Central and Eastern European Socio-Political and Legal Transition Revisited

Central and Eastern European Forum for Legal, Political, and Social Theory Yearbook

Edited by Jürgen Busch / Péter Cserne / Michael Hein /
Miklós Könczöl / Miodrag Jovanović / Marta Soniewicka

Volume 7

Balázs Fekete/Fruzsina Gárdos-Orosz (eds.)

Central and Eastern European Socio-Political and Legal Transition Revisited

Bibliographic Information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication
in the Deutsche Nationalbibliografie; detailed bibliographic
data is available in the internet at http://dnb.d-nb.de.

ISSN 2191-8317
ISBN 978-3-631-72761-4 (Print)
E-ISBN 978-3-631-72762-1 (E-PDF)
E-ISBN 978-3-631-72763-8 (E-PUB)
E-ISBN 978-3-631-72764-5 (Mobi)
DOI 10.3726/b11406

© Peter Lang GmbH
Internationaler Verlag der Wissenschaften
Frankfurt am Main 2017
All rights reserved.

Peter Lang – Frankfurt am Main · Bern · Bruxelles · New York ·
Oxford · Warszawa · Wien

All parts of this publication are protected by copyright. Any
utilisation outside the strict limits of the copyright law, without
the permission of the publisher, is forbidden and liable to
prosecution. This applies in particular to reproductions,
translations, microfilming, and storage and processing in
electronic retrieval systems.

This publication has been peer reviewed.

www.peterlang.com

Contents

Ivan Szelényi
Preface ... 7

Balázs Fekete-Fruzsina Gárdos-Orosz
Introduction ... 13

Marie-Elisabeth Baudoin
Constitutional Law as a mirror of transition to liberal democracy and its backsliding in Eastern Europe ... 23

György Gajduschek
'The Opposite is True … as Well.' Inconsistent Values and Attitudes in Hungarian Legal Culture: Empirical Evidence from and Speculation over Hungarian Survey Data ... 41

Maciej Dybowski
Transition to Democracy and Determinacy of Legal Concepts. A Brandomian Semantics View ... 57

Jan Bazyli Klakla
The Rebirth of Customary Law in a Time of Transition. The Case of Albania ... 75

Petra Burai
Transitioning Boundaries Between Law and Social Practice: Corruption in Hungary Before and After 1989 ... 89

Rafał Mańko
Law, Politics and the Economy in Poland's Post-Socialist Transformation: Preliminary Notes Towards an Investigation ... 105

Dario Čepo
Between Path Dependence and Political Elite Capture: The Second Chambers in Central and Eastern European Unitary States Explained ... 121

Ketrina Çabiri Mijo and Adela Danaj
Explaining the Trajectories of Post-Communist Democratization. The Case of Albania ... 137

Danilo Vuković
The Hollowing Out of Institutions: Law- and Policymaking in Contemporary Serbia 155

Mirosław Sadowski
Collective Memory and Historical Determinacy: The Shaping of the Polish Transition 175

Axelle Reiter
Justice (Lost) in Transition: Assessing the ICTY Legacy 193

Martin Belov
The Opening of the Constitutional Order of Democracy in Transition towards Supranational Constitutionalism: the Bulgarian case 213

Ferenc Hörcher
The V4 Cooperation and the European schism over the migration crisis: The history of political thought in the service of political analysis 231

Ivan Szelényi

Preface

~~William Graham Sumner Emeritus Professor of Sociology and Political Science, Yale University; Max Weber Professor of Social Sciences and Foundation Dean of Social Sciences at NYU Abu Dhabi. He is a Fellow of American Academy of Arts and Sciences and an ordinary member of the Hungarian National Academy of Sciences.~~

25 Years After the Transition – is the title of the 8th CEE Forum. This is a great topic: such an anniversary is a great opportunity to confront the illusions we harboured 25 years ago and celebrate the achievements of societies which drifted away from communism in the direction promised to be liberal capitalist democracy. The 13 papers presented in this volume offer cool-headed analysis. Most of the papers belong to legal scholarship, while some of them touch upon social, economic, cultural and political processes. I identify myself as a sociologist – with some stretch I may call myself as a political scientist – but I certainly am no scholar of law. Therefore, I am not really competent to act as a commentator on this work. Nevertheless, the legal issues discussed at this conference not only have far reaching implications for the social, political and economic processes the post-communist world is struggling with, but they are questions I have been confronted with in my work on the nature of 'varieties of post-communist capitalisms'. I believe I am competent enough to raise some central questions about issues like the rule of law, constitutionalism, the separation of powers, the present and future of liberalism, the struggle to establish private property rights, the nature of legitimacy under post-communism.[1]

Constitutionalism, constitution making

Let me begin with one of the most urgent and difficult tasks during the transition ex-communist countries had to deal with: the pressing problem of establishing the rule of law and the making of liberal (bourgeois) constitutions.

Communist states were not cases of 'rule of law' in the conventional sense. Nevertheless, they felt a need to create constitutions, following the Stalinist Constitution of the USSR. There was commitment to law actually, but that was

1 See three of my recent publications: Szelényi 2016, Szelényi and Csillag 2015, Szelényi 2015.

supposed to be 'substantive' rather than 'formal'. Inspired by Lukács's theory of 'reified bourgeois consciousness' (1923) Pashukanis (1929) criticized formal law as being 'bourgeois law' (interestingly this criticism of formal law re-emerged in the West during the 1970s and'80s in 'critical legal studies'; so whether the law is 'substantive' or 'formal' is not a trivial question).

During the transition the major task was to transit from a constitution based on substantive legal thinking to formal law. Could it be achieved by readjusting the existing constitution or was there a substantial reason to create a new constitution? In the 1990s in Hungary the Constitutional Court conceptualized an 'invisible constitution'. This idea worked well, but the court was occasionally accused of 'creating' rather than 'administering' the constitution. What is the appropriate mechanism to pass a constitution? Shall the source of the constitution be the democratically elected legislative branch of the government (shall it be by simple or qualified majority?), or shall it be the 'will of the people', hence approved by referenda? Who are the people and in what way can their will be implemented? The US constitution set the standard for over two centuries by clearly identifying the sovereign: 'We the people'.

The Hungarian 'Basic Law' passed in 2011 is more qualified, it states 'We the members of the Hungarian nation', by using an ethno-cultural definition of the sovereign (and consciously not identifying it as,'we the citizens of the Hungarian Republic'). Furthermore this basic law was approved by the two-thirds majority of the parliament, hence by the elected representatives of the citizens (at that time residents in Hungary), which, given the moderate participation rate at elections and the electoral law rewarding the winners of elections, did not mean the approval of the basic law by the majority of Hungarian citizenry.

Separation of powers

Post-communist countries were committed to the principle of the separation of powers. In classical political theory (Montesquieu) the executive branch is the monarch and the legislative branch is 'properly constituted' and, of course, the judiciary is independent from both.

Hence, the idea of the 'separation of powers' was advocated by constitutional monarchies and it is more easily applicable to strong presidential systems (like the US system) than to parliamentary democracies where the executive is elected by the legislature, so the separation of these two branches is not quite that clear. In addition, if a party once attains (qualified – if necessary) majority, the separation of the two major branches (legislative and executive) of government does

not exist any more (like Hungary in 2010–2014 and for a few months after the 2014 elections).

In transitional societies there are strong arguments for a strong executive (especially to facilitate efficient privatization of public goods – while this brings along the dangers of 'corruption' or what Bálint Magyar has recently called the 'mafia state').

So, the separation of powers is highly contested nowadays.

There is a great deal of controversy about the role of constitutional courts, too. Is the court making the law? Already Yeltsin attacked the constitutional court, the Orbán government has limited its powers, so does the Kaczynski regime and – like it has been attempted a number of times in the US, though without definite success – stacks the court with their loyal followers.

There is also intense struggle about the independence of the courts and prosecution.

How much independence the prosecution shall have is also controversial. After all, the prosecution can be seen as an arm of the executive. But is it? If the prosecution – what seems to be the case in Hungary – is just an arm of the executive that can lead to the 'selective criminalization' of the political enemy (is this happening in Romania?). How independent can the courts be if the prosecution is just an arm of the executive? How far can the courts go to criticize rulings by the court?

Liberalism, illiberalism

One reason to limit the autonomy of courts and try to create solid majorities in the legislative is to break the deadlock of legislature, what happens for instance all the time in the US.

Liberalism can be interpreted as excessive defence of individual interest and the executive may want to increase its discretion. In the US, the president attempts to rule by decree to overrule the particularisms of unbreakable conflicts in the legislature. The Polish, Hungarian and Russian state moves towards 'illiberalism', hence a strong executive which, if needed, can push legislation through the legislative bodies within hours or days.

Property rights

One important component of illiberalism is the limitation of property rights. This is especially important in post-communist states, particularly in times when the privatization of massive property is at stake. The legislature and, with parliamentary majority, the executive may limit property rights by imposing extra taxes or

even reallocating property from 'oligarchs', hence from the new rich with opposition political agenda and reallocating it to new clients. This is a typical practice of Russia under Putin (forcing Berezovsky into exile – eventually into what appears to be suicide – and putting Khodorkovsky in jail, while reallocating their properties to new loyal clients (Abramovich) are the most often cited examples). This may be an emergent trend in other post-communist countries where the recruitment of political clients through privatization is exhausted, so new a clients can only be found by the reallocation of property. An interesting example is the so called Orbán-Simicska war in Hungary. The disobedient – and politically ambitious – Simicska is excluded from competitions or from public auctions and new loyal followers, like Vajna and Habony have been richly rewarded. A lot of what Simicska lost has been won by Vajna and Habony. Despite transition to capitalism, ironically in post-communist capitalisms politics often 'remains in command' what Mao – in a smart way – used to define as the essence of communism. Post-communist capitalism, of course, is not communism, but it is a unique form of new capitalism, for sure.

The question of legitimacy and hegemonic ideology

What was the legitimacy of communist regimes can also be debated. Some regard communism as illegitimate, others tended to think about major communist leaders as charismatic leaders. Some even called communism traditional authority, Fehér and Rigby coined the interesting term: goal rational authority.

Post-communism has to find its legitimacy and new dominant ideology. In Weberian terms it was assumed that post-communism will merely mean a transition to legal-rational authority (liberal socio-political order).

But we have seen a creeping-in of illiberalism and an important role of some kind of paternalistic, neo-traditional order. Liberalism as an ideology is fighting an intense (and in some cases apparently losing) battle against traditionalism. Anti-communism (lustration is an important weapon in the anti-communist struggle), patriotism, the emphasis on national sovereignty against federalist tendencies in the EU, emphasis on patriotism, fear of foreigners and anti-immigrants feelings are increasingly the dominant features of post-communist culture.

During the past 25 years former communist societies have faced many legal, social, political and economic challenges. After a quarter of a century these countries and their political elites can be proud of significant achievements: there is indefinitely more law and order than there was under communism; courts have become more autonomous than they used to be; the importance of liberal democracy has been established, reasonably free elections have been held and the freedom

of the press has functioned, though was not uncontested; private property has been legalized. But this success is burdened by contradiction. Many, if not most, communist countries have drifted from rule of law to rule by law; the autonomy of constitutional courts has been restricted by political pressure; government has often tried to use public radio and TV channels as instruments of government propaganda; parties in government have often attempted to change electoral rules to preserve their political power; even the very ideals of liberalism are questioned and instead the need for strong leadership is emphasized.

