



The evolution of law under communism and post-communism: a system-theory analysis in the spirit of Luhmann

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Article**

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Abstract

The paper suggests that Luhmann's theory of social systems and evolution offers a powerful approach for analyzing law and the economy. It considers Yugoslavia and some Central European countries before and after 1990. Luhmann's concept of evolution stands in stark contrast to mainstream economic theory. It enables us to clarify the concept of transformation. A transformation became necessary because communism was an evolutionary dead end. According to this view, in post-communism the primacy of functional differentiation needs to be reestablished because it was partially reversed under communist rule. In these circumstances, the popular call for "sufficient" public control over the market is asking for the impossible. Post-communist law is bound to fall behind the evolution of markets. This causes economic problems and retards financial deepening.

Keywords: evolution, function systems, re-stabilization, operation closure, judge-made law

1 INTRODUCTION

When speaking about Central Europe and the Baltic states, most observers agree that the post-communist transformation¹ has been successful. The reverse is widely accepted for Russia and the other CIS countries. On the Balkan Peninsula matters are more mixed. Recent developments in Ukraine have reminded us that spelling out the ingredients of successful transformation continues to be more than just an academic concern. Some economists claim that an adequate theory of transformation has already been provided. However, their treatises² suffer from a major defect: they gloss over the obvious fact that in post-communism the political and legal systems were in need of fundamental changes and that this transformation was by no means less challenging than "the economic transition". In addition, they tend to play down the intricate interdependencies between these three agendas of transformation. The assertion that economic theory by itself can provide an adequate understanding of transformation is tantamount to the preposterous proposition that political science and sociology lack substance and may without further ado be replaced by economic analysis. The poor results of economists' attempts to comprehend post-communism thus reveal the folly of economic imperialism. Gambetta's quip "We know much and understand little"³ aptly describes the failure.

This problem can be solved only by means of an overarching theory, i.e. a theory of society. Presumably, no such theory was available in 1990.⁴ No doubt, economists were ill-equipped to fill the gap. As will be argued in this paper, their candidate for the job, which was the theory of economic systems and Hayek's theory of social order, was not up to it either. Matters changed in 1997, when Luhmann's magnum opus was published. However, few economists took note of the event.

¹ In the course of this paper it will become clear why we prefer this term over the more popular word transition.

² See, e.g. Roland (2000), Drahokoupil and Myant (2011).

³ See Gambetta (1988:127).

⁴ See the discussion of the crisis of sociological theory in Luhmann (2012, 2013).

Unfortunately, all of his key works were written in German. English translations became available only with great delay and even as of now some central pieces of Luhmann's titanic work have not yet been translated⁵. Since his texts are about as readable as Kant's Critique of Pure Reason and Hegel's Phenomenology of Spirit taken together⁶ this has greatly hampered diffusion.

The paper starts with a critical review of the traditional approach towards transition. Subsequently, Luhmannian concepts such as function systems, differentiation of systems, operation closure and evolutionary dead ends are introduced. Their impact is revolutionary and changes our whole way of thinking.

2 CONCEPTS OF EVOLUTION

2.1 THE TRADITIONAL VIEW

As this paper argues, the failure to understand post-communism is due to an underdeveloped theory of societal evolution. Throughout the history of economic thought, economists have occasionally referred to evolution but this has been little more than a biological metaphor and a makeshift device grasped at to avoid embarrassment. Usually this happened when mainstream theorists were confronted with a question for which they had no good answer. If economists are pressured hard to explain the meaning of evolution, they tend to quote Hayek⁷. Hayek reminded them of the legacy of the Scottish enlightenment, of David Hume, Adam Ferguson and Lord Kames. According to these writers, evolution is unpredictable and uncontrollable. It cannot be planned. It keeps surprising us. It is about the unintended consequences of human action. According to Ferguson, it creates institutions that are the "result of human action but not the execution of human design".⁸

Clearly, this is only a negative concept of evolution. It tells us what evolution is not. It does not even ask the question whether all social change is by necessity evolutionary and whether other modes of social change are pursuable as well. If all social change occurs through evolution and if these Scotsmen have captured its essence, bold political action is undesirable. If one knows so little about outcomes, wisdom suggests a conservative and risk-averse approach towards policymaking. Unfortunately, this policy-stance is unlikely to win democratic elections. Democracy tends towards the welfare state, which is tantamount to political activism.⁹ As far as the post-communist transformation is concerned, the Scottish view, presumably, suggests gradualism. Wiles' (1992:392) advice against haste ("... things

⁵ Luhmann (1990, 2000) to this date can be only read in German.

⁶ This is not an approving statement!

⁷ Or they refer to Nelson and Winter (1982) who however did not answer the questions posed in this paper. They confined themselves to an attempt to apply a particular concept of evolution to a free enterprise economy. For a refutation of this concept see Luhmann (2012:337).

⁸ See oll.libertyfund.org/groups/104 with reference to Ferguson: *An Essay on the History of Civil Society*. London: Cadell 1767.

⁹ This has been deplored by (neo)liberals who have been calling for a return to limited government. See, e.g. Epstein (1995). According to Luhmann (2000) this is unlikely to happen. He presents a theory of "systemic" hyperactivity.

done in haste are done badly”) probably captures its essence. Indeed, Hayek himself used the word “gradual” in ways that suggest that evolution is more or less tantamount to gradual change.¹⁰

The experience of Central Europe disproves this view. In little more than a decade Central European countries went through changes that had taken centuries elsewhere. This was social change on the superfast track. If gradualists had been right all of this should have ended up in total disaster, but it did not. This false prognosis is not the only defect of the gradualist conception. It also fails to pay due respect to the degree to which the communist economic order depended on the coercive powers of government. When communist power was fading, this indispensable building block was irretrievably lost. The decline of communist power was revealed by two economic ills, inflation and foreign indebtedness. The rising tide of inflation, whether open or repressed, as well as the mounting foreign debt and increasing shortage of foreign exchange, indicated that the regime was no longer able to resolve distributional conflicts, and, as a result, lost control over the money supply and imports.¹¹ In the late eighties at least one of these two symptoms of crisis, if not both, could be found in all communist countries except Czechoslovakia¹² and China.

Presumably, the post-communist transition would have been a lot easier, if East European communists had undertaken decisive steps in the direction of the market at a time when they still wielded enough power to carry this project out. By the 1980s, they had wasted the chances history had offered to them. In retrospect, we know that their rule had become fragile and that most communist leaders were aware of this. Even if Gorbachev had wanted to implement bold market-oriented reforms, he could not have succeeded. The attempt would only have resulted in his fall, irrespective of the vast powers the formal organization of government bestowed upon him. Historians proved this convincingly.¹³ Among the European communist countries, only Hungary and Yugoslavia undertook market-oriented reforms at a time when communist power was still solid. As a result, transition without shock may have been conceivable in these countries. In Yugoslavia, this opportunity was lost when inflation got out of control and the Yugoslav project headed towards bankruptcy, rendering political disintegration along ethnic lines unavoidable.¹⁴

¹⁰ See, e.g. Hayek (1989:30ff).

¹¹ For a general discussion see Madžar (1990:358f). For a more specific view on the Soviet Union see Gajdar (2007), for the GDR Schürer (1998), for Bulgaria Christov (2007).

¹² See Turek (1995). For the reasons why Czechoslovakia was different see Možný (2009). Obviously, this made post-communist reforms easier.

¹³ Durman (1998) and Gajdar (2007) offer impressive accounts.

