

Introduction

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The concept

This new *Yearbook of the Central and Eastern European Forum of Young Legal, Political and Social Theorists* is devoted to the analysis of the Central- and Eastern European transition. We have continued the traditions of the Forum in studying the region's social, political and legal challenges. Nation-wide, region-wide and global changes remind us of thinking together on interpreting and shaping our environment. We have focused in this volume on understanding the constantly evolving process of democratization. Following the collapse of the Soviet-Union democratic transitions took place all over this region and the new democracies had different shapes. However, all states wished to become a western-type democracy and almost all of them are now members of the European Union, the Council of Europe and the North Atlantic Treaty Organization. What one may be able to learn from this book is the ongoing struggle almost everywhere in the region to understand and to make others understand the peculiarities of these seemingly western-type, but essentially quite different democratic regimes. Reading the chapters of this book, we recognize the particular problems of our countries in the mirror of the analyses about the neighbors.

We observe that our world, being in a constant state of transition, is a demanding field to study, and we hope that this new volume, which brings inspired authors together, will help the readers to orientate themselves in Central and Eastern European society, politics and law.

Our aim was to better understand and to make others better understand this region. We invite the readers to study what the major reasons could be behind the contemporary controversies and what kind of deficiencies and what kind of specialties we see in these national ways of developments. We emphasize that almost all authors of this book are insiders. In addition, they articulate their observations with the aim to explain the consequences of the democratic transition. We recognize that although the countries of the post-soviet region are very different as to their language, as to their history and culture, there still is something fundamentally similar in their approaches to law, politics, and society. In 2017, these similarities are partly embedded in the difficulties of the democratic transitions. All of the countries we deal with in this volume suffer from the heritage of dictatorial regimes. This is clear when we look at the law, the politics and the society from theoretical angles.

This selection of papers we offer here is, therefore, focused strictly on the discussion and reassessment of the Central and Eastern European transition that started in 1989 and apparently has not finished yet. Since more than twenty-five years have passed, the historical distance necessary for the formulation of scholarly insights on either the transition process as such or its several dimensions has been reached. Therefore, the time has come for a critical reconsideration of the earlier scholarly findings or commonplaces and the formulation of more nuanced and refined conclusions. Accordingly, contributions come from the fields of legal, social or political theory related to this complex issue. Special emphasis is placed on the impact of the European-integration, on the historical determinacy of the transition process with regard to unique historical, political, social or cultural factors; on the role of law, legal bodies and legal thinking in the process of transition; on theoretical and practical problems of illustration; on the surviving components of the former official Marxist-Leninist socio-political thinking and the effects of this legacy; and on the phenomenon of legal and political transplants either from Western Europe or of an intra-regional nature.

Most of the authors are younger researchers either working in Central and Eastern Europe or studying topics with Central and Eastern European dimensions, but the reader will find contributions from widely acknowledged professors in law, philosophy and sociology as well.

About the contributions

Our starting point in this book is, what Iván Szelényi suggests in his preface, that ‘post-communism has to find its legitimacy in a new dominant ideology’. Many of us believed that post-communism would bring a transition from a dictatorial regime to a legal-rational authority based statehood, called the liberal socio-political order. Contrary to this illusion, illiberalism has spread in many countries and we observe the presence of different paternalistic, neo-traditional orders. Liberalism, as the new ideology of the post-transition period, is fighting a battle against traditionalism, nationalism and other competing ideas. Although Szelényi concludes that liberalism seems to be fading away in this region, the authors of this volume argue that, in spite of the pitfalls, there are significant efforts to construct liberal democratic regimes and find the ways to adhere to the common European heritage.

Significant achievements have been reached since the transitions, but in the past few years the difficulties have captured the states in certain crises and locked the ongoing democratisation process. Marie-Elisabeth Baudoin observes that most of the Central and Eastern European countries were able, during the 1990s, to change their political and legal systems, without using any violence. More than 25 years after the pacific revolutions, when a backsliding of democracy can be observed, especially in Hungary or in Poland, what is really at stake is the choice that was made in 1989-1990 to adopt the so-called European model of

democracy. The recent crises in Central and Eastern Europe are symptomatic of an identity crisis and disenchantment with the liberal constitutional democratic values. This uncertainty in the political sphere has important effects on the ways in which societies function.

