# Law Transfer in Eastern Europe - Systems in Transition from the Viewpoint of Practitioners*

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## I. PURPOSE OF THE PRESENT ARTICLE AND INTRODUCTION

When discussing the transfer of laws and new legal orders in Eastern Europe, the question about what a practitioner has to contribute arises. Valuable academic articles already exist that address the topic of law transfer. The variety of analyses is broad and ranges from considerations that belong, on the one hand, to the field of legal theory and, on the other hand, to very concrete instructions explaining how a legal rule should be transferred into the target country.[1] If the practitioner is not actively

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[1] *See, e.g.*, Klaus-Jürgen Kuss, *Methodische Fragen der Ost-West-Rechtsvergleichung im Zeichen des Systemwechsels in Osteuropa* ZEIT. VERGL. R. WISS 405-22 (1991); Giuditta Cordero Moss, *Russian Legislation and Foreign Models: Some Observations on Comparative Law*, 1998 EUROPA E DIRITTO PRIVATO 523; Gianmaria Ajani & Ugo Mattei, *Codifying*

involved in writing legal opinions, he or she remains mostly excluded from this process. However, just in the daily work of giving advice and safeguarding the legal interests of the client, every practitioner eventually encounters what appears to be the result of the legal transformation process within the target country.

It is exactly the practitioner's practical view of, and experience with, legal transfer that motivates one to provide feedback on how new legislation is implemented in daily legal practice. In this sense, the purpose of this article is to inform those responsible for legal transfer in both target and export countries of some of the ways practitioners are experiencing the effects of such new legislation in import countries in their practice. It is not the practitioner's work as such that is at issue. Rather, the practitioner's considerations are set against the background of the needs of commercial clients who are actually trying to materialize their interests within the target country. The examples to be presented will focus on experiences in Russia and the Ukraine.

As a starting point, the efforts made by various parties, since the collapse of communist systems in Eastern Europe, to adapt their legal orders to the requirements of a new market economy are undeniably substantial. As a result, Russia and the Ukraine have enacted a series of statutes to create the framework for a market-oriented economic order. However, despite the identical wording of some of the legal norms in force, the practitioner quite often recognises that the application of the law is fundamentally different from what he or she is accustomed to in the practice of his or her home jurisdiction. Despite the existing textual alignments, there is a recurrent conclusion that the results of the transformation process have been ineffective or unsatisfactory.

## II. EXAMPLES

### *A. Substantive Civil Law (Private Law)*

#### 1. Lack of Understanding for the Nature of Private Law

The establishment of Soviet power entailed a complete change of understanding concerning private relationships and the function of law governing such relationships. Thus, Russia today lacks the skills to deal with relationships of private law that are necessary in market orders. Lenin's proposition that there was "nothing private" in the economic field and that "everything [was] public law by nature" rendered private law impossible as such. This in fact would require the government's vigorous interference with "relationships of private law"[2] and is still present in the

*Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics*, 19 HASTINGS INT'L & COMP. L. REV. 117 (1995).

[2] V.I. LENIN, 44 POLNOE SOBRANIE SOTSCHINENIJ [THE COLLECTED WORKS OF LENIN] 398, 412. Lenin rightly had recognised that, without governmental control and mechanisms of enforcement, market ("capitalist") economic conditions would spontaneously prevail again and again, thereby rendering impossible the development of communist conditions.



brains of Russian lawyers, be it in a conscious or unconscious way. Therefore, the practice of law in Russia traditionally has been governed by the idea that it is the duty of the government to watch and control as much as possible those who participate in civil (private) law relationships. Thus, governmental activities still are considered to be more important than the individual arrangement of legal relationships by the parties themselves. The explicit incorporation of previously rejected principles of private law patterned after the Western model does not prevent this.