¹⁴ The peculiar window of opportunity that Yugoslav socialism offered presumably closed in the 1970s, when Tito sided with the conservatives against the liberal wing of the SKJ (League of Communists of Yugoslavia). Luhmann’s theory suggests various speculations about the Yugoslav project. Presumably it got on a wrong start as early as 1919, when it was decided that the capital of the Kingdom should be Belgrade. If the intention had been to build a modern state rather than an empire, Zagreb would have been the better choice. One may wonder whether Italy would still exist, if Naples or Palermo had been chosen for the capital after Italian unification. In Yugoslavia, matters did not get any better after 1944. Socialist Yugoslavia was a contradiction

The history of market-oriented reforms undertaken under communist rule casts further doubts on the possibility of transition without shock. As a rule, market-oriented reforms were successful only if they were undertaken at a relatively early stage of communist rule and if they liberalized a sector of considerable importance in which no more than a partial return to pre-communist patterns was needed to unleash entrepreneurial spirits and generate a surge of output. The prime candidate was agriculture.¹⁵ This happened e.g. in China, Hungary and Yugoslavia. The Chinese and Hungarian reforms of industrial management were predated by an agricultural reform that created prosperity because it offered entrepreneurial opportunities to farmers.¹⁶ According to McKinnon (1992) the Chinese path towards market-oriented reforms was in the spirit of Hayek. He suggested that economists should think about Hayekian approaches for Eastern Europe. However, nobody ever managed to meet this challenge. This indicates that the Hayekian concept of evolution could not tackle the issue of post-communist transformation.

2.2 A NEW APPROACH

In this dilemma, Luhmann's concepts come in handy.¹⁷ In the spirit of Luhmann, communism may be conceptualized as an evolutionary dead end. If, by mistake, you are running down a dead end road, turning around early saves time and trouble. The failure to do this in time explains the misfortunes of later attempts at reform. The abstract concept behind the metaphor of a dead end is "a normalization of the improbable that no longer suffices for further evolution"¹⁸. In the course of evolution certain operations, which hitherto have appeared far-fetched and unlikely, become perfectly normal and a matter of everyday experience. However, not everything can be normalized. Evolution keeps trying. Most, if not all, attempts fail. A second piece of evidence supporting the view that communism was a dead end is the amazing ease of its collapse. Have we ever seen an empire of this enormous size vanishing with so little ado? To be sure, the ideological conviction which had built the empire had long been fading, but such problems usually can be solved and the fading ideas substituted for by fresh ones. The medieval and early modern nobility of Western Europe managed to do this. It overhauled its

in terms. The socialist emphasis on redistribution was bound to alienate the wealthier regions of the country. At a deeper level of analysis it is worth pointing out, that, with few exceptions, "nations" came into existence as a side-effect of transition towards the primarily functionally differentiated society, i.e. the very opposite of socialism. See Luhmann (2013:283).

¹⁵ For more on this see Gajdar (2012:468). His ultimate source of inspiration was an unpublished paper of Berliner quoted in Sachs and Woo (1994:121). Berliner wrote: "The Chinese transformation began with millions of peasants and others virtually beating at the gates of government to dismantle the restraints of the past and to let them work and thrive. When the gates were let down, they rushed in, and produced that remarkable surge of output. Soviet farmers, however, were not beating ..."

¹⁶ See Berend (1990:93f). In 1958, Hungarian communists started to revise their concept of socialist agriculture and created opportunities for private entrepreneurship. As a result, agriculture thrived. This was widely noticed. GDR-economists called it a miracle. The Hungarian party leadership took care to hide the reasons for this outcome. It did not want to be castigated for "Titoism". Polish agriculture was not fully socialized either. Unlike the aforementioned countries, this was not a prelude to market socialism, which was tried only in the 1980s and turned into an outright disaster for the regime. See Hardy (2009:23-26). For this reason Gajdar classifies Poland and the Soviet Union as prime examples of the dead end-proposition.

¹⁷ A complete review of Luhmann's theory and its applications is beyond the scope of this paper. Moeller (2006) provides a user-friendly introduction.

¹⁸ Luhmann (2013:29).

self-image and world-outlook several times without jeopardizing its supremacy in society.

Moreover, Luhmann proposes that the term evolution should be used only if variation and selection can be distinguished and have become random events for each other. This can occur only in complex systems. Such systems can generate large numbers of variations, most of which are discarded and forgotten without leaving a trace.¹⁹ At some moment, unexpectedly, a variation is selected. This may result in great changes. As an example, think of the innumerable instances of dissent and opposition that occurred throughout the history of communist rule and were quickly crushed by the regime.²⁰ In 1989, all of a sudden, dissent caused momentous and unpredicted consequences. This conceptualization implies that evolution is not tantamount to a slow-moving process. The opposite may be true. Long times of stagnation may be followed by a catastrophic avalanche of change, by an accumulation of effects and after-effects. In Luhmann's words (2012:253): "Evolution is, as it were, a theory of waiting for useful chances."

For further analysis, we need to take a closer look at the system that is subject to evolution. At this point, the term post-communist *transformation* turns out to be superior to the term transition, because it captures the idea that post-communism is about a change of the primary *form* characterizing society, its primary mode of internal differentiation. Throughout the world, the nineteenth century witnessed the rise of functional differentiation and its establishment as the primary form of world society. This means that the economy, law, politics and some other areas became "operationally closed", autonomous function systems, each of which is specialized in fulfilling a particular function for society and employs its own self-generated structures and "memory" for this purpose. The idea of self-generated structures distinguishes this concept from older teachings about the division of labor. The prevalence of this form on a world scale, however, does not imply that all of its function systems operate properly in all territories of the world society. They do not! In most countries of the world, law works badly. Its autonomy is jeopardized and courts are subject to political interference if a case is considered politically important. The resulting underdevelopment of the legal system causes severe problems for both business and politics. By way of illustration, consider the division of powers and the institution of a democratically elected legislative assembly. This idea loses much of its appeal if the laws given by the legislature have little or no effect. This is the likely outcome if the administration of justice is less than "tolerable"²¹.

¹⁹ This definition implies that the technical progress generated by the research and development departments of companies is not evolution in the Luhmann sense. In contrast, the basic research done at universities (such as the research that resulted in this paper) is evolutionary. Proof: most of the research papers written by professors rapidly fade into oblivion and do not even get a single quote. Like biological evolution, social evolution tends to produce tremendous abundance.

²⁰ Havel's (2012) essay conveys the feeling of hopelessness that the apparent invincibility of the regime caused among dissenters.

²¹ In the sense of Adam Smith, who considered "tolerable administration of justice" as a prerequisite for increasing the wealth of a nation beyond a certain level. See Irwin (2014).

The mutual relations between the three function systems for the economy, law and politics have often been described as harmony and support. However, in reality they frequently disturb and obstruct each other. As an example of sabotage, consider a political move towards the overregulation of important industries. This weakens their economic performance and backfires on politics because public revenue declines. In addition, corruption spreads because it enables businessmen to bypass burdensome regulations. In emerging and developing countries, this may result in a sort of vicious circle²². Presumably, this poses less of a danger in wealthy countries. They wouldn't be wealthy if their function systems hadn't achieved high levels of performance. If performance declines after destructive interventions, this is strongly felt in many walks of life. Important players may then change their mind and seek to correct the error. In post-communism, persistent mutual obstruction is a more likely outcome because function systems have not yet reached high standards of performance and the population has not got used to them.