Further, the rule of law concept loses its relevance: many authors in this book examine this phenomenon from different angles. György Gajduschek explains in his chapter that surveys of Hungarian legal culture have detected a high level of inconsistency of beliefs and values regarding basic questions related to the rule of law (i.e. human rights, dealing with unfair laws) of a modern legal system. Gajduschek proposes a few possible, mutually non-exclusive explanations. The most interesting interpretation is – with the argument that also appears in Danilo Vukovic's chapter –, that the legal institutions after 1990 were imported and adopted from the West. This happened within a few months, based on the strange – though probably very typical – belief that the law has the power to change both the political and the social settings. However, culture, unlike the law in the continental legal systems, tends to change only slowly. Maciej Dybowski agrees with Gajduschek by saying that the content of legal concepts, as applied by legal professionals, is highly debatable as far their determinacy is concerned. Political, economic and cultural change, all of which have to do with transition, have an impact on any discursive practice. Dybowski argues that in determining the content of legal concepts, a non-legal concept of the common good could be useful. The controversial experiences of the transitions may have alienated people from the law and the democratic institutions. As a consequence, several layers of highly contradicting normative systems are present. From different perspectives, Jan Bazyl Klakla focuses on the role of the customary law in maintaining social order in the times of transition. His argument is also based on the notion of uncertainty that a transition generates. This may undermine the reliance on state institutions and it may sometimes result in some sort of social anomy. When the previous social order is already gone and the future one is not fully developed yet, this

normative gap needs to be filled. In certain circumstances by the customary law. Social rules are, however, not always positive ones: corruption is also a symptom of the irrelevance of applicable rules. Petra Burai points out that when social structures and the legal system are in constant flux, turning away from the normative order and focusing on personal values instead is particularly effective but not always fruitful. Rafal Manko also argues that the dynamics of the interaction between law and economics with regard to the privatisation of state property is still significant in this region. The introduction of economic freedom, the dismantlement of central economic planning, the transformation of the cooperative sector needed new legal foundations. He concludes that, in spite of all the deficiencies, the law should be an autonomous player within the dynamics of socio-economic and political transformation. A closer examination, however, reveals that despite the aspirations of the legal community, at least in the Polish case of post-communist transformation, the law was nothing but a form, always one step behind the dynamics of socio-economic and political change.

Turning from the instability of law towards the instability of the institutions, we refer to the chapters of Dario Cepo, Danilo Vukovic and Ketrina Cabiri Mijo and Adela Danaj. All deal with the difficulties of establishing and maintaining the due operation of democratic institutions. Dario Cepo reviews the reasons for the establishment as well as the necessity of maintaining upper houses in Central and Eastern European countries after the transition, and to investigate how upper houses should be abolished or reformed in order to cope with new democratic challenges. Ketrina Cabiri Mijo and Adela Danaj argue that the trajectories of the democratic transitions were manifold in this region. In Albania, for example, given that it embraced a specific communist regime, communist legacies still harshly impact the democratization process. The model starts from the communist repression as the independent variable responsible for the lack of political culture and the lack of opponents to the regime. The lack of the historical embeddedness of these components is reflected in the new leaders'

mentality, thus in the institutional choices they make, as well. Danilo Vukovic's claim is very much in line with this. When analysing the changes of law- and policymaking institutions in contemporary Serbia, he observes that a process of 'the hollowing out' of institutions is taking place. The processes of post-socialist transformation and globalization have influenced institutions on two levels: the post-socialist transformation has led to the dissolution of old institutions, connected to a controlled economy and a political system, accompanied by the gradual creation of new ones. However, many of these institutions found themselves in an institutional vacuum that has increased the power of informal institutions, networks, and actors.