#### 2. Freedom of Contract

For example, Article 9, section 1 of the new Russian Civil Code explicitly incorporates the individual freedom to arrange legal relationships for both natural and juridical persons who are making use of their rights under private law.[3] In connection with the design of contracts, Article 421, a detailed provision concerning the principle of freedom of contract, describes this concept in a more concrete way.[4] Nevertheless, neither the Civil Code itself nor legal practice consistently apply the concept of freedom of contract. In particular, the methods available for parties to annul legal relationships that they feel are unsustainable are in no way sufficient. Thus, a contract basically subject to rescission (e.g., because a legally relevant error affected one party) cannot be done away with through a mere declaration of avoidance by the party in question vis-à-vis the other party. Rather, pursuant to Article 166, section 2 of the Civil Code, rescission of the contract presupposes a court order declaring that the contract is not binding.[5]

Similarly, when it comes to practical enforcement, the rescission of contracts due to material breach by one party can only be obtained by way of an action in court under Article 450, section 3 of the Civil Code.[6] One should not be fooled by the liberal wording of Article 450, section 3, which states that a contract is rescinded upon a justified (i.e., statutorily or contractually admissible) refusal by one party to perform the contract. This legal norm governs only the point in time at which the contract is terminated, not the question of the termination itself. In addition, the parties do not have the right to define the point in time at which a simple breach of contract (e.g., delay in delivery) becomes a relevant breach of contract, as a definitive non-delivery. Prior to a court decision, it is never clear to a contracting party how far into the future performance of the contract still should be accepted and paid for, a situation that is likely to represent a substantial hindrance in the commercial context.

The principle of compensation, which is a means to individually condition legal relationships, provides another example. As is the case with Western codes, a declaration to compensate by one party under

[3] Civil Code of the Russian Federation Part One, Sobr. Zakonod. RF, 1994, No. 32, Item 3301, art. 9.

[4] *Id.* art. 421.

[5] *Id.* art. 166(2).

[6] *Id.* art. 450.

Article 410 of the Russian Civil Code entails extinction of the set-off interest.[7] This legal norm is literally identical with the corresponding Article of the Soviet-Russian Civil Code.[8] However, the practice of Russian and Ukrainian arbitral tribunals for international commercial disputes, on whose part one would primarily expect new thinking, demonstrates that the importance of this provision is very limited and is used as it was in the Soviet era. From the viewpoint of those bodies, admissibility of compensation depends on whether the underlying claims are contested. Damages, the contestation of which is presumed, are therefore *a priori* not susceptible to being set off against primary contractual rights to performance. Another limitation stems from the requirement of being of the "same kind" applied to obligations to be set off against each other. According to those who apply the law, monetary obligations are not necessarily of the same kind, but only in cases where one is dealing on both sides with claims to a purchase price, forfeit money, etc. The practical significance of the set-off thereby is reduced to the concept of the current account relationship in Western legal orders.

### 3. The Lack of Publicity

A system in which commercial relationships hinge on the autonomy of individuals requires a certain degree of transparency concerning the internal legal and economic conditions of legal entities. Therefore, those who participate in such relationships will need corresponding opportunities to duly inform themselves. It is exactly this function, in connection with statutory requirements of publicity aimed at securing the system of legal relationships, that characterizes public registers in Western-style, market-oriented economic orders.

In Russia and the Ukraine, enterprises are subject to registration as well. A new law finally was passed in Russia in 2001.[9] This law has adopted many of the familiar duties to register and may convey the impression that the registers' functions are more or less equivalent to those attributed to Western company registration. However, the register is perceived primarily as an institution to oversee and control the formation of enterprises and the further arrangements of their internal structures. The main informational duties of the registration authorities are understood to include providing information to the tax authority and other "interested governmental bodies."[10]

It is now possible for business people striving to inform themselves about a potential business partner to try to obtain the necessary

[7] *Id.* art. 410.

[8] Soviet-Russian Civil Code, 1964, art. 229.

[9] Fed. Law on the State Registration of Legal Entities of Aug. 8, 2001, (with effects from July 1, 2002), Sobr. Zakonod. RF, 2001, No. 33, Item 3431.