Communist ideology, in essence, rejected the primacy of functional differentiation.²³ This held in particular for the economy, law and politics. After coming to power, communists did their utmost to reverse it, striving for dedifferentiation. In the confines of the territory they controlled, they largely succeeded. In the rest of the world, however, the primacy of functional differentiation has been strengthened. Rejecting the form of functional differentiation did not enable communists to create a formless society. There is no such thing. Moreover, complex societies need to make their primary form somehow observable for themselves, even though such self-descriptions are of necessity no more than crude simplifications.²⁴ Availability of a plausible self-description is a prerequisite for a steady and reliable reproduction of the form. The primary form of the society created by communists was hierarchical differentiation. The doctrine that made this observable inside the system was Lenin's teachings about the leading role of the Communist Party.²⁵ Post-communist transformation, similarly, was about a change of form, this time from hierarchical to functional differentiation. This is why transformation is an apt term.

This change of form implies an evolution of evolution, i.e. a change of the style of evolution. Under the primacy of hierarchical differentiation, variations had a chance to be selected if they appeared to be helpful for the stabilization of the hierarchy. This sort of stability was a primary criterion for selection. Applying it could be difficult and mistakes did happen, most notably in the stormy years between

²² In Greece, for example, reciprocal obstruction of function systems became mutually reinforcing. The decline of manufacturing and agriculture resulted in political pressure to create even more public sector jobs.

²³ Concerning the law this was implied by the subordination doctrine which viewed the law as "concentrated politics". See Marković and Vuković (1978:550). The source illustrates that this doctrine was upheld even in the most liberal of all communist regimes. When Uzelac (2012) expounds the "overarching principle of instrumentalism" in socialist law, he points to an aspect of dedifferentiation. As far as the economy is concerned, the doctrine of planning found in innumerable textbooks of the political economy of socialism similarly implied dedifferentiation.

²⁴ See Luhmann (1995:298f) Functional differentiation was first observed as (enhanced) division of labor. This description became available in the 18th century.

²⁵ For a "classic" restatement see Stalin (1947:85-98).

1953 and 1957. Under the primacy of functional differentiation, every function system selects variations according to its own criteria and without regard to the stability of other systems. Moreover: “functional systems switch their mode of selection to essentially unstable criteria” (Luhmann, 2012:297). The functionally differentiated society does not have a central authority applying and enforcing a selection criterion that makes overall stability likely. Politicians may be under the illusion that this is up to them but they are wrong. If the selections performed by some function system oversupply other function systems with disturbances, corrections can be made only *ex post*. “Overall, society switches its stabilization efforts to reactive procedures. Society has become too complex and too opaque to set stability as an attainable goal” (ibid, 2012:295). An example of a reactive procedure was given above. If politics obstructs important industries, this will backfire on politics. After a while, politics will start to recognize and try to correct its mistake. This means that evolution routinely consists of three different components. It is not just about variation and selection, but also about re-stabilization, because selections, be they positive or negative (acceptance and rejection of a variation), inadvertently cause stability problems that will need to be treated subsequently.

2.3 SYSTEM DIFFERENTIATION IN POST-COMMUNISM: THE LAW AND POLITICS

In section 1, the Russian and the Ukrainian transformation were assessed as unsuccessful and incomplete. Section 2.2 revealed the theoretical foundations of this proposition. In Russia and the other CIS-countries, the “outdifferentiation” of function systems has remained incomplete. At least for some of the major function systems “operation closure” has not yet occurred. This can be shown for numerous function systems²⁶, but this paper is primarily concerned about the economy, law and politics. Corruption is a case in point. Of course, corruption cannot be extinguished. However, there is a difference between countries in which corruption is pervasive and well-entrenched, and others, where it is more of an occasional affair and largely limited to a few interfaces between different function systems that tend to be particularly corruption-prone like public procurement and socialized medicine. If corruption is pervasive, the distinction between the economy and politics is blurred, while occasional corruption honors it in the breach. Pervasive corruption means that politics and public administration generate and sell business opportunities. Businessmen are turned into subtenants of politics and are kept in a precarious position because the rental fee may change suddenly. In contrast to Eastern Europe, in Central Europe corruption is not pervasive.

System differentiation between the law and politics requires that politics is in actual fact constrained by the constitution of the country.²⁷ If this constraint is bind-

²⁶ The peculiar role of the Orthodox Church in contemporary Russia is noteworthy in this context and so is the lack of academic freedom. It indicates that operation closure has remained incomplete not only in the function systems discussed in this paper, but in others as well.

²⁷ See Luhmann (2004:410) for his concept of constitution. In the functionally differentiated society the constitution is a structural coupling between politics and the law. For more on such couplings see below.

ing, politicians take a serious political risk whenever they violate clear-cut constitutional provisions. Countries with incomplete differentiation usually have some sort of constitution as well, but its primary role is “to protect hierarchy’s need for latency.”²⁸ Generally speaking, a merely symbolic role of the constitution is incompatible with the full differentiation of function systems. Full functional differentiation between the law and politics implies that the law embarks on its own independent intra-societal evolution. What matters is that this evolution actually occurs, whether jurisprudence and legal theory have taken notice or not. Jurisprudence may need time to discover this evolution. To be sure, in England the discovery was made as early as the 17th century. It happened in England, because in Common Law evolutionary features are easier discernible.²⁹ On the Continent, the historic school recognized evolution, but its impact remained limited. As a result, Eugen Ehrlich, professor legum (of laws) at Czernowitz (Bukovina)³⁰, managed to make a stir, when he proposed in 1913: “We shall have to get used to the thought ... that the intent of the author of a statute is a matter of absolute indifference so far as its effects are concerned. Once in force, it goes its own way”.³¹ The stir was symptomatic of the prevailing spirit, since Ehrlich’s dictum was little else than a law-specific restatement of the most widely quoted Scottish definition of evolution: The result of human action but not of human design. The traditional neglect of evolutionary concepts in much of Continental legal theory explains, why in 1990 even the boldest post-communist reformers tended to think about law as a product of legislation rather than evolution.³²

The distinction between law and politics has deep roots in Europe. The ancient idea of a legal right to resist tyrannical rule exemplifies this tradition.³³ Soviet rulers were confronted with it when they extended their empire towards the Balkan Peninsula and Central Europe. Historians have managed to trace some of the effects. They showed that even at the climax of Stalinism Czech courts were not always obedient servants of the secret service and communist officials. Seeking refuge in the courts sometimes helped citizens if their alleged political offences

²⁸ See Luhmann (1995:337): “The more starkly a system is hierarchized, the more clearly do forms whose latent function is to protect hierarchy’s need for latency stand out.”

²⁹ This was noticed already by Maine (1906:4) who wrote: “... that an Englishman should be better able than a foreigner to appreciate the historical fact...”

³⁰ Nowadays this is Černivci.

³¹ Ehrlich (1962:375). For a much-quoted American statement of the evolutionary view, see Holmes (1991:1): “The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries ... In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage...”

³² Notice, that the evolutionary approach doesn’t negate the role of legislation. It “only” insists that legislation cannot determine the development of law. And this is what Ehrlich said.