This volume is a work-in-progress report of countries half-way between communism and liberal democratic capitalism. The road ahead of these countries will probably be long, curvy and rocky.

References

Szelényi, Ivan. 2016. Weber's Theory of Domination and Post-Communist Capitalisms. *Theory and Society* 45(1): 1–24

Szelényi, Ivan and Tamás Csillag. 2015. Drifting from Liberal Democracy: Traditionalist/Neo-conservative Ideology of Managed Illiberal Democratic Capitalism in Post (with). *Intersections: East European Journal of Society and Politics* 1(1): 1–31.

Szelényi, Ivan. 2015. Capitalisms after communisms. *New Left Review* 96: 1–13.

Pashukanis, Evgeny B. [1929] 1978. *Law and Marxism.* London: Ink Links Ltd.

Lukács, Georg. 1923. *Geschicte und Klassenbewusstsein*. Berlin: Der Malik Verlag.

Balázs Fekete-Fruzsina Gárdos-Orosz

Introduction

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 lustration; 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 ef-

fective 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 co-operative 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 investigates 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 understand-

ing 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. However, from a regional perspective, 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 countries 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.

Acknowledgements

We would like to thank all the contributions submitted for publication to this yearbook, also the ones that were finally not selected. The vision, the knowledge, and the experience were there to help all of us to understand the past and pave our way into the future. They were all proactive and contributed to theorizing the transition and its legal, political and social consequences. We are very grateful also for the financial and institutional support of the Hungarian Academy of Sciences Centre for Social Sciences, Institute for Legal Studies and for the intellectual support and input of our colleagues at the Institute who were engaged in this project. Finally, this book could not have been prepared without the contribution of Bálint Gárdos, research assistant in the Institute for Legal Studies and lecturer at the School of English and American Studies, Budapest, Eötvös Loránd University.

30 April 2017, Budapest

Balázs Fekete – research fellow, Hungarian Academy of Sciences, Institute for Legal Studies, Center for Social Sciences

Fruzsina Gárdos-Orosz – research fellow, Hungarian Academy of Sciences, Institute for Legal Studies, Center for Social Sciences

References:

Dénes, Iván Zoltán (ed.) 2015. *The Art of Peacemaking, Political Essays by István Bibó*, translated by Peter Pasztor. New Haven: Yale University Press.

Nagy, Károly (ed.) 1991. *Bibo, Istvan, Democracy. Revolution. Self-Determination: Selected Writings*, translated by Andras Boros-Kazai. Atlantic Studies on Society in Charge, Eastern European Monographs, No. CCCXVIII, New York: Columbia Press.

Lojkó, Miklós (ed.) 2012. *Hungary's Long Nineteenth Century: Constitutional and Democratic Traditions in a European Perspective. Collected Studies by László Péter*. Leiden and Boston: Brill, 2012.

Péter, László. 1998. Autokrácia Kelet-Európában in László Péter: *Az Elbától keletre*. Budapest: Osiris. 37–59.

Huszár, Tibor and Vida, I István (eds.) 1986. István Bibó: Az európai egyensúlyról és békéről. In *Bibó István: Válogatott tanulmányok. Vol 1*. 295–637. Budapest 1986.

Huszár, Tubor and Vida, István (eds.) 1986. István Bibó: A kelet-európai kisállamok nyomorúsága. In *Bibó István: Válogatott tanulmányok. Vol 2.* 185–265. Budapest: Magvető.

List of contributors

Marie-Elisabeth Baudoin (Université D'Auvergne École de Droit, Clermont-Ferrand)

Martin Belov (University of Sofia 'St. Kliment Ohridski', Faculty of Law)

Petra Burai (Max Planck Institute for Social Anthropology, Halle/Saale ~~Eötvös Loránd University Faculty of Law, Budapest~~)

Dario Cepo (University of Zagreb, Faculty of Law, Zagreb)

Adela Danaj (Central European University, Department of Political Science)

Maciej Dybowski (Adam Mickiewicz University, Faculty of Law and Administration, Poznań)

György Gajduschek (Hungarian Academy of Sciences, Center for Social Sciences, Institute for Legal Studies; Corvinus University Budapest)

Ferenc Hörcher (Hungarian Academy of Sciences, Research Centre for Humanities, Institute of Philosophy)

Jan Bazyli Klakla (Jagiellonian University, Department of Sociology of Law, Cracow)

Rafal Manko (University of Amsterdam, Centre for the Study of European Contract Law)

Ketrina Çabiri Mijo (European University of Tirana, Faculty of Social Science and Education; University of Essex – ISER)

Axelle Reiter (University of Verona, Faculty of Law)

Miroslaw Michal Sadowski (University of Wrocław, Faculty of Law)

Iván Szelényi (William Graham Sumner Emeritus Professor of Sociology and Political Science, Yale University; Max Weber Professor of Social Sciences and

Foundation Dean of Social Sciences at NYU Abu Dhabi. Fellow of American Academy of Arts and Sciences and an ordinary member of the Hungarian National Academy of Sciences)

Danilo Vukovic (University of Belgrade, Faculty of Law)

Marie-Elisabeth Baudoin

Constitutional Law as a mirror of transition to liberal democracy and its backsliding in Eastern Europe

Abstract: 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 peaceful revolutions, it is important to have a closer look at the constitutional evolutions in Eastern Europe. Constitutional Law mirrors not only the peaceful transition to democracy but also the obstacles faced by new democracies. Recently, constitutional crises have been observed in Hungary and Poland, raising the question of what is really at stake: a backsliding of democracy or a backsliding of liberal democracy? If we look back into the past and the 1980s' transition to democracy, the choice was made to adopt a liberal model of democracy, the European model of democracy. This paper argues that more than mirroring a backsliding of democracy, the recent crises in Eastern Europe mirror an identity crisis and disenchantment with the idea of liberal constitutional democracy.

Introduction

Twenty-eight years after the so-called 'Velvet', 'peaceful' or 'constitutional revolutions' in Eastern Europe, time has come to look back into the past and analyse the democratic changes. The recent constitutional crisis that happened in Poland in 2015–2016, as well as the constitutional evolution in Hungary since 2010, could lead us to a quite pessimistic and dark picture of the consequences of the so-called transition to democracy. In 2011, Hungary adopted a new Constitution replacing the 1949 amended 'socialist' Constitution. The new Hungarian Basic Law entered into force in January 2012 and was then amended five times within a 20-month period by the governing party (Fidesz) that possessed a constitution-making majority in Parliament. These constitutional developments led to significant criticism domestically and abroad denouncing an elimination of checks and balances and guarantees of fundamental rights. In Poland, in December 2015, the Constitutional Court was at the heart of a major political crisis because of the appointment of the 'October judges';[1] the newly elected Sejm (with a Law and Justice majority)

1 The Polish episode has a lot in common with the American episode of the 'Midnight judges' that were appointed by President Adams in 1801, leading to the famous decision *Marbury v. Madison* adopted by the US Supreme Court in 1803.

drafted amendments to the Act on the Constitutional Court that were adopted on 19 November 2015. These amendments were assessed by the Venice Commission of the Council of Europe on March 11, 2016, as 'hamper[ing] the effectiveness of the Constitutional Tribunal' and undermining democracy, human rights and the rule of Law.[2] Apart from these two examples, the international ranking institutions have shown similar worrying tendencies of the regression of democracy in all new democracies.[3]

But denouncing a backsliding of democracy is not sufficient. The situation requires a deeper analysis and a search for explanations. After the collapse of the authoritarian regimes in the late 1980s, the Eastern European populations expected, under the label of democracy, a Western welfare state. Despite the achievements of democratization and Europeanization during the 1990s, their controversial and ambiguous character led to a tremendous disappointment. To observe this malaise in the new democracies, the legal aspect – though it is just one aspect of the changes – merits being taken into account. Transition to democracy is first and foremost a political phenomenon, but it is also a legal one. Constitutional law is a 'laboratory', which helps in analysing the transitional period. It is an indicator of the changes over time: the transformation of the State or the end of the transition period can be observed through the adoption of a new Fundamental Law, through the amendments introduced in the Constitution, and also through the application of the newly adopted Constitution. Studying those mechanisms enables us to assess if the constitutional transition is over and when the consolidation era starts. At the same time, Constitutional Law is also an indicator of the changes in values as the Constitution bears an axiological dimension and reflects the new democratic values adopted by the post-socialist States.

This paper argues that Constitutional law is a mirror reflecting the democratic and State evolutions. The term 'Constitutional law' means the principles guaranteed by the Constitution but also the constitution-making process and the decisions of the Constitutional Courts as guardians of the Constitution. Nevertheless, such an analysis cannot be done solely from an internal perspective. We need to add an external or supra-national, i.e. European perspective. The admissions of Central European countries to the European Union in 2004 (in the case of Czech

2 Opinion n°833/2015 of the European Commission for Democracy through Law on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland (Venice, 11–12 March 2016), CDL-AD(2016)001, p. 16.

3 'A deep-seated political malaise in east-central Europe has led to disappointment and widespread questioning of the strength of the region's democratic transition'. See *The Economist Intelligence Unit's Democracy Index 2015*, Democracy in an age of anxiety. 10.

Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia) or in 2007 (Bulgaria and Romania), as well as the membership of the Council of Europe in the 1990s, have strongly influenced the constitutional changes. Such an influence can be witnessed at the level of the constitution-making process, during the first period, in the late 1980s, as well as on the consolidation of democracy itself during the second period.

Transition to democracy and democracy itself do not stand as a quiet long river. The adoption of new democratic values is not enough. Democratization requires a change in behaviours from the political elites as well as from the society. It also requires a change in political culture and an acceptance of the new rules of the democratic game. Democracy is more about the journey than the destination. And the journey is sometimes paved with obstacles. As a result, constitutional law in Eastern Europe reflects a paradox: used in the late 1980's as an instrument of departure from the authoritarian regime, it mirrored the peaceful transition to democracy (I). Once democracy was established, Constitutional law mirrored the tribulations of democracy, which are, to some extent, rooted in the transitional process itself (II).

I. Constitutional Law, as a mirror of a peaceful transition to democracy

Ending the 'third wave of democratization' according to the Samuel Huntington (1991) analysis, Eastern European countries departed from the authoritarian regime without using any violence, and in a pacific manner, through the adoption of legal rules. Apart from some exceptions, such as in Romania, law in general and constitutional law in particular was the instrument of revolutionary changes (A). As a result, the revised or newly adopted Constitutions had a common tendency to adopt traditional democratic principles developed by Western constitutionalism (B).

A. The constitutional decision-making process as an instrument of transition to democracy

During the late 1980s, in Central Eastern Europe, the constitutional decision-making process reflected a specific – peaceful – dynamic, very different from the logic of conflict that existed in some post-Soviet States, such as Russia.

Such a peaceful dynamic took place in most of the countries, as the transition was the result of negotiation and compromise. It was the case in Poland, Czechoslovakia, Lithuania, Hungary and Bulgaria where Round Table talks were

held to discuss the transitional steps (see Elster 1996). In 1989, the Round Table agreements in Poland and Hungary enabled a smooth transition, without political chaos, as they were the results of negotiations between the Communist government and the oppositionist forces. They set up the agenda for democratic elections but also for the constitution-making process.