[10] In this sense, the President of the Moscow Registration Chamber, Mr. Vladimir Sobolev, gave an interview for the business journal *Ekonomika i shizn* in which he does not conceal the fact that the interested bodies for the most part are organs of internal security and the attorney general. 41 EKON I ZH 42 (1996).



information through the registration authorities. Russia has overcome the situation in which one had to rely on what the potential partners let them know or what private investigation firms were able to find out. Nevertheless, in practice, the good faith requirement (*bona fide*) is not protected by existing laws. Further, the idea of liability on the basis of appearance at present still is unknown both in Russian and Ukrainian law.

## *B. Procedural Law and State Powers*

### 1. The Finding of the Truth in Civil Procedure

It is characteristic for law transfers from West to East to concentrate on substantive law. It is equally critical, however, to have a new order in the field of procedural law. Structuring and administering civil and commercial proceedings that are tailored to the needs of a market economy is practically unobtainable without instilling into the judiciary a different way of thinking, a different understanding of its own role.

Among the procedural outgrowths of the private individual's autonomy are the principle of disposition *(Dispositionsgrundsatz)* and the maxim of debate *(Verhandlungsmaxime),* both of which are prevailing principles for the conduct of proceedings in liberal legal orders. Civil procedure of the Soviet type opposed this with the ex-officio maxim *(Offizialmaxime)* and the principle of inquisition *(Untersuchungsgrundsatz).*

The Soviet doctrine of civil procedure followed the principle of an active role for the court and its inquiry into the objective truth.[11] These principles were statutorily expressed in a fundamental way in Article 14 of the Russian Civil Code of Procedure and Article 15 of the Ukrainian Civil Code of Procedure.[12] Formally, the principle of disposition in proceedings did exist, but it was secondary to the first two principles and could be limited by the court at any time.[13]

In November 2002, Russia passed a new Code of Civil Procedure,[14] which confirms and reinforces the fundamental amendments of the former Code of November 1995.[15] As opposed to Soviet law, the court is no longer *a priori* bound to overlook what the parties argue. It should no longer inquire as to the "objective truth," but only bring about the necessary conditions for comprehensive and complete inquiry into the facts. Like the earlier amendments of 1995, this new law has had only a small influence on what Russian judges (at least in lower courts) do in

[11] *See* THE RUSSIAN CIVIL PROCEDURE 46-48, 51-52 (K.I. Komissarov & V.M. Semjonov eds., 1978).

[12] THE UKRAINIAN CIVIL PROCEDURE, VVR URSR 1963, No. 30, Item 464.

[13] THE RUSSIAN CIVIL PROCEDURE, *supra* note 12, at 49-50 (referring to Lenin on the role of the state in Soviet civil procedure).

[14] CODE OF CIVIL PROCEDURE, SOBR. ZAKONOD. RF, 2002, No. 46, Item 4531.

[15] CODE OF CIVIL PROCEDURE, SOBR. ZAKONOD. RF, 1995, No. 49, Item 4696.

practice. The majority of judges stubbornly cling to the idea of finding the "objective truth" and decide cases upon the basis of this principle.

The free assessment of evidence in line with the inner conviction of the judge was a valid principle of civil procedure in the Soviet era.[16] The new wording of the Russian Code of Civil Procedure merely has done away with the tying of the inner conviction to "law and socialist legal consciousness."[17] It is this legal consciousness that hardly has changed, despite the lawmakers' efforts. A striking feature of the consideration of facts by Russian judges is that they attribute a far higher evidentiary value to documents originating from a governmental body than they do to other documents. Private documents sometimes are virtually ignored, even if the chain of evidence is very conclusive and the opposite party does not contest them. On the other hand, a document that is flawless from a formalistic viewpoint may lead the court to consider as a proven fact which is "covered" by that document, even though it is contrary to evidence considered more credible by the judge.