³³ In actual fact, this was primarily a right of the nobility who used it quite actively. Outside Europe, conflicts between kings and the nobility were common-place as well, but even if they were couched as matter of right the underlying notion of right was not clearly distinct from custom. As Berman (1983) points out, the establishment and amplification of this distinction constituted the unique advance made in Western Europe during the papal revolution of the 11th century.

were considered minor. This was shown in Czech research about the expropriation and resettlement of so-called kulaks (large farmers)³⁴. Notwithstanding these obstacles, communist governments deformed the law radically. All fields of law were thoroughly politicized. Law lost much and sometimes all of its autonomy. In this (and only this) regard, a number of communist countries, among them the GDR and Czechoslovakia, returned to the Dark Ages, since as Berman (1983) showed, the “outdifferentiation” of the law started as early as the 11th century³⁵. A major difference between Central Europe and the Soviet Union was that a large part of the Soviet population failed to notice this return because it had never been much in contact with the law. To be sure, after the reforms of Alexander II, Russian law had started to evolve. However, in the remaining time before the communist take-over, only a small elite group became accustomed to this new development. What remained of the elite after the Civil War was largely liquidated during the Cultural Revolution (1928-31)³⁶. Proceeding likewise was not feasible in Central Europe. The law had put down much deeper roots and a large part of the population had become used to it. As a result, communist propaganda found it difficult to convince people that a merger of law and politics was a progressive move. It was presumably for this reason that in late socialism Central European courts acquired more independence than Soviet courts. This can be demonstrated from the example of *telefonskoe pravo*.³⁷

This analysis leads to the conclusion that a widely held view about post-communist legal reform is mistaken, because it underestimates the scale of the required change. After 1989, it was commonly thought that this reform was primarily about an effective protection of courts from political interference and about amending statute law. In actual fact, what was required was a radical change of the whole operating method of the law. There was a need to regain a nearly forgotten culture of refined legal argumentation, not to be confounded with political rhetoric. The preconditions for this change were much worse than e.g. in Austria or West Germany in 1945. Austrian and German judges and lawyers had not yet forgotten what they had learnt before 1933 or 1938, respectively. In Yugoslavia more of this culture had been preserved than in many other parts of Central and Eastern Europe, but this was mostly an academic affair. Moreover, even among Yugoslav professors there was a vocal minority group that cared little about legal argumentation proper and kept mixing up law and politics. Differences between the newly established and the traditional faculties of law tended to be large.³⁸ The old facul-

³⁴ See Petráš and Svoboda (2014:409f).

³⁵ The reader of Berman’s work is likely to be struck by the distinctiveness which legal communication acquired – even vis-à-vis theology! The use of Latin was helpful in differentiating legal from everyday communication.

³⁶ See Fitzpatrick (1999).

³⁷ This Russian word means that the decision of the court is determined by a telephone call. The power of *telefonskoe pravo* [telephone law] in various communist countries is discussed in Schönfelder (2012:413-417). As of today, Russian *telefonskoe pravo* is alive and well.

³⁸ At times, some of the new faculties turned into a hotbed of dedifferentiating activism. Examples can be found e.g. in the *Zbornik Radova* of the Novi Sad faculty of law. For a textbook summarizing the “progressive” view see Popović (1981). He was a professor of the newly established law faculty of Niš. For a review of Yugoslav attempts to push the dedifferentiation of law ahead, see Pokrovac (1999).

ties kept their tradition of scholarship alive, but not much of this rubbed off on students, except a few unusually talented ones. These talented students rarely decided to become judges or solicitors and if they did they often changed their profession after a while. The judiciary was considered an unattractive employer.³⁹

The limited role of legal argumentation in the daily operations of the judiciary is revealed by the texts it used and produced. In Czechoslovakia and the GDR, civil procedure essentially turned into some type of social work.⁴⁰ The writings of lawyers became indistinguishable from those of laymen. Most litigants were self-represented. In the GDR, legal representation was considered too unimportant to be mentioned in the otherwise meticulous protocol. Civil cases usually ended with a settlement. If litigants were intransigent and refused attempts at reconciliation, the court more often than not imposed a compromise. Judges educated litigants and treated them as immature creatures in need of parental guidance. If the judge did not impose a compromise but decided the case, he usually wrote a very brief opinion. These “socialist” opinions rarely delved into the legal questions raised by the case. If a citizen wanted to get legal information and consulted academic textbooks, academic journals or commentaries written by legal scholars etc., he usually did not feel illuminated either. Much of this literature was shallow and routinely avoided the in-depth discussion of controversial legal issues. In contrast, in Yugoslavia more and better texts were available. Yugoslav civil procedure never degenerated into social work. However, the skill of writing elaborate opinions was lost as well, and needed to be relearned after 1990. This was a drawn-out process. An analysis⁴¹ of Croatian opinions written in the 1990s found that an attempt to build a legal argument was undertaken only in 30 per cent of these texts. Usually it was discontinued after a few lines. Only 3 per cent cited at least one precedent. Citations of legal literature like commentaries, law journals or monographs were found even less frequently. Opinions written by appellate courts tended to be even less elaborate than opinions written by trial courts. This is disturbing because appellate courts should play a key role in establishing precedents. Research about opinions written by Czech judges leads to somewhat different conclusions. In contrast to some of their Croatian colleagues, they were diligent and hard-working persons. After 1990, they started to write long opinions that contained a detailed description of the facts established in court and the course the procedure had taken, the judicial advice given to litigants and so on. However, like the Croatian opinions, these Czech texts avoided discussing the legal merits of the case.⁴² In either case, it would be wrong to blame judges for a failure that was primarily due to the loss of the tradition of legal argumentation.

³⁹ See, e.g. Uzelac (1992:582).

⁴⁰ See Markovits (1995, 2000) on the GDR. Markovits was primarily interested in the sociology of communist law. In most communist countries, the available research primarily takes a legal-history and legal-theory approach. According to Kühn (2005:XVI) Markovits’ findings hold for Czechoslovakia as well. Maňko (2013b) similarly emphasizes the limited role of legal argumentation even in countries like Poland that managed to preserve more of their legal tradition.

⁴¹ See Harašić (2006).

⁴² For further details see Schönfelder (2012:408-412, 417-420, 506-521, 936-943).

Luhmann (2004:330) argues that the social functions of legal reasoning have not been fully elaborated by the available theories of legal argumentation. Legal reason is “artificial reason”⁴³. Its key contribution is “the creation of sufficient redundancy”⁴⁴. “Reasons are symbols for redundancy” (ibid:331) The long-run result of reasoning is the provision of “a web of points of view ... we call it legal doctrine ... The outcome of all these checks, which also serve to show what can go wrong, is a tradition of principles, rules, and doctrines but also of rejected alternative instructions which form the reservoir from which legislation and above all judicial lawmaking take their materials” (ibid:326-327). A developed culture of legal reasoning provides guidance to judicial decision-making, but it doesn’t determine its results. It leaves room for controversy by limiting controversy. It serves as a “shield ... against a constant and ultimately limitless political ‘questioning’, that is, as a rule for limitation for reasoning in its quest for reasons” (ibid:342). This is the ultimate defense against political pressures on judicial decision-making. If this defense has been put in place, “all efforts to steer courts onto a politically desirable course must confront the internal workings of courts. Most of the time they founder on the internal culture, the mode of argument operating within the legal system” (ibid:365). This is the reason why communists wanted to abandon tradition and rebuild the legal system from scratch. This rendered law defenseless against political interference. The missing defense cannot be adequately substituted for by formal fire-walls, such as the institutional independence of the judiciary that Italian-style self-administration offers.⁴⁵ The autonomy of the law should not be confused with institutional independence. Neither is it institutional independence plus something else. The judiciary is a large organization and large organizations are always infiltrated by politics. Italian-style institutional independence cannot prevent it. What really matters is what happens afterwards. Italian-style judicial independence makes it difficult to prevent long-term damage from infiltration. In contrast, in Germany, the (state or federal) minister of justice appoints judges. These decisions are indisputably political, but for this very reason the minister takes care to avoid the shameless politicization of judicial appointments that the political factions represented in the Italian High Judicial Council pursue. In German appointment processes, considerable emphasis is placed on provable professional expertise and competence. As a result, levels of professional competence tend to be high.

I have emphasized the role of routine and redundancy in legal reasoning and the discipline that it provides. The belief that this discipline can be replaced by organizational arrangements amounts to a confusion of two different types of social

⁴³ This is the famous wording of Chief Justice Coke who “rejected the authority that James I claimed to have over his own reasoning. Reasoning, in Coke’s view, had to be ‘artificial reason’, that is, to be professionally induced through experience and competence.” (Luhmann 2004:311).