In Poland, these negotiations started on February 6, 1989 and lasted until April 5, 1989. The April agreement decided several important political changes. First, the Sejm would be dissolved and new elections would be held in June 1989. Secondly, a second chamber of Parliament, called the Senate, as well as a powerful presidential institution would be created. On April 7, 1989, the 'April Amendment' began to transform the structure of the government. Several other Acts amending the 1952 Constitution followed it, that were no longer based on compromise and that introduced the new foundations of the Polish constitutional order. But, at the same time, very early on, the decision was taken to replace the 1952 'Stalinist' Constitution by a new Constitution. Some constitutional preparatory works started in the fall of 1989, but were stopped in 1991. The majority of the MPs considered that the Parliament born from the 1989 elections (that were partially free according to the Round Table agreements[4]) has no legitimacy to adopt the new Fundamental Law and that this mission should be devolved to the new Parliament democratically elected in October 1991. Looking back to the first years of the Polish transition, the 1989 April Agreement was, according to Lech Garlicki and Zofia Garlicka (2010, 402), 'the best example of a constitutional change that was closely related to the "peace negotiations" – that is, the Round Table talks'.

In Hungary, the political transition started in March 1989 when the Round Table of the Opposition (*Ellenzéki Kerekasztal*) was established, gathering all movements opposing the communist regime. Shortly afterwards, on June 10, 1989, the leaders of the Communist Party accepted to start political negotiations on a constitutional reform (Sonnevend et al., 2015, 39–40). And on June 13, 1989, the National Round Table (*Nemzeti Kerekasztal*) was established, gathering the participants of the Round Table of the Opposition, the representatives of the Communist Party and the members of trade unions and civil society organization. Contrary to Poland, the decision was taken not to adopt a new Constitution but to amend the 1949 socialist Constitution. Such a choice could not only be explained by a fear to create a new constitution that had no connection with the communist regime, but also because it soon appeared that there was no consensus among the former opposition on a new Fundamental Law. As a result, Act XXXI of October 23, 1989 was adopted by the

4 It was agreed that the opposition could gain no more than 35% of seats at the *Sejm*.

Parliament, establishing a new constitutional order, based on the negotiations of the National Round Table, which agreed on the text of the 1989 constitutional reform on September 18, 1989. However, the 1949 amended Constitution was considered as a temporary Constitution. As in Poland, the Round Table talks opened the road to a smooth transition based on compromises.

Apart from their peacefulness, time and temporality seem to be a key point in transitional processes and in constitution-making processes. Whereas in Poland, a temporary Constitution was adopted in 1992 and in Hungary, the 1949 socialist Constitution was substantially amended, other States quickly adopted a new Constitution (in 1991 in Romania or Bulgaria and in 1992 in the Czech Republic and Slovakia). Often, especially when new constitutions emerged very rapidly, some solutions were mechanically imported from the Western experience, in the context of the general euphoria that accompanied the early 1990s. These constitutional transplants led sometimes to some severe difficulties, because of the gap existing between the domestic realities and the imported rules. As Bogdan Iancu explains, in Romania, if a few clear political options predetermined the broader features of the new fundamental law, 'the many more technical decisions, including the crucial choices on the actual institutional settings and the checks-and-balances configuration, were the result of a rather haphazard form of bricolage, a jigsaw puzzle of Western constitutional templates' (2015, 157).

In Hungary, the amended 1949 Constitution also seemed to be vulnerable. As the constitutional reform of 1989 was prepared within just a few months, the Hungarian Constitution contained some contradictions and inconsistencies. It became a sort of a 'patchwork document' (Arato et al. 2010, 369). In such a context, the Constitutional Court that was established by the new Constitution developed a very activist attitude, becoming more than a simple guardian of the Constitution, rather a real constitution maker. At that time, the Chief Justice of the Court, Lászlo Sólyom, developed the theory of the 'invisible constitution', created by the Constitutional Court itself in order to formulate a coherent system (Sajó 1995, 253). The Constitutional Court played to some extent a quite ambiguous role, sometimes usurping the constituent sovereignty belonging to the Parliament. The judicial activism of the Constitutional Court that was observed at the beginning of the Hungarian transition raised the question of the legitimacy of the Court in this very specific 'constitution-making process'. And such a question was one of the arguments that the Orbán government used to support the idea of adopting a new Constitution in 2010.

The 'long Polish way' to the new Constitution was maybe a more adequate solution, because the legislature could identify some mistakes made at the beginning of the transformation. Indeed, in Poland, on April 23, 1992, the Constitutional Law

on the Procedure for Preparing and Enacting of the Constitution was adopted. It provided for the establishment of a constitutional committee composed of forty-six *Sejm* members and ten Senate members (Garlicki et al. 2010, 395). But as the constitution-making process appeared to be a heated debate between Parliament and the President, a 'Small Constitution' was adopted on October 17, 1992, as a temporary Constitution. This constitutional amendment set up the rules concerning the legislative and executive branches, replacing most provisions of the 1989 April Amendment and limiting the powers of the President of the Republic. After several years of debate – nearly eight years –, the full Constitution was finally adopted by referendum on May 25, 1997 and entered into force on October 17, 1997. And this Constitution was regarded as 'an instrument of stabilization and normalization' (ibid, 410), that intends to last longer.

The constitution-making process is therefore a key element that needs to be taken into account for a better understanding of the democratization process and its further obstacles.

B. The adoption of the standard Western liberal democratic model

Apart from the formal process, another important aspect is the content itself of the 'new' democratic Constitutions (either brand new or amended Constitutions). Their drafting was clearly a reaction against socialist constitutionalism and a move towards the Western European model of liberal democracy. As a reaction against the socialist regime, the new democracies (Poland, Hungary, the Czech Republic, Slovakia, Romania) adopted, in the late 1980s, the traditional democratic principles developed by Western constitutionalism, i.e. the principle of separation of powers, guarantees of human rights and freedoms based on human dignity, rule of law, independence of the judiciary and political pluralism. As an example, the Hungarian Constitution of 1989–1990 included a new provision that stated: 'The Republic of Hungary is an independent democratic constitutional state where all power belongs to the people' (Article 2, Section (1) and (2)).

In such a context, the newly created Constitutional Courts played a great role by defining the new rules of State action and also by educating the stakeholders and the society through their interpretation of the constitutional principles. They had to explain how powers were to be shared and exercised in a democratic manner, to define the role of new institutions such as the presidency or an independent judiciary and to settle conflicts of competence between the institutions. Such a regulatory role was particularly important at the beginning of the transition, when the final Constitutions were not yet adopted. As an example, in Poland, the principle of the separation of powers was not implemented by the April 1989

amendments. Therefore, the creation of the presidency was inconsistent with the still existing principle of the unity of state power. Also, the Sejm was still defined as the 'highest organ of state authority'. The Polish Constitutional Tribunal had, therefore, to deal with inconsistencies within the Constitution.

Regulation of the past was also a major challenge of the transition. Most of the Constitutional Courts had to deal with the lustration issue as well as criminal prosecution of former communist officials responsible for crimes against the people. Ruling on the right to prosecute serious criminal offences not previously prosecuted for political reasons, the Hungarian Constitutional Court stated its famous theory according to which: 'A State under the rule of law cannot be created by undermining the rule of law'.[5] As a consequence, the Court ruled that the law was unconstitutional. It held that in a constitutional state, the violation of rights can only be remedied by upholding the rule of the law. The legal system of a constitutional state cannot deprive anyone of legal guarantees. […] Justice and moral argument may, of course, motivate penal sanction, but its legal foundation must be constitutional.

During the transition period, Constitutional Courts had also to guarantee the enforcement of rights and freedoms. They played a crucial role, particularly when the Constitution was not completely amended. The Polish example is once more relevant, as the constitutional changes that followed the collapse of communism in 1989 did not contain changes to the existing framework of individual rights and freedoms. Nevertheless, the Constitutional Tribunal was able to enhance individual rights using the 'rule of law' principle. By guaranteeing freedom of speech, freedom of assembly, fair trial and abolishing death penalty,[6] the case law of the Constitutional Courts marked a clear departure from the socialist past.

Constitutional law also explicitly reflected the democratic aspirations of the Central Eastern countries and their will to 'return to Europe'. Such an aspiration was clearly mentioned in the Preamble of the Constitution of the Czech Republic of 16 December 1992: 'We, the citizens of the Czech Republic […], determined to build, protect and develop the Czech Republic in the spirit of the inalienable values of human dignity and freedom […] as a member of the family of European and world democracies…' Whereas the socialist Constitutions focused on collective rights or social rights, the Western European tradition was centred around the definition of the status of the individual. As a result of this evolution, the concept

---

5 Decision 11/1992, 5 March 1992, on the retroactive prosecution of serious criminal offences.

6 Decision of the Hungarian Constitutional Court, n°23/1990.

of human dignity, together with the concept of freedom, became an integral element of political relations. The influence of the German Basic Law led to prohibitions of any legal restrictions to the contents of these fundamental human rights.

The Constitutional Courts supported this Westernization or Europeanization of domestic law. As the former Chairman of the Hungarian Constitutional Court, László Sólyom, pointed out, 'the ideology of "Returning to Europe"- after 40 years was powerful' (2015, 13). According to him, the Constitutional Court wanted to demonstrate that the country has not lost connections to Europe. At that time, there was no fear of losing national sovereignty or moving away from the national heritage. This is why the Hungarian Constitutional Court was able to introduce the European standards in its case law without facing political or popular scepticism or blame. A similar dynamic was observed in Poland, where the Constitutional Tribunal modernized the amended 1952 Constitution, using the European Convention on Human Rights (even before its ratification by Poland) and the case law of the Strasbourg's Court. Apart from importing legal techniques borrowed from other European Courts or from the European Court of Human Rights, the Eastern European Constitutional Courts also imported ideas and specific interpretations of rights and freedoms. It is no secret that the Hungarian Constitutional Court imported from German constitutional law the right to human dignity (Dupré 2003), although 'importing' did not necessarily mean 'imitating'.

At the same time, the Constitutional Courts encountered specific difficulties while protecting social rights against the market economy policy. Applying the legal security principle, the Polish Constitutional Tribunal was able to give a better protection to social rights. The Hungarian Constitutional Court did the same in 1995, when it annulled a governmental package of economic measures, interpreting social services as acquired rights.[7] Its legal position was analysed as a way to protect welfare rights inherited from state socialism and was criticized for playing an 'obstructionist role, preventing changes to the inherited welfare system' (Sajó 1996, 31).

Therefore twenty-eight years after the collapse of the socialist regime, many questions arise, such as the following: how deeply these new constitutional provisions, based on the individualistic approach and separation of powers, have taken root in the new democracies? To what extent were they really accepted and desired by the Eastern European populations? The answer to these questions could help us understand, at least to some extent, the scepticism towards liberal democracy

7 Hungarian Constitutional Court, decision n°43/1995.

which is growing in Eastern European countries and which is also reflected by constitutional law.

II. Constitutional Law, as a mirror of the tribulations of democracy

Constitutional Law also mirrors the obstacles faced by new democracies. International and European organizations have recently denounced a decline of democracy in Hungary and in Poland, countries that were so far considered as trendsetters. In this second part, we will argue that more than mirroring a backsliding of democracy, the recent crises in Eastern Europe mirror an identity crisis and a disenchantment with the liberal constitutional democracy. This might be explained because, firstly, the Constitution is, in essence, a political or social pact (A) and secondly, because the post-communist Constitutions were strongly shaped by the European model which is currently facing an ontological crisis (B).