This approach undoubtedly indicates the survival and—in the sense of a developed order—dysfunctional consequences of traditional legal thinking: a certificate issued by a governmental body (possibly with a round stamp affixed to it) is as a matter of principle more trustworthy than, for instance, a private expert. This state-oriented way of thinking is the result of the socialist legal tradition that lasted for decades and which cannot be done away with by a mere transfer of norms from West to East.

### 2. The Understanding of the Separation of State Powers

One of the most difficult things to understand for Western lawyers working in Russia and the Ukraine is the fact that more than ten years after the change in political systems and after so many years of legal transfer in various fields, there is still no clear understanding of what Article 10 of the Constitution of 1993,[18] providing for the separation of the state powers, really means and how this is supposed to work in practice. Only recently, the head-deputy of the administration of the Russian President, Viktor Ivanov, showed absolutely no reluctance to give very concrete instructions to the judicial branch when briefing the presidents of the commercial courts.[19] Commenting about the problem of fraudulent insolvencies that the Russian courts often are confronted with in private party litigations, Ivanov directed the judges to take a firm position on these cases; at the same time, he urged them to take special care in cases involving the weapons industry "because otherwise our forces will remain without weapons."[20] Ivanov further urged his auditors to take a particularly "careful look" at former lawyers when evaluating them as candidates for the judicial branch.[21] When dealing with former public prosecutors or police investigators seeking to become judges, no such special screening appears to be of concern to Ivanov. With such statements, it becomes evident that even if the judicial branch theoretically is accepted as a separate power, in practice it still is regarded as subordinate to the other state powers. Ivanov's words also provide evidence that there is no common understanding of the difference between state power and protection of state interests.

[16] THE SOVIET-RUSSIAN CIVIL PROCEDURE, *supra* note 12, art. 56; SOVIET-UKRAINIAN CODE OF CIVIL PROCEDURE, *supra* note 13, art. 62.

[17] *See* TEORIA GOSUDARSTVA I PRAVA [THEORY OF STATE AND LAW] 337-50 (A.I. Koroljov & L.S. Yavitch eds., 1987).

[18] KONST. RF (1993), art. 10.

[19] *Kurs dlya tretey vlasti [Course for the Third Power]*, ROSS. GAZETA, Feb. 12, 2004.

[20] *Id.*



## III. APPRECIATION

The academic articles on the phenomenon of legal transfer, mentioned at the outset, point out that the reception of a law is limited by its acceptance in the target country. Long ago it was recognised that "imported law" rarely becomes part of an organically grown legal order, but largely remains an alien element within the legal thinking and culture of the target country. The reflections and observations made on specific aspects of the Russian and the Ukrainian legal orders have evidenced that the reception and the existence of legal norms is not sufficient, inasmuch as they may remain "empty" when their real significance within the recipient legal order is considered.

One therefore comes to the conclusion that the reception of legal norms cannot be the end of the transformation process, but that it should be understood in a wider, more comprehensive sense. There are not only norms to be transferred; a successful transfer has to embrace the underlying legal thinking as well. Thus, on the following pages, we will record some reflections on what this proposition could actually mean in connection with legal transfers from West to East and what could be the causes for the deficiencies illustrated by means of the above examples.

### *A. Transfer of Ideas Instead of Legal Norms*

The stated proposition that countries should transfer ideas instead of legal norms has to be associated with a very fundamental question: whether legal norms reflect the societal order as it *is* or as it *should be*. It is exactly in the perception of this issue that the communist legal systems were very different from market-economy-oriented countries; communist legal systems followed a concept according to which the only function of the law was to favour the materialization of social-political objectives, the attainment of the latter entailing the abolishment of law itself.[22] Such social engineering has been rejected, and it still is rejected in a

[21] *Id.*

[22] "Law is . . . an organized means of influence by the state." P.I. STUTSCHKA, SOVETSKOJE GOSUDARSTVO I PRAVO [SOVIET STATE & LAW] 44 (1931). "Law is one of the means of the socialist state to change economic conditions." FOUNDATIONS OF THEORY OF STATE AND LAW 303 (N.G. Aleksandrov ed., 1963). *See also* V.I. Lenin, *State and Law*, 33 POLNOE SOBRANIE SOTSCHINENIJ [THE COLLECTED WORKS OF LENIN] 16 (concerning the "withering away" of the state and thereby of the law and referring to Engels).

fundamental way in Western legal thinking, which stresses that a legal order should be an expression of the already existing order of society.