⁴⁴ Luhmann (2004:319), who continues in a footnote: “Or, to use the words coming from legal practice, ‘to keepe as neare as may be to the Certainty of the Law and to the Consonance of it to it Selfe’, namely those of Sir Matthew Hale in an objection to Hobbes in the seventeenth century.” Redundancy means routine, i.e. repetitive communication. Redundancy renders it possible to recognize the Self of the Law.

⁴⁵ See Wittreck (2006) for a critical analysis of Italy and Germany.

system. It fails to recognize the difference between the function (sub)systems of modern society and organizations.⁴⁶ To be sure, all function systems depend on organization – the law cannot operate without courts, the economy cannot operate without firms – but what they need is a great multitude of different organizations. Some play the role of centers while others are located in the periphery of their respective function system. In the case of the economy, banks and central banks form the center while real sector firms and other entities populate the periphery. In the case of the law, the courts form the center, while law firms, parliament and so on are in the periphery. This positioning of parliament demonstrates the radical divergence of Luhmann’s approach from more traditional political theory.

2.4 DIVERGING VELOCITIES AND THE LOSS OF PUBLIC CONTROL OVER THE MARKET

In post-communism, the economic system evolved much faster than the legal system. When profit-maximizing behavior was no longer ostracized, the economy spurred. After the removal of administrative obstacles, it quickly reintegrated into the world economy, provided that some basic requisites were met such as a reasonably developed transportation network and a manufacturing sector enabling the country to generate export revenues outside the former socialist camp. This reintegration was tantamount to emancipation from political tutelage and sharply reduced political control over the economy. The speed at which this materialized stood in striking contrast to the vacillations of the law.⁴⁷ In Central Europe, the lagging of the law was not as obvious at first, because the enactment of new statutes seemed to proceed at a fast pace. Economists tend to be unaware of the difference between law and legislation and to overrate statute law. In Yugoslavia, the erroneous belief that social reality can be determined by statute production used to be referred to as *zakonomanija* (law mania) and *dekretomanija* (ordinance mania).⁴⁸ Economists (and socialists) are prone to these manias. They were overimpressed by the legislative activity of Central European parliaments. It took them years to detect “implementation problems”. When the problems could no longer be overlooked, economists once more blamed them on insufficient statute-production. *Zakonomanija* has long become a sort of reflex action.

This fallacy can be detected in the writings of American economists as well, and the Nobel prize winner Joseph Stiglitz has distinguished himself as its most prominent proponent.⁴⁹ The wording differs. Instead of statute-production or delegated

⁴⁶ This distinction is elaborated in Luhmann (2013) and is one of his major contributions.

⁴⁷ Luhmann suggests a theoretical approach to measuring velocity. It employs the concept of eigenvalue, which in system theory means relatively stable parts of system structures. Stability is needed to forecast system operations. System-theory proposes that a system is unlikely to survive for long if it does not manage to create eigenvalues. In the legal system, eigenvalues are crucial for the predictability of judicial decisions. In the economic system, the key eigenvalue is the future value of money. In either case, it is intuitive that both social support for the law and the acceptance of money will decline if such forecasts tend to be extremely unreliable. In most post-communist countries, money was stabilized in the course of the 1990s. In contrast, forecasting the outcome of litigation remained very difficult. According to Rychetský (2004:92), in the Czech Republic, post-communist administration of justice resembled a “dark jungle”. Its decisions were totally unpredictable.

⁴⁸ See Pašić (1981:225).

⁴⁹ See, e.g. Stiglitz (2003).

legislation he writes about “regulation”. This vague term suggests the need for public control over the market. In Stiglitz’s writings, it presumably means both the common law method of public control and direct public regulation⁵⁰. He has not addressed the issue of whether direct public regulation should be subject to judicial review. Presumably, he meant some mixture of both methods and ignored the concern that judicial review was unlikely to constrain government interference in post-communism. Because of Stiglitz’ authoritative intervention, the fallacy was “reconfirmed” as a putative truth and once more committed to the collective memory of the profession.

Among legal scholars, the fallacy is less popular. The author of this paper remembers how discussions with legal scholars went in 1991 and 1992. They argued that, in the short run, only liberalizing measures would produce an effect. The other provisions would become effective much later, because courts would need at least ten years to clarify their meaning. Only after this clarification could citizens be expected to abide by the law. By way of illustration, the decriminalization of private enterprise and “speculation”, a liberalizing measure, had an immediate effect, and it was of considerable importance that it occurred in Czechoslovakia in 1990 while in most CIS-countries this came much later. In contrast, the provisions of company law that protect small stock-holders against block-holders and managers remained irrelevant for at least a decade. Economists often ignored this insight because it didn’t fit in with their mindset. Legal scholars weren’t quite right, either. They were too optimistic about the length of the lags. They should have said 30 years instead of ten, or maybe 50. They assumed that clarifying the meaning of the law would take post-communist courts no longer than West German courts. This was utterly unrealistic. The assessment of legal scholars was based on experience, not on theory.

After 1989, a rebirth of legal reasoning was needed. This was the key to the operative closure of the function system of the law, since “in the normal process of decision-making, the system ... observes itself – as an accumulation of legal texts that refer to each other ... The crucial point is that the system can ‘recall’ internal contexts from the past and through that reduce the scope of possible operations in the present. Finding the relevant texts ... requires professional competence and thus it represents a crucial (and frequently overlooked) instance of legal skill” Luhmann (2004:305-306). Only after this skill is regained will solutions for doctrinal controversies be sought and found inside the function system of the law. When communist judges considered a case, they usually did not consult a variety of relevant legal texts⁵¹ and even if they did, they usually had no intention of subjecting them to critical review, which could have resulted in an innovative, but system-compatible solution of the case at hand. In some Central and Eastern European countries as in the GDR, judges received detailed instructions concerning

⁵⁰ For the distinction see Posner (2011:487).

⁵¹ Kühn (2011) suggests that Hungarian and Polish judges may have been exceptions to this rule.

how they were to construe the law. The instructors who performed this task were selected and appointed by the department for law and state that worked for the party leadership. Instructors used mimeographed texts, which, however, were either not handed out to judges or had to be returned. During their lectures, judges took notes. Guidelines changed frequently and their rationale was, as a rule, political, not legal. Critical discussion of these materials was not encouraged. If a judge had his own opinion about some question of law, he was required to seek prior authorization before he could decide a case accordingly. In 1989/90 all of this came to an end. All of a sudden, judges had to take decisions independently and on their own responsibility. Moreover, most post-communist countries witnessed a great shortage of legal texts written in the judge's mother tongue that could claim relevance in the new situation. As the Luhmann-quote indicates, this was a serious dilemma. The normal mode of system operations was blocked. Even in the Czech Republic which had a more lucrative market for legal texts than most other post-communist countries⁵², it took more than a decade for a substantial body of relevant texts to be printed or made available electronically.

If post-communist legislation revitalized pre-communist legacies or copied foreign models judges could, as a matter of principle, consult pre-communist and foreign literature. In Czechoslovakia, the GDR and Yugoslavia, the pre-communist literature had been removed from the shelves of most libraries and much of it destroyed. Foreign literature was accessible only to the few who had learnt foreign languages well enough to read it. In Croatia, the old *Opći građanski zakonik* [General Civil Code] (OGZ, Austrian ABGB) was considered a second-string source of law after 1945. The judge was required to consult it if he was confronted with a legal question for which the new socialist law held no answer. In doing this, he was supposed to read the OGZ through socialist lenses. Austrian commentaries of the OGZ were not helpful for this task, and, consequently, they were rarely used by judges and lawyers. Moreover, knowledge of German has been much in decline among judges and lawyers. After 1990, change was slow. Likewise, in the Czech Republic the pre-communist heritage became widely used only after a monumental (5000 pages!) Czech commentary of the OGZ was reprinted. It had been written in the 1930s by two of the most prominent legal scholars of the country⁵³. Following this example would not have been very helpful in Croatia because Croatian pre-communist discussions of civil law were less profound than the Czech.