A. The Constitution, at the crossroads of law and politics

Eastern European countries are facing a challenge that is common to all States. Being a political instrument and bearing a political worldview, the Constitution might be easily used and misused or abused by governments to reinforce their power. Such a phenomenon was recently observed in Hungary and in Poland where the Fidesz and PiS parties attempted to strengthen their power by amending the Constitution (in Hungary) or by an Act of Parliament on the Constitutional Court (in Poland), in order to diminish the role of the minority or the role of the guardian of the minority, i.e. the Constitutional Court.

In Hungary, the 2012 Constitution and the five packages of constitutional amendments adopted under Viktor Orbán's government were criticized by European and international experts for driving Hungary away from European democracy. Among these amendments, the Fourth amendment (adopted on March 11, 2013) was the most controversial.[8] Indeed the scope of the Fourth amendment is very broad: including, as examples, the protection of marriage, as the union of a man and a woman, and the family (article 1), the condemnation of the com-

8 According to the Venice Commission, 'the Fourth Amendment perpetuates the problematic position of the President of the National Judicial Office, seriously undermines the possibilities of constitutional review in Hungary and endangers the constitutional system of checks and balances'. See CDL-AD(2013)012, Opinion n°720 / 2013 on the Fourth Amendment to the Fundamental Law of Hungary, June 17, 2013.32.

munist past of Hungary (article 3), the recognition of churches (article 4), the limitation of the freedom of speech (article 5.2), or the role of the Constitutional Court (articles 12.1, 12.3, 17.1, 19).

In fact, most of the provisions which were introduced in the Fundamental Law by the Fourth Amendment had been previously annulled by the Constitutional Court: the Transitional Provisions about the possibility to reduce pensions of former communist leaders or about the suspension of the statute of limitations for crimes not prosecuted for political reasons in the communist regime had been annulled by decision 45/2012 (XII.29) AB; the narrow concept of a family enclosed in the Act on the Protection of Families had been annulled by decision 43/2012 (XII.20) AB; in its decision 6/2013 (III.1) AB, the Constitutional Court had decided, that on the ground of freedom of religion, Parliament cannot be authorized to grant church status; for twenty years, the Constitutional Court declared unconstitutional several laws that aimed to penalize hate speech. As a consequence, the long Fourth Amendment was analysed as the revenge of the Parliament and the Fidesz majority over the Constitutional Court. According to Attila Vincze, 'the Parliament did everything in order to housetrain the formerly widely acknowledged Constitutional Court: cut back its powers, filled the bench with rather loyal justices and blocked the critical decisions' (2014, 86). To give a full picture of this battle between the Parliament, acting as the Constituent power, and the Constitutional Court, the Hungarian context needs to be reviewed, as it is very specific.

In 2012, after the entry into force of the new Fundamental Law, the Constitutional Court decided to exercise a substantive review of constitutional amendment, without any legal basis to exercise such a competence. It established the rules of this substantive review in its 45/2012 decision, when it declared that the Transitory Provisions of the Basic Law were unconstitutional. Such a position by the Constitutional Court can be explained by the moral authority and charisma that the Court gained in the country during the transitional period in the 1990s. Once the new Fundamental Law was adopted in 2011, the Court continued to act as a constituent power. The former President of the Hungarian Constitutional Court, László Sólyom defended this approach, considering that Constitutional Courts can declare the unconstitutionality of some constitutional amendments, 'when amending the constitution runs the risk of altering the identity of the constitution' (2015, 28).

One might agree with such an approach, but it is not the only existing legal theory. One could also oppose this approach with the formal Kelsenian theory, according to which any amendment is valid if it has been adopted according to

the proper procedural rules. Nevertheless, if one agrees with this substantive approach of the Constitution based on its fundamental hard core, and if one agrees with the role of the Constitutional Court as the guardian of the Constitution, one question remains open: who is the guardian of the guardian of the Constitution? What other institution might have legitimacy to override the decision adopted by the Constitutional Court, apart from the Sovereign himself, i.e. the constituent power? Such an answer refers to the famous doctrine of the 'lit de justice' developed in France by Dean Vedel.[9]

As a consequence, the Fourth Amendment might also be interpreted as a reaction of the Sovereign against the guardian of the Constitution overstepping its boundaries. According to constitutional theory, the Constitution, being the political pact, is the work of the constituent power. And the Hungarian Sovereign was able to reverse the Constitutional Court's decisions thanks to its absolute majority at the National Assembly, the Fidesz having 263 seats out of the 386. This also explains why the constituent power deprived the Court of the right to review the substance of constitutional amendments, according to new article 24.5 of the Fundamental Law.

This being said, the main problem in the Hungarian context is not the fact that a supermajority was able to amend the Constitution. It lies in the abuse by this majority of its right to substantially transform the Constitution in order to get rid of the checks and balances and to gag the guardian of the Constitution. Indeed by creating 'procedural hurdles' (Sonnevend et al. 2015, 60), the Rule of Law can be rendered fragile. The new provision of point 5 of the Closing and Miscellaneous Provisions of the Hungarian Fundamental Law, according to which the 'Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed', is one example of such fragilization of the Guardian of the Constitution. To that extent, the polish situation leads to similar consequences: the weakening of the Constitutional Court and the violation of the separation of powers. But looking closer at the context helps understanding that the situation is very different in Poland where there is a harsh political conflict and a misunderstanding by the executive power of the meaning of Rule of Law. In Poland, contrary to Hungary, the executive and legislative branches tried to change the political system without changing the Constitution and without appealing to the constituent power.

---

9 Dean Vedel used this expression for the first time in his article 'Schengen and Maastricht', *RFD adm.* 1992, 8 (2):173. Under the Ancien Régime, 'Lit de justice' referred initially to a particular formal session of the Parliament of Paris, under the presidency of the king.

In Poland, the crisis started with the appointment of the 'October judges' and the refusal by the President of the Republic to accept their oath of office and this led to a severe constitutional crisis and stalemate. On December 3, 2015, the Constitutional Court ruled that article 137 of the Act on the Constitutional Court of June 25, 2015 was a constitutional basis for the election of three judges (the ones replacing the judges whose term ended on November 6th), but was found unconstitutional with respect to two judges whose term ended on December 2 and 8.[10] On December 9, 2015, the Constitutional Court reviewed the Act of November 19, 2015 amending the Act on the Constitutional Court.[11] It confirmed that the Sejm of 7th legislature was entitled to elect three judges, and the Sejm of 8th legislature only two judges. The Court also held that the challenged provision constitutes unauthorized interference in the realm of the judiciary by the legislator and undermines the principle that the Constitutional Tribunal is independent of the other branches of government. A second Act amending the Act on the Constitutional Court was adopted by the Parliament and signed by the President on December 28, 2015. According to the new Act, the Tribunal had to adjudicate in full bench as a general rule and was only competent to render judgments with a two-thirds majority. The Polish Constitutional Court replied by stating in a March 9, 2016 decision that the Act of Parliament from December 2015 was unconstitutional.[12]

Though the European Commission launched the rule of law inquiry against Poland in January 12, 2016, the Polish Court is still in a stalemate, and at the heart of a severe political crisis. Since March 2016, it has functioned on the basis of the Act on the Constitutional Tribunal of June 2015. During this time, the judges have adopted more than 20 judgments concerning the compliance of various legal acts with the Constitution. Until August, none of them had been published.[13] On July 30, 2016, President Duda signed a new Act on the Constitutional Court and on August 11, 2016, the Constitutional Tribunal ruled that the Act was partially unconstitutional. The crisis is not over yet and is definitely rooted in a political struggle between the former majority and the newly re-elected PiS majority. As a consequence, the Rule of Law became, in Poland, a victim of a political struggle.

The Constitution lies at the crossroads of law and politics and cannot therefore avoid being a political document. This is why Constitutional Courts are often caught in political conflicts and their action is under scrutiny of the executive and

10 Judgment n° K 34/15.

11 Judgment n° K 35/15.

12 Judgment n° K 47/15.

13 *The constitutional crisis in Poland 2015–2016*, Helsinki Foundation for Human Rights, 2016. 34.

legislative power. The balance of powers between the executive, the legislative and the Constitutional Court has to be maintained and pacified, otherwise the Rule of Law might be endangered. But the real question which has remained unanswered so far is why did the Hungarian people renew its confidence to the Fidesz party during the 2014 elections and why did the Polish people re-elect a *PiS* majority at Parliament in 2015, supporting the idea of illiberal democracy after twenty years of democratization?

B. A matter of choice in terms of democratic models

Do the constitutional crises observed in Hungary and in Poland mirror a decline of democracy or disenchantment with a specific model of liberal democracy? Rather than a backsliding of democracy, they reflect a strong disappointment with the Europeanization process and a rejection of liberal democracy borrowed from Europe.

Regarding the Hungarian situation, the Venice Commission denounced the 'instrumental use of the Constitution', considering that the 'Constitution and ordinary politics need to be clearly separated because the Constitution is not part of the "political game", but sets the rules for this game'.[14] And in another opinion on Romania, the Commission stated that 'the underlying idea may have been that the majority can do whatever it wants to do because it is the majority. This is obviously a misconception of democracy.'[15] As Alexis de Tocqueville wrote, democracy does not mean the tyranny of a majority. Nevertheless democracy is not at stake in Hungary, as there is a difference between the action of the Parliament, as ordinary legislator, and the action of the Parliament, as constituent power. The adoption of the 2013 constitutional changes was possible as the Fidesz party had in 2010 a 'supermajority' in Parliament, which is no longer the case since 2014. Therefore, what is currently at stake in the Hungarian constitutional context is rather the debate on the choice of democracy: liberal or not.

As we already pointed out, the Eastern European Constitutions that were adopted in the 90s have been tailored under the influence of Western constitutionalism. At that time, the choice was made to adopt the European liberal model of democracy, which focuses on procedures and formal mechanisms, instead of

14 CDL-AD(2013)012, Opinion n°720 / 2013 on the Fourth Amendment to the Fundamental Law of Hungary, June 17, 2013. 30.

15 CDL-AD(2012)026, Opinion n°685/2012 on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other institutions, 17 December 2012. 16.

promoting a substantive democracy based on social rights. According to Jiri Priban, 'the constitution-making process in the 1990s was heavily influenced by the political motivation to accede to the European Union' (2006, 194). The accession negotiation took place simultaneously with the consolidation of the democratic changes. As being again united with Western Europe appeared to be the main priority for most Eastern European States, meeting the Copenhagen criteria became as well the only 'game in town'. At that time the 'democratic goal' was superposed to the 'EU accession goal'. National parliaments opted for a quite smooth integrative process without much political debate. In the course of accession to the EU, the compliance with the EU pre-requirements and the harmonization of domestic laws with the EU legal framework was done without asking for people's consent. Following the fall of communism, Eastern European countries had almost no time to reconstruct their national sovereignty; they were already engaged in a dynamics of building the supra-national sovereignty of the European Union.

Furthermore, the European integration played a neutralizing role regarding ethnical tensions and nationalist policies. If this influence had positive effects at the earlier stages of the transition, in a context of general euphoria based on the 'return to Europe', it turned out to be less efficient once Euroscepticism gained importance. The impact of the economic recession and social disintegration became one of the main drivers behind the political crises in Eastern Europe. As the European *demos* is not easy to find and define and did not really participate in the foundation of the European legal order, national identities resurfaced and nationalist rhetoric was instrumentalised by politicians.