When the on-going legal transfer to Eastern Europe is considered with such an understanding in mind, it becomes obvious that the Western exporting countries draw their motivation to a considerable degree from one desire: they wish to bring about, within the target countries by way of a legal transfer, a fundamental alteration of the whole system. This is namely a liberal legal order, built on the principles and ideas of a market economy and a consolidation of the new structures. In this respect, Western-exporting countries share their understanding of the function of law with the countries on the receiving side. Professor Gianmaria Ajani speaks of an "optimistic normativism"[23] in the countries in question. As far as the West is concerned, it is indeed a salient feature of the transfer of law from West to East that we are dealing with an *active* export of law. We do not have the situation that characterised many of the earlier law transfers, where the initiative in using foreign legal orders as models for structuring local order primarily originated from the importing country.

Immediately after the breakdown of the communist systems in the former Soviet block, particularly in Russia, a plethora of governmental and non-governmental organisations (NGOs) and other groups promoted the enactment of a whole complex of legal norms that they previously had proposed, trying at the same time to set an agenda of which priorities should be followed. Unfortunately, this active legal transfer betrays a tacit attempt on the part of the exporting countries to "build a monument" for their own law codes.

What is regrettable about this situation from the viewpoint of the importing countries is that they cannot profit from pluralism in the process of legal transfer. Although there is unanimity on the part of the exporting countries that a free market economic framework is to be created in the target countries, the approach described sometimes makes them forget that this objective cannot be attained within the target countries in the same way as it was in the exporting countries. This is because the mere transfer of legal norms alone cannot guarantee a change in the legal culture.

As exporting countries strive to further the creation of a liberal legal order by supporting the transition process in said countries, they should bring to fruition the idea of change in legal thinking and legal culture. In this context, the parties concretely involved in the consulting process should understand their task is to adopt a terminology common in the natural sciences, to conduct basic research, and, to a lesser degree, to strive for the transfer of specific provisions from their own legal orders into the legal order of the target country. Instead of obtaining a single transplant, it would seem much more rewarding from the viewpoint of a target country if the exporting countries, in the ambit of the consulting process, would "decode" their own legal orders. This decoding process

[23] Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 93, 103 (1995).



should disclose core values, like the personal freedom to engage in economic activity and the guarantee of property, and explain how these values are integrated into the legal order of the exporting country. The decoding of our own legal order is a process far more complex than one might think at first glance. But, as is well known, it is exactly the comparatist discipline that allows us to better understand our own legal order and, as is the case with the importing countries, to change it when it is necessary.

The process of transfer focuses too often on concrete issues, the resolution of which is ancillary to its proper concern, which is the creation of a legal order in line with the requirements of a market economy. Thus, protagonists of the export of German law consistently presuppose as a matter of course that Eastern European legal orders require a united concept of property and that the institutionalisation of various forms of property stemming from the socialist property order (state property, collective property, private property) must be finally overcome.[24] The question of whether a property order and doctrine in line with market requirements still could evolve if the various forms of property continued to exist, has never been considered an issue. However, what primarily counts is the sufficient protection of private property and individual opportunities to pursue gainful activity. Merely abolishing certain forms of property will not attain this, nor will persistence of various forms of property necessarily prevent it. It is much more important to deprive state property of its dominant role and privileged position. In any case, this can be realised only by a revision of the whole body of law, in connection with a *de jure* and *de facto* redistribution of property to private individuals (privatization). Even though the new Russian Constitution and the new Russian Civil Code still mention various forms of property (private, state, and municipal property), this should not be disturbing to us as long as we achieve the practical realisation of the equal legal status of all forms of property and the equal protection of all property holders that have received legal recognition.[25]