And finally, three papers deal specifically with those internal and external challenges which might lead to the present state of the democratic transitions in Central and Eastern Europe. According to Miroslaw Michal Sadowski, collective memory and historical determinacy will be important elements of understanding the legal regime change. He discusses the historical factors which shaped the Polish transformation. The author also ponders on the recurrent question of lustration and looks into the collective memories of the time of the Polish People's Republic, which, 26 years after its downfall, seem more divergent than ever. The transition to democracy, unfortunately, was not so peaceful everywhere in this region. Axelle Reiter assesses the role that international criminal law plays in the transition process, focusing on the penalisation of violence in the Socialist Federal Republic of Yugoslavia (SFRY) in front of the International Criminal Tribunal for the former Yugoslavia (ICTY). The International law relies on criminal avenues to deal with wartime violence and human rights abuses in post-conflict societies. Reiter points out the appropriateness of this approach, because it is not grounded in the actual assessment of its benefits, and does not take into consideration alternative means of conflict management. The critical conclusions find an echo in the local population's scepticism towards the institution and towards criminal justice

provided by international organizations. On the other hand, the trust in the European Union was very high at least at the moments of the accessions. Martin Belov points out that many states transformed their constitutional orders in order to adhere to all EU requirements. Hoping for the stability of wealth, security and freedom, the flow of legal transplants emerged without much debate and in-depth consideration. Martin Belov takes the example of Bulgaria and claims that Europeanisation was regarded as a form of civilization. Thus, Europe has served as a cultural code and a hallmark of high civilization standards which were automatically and uncritically transplanted into the Bulgarian legal system and legal cultural context.

All contributions agree in one major observation. Right after the democratic transition, there was enthusiasm towards adopting the Western-type liberal democracies operated by democratic institutions on the basis of the rule of law. Freedom, wealth, and security were expected from joining the European Union and the NATO, from being a part of the European community. All contributions agree that at national levels and finally at a regional level the trajectories are clear and unambiguous. Ferenc Hörcher, when shedding light on the antecedents and background of the V4 cooperation, points out that discourses of political philosophy and the history of political thought always aim at understanding the real political motivations of actors. While he looks at two particular contexts of the history of the V4 cooperation from medieval times to the recent challenges, he emphasizes that if we make sense of the ideological issues of the given period, we shall more easily understand these countries.

The validity of the regional approach

What we may learn from these contributions is that constitutional democracies are slightly different in this region to the western patterns, transitional political traditions have significant impacts on the political sphere, on the law, on institutions and finally on societies. Similar observations have already been made by many great authors, political and social theory has always been strongly engaged in conceptualizing the similarities and differences between these countries and either Western Europe or Russia and the East. After the Second World War, István Bibó (1911-1979), a Hungarian historian, political philosopher, and politician had a significant influence on the legal, political and social thinking in many CEE countries. In line with Bibó, László Péter (1929-2008), historian and political theorist, found that there is something essentially Central and Eastern European in legal and political traditions (in English, Bibó in Dénes 2015, Bibó in Nagy 1991, Péter in Lojkó 2012). Central and Eastern Europe and the Balkans have always belonged to Europe but on the other hand have always been different from the West. Modernity meant to be understood as being similar to Western democracies. (Péter 38.) This region is special because many different cultures have traditionally an effect on it. (Péter 39.) As to the society, Western Europe has been in a different position since the Second World War, which might cause that Central and Eastern European societies are less tolerant today (Bibó in Huszár-Vida Vol 1. 297-300). Replying to István Bibó, we could say, that the uncertainty that all the chapters of this book touch upon has always been a significant feature of this region. One historical reason might be the uncertainty of the national frameworks (Bibó in Huszár-Vida, Vol 1. 295-304.). The Central and Eastern European nations often experience 'collective hysteria', the societies are often strongly over-politicized as compared to Western European countries. The states in this region always want to achieve something as a nation. Defining the nation and the allies of nations have always been contentious issues since the second world war (Bibó in Huszár-Vida Vol 2. 187-191). On the other hand, nationalism has always been the soil to build autocracy upon.

Péter László suggests that without having this history where the autocratic approach to power was quite usual, the history of the Soviet influence could have been different. (Péter 49-53).

What we learn from Bibó and Péter is still valid today. Although many years have gone by and all the states in this region have been transformed from dictatorial regimes to constitutional democracies, everything that constitutional democracies mean is slightly different here. As endangered liberties and threatened autonomies have become the rule, in an atmosphere of constant uncertainty state actions and individual behaviours become divergent from the adopted and settled Western patterns, modernization, as understood by Bibó and Péter, is filled with conflicts as the actors cannot truly and unconditionally believe in the success of Western models of constitutional democracy.

What we intended here in this volume is to provide an insider view on these struggles of the uncompleted transitions. We believe that there is much to understand in law, political sciences or sociology concerning the successes and the pitfalls of the Central and Eastern European countries.

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