Thus, in 1990 law started nearly from scratch and it is in its very nature that this was a slow beginning. The former British premier Gordon Brown put it like this: "In establishing the rule of law, the first five centuries are always the hardest."⁵⁴ As a result, scholars who believed that markets must be subject to public control ei-

⁵² Except Poland, of course. The Czech market was lucrative, because the population was comparatively affluent. Moreover, Czech texts continue to be used in Slovakia.

⁵³ This is Rouček and Sedláček (1998).

⁵⁴ See *The Economist* September 19, 2015, p. 10.

ther had to abandon the request that this control should be under the law, or consider post-communism a fatality that should not have happened. Actually, few were ready to face the challenge. Instead they complained. Stiglitz was the loudest complainant and was praised for the eloquence of his lament.⁵⁵ However, by 2005 one could have noticed that in Central Europe matters were not at all as bad as the academic tales of woe suggested. To be sure, the economy often had to struggle along without an adequate performance of the law.⁵⁶ This caused numerous problems and defects. However, most of the time, temporary expedients were found. No doubt, conditions were far from ideal, but liberalization nevertheless had a positive impact. Central Europe has fared better than CIS countries, which liberalized less and later.

The proposition that the law should have the lead and “regulate” the economy and other walks of life universalizes the course which history took in Europe (except in the Ottoman and the Russian empire), but nowhere else, neither in China nor in India, nor in Japan. In Europe, law acquired great significance as early as the 12th century. The “outdifferentiation” of the law was thus ahead of the “outdifferentiation” of the political system which gained momentum only in the 16th century. Canonical law was a key factor in these early advances. The early “outdifferentiation” of law strengthened, and was made possible by, a very pronounced stratification of society. As a result of this early evolution of the law, the privileges of the nobility were fully juridified in early modern times. This juridification was supported by theories that emphasized the natural inequality of the estates. Such theories were accepted in the 16th century, but in the 20th this mindset had long lost its appeal. Presumably, its restoration was inconceivable under communist rule. To be sure, in common parlance the privileges of communist officials were compared with the former nobility, and officials were referred to as a new nobility, but this did not restore the idea of natural inequality, although an attempt at revival was undertaken⁵⁷. The failure to juridify the hierarchy meant that the upper class essentially remained outside the law. This division of society was a serious obstacle to the growth of the law and the expansion of its sphere of influence. Yugoslav history holds lessons about the limits of law under communist rule. Presumably, socialist Yugoslavia never came closer to the operational closure of the law than during the Croatian Spring (1969-72). Moreover, there was more economic and political liberty than at any other time during the Tito era. This resulted in civil

⁵⁵ For a critical review of various contributions to this debate see Schönfelder (2012).

⁵⁶ For the concept of performance see Luhmann (2013:96). It means the services the law provides to other function systems.

⁵⁷ For a review of Stalin’s efforts see Fitzpatrick (1999:82). After the conquest of Belgrade, Tito did not waste time either and moved into the king’s premises. Even though he probably never doubted that this was appropriate housing, he found it difficult to explain this view to the intellectuals of the country. According to Pirjevec (2013a:297, “Nažalost, naši su ljudi uglavnom seljaci, a ti znaš...”) he argued that he was ruling a nation of peasants who were much impressed by pomp and rank and wouldn’t respect a ruler who dispensed with it. However, this was at best a temporary excuse. According to the party-platform, peasants were to be reformed and assimilated to the condition of workers. This observation as well as the ultimate failure of Stalin’s attempts to lay the ground-work for a juridification of privilege, support the proposition that under communist rule the normalization of the improbable remained insufficient for further evolution.

unrest which was thought of as a threat to the Yugoslav federation and communist rule and provoked a harsh backlash.⁵⁸

2.5 FREEDOM OF CONTRACT AND FREE USE OF INDIVIDUALLY ATTRIBUTED PROPERTY AS STRUCTURAL COUPLINGS BETWEEN THE LAW AND THE ECONOMY

Above it was argued that in post-communism reforms could not be sequenced in the way that the public-control view suggests. In this section it will be shown that even if this problem had been solved somehow, the appearance of suitable, market-friendly controls would have been unlikely. Regulations need to be created by somebody. Who should be their creator? Presumably, the political system is the only available candidate. The legal system is too immature and too slow to make significant contributions in time. However, may we hope that the political system will perform reasonably well? Not really, if Luhmann is right. Its capacity is limited and the likely standards of achievement and performance are low. As far as the economic system is concerned, low standards imply backwardness and poverty; in the legal system they stand for the short reach and powerlessness of the law. If one wants more, the operational closure of function systems cannot be avoided. This means that function systems are released into autonomy and launch their own system-specific evolution. One may object that this may generate clashes between function systems. Indeed, such clashes cannot be ruled out. If the economic system embarks on a journey of its own making, nobody can guarantee that the results are bearable from the viewpoint of the law. The autonomous evolution of the function system of the law causes similar concerns. If left to itself, the law may evolve in ways that are incompatible with economic growth. This would force entrepreneurs to avoid the sphere of the law and conduct their affairs in lawless ways. In contrast to 19th century concepts of evolution, Luhmann's theory does not believe in natural selection and survival of the fittest. It rather asks how a certain minimum degree of adjustment can be maintained. It considers maladjustment as a likely outcome of evolution. The real question is then how readjustments can be initiated.

The economic analysis of law has often taken a more optimistic view. Posner (2011:714) claims that "judge-made rules tend to be efficiency-promoting while those made by legislatures, other than those rules that codify common law principles tend to be efficiency-reducing." According to him, adjustment problems between the law and the economy will disappear in the course of time, if the legislature doesn't interfere. An optimal fit will be reached because a hitherto unknown sort of invisible hand guides judicial decision-making. This is definitely not the invisible hand referred to by Adam Smith. In Posner's view, the only problem with judicial law-making is the slow speed at which common law rules change. "Judge-made law ... will not do when new law has to be made in a hurry, or when a big

⁵⁸ In retrospect, it seems clear that Tito saved the federation by means which rendered it non-viable in the long run. For one of the best accounts of the Croatian Spring see Pirjevec (2013b).

change in law is desired.” German experience with judge-made law does not seem to confirm this optimistic stance. Important parts of German labor law are judge-made. It is efficiency-reducing rather than efficiency-promoting although it is not as bad as the French legislature-made labor law.⁵⁹ Before we are ready to trust the new invisible hand invoked by Posner, its nature and working should be explained in some detail. The economic analysis of law has tried to meet this challenge, but has failed to come up with a convincing story. All of its attempts seem to have in common, that the outcome crucially depends on the intellectual abilities of judges. They assume that the judge’s mind can somehow grasp economic rationality and decide accordingly. As far as simple controversies are concerned, this is perhaps not utterly unrealistic. Nevertheless, according to Luhmann, it is unwise to rely on this mechanism because it is unlikely to ensure a sufficient adjustment of the law to the needs of the economic system.