A first conclusion can be presented at this point: an "empty" transfer of legal norms is not an appropriate means to effectuate the desired change of legal thinking within the target country; even an identical transfer of law will not automatically bring about the desired result. Against the background of the necessity of transferring not only norms, but a whole sets of values, it can be asserted that the law-exporting countries should strive to present to the importing country *possible solutions* to the problems of reducing the desired values of freedom to legal norms and coping with the associated technical regulatory problems. The transformation process thereby is shifted onto a higher level—a level

[24] WIRTSCHAFTS-UND GESELLSCHAFTSRECHT OSTEUEROPAS IM ZEICHEN DES ÜBERGANGS ZUR MARKTWIRTSCHAFT [EAST EUROPEAN ECONOMICS AND BUSINESS LAW IN LIGHT OF THE TRANSFORMATION TO A MARKET ECONOMY] 419 (W. Seifert ed., 1992); H.H. HERRNFELD, RECHT EUROPÄISCH: RECHTSREFORM UND RECHTSANGLEICHUNG IN DEN VYSEGRAD STAATEN [EUROPEAN LAW: LEGAL REFORM AND ASSIMILATION IN THE VYSEGRAD STATES] 22 (1995).

[25] KONST. RF (1993), art. 8, sec. 2; CIVIL CODE OF THE RUSSIAN FEDERATION PART ONE, Sobr. Zakonod. RF, 1994, No. 32, Item 3301, art. 212, sec. 1.

on which value-implementing and problem-oriented concepts, and not legal norms, must be transferred. Instead of expecting the importing country to regard the acceptance of a single set of legal norms as an absolute value, proponents of an active export of law should rather ask themselves what appropriately is regarded as the essential nucleus of their own legal order.

### *B. The Personal Aspect in the Process of Transformation*

Since the "empty" transfer of norms cannot change the legal culture in a country, a successful reception takes place only where it is combined with an intensive exchange of people, namely in the context of research activities. Obviously, this statement also is valid in connection with the transformation process in Eastern Europe.[26] Interestingly, it is exactly *because* of the existing awareness of this phenomenon and the ensuing cultivation of personal contacts within the scientific community, funded largely through support programs and initiatives aimed at fostering the development of the new legal orders, that some critical observations on this topic are warranted.

Western countries have hailed the collapse of the communist system with an enthusiasm that was not, or at least not exclusively, grounded in its interpretation as a sort of *imprimatur* for their own societal order. The collapse of the communist system was recognised with the satisfaction that the breakdown re-opened the opportunities for a cultural and intellectual exchange with the countries of Eastern Europe. The impetus that had to be generated in the field of exchange amongst lawyers was not completely unproblematic and accordingly cannot yet unconditionally be called a success. Particularly, at the beginning, the linguistic preconditions for personal exchange were not always present. Eastern European languages were not widely studied and cultivated in the West, while, on the other side, there was in the Eastern European countries a general need to catch up in learning Western languages, particularly English. From this starting point, exporting countries give insufficient consideration to the reality that, in the former communist systems, it was often exactly those persons who complied with and served the system, who have the knowledge in question at their disposal. Additionally, it is often forgotten that people whom the system had considered worthy of representing formally enjoyed, as a consequence, the opportunity to become experienced in cultivating international contacts.

In a manner that is sometimes taken to be a matter of course, the same circles or the groups co-selected by them, today enter the exchange programs sponsored by Western countries. Unfortunately, the urgent necessity of fostering a *really* new generation of jurists is not sufficiently taken into account. Care must be taken to recruit those personalities who deserve it on the basis of their own performance. Today, there are enough

[26] It may be of interest in this context to note that the only Roman roots that can be evidenced in Russian law go back to the very close personal contacts between Russia and Berlin in the era of Savigny. V. Gsovski, *Roman Private Law in Russia*, 5 BULLETINO DEL INSTITUTO DI DIRITTO ROMANO 336.



young and legally trained people around who have acquired the linguistic skills necessary to really engage in comparative law as a discipline through their own efforts and personal motivations and who are thus qualified to contribute to the transformation process in their countries. Certainly, it is legitimate for everybody to strive for a secured position under the new circumstances; however, as long as the exporting countries' available financial resources for the support of the transformation process are limited, these exporting countries are well advised to select and promote people carefully, considering the potential of each candidate to internalize the values to be transferred, and thereby to import them.