The EU membership and the EU legal order supremacy on national legal orders also had some consequences on the content of the Constitutions and on constitutional law. As in Western European States, Eastern European constitutions had to be amended in order to conform to European Union treaties or to ratify them. In Hungary, the Constitution was amended in 2003 to expressly allow Hungary to join the European Union (article 2A). In Poland, the 1997 Constitution did not refer to the European Union but contained a general provision recognizing the possibility for the State to delegate, by treaty, its sovereignty to an international organization or international institution (article 90.1). And though several Constitutional Courts, such as the Polish Constitutional Tribunal, adopted an interpretation of domestic law 'in a manner that is favourable to EU law', the relationships between the EU legal order and the national legal orders also raised the question of constitutional pluralism with the threat of tensions and conflicts between the EU legal orders and national orders (Baudoin 2010). The Polish Constitutional Tribunal in its May 11, 2005 decision on the constitutionality of the Accession

Treaty highlighted such a possibility.[16] The Constitutional Tribunal considered that the accession of Poland to the EU did not undermine the supremacy of the Constitution over the whole legal order. Being the supreme act and the expression of the Nation's will, the Constitution would not lose its binding force even in a case of inconsistency with an EU norm. The Constitutional Tribunal pointed out very clearly that the concept and model of European Law created a new situation, wherein, within each Member State, 'autonomous legal orders co-exist and are simultaneously operative'. As a consequence, the traditional concepts of monism and dualism regarding the relationship between domestic and international law failed to shed light on this new type of relationship. The existence of the relative autonomy of national and Community legal orders did not mean an absence of interaction between them.

The complex interaction between legal orders has not just been regulated by the judiciary and by Constitutional Courts. Some political answers have also been given, some of them radical, as the Brexit option in the United Kingdom, some of them less radical with the negotiation of 'opt-outs' from the EU Charter of Fundamental rights in the case of Poland and the Czech Republic. Generally speaking, within Europe, the Europeanization of State constitutions provoked a certain malaise that raised the question of the sovereignty of States and of the supremacy of domestic Fundamental Laws. The influence of EU Law combined with the 'supervision' by the Council of Europe organs, including the European Court of Human Rights or the Venice Commission, sometimes led to a certain form of protectionism through the Constitution.

The 2012 Hungarian Constitution is a good illustration of this type of protectionism. Its adoption gave birth to a rhetoric developed by Viktor Orbán and based on national values and on the promotion of illiberal democracy.[17] By liberal democracy, the Hungarian Prime Minister denounced a specific ideology based on liberalism. Indeed Hungarian constitutional law is certainly less liberal, but it is not undemocratic. As explained by Catherine Dupré (2015, 353), 'the Euro-constitutionalism is born out of a commitment to establish and enhance liberal democracy'. It is, therefore, a prescriptive doctrine and ideology that associates

16 Judgment n° K 18/04.

17 In a famous speech of July 26, 2014, given at Băile Tuşnad, Viktor Orbán claimed: '[…] The Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom, etc. But it does not make this ideology a central element of state organization, but applies a specific, national, particular approach in its stead'.

democracy with human rights. Legal theory teaches us to distinguish democracy and the Rule of Law. Democracy is based on the Nation's will and votes; Rule of Law is based on the judiciary and the protection of Human Rights. If, ideally, one might expect that States are built on both pillars – democracy and the Rule of Law –, imposing a liberal democracy from above itself constitutes a breach of democracy and leads to a negative protectionist reaction that might be very dangerous. The Polish example illustrates such a move backwards. On January 19, 2016, Beata Szydło, the polish Prime Minister, stated during the debate in the European Parliament: 'I think that Poland does not deserve to undergo examination by the European Commission because human rights are not violated, nor is the rule of law […]. We should deal with our Polish matters within our Polish boarders.'[18]

Isolationism is a major threat to European unity, but conversely the loss of national identity also represents a danger for European diversity. Democracy implies respecting the will of the Nation. To what extent can European organizations impose on its Member States its ideological conception of democracy? Imposing liberal Democracy cannot be successful without the Nation's consent… at least if the European Union and the Council of Europe intend to play by the same rules, i.e. democratic rules.

Conclusion

Since the 1980s and the collapse of communism, Central Eastern European countries have gone a long way towards democracy. As any other State, their constitutional law reflected steps forwards as well as steps backwards. Being at the crossroads of Law and Politics, the Constitution is a fragile compromise, always under the threat of an instrumentalisation by the executive or legislative power. The current constitutional and political tensions that are ongoing in Eastern Europe do not reflect the failure of the transition to democracy or a regression of democracy. They reflect the conflicting conceptions of what democracy is and also illustrates the fact that democracy entails a permanent struggle to make it a living reality.

This article did not intend to assess the quality of democracy in Eastern European countries, nor in Europe in general. Legal theory does not have the mission to assess democracy, nor to prescribe what the right type of political regime is. Lawyers have the duty to shed light on the epistemological framework. As such, there is no single approach to democracy, there are different approaches to

18 January 19, 2016, available at: http://www.europarl.europa.eu/ep-live/en/plenary/video?debate=1453218960960

democracy, which are based on an ideological choice. Nevertheless, democracy implies one condition: the taking into account of the people's voice. Observing the constitutional changes in Eastern Europe is a task rendered difficult when the only model of reference which is taken into account is the European one. Though there is surely a European constitutional heritage, based on principles and standards which are shared by European States, this heritage is based on the constitutional traditions of the States. The construction of the European Union or the Council of Europe is a dynamic that is legitimate as it is anchored in the States' consent. Conversely, the supra-national organizations have no legitimacy to impose a chosen type of democracy on their member States. Adopting or amending a Constitution is an act of sovereignty. A Constitution is a political project that is born in a historical context and draws the future of a State, in other words, the Constitution reflects the State's identity. A plug-and-play imposed Constitution, drafted according to the European standards, is, just as imposed democracy, as hazardous an option as being deaf to the people's voice…

References

Baudoin, Marie-Elisabeth. 2010. Les Pays d'Europe Centrale et Orientale face à l'articulation des sources de protection des droits fondamentaux. In *Les droits fondamentaux : charnières entre orders et systèmes juridiques,* edited by Edouard Dubout and Sébastien Touzé. 279–301. Paris: Pedone.

von Bogdandy , Armin and Sonnevend, Pál. 2015. *Constitutional Crisis in the European Constitutional Area, Theory, Law and Politics in Hungary and Romania*. Oxford and Portland: Hart Publishing.

Dupré, Catherine. 2003. *Importing the Law in Post-Communist transitions. The Hungarian Constitutional Court and the Right to Human Dignity*. Oxford and Portland Oregon: Hart Publishing,.

Elster, Jon (ed.) 1996. *The Roundtable Talks and the Breakdown of Communism*. Chicago: University of Chicago Press.

Huntington, Samuel. 1991. *The Third Wave: Democratization in the Late Twentieth Century*. London: University of Oklahoma Press.

Miller, Laurel E. 2010. *Framing the State in Times of Transition – Case Studies in Constitution Making*. Washington, DC: United States Institute of Peace Press.

Priban, Jiri. 2006. Happy Returns to Europe? The Union's Identity, Constitution-Making, and its Impact on the Central European Accession States. In *Spreading Democracy and the Rule of Law? The Impact of EU enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist legal orders*, edited by Wojciech Sadurski, Adam Czarnota and Martin Krygier. Berlin: Springer.

Sajó, András. 1995. Reading the Invisible Constitution: Judicial Review in Hungary. *Oxford Journal of Legal Studies* 15(2): 253–267.

Sajó, András. 1996. How the Rule of Law Killed Hungarian Welfare Reform. *Eastern European Constitutional Review* 5(1): 31–41.

Vincze, Attila. 2014. Wrestling with Constitutionalism: the Supermajority and the Hungarian Constitutional Court. *Vienna Journal on International Constitutional Law* 8:86–97.

György Gajduschek

'The Opposite is True … as Well.' Inconsistent Values and Attitudes in Hungarian Legal Culture: Empirical Evidence from and Speculation over Hungarian Survey Data

Abstract: Researchers working with survey data on legal culture in Hungary regularly encounter citizens' highly inconsistent values and attitudes towards the legal system and its institutions. Three hypothetical explanations for these extreme inconsistencies are proposed below, all of which refer to history: (1) The government and the public sphere were occupied by aliens (foreign suppressors) for five centuries. This has generated an especially high level of alienation from the public sphere and a sharp distinction between formal (theirs) and informal (ours) institutions. (2) Ideological components of previous regimes are typically unconsciously inculcated into citizens' minds (e.g. via school education), and these ideologies are highly contradictory. (3) The legal order of transition has mostly been created on the basis of legal transplants, rather than via an organic historical evolution; thus neither tradition nor the social memory of successful problem-solving legitimizes these rules among citizens.

Introduction

This paper addresses certain specificities of Hungarian 'legal culture'. The term 'legal culture' is conceived in this paper as the general predisposition of the people in a society toward the 'law'.[1] Legal culture (and culture more generally) embraces cognitive, evaluative (moral) and affective elements. In another approach, using earlier scholarly concepts, namely the so-called Knowledge and Opinion about the Law studies (Podgorecki and Kurczewski 1974), legal culture is composed of

1 It would be inappropriate and even impossible here to discuss the scholarly debates about the meaning and usefulness of the term. For instance, Cotterell (2013), quite harshly argues that legal culture is a vague and useless term as, most importantly, no modern society shares the same cultural elements. This paper, however, is based on the presumption that not only a country but a whole region, namely the Central and East European (CEE) region shares similar legal-cultural attributes. These similarities may stem from a common historical experience in the Habsburg Monarchy and under the Russian-Soviet rule. On a more general level, this region may be interpreted as one stack in between the West and the East as Jenő Szűcs (1983) described it.

knowledge and opinions about the law including attitudes towards the law. 'Legal culture' is also used by comparative scholars to describe the overall characteristics of a country's legal system, similar – in terms of the function of usage – to Rene David's 'legal systems' or 'legal styles'. (Zweigert and Kötz 1998, 67–68) Naturally, this way of understanding is very different from the one presented in this paper. However, the distinction offered by Friedman (1975, 193–222) between internal legal culture referring to the culture of the legal professionals (which is, presumably, in a strong interactive relationship with the legal culture used by comparative legal scholars – the overall characteristics of the legal system) and external legal culture (that is the culture of the wider public) seems to be useful. This paper focuses on the latter. It is also necessary to emphasize that legal culture does not stand alone but it is strongly interrelated with other elements (e.g. political culture) and, finally, the general culture of a society.

The 1970s and 1980s were the heydays of empirical studies of Hungarian legal culture, or 'legal consciousness' according to the terminology of that time, characterised by the work of two exceptional and internationally known scholars, Kálmán Kulcsár and András Sajó. The first two decades after 1990, however, may reasonably be pictured as a low tide in this research interest both in quantitative (the number of empirical research studies) and qualitative terms (e.g. no representative survey had been carried out on the Hungarian population for about two decades). From a practical point of view, this is quite natural due to the process of transition, the uncertainty in and the devaluation of academic activities and the enormous changes in the legal system that provided sufficient practical work to keep lawyers occupied. On the other hand, the lack of this kind of research is quite frustrating as this period could have provided an exceptionally quasi-experimental arrangement for research in legal culture, with a dominant independent variable: the transformed legal system.