In Central Europe, we have a particular type of empirical evidence suggesting that we should not trust Posner’s invisible hand. This is the teaching effectiveness of economics courses taught in law school. In Germany as well as in the former Habsburg Empire and its successor states, students of law have long been required to take some economics courses. In Germany, most law schools abolished this requirement in the 1960s. Ever since, nearly all German law students have refused to study economics. In Austria, Croatia and some other countries the old requirement is still in force. As a result Austrian and Croatian judges are much better educated about economics than German judges, and one may hypothesize that this enlightens them about the economic consequences of judge-made rules and enables them to take more efficiency-promoting decisions than are commonly found in Germany. Unfortunately, there exists, to my best knowledge, no evidence supporting this hypothesis. Being a professor of economics himself, the author of this paper would be immensely pleased to learn that the efforts of his Austrian (and Croatian) colleagues have not been in vain. Unfortunately, he is still waiting for the good news. This observation suggests that Luhmann’s skepticism is warranted.

If this is taken for granted, we need other mechanisms to ensure a certain degree of compatibility between the economy and the law. Luhmann refers to these mechanisms as structural couplings. According to him, individually attributed property, contract and competition are the three crucial couplings, but they can carry out their tasks only after most legal controls on contract and property have been removed. They can be removed only if there is sufficient competition, because in the absence of competition the economic and social consequences of freedom of contract and free use of property are unbearable. Removal of most controls is, of course, not tantamount to removal of all controls. These structural couplings require a considerable degree of economic liberty, but not “total” freedom. These familiar principles of free enterprise reappear in Luhmann’s theory, but the positioning differs from classical liberalism. They reappear as structural

⁵⁹ See Hardege and Schmitz (2008) and Valentin (2002:230).

couplings between two subsystems of society and not, as classical liberalism had it, as the very “foundations of law and society per se”⁶⁰. Freedom of contract, of course, does not mean that all contracts will be enforced by courts. Courts may and should refuse to enforce certain types of contracts (like contracts for criminal purposes or contracts in restraint of trade). Moreover, before a contract can be enforced, courts need to form an opinion about the proper “interpretation of the contracting parties’ expression of intent based on their presumed interests” (Luhmann, 2004:397). Neither does the proposed need for structural couplings imply that all industries should be turned over to free enterprise as soon as possible. What matters instead is that its realm is large enough, that it prospers and provides a good living for droves of lawyers who give legal advice to business people and represent them in court. If this condition is met, litigation will in the course of time produce a body of judge-made rules that will enable entrepreneurs to forecast which contracts are likely to be upheld and enforced by the court. Freedom of contract enables businesses to contract around clauses deemed unacceptable by judges. To be sure, more often than not the rulings of courts will perplex litigants and other observers and their rationale will be difficult to defend from the viewpoint of economic rationality, but, as a rule, such failures will be found tolerable under freedom of contract and individually attributed property, because they provide sufficient opportunities for these pitfalls to be avoided by writing different contracts. Freedom of contract, thus, is a safety net for the failures of courts. Operational closure of law creates hazards, but the safety net makes them bearable.

Yugoslav civil law illustrates what may happen if the safety net is removed. Freedom of contract and free use of property were rejected by Yugoslav communists.⁶¹ Yugoslav law tried to regulate the use of private property down to the smallest detail. This petty tutelage kept private business away from the courts. Yugoslavia always (except 1949-1951) had a large private sector, which employed a sizable part of the labor force and generated a much larger share of GDP than official statistics show.⁶² The judicial caseload statistics (civil cases commenced) reveal that its share in the civil caseload remained very small (CBS, 1991). The private sector preferred to conduct its business in ways that hindered investigations and discovery. Most agreements were oral and not written, which renders it difficult to identify breach by failure of performance. Law of contract, property and tort was codified only in 1978 or in 1980 and, in spite of the long gestation lag, these codifications left many controversial issues open. Before codification these fields of law were, according to official Yugoslav doctrine, primarily regulated by judge-made law. According to Alinčić (1994:148 and 2005:179) this doctrine made the socialist rejection of freedom of contract and free use of property somewhat more

⁶⁰ Luhmann (2012:112). This marks the contrast to Hayek (1989) who appeals to the approach of classical liberalism.

⁶¹ For this and the following statements see Alinčić (1994:54f; 2005:83) who points out that throughout much of the history of socialist Yugoslavia, the public administration and judiciary tended to be more hostile to entrepreneurship and private property than the wording of party documents suggested. For examples see also Gams (1998:435f). This changed only in the 1980s and only in parts of the country.

⁶² See Lydall (1984:267f).

bearable, but that did not help much.⁶³ Socialist civil law hindered rather than assisted trade. As an example, consider the law of real property. Communists were preoccupied with private property. Since in Yugoslavia most real estate always remained in private ownership, this preoccupation gave rise to numerous efforts at reducing its marketability. Seen from a historical perspective, the communist transformation of property law resembled a return to the 18th, if not the 12th century.⁶⁴ Observers were struck by this urge. One of them noted accordingly “that Yugoslav law ... is in the process of developing new forms of almost feudal complexity. This is not surprising because, after all, the refinements of feudalism represented different types of control of land, and it is this development of different types of control and enjoyment of land which is typical of contemporary Yugoslav land law”.⁶⁵ Medieval land law often restrained the alienation of land. Divided ownership and estates in land made transfer difficult even if there was no formal limitation. Transferability is decisive for operational closure of the economic system. “The history of English land law is a history of efforts to make land more easily transferable” (Posner, 2011:95). The unitization of divided ownership meets powerful resistance even it clearly creates value. Most tenancy holders oppose change and, even if they are ready to cooperate in principle, they have every reason to drive a hard bargain. Overcoming such resistance has taken centuries in Western Europe. In post-communism, the road back from the 12th century was long and slow. There were no short cuts. In many post-communist countries, as a result, much real estate will not become easily transferable for a long time.⁶⁶

3 CONCLUDING REMARKS AND SUGGESTIONS FOR FURTHER RESEARCH

In post-communism, the evolution of law proceeded at a comparatively slow pace and fell behind the evolution of the economy. This difference of speed did not end up in the catastrophe predicted by some observers. Nevertheless, it seriously impaired the operations of the economic system and in particular of the financial sector, which depends more on the performance of the law than most other industries.

At this point, our analysis blends in with several strands of economic literature. One of them is the literature on sovereign debt. If debt collection is difficult or impossible, the debtor resembles the prototypical sovereign debtor⁶⁷. Non-enforceability of contracts with sovereign debtors has long been considered a major reason why international capital markets are relatively small and limited compared with the national capital markets of countries which are under the rule of law. Another strand of literature has focused on the persistent adverse effects of temporary financial crises. A “widening of the agency friction” caused by declin-

⁶³ See also Schönfelder (2012:442ff and 481f).

⁶⁴ It is the 12th century, if English land law is the yardstick, and the 18th if French land law is referred to.

⁶⁵ See Chloros (1970:147) who also notes that this was a reversal of the French revolution. “On the Continent, as a result of the French Revolution, the absolute right of ownership was restored and thus it became an expression of individualism, of the rights of man ... On the eve of 1789, land law in France was far removed from the law of Justinian. ‘It is the Code civil which has given to property its individualistic character’.”

⁶⁶ Poland has been an exception to this rule. I owe this information to an anonymous referee.

⁶⁷ See Obstfeld and Rogoff (1996:350f).

ing collateral value was identified as a key generator of these effects.⁶⁸ It is well known that an underdeveloped law of property and security interest widens this friction as well.