Where such a selection of experts is concerned, the practitioner often has no real choice. If in the ambit of safeguarding a client's interests a legal expert is to be chosen, it is hardly possible to pick a jurist who is (still) unknown and without a certain degree of reputation, even if the person in question may appear to be highly knowledgeable. Rather, the goal is to win a well-known, recognised name for the client's cause. Therefore, it is the task of circles currently in a position of complete independence to discover the new generation of jurists, thereby catalyzing changes of thinking.

### *C. Final Considerations*

It seems that the reasons for the slow change in the legal orders of former Soviet republics are more deeply rooted than the benevolent and optimistic assessment of the phenomenon by representatives of Western exporting countries or the written laws might imply. As has been said, at least in Russia, the content of the laws has undergone reform and has been molded to conform with a market economy, but the required changes in the concept of law and legal thinking have not yet occurred.

No new concepts of the role of state and law combined have yet replaced extreme legal positivism linked to an understanding of the role of the state as a dominant influence upon both written law and law applied in practice. At best, recent treatises of legal theory lead one to perceive the quest for a new concept.[27] It is hardly a coincidence that today's Russia remembers the well-known, pre-socialist legal scholar Gabriel Scherschenjevitsch, one of the most fervent defendants of legal positivism in its government-oriented form. [28] In particular, his treatises on Russian civil and commercial law recently have been rediscovered and reprinted.[29]

[27] *See* TEORIA GOSUDARSTVA I PRAVA [THEORY OF LAW AND STATE] 76 (G.N. Manov ed., 1995). *See* S.S. ALEKSEJEW, GOSUDARSTVO I PRAVO, [STATE AND LAW: AN ELEMENTARY COURSE] 69 (1993) (discussing the traditional positivist concept of law).

[28] "Law is a function of the state and therefore logically not thinkable without the state or prior to the state." G. F. SCHERSCHENJEVITSCH, TEORIA PRAVA [THEORY OF LAW] 310 (1910).

[29] G. F. SCHERSCHENJEVITSCH, DOGOVORI V ROSSIJSKOM GRAZHDANSKOM PRAVE, [TREATISE OF RUSSIAN CIVIL LAW] (1995) (following the 1907 edition); G. F. SCHERSCHENJEVITSCH, DOGOVORI V TORGOVOM PRAVE [TREATISE OF COMMERCIAL LAW] (1994) (following the 1914 edition).

As much as possible, one tries to fill the vacuum that has come to exist in the field of legal philosophy by drawing on familiar patterns of thinking. For legal practice, this means that the new and growing body of law will be applied in a traditionalist way (i.e., legal positivism, formalism). On the one hand, the judicial branch cannot be expected to apply laws and norms of private law in an even-handed, proper manner. On the other hand, the traditional belief in the correctness and the absence of inner contradictions within a written legal norm will prevent the law's development and evolution necessary for the functioning of a legal order of the Western type. It will prevent the law's continuous adaptation to the ever-changing situations of life and changing values, needs which may even require the judge to turn away from the letter of a statute. This change will not occur until a new generation of jurists, following a corresponding concept of law and legal thinking, begins filling positions in the administration of justice and is discovered by its Western counterparts.

In summary, the process of legal transfer should be more theoretical in nature. The content of core values embodied in a legal order should be stressed in the process. In connection with the personal element, i.e., the exchange of jurists and similar initiatives, the conclusion that the exporting countries should follow a more pragmatic approach is warranted.