In recent years, however, increasing interest can be detected. Quite a few surveys have been administered to a representative sample of the Hungarian population and other research activities, such as interviews, case studies have been carried out. Some of the findings have been already published. Perhaps the most important publication in this regard is a volume relying on a socio-psychological approach to law and containing fourteen well-elaborated studies (Hunyady and Berkics 2015). Most chapters address directly the topic of legal culture, based on intensive empirical research, including two questionnaire surveys on representative samples of the adult Hungarian population and another survey on the population holding a university degree, half of them having a law degree (lawyers'

sub-sample). The author of this chapter and his colleagues[2] also worked with a questionnaire survey administered by Szonda-Ipsos on a representative sample of the Hungarian adult population carried out by personal interviews (CAPI) in 2015, November. The empirical evidence presented below stems from these two research projects.

The problem: inconsistent values regarding law and legal culture

One of the recurrent findings of empirical research on Hungarian legal culture is that respondents tend to give highly contradictory answers to questions raised in various questionnaire surveys. On a more general level, people do not seem to have a relatively stable and/or consistent system of values regarding issues of the legal system. The most obvious example is provided by Berkics (Berkics 2015, 144–47), who found that 75% of the respondents of the population sample and 66% of the university sample (!) agreed with both of the following statements: ‘Certain human rights must not be denied anyone irrespective of their behaviour’ and ‘Only those who fulfil their obligations should have rights’. These questions were raised at distant points of the questionnaire. At another point of the questionnaire, the two very similarly phrased but clearly contradicting statements (‘It is better to acquit a hundred guilty then to sentence one innocent person’ and ‘It is better to sentence an innocent person than to acquit one who is guilty’) were raised in the very same question set. In this case, 7% of the total population and 6% of the university sample agreed with both statements, whereas 36% and 22% agreed with neither of them – indicating the lack of a steady view on this simple and basic issue (aside from the 9% and 6% of those who expressed that they could not answer the question). Similar contradictions were detected by most research projects in the field. For instance, Krekó (2015), when analysing the causes of distrust towards the legal order, generally identifies three major types of attitudes in the Hungarian society. The first one may be translated as the ‘traditional-national-resistance’ attitude. This attitude that seems to be most widely present in the Hungarian society may be described as genuine distrust towards the government and the law, the latter being conceived as a product of the government. Krekó explains this as a heritage of times when the country was ruled, its government held by foreign powers, ‘the Turks, Habsburgs, and the Soviets’ (422). In this frame, legal norms

2 Zsolt Boda, Balázs Fekete, György Gajduschek, István H. Szilágyi, Péter Róbert, the team of the research project (OTKA 105552) on the Legal Culture of the Hungarian Population – A Theoretical and Empirical Study.

are to be neglected or evaded whenever possible. Doing so is not simply a utility maximizing behavior or a necessity for individual success, but in a way it is also a heroic or at least a positive, patriotic act. The second attitude was named as 'respect for rule of law' referring to the agreement with such statements as 'laws represent the public interest', 'laws safeguard everyone's interest equally', 'the government effectively regulates and thus makes our life easier' etc. One may reasonably expect that if these two views are present in a society, they are expressed by different social groups or strata. Some approach law as a hostile phenomenon to be handled with neglect and resistance, whereas others believe that law must be accepted, respected and followed. However, this is not the case. On the contrary, both attitudes are detected within a large portion of the same respondents.

Berkics also asked for a set of five responses based on contradictory statements – e.g. 'laws must be followed even if the result is against the majority will' vs. 'the will of the people trumps even the laws' or 'leaders should not break the law even if they try to serve justice' vs. 'if a leader tries to serve justice it is acceptable if s/he breaks the law' and three others, including the above-mentioned questions (about acquitting guilty and innocent and if right should be assured only if obligations fulfilled) now set explicitly into contradicting pairs. The respondents had to position themselves between these pairs of statements. Berkics ran a factor analysis to identify deeper values that direct respondents in their answers to specific questions. Based on previous international research he expected two main factors that may be identified roughly with Weber's distinction between the formal and substantial rationality of law (Weber and Roth 1978, 656–57). However, Berkics did not observe these two or any other meaningful factors.[3]

Several other findings that reveal an extremely high level of inconsistency of values and attitudes referring to the law could be enlisted from this book. Our survey results reinforce the findings of the above-mentioned publications. Factor analysis that, as the international academic literature argues, provides robust factors depicting a certain consistent set of general values and attitudes towards the law yields no such results in Hungary. We applied an eight-question set used in a previous study. (Gibson and Caldeira 1996) The authors of that comparative study, which was carried out in countries of the EU 15 (at that time predominantly West-European countries), reported that they identified the factors of those three variables that they originally intended to measure. When we repeated this exercise,

3 The KMO value was 0.489, and if one factor was generated, that could explain only 25% of the total variance.

we could not identify the expected factors, or any other factor set that could be meaningfully interpreted.

Seemingly we face a society without clear and coherent values towards the legal system. This is not to argue that the society is polarised on certain issues; i.e. different social groups follow contradicting values, which is quite typical in most modern societies. It is the individuals who – in a kind of schizophrenic manner – do not have a relatively consistent set of values; therefore, their answers are highly volatile; further, they react to the same question differently in a slightly different context, or they simply provide contradicting answers.

Another attribute that may be related to the above is the sharp contrast between values revealed by respondents in a questionnaire and the actual behaviour detected on the aggregate level of the society. For instance, as World Value Survey shows, Hungarians are quite high on condemning tax evasion. The Hungarian response rate is higher than those of the UK or Germany and roughly equal to the US. Nonetheless, almost everyone who can do so evades tax payment (Boda and Bartha 2016). A similar discrepancy was detected in our survey. A question asked what people should do if the Parliament adopts a law that people feel unfair. Sixty percent of the respondents answered that people should publicly protest against that law. This answer is in some contrast with the fact that 92% said they have never participated in any public protest.[4]

Taking all these into account, three potential, hypothetical explanations for these findings may be proposed. For this purpose history as such will be used as a reference point, as the culture of a group is frequently understood as an upshot of previous events, an outcome of unconscious learning processes.[5] The

4 Of course, if there has never been an unfair law adopted then there is no discrepancy. During the pilot of the survey, the author carried out about a dozen interviews containing this question, in a town some 50 kilometres from Budapest, mostly with respondents with secondary education or below. It was quite typical that respondents said something like 'naturally, they should protest' and refused such alternative that 'they should try to silently neglect' the law. When, however, around the end of the interview, the question regarding participation in public protest was raised, the same respondents said 'No', accompanied by mimics and gestures telling that 'I am not such a person / I am not a troublemaker.'

5 Strangely, this view appears most lucidly in the work of Schein, the leading scholar of organizational culture, who explains the phenomenon solely from the history of the organization (Schein 2010). Among historians, Arnold Toynbee expressed this view most characteristically (Toynbee and Somervell 1987). Though Toynbee has been criticised for several reasons (Hughes-Warrington 2008), his challenge-response approach to history is still accepted and widely applied. Furthermore, as Posner explains, the

three hypothetical explanations differ in their time span. The first refers to a half-millennium-long historical experience, which is a common experience of most of CEE countries. The second is based on a somewhat shorter, about a century-long, historical overview, whereas the third refers most of all to the experience of the transition.

Proposed explanation 1: Long-term historical experience: 'The public' as an alien field

Since the early ages of European civilization, the relationship between 'power-holders', the 'elite' or the 'establishment', and society at large has always been ambiguous (Dahrendorf 1990). Their power has always been challenged by some, whereas strong legitimizing ideologies, shared by the majority or at least a large part of society have always been present. It is also clear that there is a certain cultural divide between the upper and lower strata of all societies. (Bourdieu and Johnson 1993; Rouse 2005) The culture of the lower strata may be a cause of hostility towards the elite. However, the very same culture, surreptitiously influenced by the elite, may also contain unreflected elements that reinforce (legitimise in a sociological way) the position of power-holders.[6] In Western societies this – undoubtedly ambiguous – relationship between the elite and the masses has typically been an internal affair in the given society. The Hungarians, and for that matter most of the CEE countries, have a different historical experience. In these countries, for about half a millennium, the tension between the power-holders and subjects was not an internal social issue and, was not ambiguous in that sense either.

In most of the cases, rulers of various CEE countries were 'aliens', in all respect. Hungary, for instance, was occupied by the Turks after the 1526 battle at Mohács

---

development of moral ideas relevant to the law may also be explained this way. (Posner 2002) (An excellent summary of the challenge-response theory for the legal systems is provided by Jakab (2016).

The view of 'historical learning' theory also explains the change in culture (as an outcome of historical change), and at the same time, the persistence of several cultural features, as this learning is unconscious, similar to the socialization of children in their early years on an individual level. Both of them function as mechanisms to regulate human behaviour effectively and steadily.

6 This idea appears in Gramsci's writings (Gramsci, Nowell-Smith, and Hoare 1971, 206–76) and his idea of cultural hegemony; or from a perfectly different perspective, this is also Foucault's central idea regarding the relationship between power and knowledge. See on this: (Schulzke 2016).

was lost, the battle that is still a symbol of national tragedy. The basic facts: Turks spoke the Turkish language in Hungary; they were Muslims in a Christian country in an age, when religion played a central role in peoples’ lives. They were alien in all respects. Turks ran their own administrative-governmental system, collected taxes and ruled the country. The Turks were ousted by the Habsburg army. Habsburgs spoke German and used German as an official language of administration and government. Habsburgs were Roman Catholics in Hungary, which at that time was predominantly Lutheran, and soon started a cruel re-Catholicization campaign. Habsburgs ruled Hungary for more than two centuries. Later, Russian-Soviet rule came from the East in a country that tended to follow Western models; Soviets required atheism in a still relatively religious country and the Russian language was the obligatory foreign language in schools, where, for most people, the second language was German.

In brief, rulers were aliens, or rather the enemies of the country / the nation / the ‘people of Hungary’ as they got into power by force, by occupying the country. It is not that the government and government elite was ’alienated from the masses’, to use the Marxist terminology; they were indeed aliens. As these rulers created their own governmental system, they practically occupied the centre of the public sphere, too. There appears a sharp distinction between US and THEM, which is otherwise a typical distinction in all human communities (Allport 1979). It is also usual that this distinction appears between the masses and the elite, as we know from sociology or the conflict theory from Marx to Dahrendorf. However, in the case of Hungary (and the region) the US and THEM divide sharply separates ‘those in the public sphere’ from ‘us in the private sphere’. The public is not ours; the public is alien.

This distinction also divides the formal and informal,[7] the ‘system’ and the ‘life-world’ as Habermas uses the latter term. (Habermas 1985) There appears an unbridgeable abyss between people living their everyday lives and the public sphere, with special regard to the government. There is a different set of values and beliefs

7 On the distinction between formal and informal institutions see: (Helmke and Levitsky 2004) On the dominance of informal over formal in the everyday practice of CEE societies see for instance: (Dimitrova 2010); more explicitly: (Gajduschek 2012). More generally, (Elster, Offe, and Preuss 1998) indicate that transition countries fail to build stable formal institutions. All these items, however, refer to the transition setting of post-communist countries. Inability to build formal institutions may stem either from the heritage of the communist regime or the chaotic situation of transition. However, I argue here that the inability to create formal institutions that are backed by the majority of the society and able to coordinate social behaviour is a much more chronic feature of these societies.

about THEM and US. The communication between the two – at least honest and effective communication – is impossible.[8] But those aliens running the government, controlling the public sphere and setting up the formal institutions have the power.