A third strand evaluates the efficiency of debt collection⁶⁹, but fails to appreciate the sociological implications of its findings. Luhmann (2004:401) suggests that the enforcement of civil judgement is a useful indicator for the “outdifferentiation” of the law. Civil law is about legal obligations that are created outside political control. A credit contract is an obvious example: the creditor and the debtor do not ask politics for permission before they conclude it. Enforcement of such claims means that the police, i.e. the use of physical power is at the disposal of the creditor, if this is needed to enforce his claim, and that his use of this power is limited only by the law and not by political considerations. Communists wanted to abolish the enforcement of civil judgements, but realized that this would take some time. So they took intermediate steps and changed civil procedure in ways that weakened and marginalized enforcement.⁷⁰ Although these ideological beliefs faded in the 1970s the intermediate steps were not reversed. This was a push towards dedifferentiation that survived to the end of the communist regime and beyond. Early legal reforms undertaken in post-communism often failed to appreciate the significance of this issue. The result often was a decline of confidence in the legal system, which occurred as soon as creditors realized that the hard-won judgements were worthless because they could not be enforced. In system-theory terms this decline is a destabilization of the legal system. Unfortunately, the judiciary could do rather little to restore confidence because legislation was needed to improve enforcement. Enforcement is about the use of powers which are under the control of the executive branch of government. Stability problems of the legal system are unlikely to bother an up-to-date (as opposed to a 19th century) parliament⁷¹. Legislative initiatives are likely to be successful only if they are supported by the ruling party and this party is likely to grant support only if the issue has turned into a political problem and, thus, has arrived in the political system. The crossing of system boundaries is likely to happen only if the problems of the legal system have resulted in serious economic problems like a crisis of the financial system and, consequently, of the real economy. Then matters can no longer be ignored. The theory presented in this paper suggests that strengthening enforcement is re-stabilization – remember the proposition, that functional differentiation transforms evolution into a three-step movement – and a sort of re-stabilization that is likely to occur only after a crisis extending far beyond the legal system.

⁶⁸ See, e.g. Hall (2010:7).

⁶⁹ See, e.g. Djankov et al. (2008).

⁷⁰ This was an explicit purpose of the reform of Czechoslovak civil procedure undertaken in 1964. See Rubeš et al. (1970:189). Similar developments occurred in the GDR and Yugoslavia, but the details differed a lot. See Thætner (2003) and Schönfelder (2012:454-464 and 968f). The ideological background was that communists expected a merger of civil law and morals. After the merger, enforcement usually would be achieved by moral pressure. How about individuals who refuse to succumb to this pressure? Presumably, they would be removed. See the treatment of “outsiders” reported in Markovits (1995).

⁷¹ For a striking example for the failure of the legislator to react to the requests of a judiciary that suffered from this crisis of confidence, see Crnić (2004).

This implication is empirically testable. Schönfelder (2012) conducts the test for four countries and finds Luhmann confirmed. Further research could extend this to other post-communist countries.

This paper focused on a small subset of formerly communist countries. It may be instructive to extend the analysis to countries such as Poland in which the dedifferentiation of the law was not pushed as far.⁷² System-environment theory suggests that this should make post-communist transformation easier. If this can be shown, it would provide an empirical test for the theory.⁷³ If less dedifferentiation helped in Poland, why did it help so little in most if not all successor states of former Yugoslavia countries? Schönfelder (2012) demonstrates that in Croatia the legal system developed more slowly than in Slovakia and the Czech Republic. A Luhmannian attempt to explain this difference could point to the conflict between nation-building and functional differentiation. In Luhmann's words: "The idea of nation . . . belongs to the set of short-lived semantics that can exercise a fascination for a transitional period without betraying what societal system they refer to. It can therefore be assumed that this idea is now on the wane, a phase in which it does more harm than good and from a sociological point of view constitutes one of those *obstacles épistémologiques* that for reason of past plausibilities block urgently needed insights."⁷⁴ The idea of nation proposes a unity above function systems. However, no such unity can exist nowadays. Function systems operate on a world-wide scale. As far as the economic system and science are concerned, this is close to obvious, but it holds for the law and for politics as well. All attempts to build a national economy are futile and counterproductive. A comparison between Croatia and Slovakia may be illustrative at this point. In the 1992s, the Slovaks got their nation-state and this was an effortless achievement. As soon as the Slovaks had it, they found out that it did not solve any real problem. It took them little time to realize this and act accordingly. In contrast, the Croatian nation-state was hard-earned and came at the cost of great sacrifice. Small wonder that Croats have tended to overestimate this gain. To test the theory one might study Slovenia, which should come out as an intermediate case between Croatia and Slovakia.

In this paper, system-environment-theory has been contrasted with the approach taken by economists. A juxtaposition of legal theory-approaches may be instructive as well. Legal theorists coined the notions of ultra-formalism or hyperpositivism that are meant to capture certain characteristics of late socialist and post-communist judicial decision-making.⁷⁵ The theory presented in this paper should be seen as a congenial to this view. It makes a stab at deepening the analysis. The hyperpositivism-literature emphasizes that in the 1970s and 1980s judicial behav-

⁷² For a comparison see Kühn (2011:25f).

⁷³ In the 1990s, Jacek Rostowski (oral communication), praised Polish citizens for being amazingly law abiding – amazingly in view of the problems of poverty that plagued the country. Rostowski was an astute observer. If he was right, this would count in favor of the Luhmannian approach taken in this paper.

⁷⁴ Luhmann (2013:289) uses the French expression *obstacles épistémologiques* himself.

⁷⁵ Kühn (2005, 2011) and Maňko (2013a,b).

our changed. The bluntly political abjudications of Stalinist courts largely were a matter of the past. In the vein of system-environment theory this change can be classified as a first step towards a renewed “outdifferentiation” of the law. Adherence to judicial procedure and obedience to the letter of the law rendered judicial decision-making distinct from the working style of the executive branch of government and the Communist Party which continued to despise such attitudes.⁷⁶ In post-communism operational closure became feasible. Whatever judges had learnt in school, they couldn’t help noticing that all of sudden they had to *decide* cases – and not just arbitrate them, as they often did in the GDR and Czechoslovakia, or double-check or implement decisions taken by the prosecutor or politics. And these weren’t the petty and (for the most) easy cases which filled the civil dockets of communist courts.⁷⁷ Post-communist judges couldn’t help noticing that “hard cases” cannot actually be *decided* within the narrow confines of hyperpositivism. System-environment theory proposes that operational closure creates indeterminacy inside the system. Indeterminacy is a prerequisite for decision-making.⁷⁸ Henceforth, decision-making needs to be guided by a “system memory”, but this memory grows only as a by-product of system-operations. In this predicament, judges grasped at straws. They employed hyperpositivism to make excuses. In addition, hyperpositivism may have been another *obstacle épistémologique*, but the theory would suggest that in view of the paramount importance of operational closure this should be a matter of secondary importance. If this proposition is right, hyperpositivism should not be regarded as a “third legal tradition” on the same footing as Common Law and Roman Law.⁷⁹

⁷⁶ In communist Czechoslovakia and the GDR public administration and the Party nearly always preferred to take an informal approach neglecting procedural niceties and emphasizing political correctness (“following the party line”). See Bernet (1995), Kabele (2004:46) and Schröder (2008:42). In Yugoslavia this held for party officials, but not necessarily for public administration.

⁷⁷ In Yugoslavia as well as in the GDR and Czechoslovakia a political decision-maker “guided” the court whenever a controversy was deemed politically important – except during the Croatian spring. See Pokrovac (1988) and Uzelac (2012). The handling of unimportant cases differed from the GDR and Czechoslovakia: they were often decided by Yugoslav judges rather than arbitrated. See Schönfelder (2012:472).

⁷⁸ Luhmann (2000:147) approvingly quotes Shackle’s dictum: “Choice is an exploitation of unknowledge.”

⁷⁹ If Uzelac (2012) insisted on equal footing, I would disagree.

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