Historical analyses could best support the above statement. Identifying relevant studies, especially ones that are available in English, requires further research. Jenő Szűcs's famous piece (1983) could be a highly relevant item in this regard. Another, internationally less known, though in Hungary highly appreciated author is István Bibó, who in fact could be quoted with regard to all three hypotheses. Bibó's starting point in analysing the – distorted – political culture in the region is also the fact that '…East European nations were always overshadowed by alien, rootless state powers…' (Bibó and Dénes 2015, 149). Bibó explains from this fact hysterical social reactions and the readiness to accept symbolic political solutions instead of real ones, most importantly the openness to an extreme form of nationalism. Nevertheless, on a more general level, Bibó's conclusion is similar: CEE nations had no chance to form and practice their own political community deciding public issues and carrying out public decisions jointly; a feeling that decisions made in the political sphere, and formal institutions created by US indeed serve OUR interest, is expressed in the following excerpt:

> [The] nations in this region lacked what was self-evidently, clearly, circumscribably, and graspably present in both the reality and the consciousnesses of West European communities—the reality of their own national and state frameworks, their capital cities, their being politically and economically accustomed to one another, a single social elite, etc. (Bibó and Dénes 2015, 149).

In the CEE countries, where US and THEM, the private and public is so distinct, ordinary people try to avoid any relationship with the public sphere, politics, or the government. As this is not possible, people need to pretend, to hide their real thoughts and feelings. There must be a set of fake values, statements to be presented if one meets THEM in formal situations.

There are at least two logical consequences of this reconstruction of typical habits of average Hungarians. First, from an ontological point of view, they could not form a relatively stable and consistent set of approaches to public issues (like

---

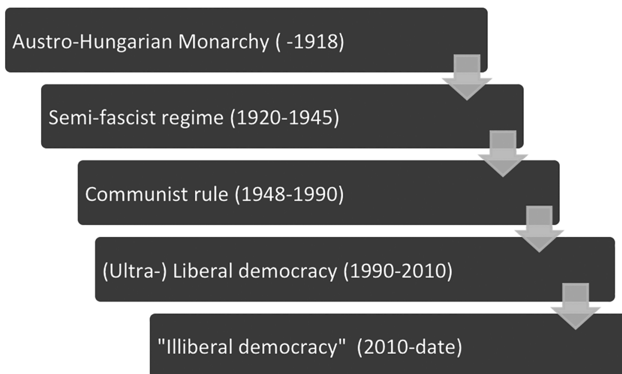
Still, further research is needed to identify academic works that address the issue of the sharp divide between formal and informal social institutions in a long-term historical context in the region.

8 In contrast to Offe's theory, according to which late capitalist societies are based on mass loyalty building rather that real legitimacy, i.e. the elite uses dishonest communication towards the masses (PR, marketing techniques), in this case, the masses also systematically use dishonest communication towards the representatives of the government.

the law or government) because they could not have knowledge and experience about the public, as that was occupied by others, moreover, by aliens. It has been an unknown, dangerous territory for ordinary Hungarians for five centuries. Second, from an epistemological or methodological point of view, the survey situation presumably brings out the formal, pretended set of values from some or most of the respondents. A stranger, usually a formally dressed person, asks strange and strangely formulated questions and makes notes on the answers, quite similar to a government official. This may activate the respondents ‘OUR answer to THEM’ communication mode, while she desperately strives to provide the appropriate answer, though – of course – she cannot be sure what the right answer to THEM is.[9]

Proposed explanation 2: Mid-term historical experience: The footprint of regimes in the minds of the people

Six different political regimes have dominated in Hungary in the past century, as shown in the figure below, with two short periods omitted: the few months of communist revolution in 1918 and the few years of relative, Western-style democracy (in the shadow of the Soviet army) between 1945–1947.



9 Naturally, the problem of distorted communication, i.e. that the interviewee attempts to provide answers that she thinks the interviewer is satisfied with, or at least does not offend her, stems from human nature and is a general phenomenon discussed by basic social science methodology books. (Babbie 2013, 262–64) I argue here that in Hungary the motivation of the respondent in a typical survey situation is different that leads to higher level of distortion and potentially a different type of distortion as well. See, for instance, the above-quoted example on the extreme difference between actual behaviour and pledged values about taxes.

There are some similarities among most of these regimes. The most obvious, though paradoxical, similarity is that their legitimizing ideology was always founded on the harsh denial of the previous one. It is self-evident in the case of the two communist periods. The Horthy-regime established a strong anti-communist narrative and ideology, while it also refused the legacy of the Habsburg Monarchy and the monarch. The subsequent communist rule during the post-World War II era condemned the Horthy regime as a fascist and deviant one in all respects. The new liberal constitutional arrangement in 1990 was designed as a perfect opposite of the communist political setting with an extremely diluted executive power, with a Constitutional Court among the world's strongest, with four separate ombudsmen, with practically uncontrolled municipalities and judiciary, and with an extreme level of protection of fundamental rights,[10] etc. Finally, the Orbán regime refused most of the values of the previous regime, evaluated the 1990–2010 period as a chaotic era and proclaimed a so-called illiberal democracy that denies most of the values on which the political-legal system was based (e.g. checks and balances) in the previous two decades.

Most of these regimes, except for the 1990–2010 period, had authoritarian features or had a totalitarian nature. The legitimacy of each regime was mostly not based on free elections, on a democratic arrangement, or on a high level of welfare for the people. Instead, these regimes relied on actively spread ideologies that proclaimed the superiority of the given regime in various respects and served as major legitimizing forces. (Haugaard 2000) These ideologies were broadcast in print and later in electronic media (mostly or completely controlled by the government), but also in several other ways, for instance, through centrally created pseudo-civic organizations (GONGOs) and, in certain periods, the Church actively cooperated with the government, too. Most importantly, schools were crucial channels for disseminating ideology. Education is especially effective, as in the early age of human life influences are more easily accepted (especially if they come from respected persons, like teachers) and thus may influence belief-systems unconsciously, and in that way most effectively. Naturally, young people, not infected by the ideology of the previous regimes, are also more open to these ideas.

One may reasonably expect that the parents at home may correct or balance the propaganda conveyed to their children in the school. However, parents take substantial risk doing this,[11] as children may not understand that they cannot

10 For example, the President of the Constitutional Court, later the President of the Republic publicly rebuked the US and the UK government for insufficient protection of freedom of information.

11 E.g. the statement that communism was good in 1944, or bad in 1949, just five years later, may turn out to be lethal.

say in public what they hear at home, or even if they understand, they may not be able to keep that secret, or they may not even realise that they have disclosed something that should be kept secret. This fact prevents most parents from sharing their views with their children, where those views differ from the official ideology. Still, children may meet some different views, especially if, as is frequently the case, the teacher herself does not believe what she needs to teach. A few years later the same child may learn that his parents' real views and also other people's views are sharply different from the official ideology. (This, in turn, could aggravate the sharp divide between the US/informal life – the THEM/formal, official sphere.) Still, certain fragments of this ideology, especially the ones that were not challenged directly by other, more convincing views, are presumably still there, existing silently and unconsciously in people's belief systems. These fragments may be activated by an external event. Let us add that allegedly the belief system of the parents and the peers have been formed in a similar process; i.e., they are already chaotic.

The end-result is that footprints of official ideologies have continuously been present in citizens' mind. However, these ideologies have been inherently contradicting. As they were inculcated in an unconscious and unreflective manner, the contradictions do not cause mental problems in everyday life. Especially, as everyday life normally does not and should not systematically activate values that are related to the formal political world, where law belongs to. Nevertheless, the end result of this mindset is what researchers may detect as legal culture in a survey.

Proposed explanation 3: The problem of legal transplants

The communist regime adopted the Soviet legal system without much adaptation (Ajani 1995). The transition introduced within a year a brand new legal system, designed mostly by law professors borrowing solutions from foreign political and legal systems, predominantly from the U.S. and West-Germany. These professors, who typically spent their whole lives in an academic (i.e. highly atypical) environment, far away from the life of ordinary people, picked up the best pieces of legal institutions – the best ones from the aspect of legal doctrine, not of real life.

The idea that laws should not and cannot be too distinct from the *Volksgeist*, or as we would call it today, national culture, is attributed to Savigny (von Savigny 1828). The problem of legal transplants, the questionable nature of the import of formal legal rules from other countries and allegedly from other social, cultural, political, etc. circumstances, as a research topic, is relatively new (Legrand 1997; Legrand 2001; Watson 1974). Unfortunately, not much research was done during the 1990s to test the social embeddedness of the completely new legal system

which was introduced (exchanging the socialist legal system). Evidently, it was either the socialist legal system before 1990 or the rule of law introduced in 1990 or both of them that did not fit the *Volksgeist* of Hungarians.[12]

Legal transplants bring in solutions that have no roots in national culture. Consequently, these legal systems, *per se*, will not have the backing of the belief and value system of the country. Furthermore, the evolution of legal systems, as indicated above, is frequently conceived as a result of a historical learning process of challenges and trial-error type answers where the successful solutions have been petrified into law. These laws may be legitimised by a nation's historical memory (of being solutions to real problems) and also with the age and maturity (with which laws became quasi-customs). Legal transplants do not have any of these qualities.

Conclusion

Three potential reasons have been submitted in this brief paper that may properly explain the extremely inconsistent, contradictory values and attitudes regarding the law in Hungary. Solely hypotheses have been formulated here. Perhaps there is no need to support the factuality of the three historical statements with much evidence. However, the suggested relationship between history and legal culture requires more research and much more evidence to achieve the status of a scholarly statement instead of a mere hypothesis. Further research is needed to establish this logical and empirical relationship or to falsify it. This is a major methodological challenge since typical social science methods (e.g. questionnaire surveys) do not seem appropriate to find evidence in this regard. Most likely, unstructured interviews or psychological experiments may be appropriate means to test the second and third hypotheses, whereas the first one may be too general to be operationalised.

Furthermore, one may also raise the question how the three proposed effects influence one another, i.e. whether they have an intertwined impact on legal culture.

Last but not least, not only the influence of independent variables is in question but the interpretation of the dependent one as well: are the inconsistencies we faced in the questionnaire surveys indeed extreme? Possibly the Hungarian legal professional's expectations are too (or unrealistically) high, and the consistency

12 As several research reports, including studies in Hunyady and Berkics (2015) and Giczi and Sik (2009), suggest the third presumption is most likely right, though the socialist law may have been somewhat closer to the Hungarian *Volksgeist*.

of Hungarian peoples' legal consciousness is not significantly worse than that of other nations. Possibly people in Western countries have similarly inconsistent ideas about law as well. Luckily, it is relatively easy to test this issue by asking the same survey questions in a few Western countries.

Acknowledgements

The research has been carried out within the frame of OTKA project No. 105552 (The legal culture of Hungarian society), financed by the Hungarian National Research, Development and Innovation Office. I am grateful to my colleagues in the project, especially to Balázs Fekete for encouraging me to write this paper and his assistance in its improvement.

References

Ajani, Gianmaria. 1995. By chance and prestige: legal transplants in Russia and Eastern Europe. *The American Journal of Comparative Law* 43(1): 93–117.

Allport, Gordon Willard. 1979. *The Nature of Prejudice*. New York: Basic Books.

Babbie, Earl R. 2013. *The Practice of Social Research*. Thirteenth edition. Belmont, Calif: Wadsworth Cengage Learning.

Berkics, Mihály. 2015. "Laikusok És Jogászok Nézetei a Jogról. [Laymen and Professionals about the Law]." In *A Jog Szociálpszichológiája. A Hiányzó Láncszem. [Social Psychology of the Law.]*, edited by György Hunyady and Mihály Berkics, 141–60. Budapest: ELTE Eötvös Kiadó.

Bibó, István and Iván Zoltán Dénes. 2015. *The Art of Peacemaking: Political Essays by István Bibó*. World Thought in Translation. New Haven, Connecticut: Yale University Press.

Boda, Zsolt and Attila Bartha. 2016. Adómorál, bizalom és kényszerek – adózási motivációk Magyarországon korrupciós botrányok idején. [Tax-morale, Trust, Sanctions. Motivating Factors in Times of Corruption Crisis] *Közgazdasági Szemle (Economic Review-Monthly of the Hungarian Academy of Sciences)* 63(10): 1021–1045.

Bourdieu, Pierre and Randal Johnson. 1993. *The Field of Cultural Production: Essays on Art and Literature*. New York: Columbia University Press.

Cotterrell, Roger. 2013. The Concept of Legal Culture. In *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*, edited by Roger Cotterrell, 81–96. Aldershot: Ashgate Publishing.

Dahrendorf, Ralf. 1990. *Class and Class Conflict in Industrial Society*. Printing 1990. Stanford, Calif: Stanford University Press.

Dimitrova, Antoaneta L. 2010. The New Member States of the EU in the Aftermath of Enlargement: Do New European Rules Remain Empty Shells? *Journal of European Public Policy* 17(1): 137–148.

Elster, Jon, Claus Offe and Ulrich K. Preuss. 1998. *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea*. Cambridge: Cambridge University Press.

Friedman, Lawrence M. 1975. *The Legal System: A Social Science Perspective*. New York: Russell Sage Foundation.

Gajduschek, György. 2012. Civil Service in CEE Countries: Where Institutions Do Not Work? *NISPAcee Journal of Public Administration and Policy* 5(2): 161–168.

Gibson, James L. and Gregory A. Caldeira. 1996. The Legal Cultures of Europe. *Law & Society Review* 30: 55–85.

Giczi, Johanna, and Endre Sik. 2009. Trust and Social Capital in Contemporary Europe. *Tárki European Social Report* 63–81.

Gramsci, Antonio. 1971. *Selections from the Prison Notebooks of Antonio Gramsci*. Edited and translated by Quintin Hoare and Geoffrey Nowell Smith. New York: International Publishers.

Habermas, Jürgen. 1985. *The Theory of Communicative Action, Volume 2: Lifeworld and System*: *A Critique of Functionalist Reason*. Boston: Beacon Press.

Haugaard, Mark. 2000. Power, ideology and legitimacy. In *Power in Contemporary Politics: Theories, Practices, Globalizations*, edited by Henri Goverde, Howard H Lentner, 59–77 London: Sage.

Helmke, Gretchen and Steven Levitsky. 2004. Informal Institutions and Comparative Politics: A Research Agenda. *Perspectives on Politics* 2(4): 725–740.

Hughes-Warrington, Marnie. 2008. *Fifty Key Thinkers on History*. 2. ed. Routledge Key Guides. London: Routledge.

Hunyady, György, and Mihály Berkics, eds. 2015. *A Jog Szociálpszichológiája. A Hiányzó Láncszem [Social Psychology of the Law]*. Budapest: ELTE Eötvös Kiadó.

Jakab, András. 2016. *European Constitutional Language*. Cambridge: Cambridge University Press.

Krekó, Péter. 2015. Gyanús Világ, Gyanús Jogrendszer. [Suspicious World, Suspicious Legal System]. In *A Jog Szociálpszichológiája. A Hiányzó Láncszem. [Social Psychology of the Law.]*, edited by György Hunyady and Mihály Berkics, 417–34. Budapest: ELTE Eötvös Kiadó.

Legrand, Pierre. 1997. The Impossibility of Legal Transplants. *Maastricht Journal of European and Comparative Law* 4: 111–124.

—. 2001. What 'Legal Transplants'? *Adapting Legal Cultures* 28: 55–67.

Podgorecki, Adam and Jacek Kurczewski. 1974. *Law and Society*. London: Routledge & Kegan Paul.

Posner, Richard A. 2002. *The Problematics of Moral and Legal Theory*. Cambridge, Mass.: Harvard University Press.

Rouse, Joseph. 2005. "4 Power/Knowledge." In *The Cambridge Companion to Foucault*, edited by Gary Gutting, 95–122. Cambridge: Cambridge University Press.

Schein, Edgar H. 2010. *Organizational Culture and Leadership*. Vol. 2. New York: John Wiley & Sons.

Schulzke, Marcus. 2016. Power and Resistance: Linking Gramsci and Foucault. In *Gramsci and Foucault: A Reassessment*, edited by David Kreps, 57–73. London: Routledge.

Szűcs, Jenő. 1983. The Three Historical Regions of Europe. An Outline. *Acta Historica Academiae Scientiarum Hungaricae* 29(2–4): 131–184.

Toynbee, Arnold, and D. C. Somervell. 1987. *A Study of History*. New York: Oxford University Press.

Von Savigny, Friedrich Carl. 1828. *Vom Beruf Unsrer Zeit Für Gesetzgebung Und Rechtswissenschaft*. Heidelberg. Mohr.

Watson, Alan. 1974. *Legal Transplants: An Approach to Comparative Law*. Athens, Georgia: University of Georgia Press.

Weber, Max, and Guenther Roth. 1978. *Economy and Society: An Outline of Interpretive Sociology. Vol. 2.* Berkeley: University of California Press.

Zweigert, Konrad and Kötz, Hain. 1998. *An Introduction to Comparative Law*, 3rd ed., trans. T. Weir. Oxford: Clarendon.

Maciej Dybowski

Transition to Democracy and Determinacy of Legal Concepts. A Brandomian Semantics View

Abstract: The content of legal concepts as applied by legal professionals is highly debatable as far their determinacy is concerned. It requires particular attention if additional circumstances occur in a given discursive practice, i.e., the practice of using concepts. Political, economic and cultural changes, all of which have to do with transition, have an impact on any discursive practice. Assuming that legal discursive practice forms part of universal discursive practice, the subjects of analysis are those legal concepts which have remained in legal practice throughout a given political transformation. This is illustrated by the use of the legal term 'freedom of conscience and religion'. This analysis is built on the model of responsibility for the content inherited from past users, and responsibility towards future users, based on Brandom's inferential semantics.

Introduction

Transition, as applied to legal matters, is a broad and interdisciplinary concept. Here it is applied as referring to the changes involved in a democratic transition, taking place in a legal system under circumstances which occur in the political, economic and cultural setting of that system. Intuitively, from the recent historical perspective of Central and Eastern Europe, a transition can be understood as 'an interval between two political regimes, such as a period between the fall of an old, undemocratic regime and the consolidation of a new, democratic political system' (Maldini 2007, 7). During such a period, many transformation processes usually take place. This paper is concerned with only one of them: the legal transformation. A useful point of view from which one could grasp what happens in the functioning of a legal system undergoing transition can be provided by the model of what institutional legal practitioners – and judges in particular – do when they use legal concepts (which is what I believe to be constitutive of law as practice). First, I will introduce the philosophical terminology applied; second, I will provide some illustrations of what I have in mind, taken from Polish legal history as revealed through case-law; and third, I will try to put the model to work in an account of what happens to legal concepts in periods of transition.

Concept Determinacy in Law

Law is essentially articulated as a discursive practice, i.e., the practice of using concepts. This claim and the account that follows is inspired by characteristics of universal discursive practice introduced and developed in the writings of Robert B. Brandom. I attempt to refine it with regard to similarities and dissimilarities between general practice and legal discursive practices. I follow Brandom in holding that expressions come to mean what they mean by being used as they are in practice (…). Content is understood in terms of proprieties of inferences, and those are understood in terms of the norm-instituting attitudes of taking or treating moves as appropriate or inappropriate in practice. (Brandom 1994, 134)

Accordingly, if one wants to understand what concepts – legal concepts included – are, or if one seeks to establish the contents of intentional states and expressions employed in legal practice (that practice being part of a universal practice of deploying concepts), one is in need of a pragmatic theory of that practice. One needs to take a theoretical route from what participants of discursive legal practice do to what they mean, rather than the other way 'round. The explanatory strategy adopted here leads from pragmatics to semantics.[1]

What people do in order to express, and hence to understand, themselves and one another is – according to Brandomian inferential semantics – treating some inferences as materially correct. This approach to semantics seems to underline the essential rationality of humans. According to Brandom, 'what is distinctive about the conceptual is its specifically inferential articulation'. An application of a concept 'must be available as a premise for drawing further conclusions, and be liable to challenge by inferences from premises with incompatible consequences.' (Brandom 2009, 184).

In the big inferentialist picture, both our beliefs and our actions have specific propositional contents: they are about something, and in that sense they are intentional. But our beliefs and actions also have a normative dimension as far as they can be ascribed to agents and believers, either correctly or incorrectly. The moves in the game of applying concepts must follow the criteria of appropriateness.[2]

---

1 Alternative, and traditional, accounts of expressions' meanings would ascribe primacy to semantics. This may be the case in artificial languages, but not in natural ones. For more criticism of the traditional account of semantics, see Brandom 1994.

2 Unlike later Wittgenstein who introduced the game-based account of linguistic practices, Brandom does not share his ultimate scepticism stemming from the possibility of infinite number of different language games. On the contrary, he believes that language does have a downtown, or that there are certain core practices, such as asserting which

Normativity and propositional content — and, respectively, the pragmatics of normative statuses (such as commitment and entitlement) instituted by practical attitudes, and the semantics of intentional content — turn out to be two sides of the same story. Semantics, however, is founded on pragmatics, because, for Brandom, it is eventually the conditions for correct material inferences that function as semantic primitives. Judging the correctness of propositionally contentful actions and beliefs can be described by the model of 'deontic score-keeping' – keeping track of one's own and others' commitments – developed in Making It Explicit. By using concepts, participants of discursive practice adopt discursive commitments for specific conceptual contents. Such commitments result in the entitlements of other participants to verify them and demand justification (see Brandom 1994, 172). In standard cases, commitments are inherited from premises, because being committed to premises in material inferences leads to being committed to conclusions. Being committed to certain contents may exclude commitments to other contents. Public acts of speech or actions are treated as assertions by those who can assess their inferential significance in the light of their own discursive commitments. Assertions can be supplemented by other acts of speech such as deferral, disavowal, query or challenge. Such discursive moves are normative precisely because they produce the normative statuses of those who participate in discursive practice; not because of some antecedent rules.

Law fits into this broadly inferentialist picture of semantics, if one considers as essential several characteristics of what legal practitioners do when they use legal concepts (e.g., 'freedom of conscience'): when they engage in legal discursive practice (LDP). To animate our thoughts on what happens to legal concepts in a legal system under transition, I will endorse some general ideas concerning the relationship between any autonomous discursive practice in a natural language (ADP), which can be characterised as above, and an LDP functioning within such an ADP.

The first idea is the rejection of methodological scepticism concerning the possibility of identifying central cases of linguistic moves in LDP. The practice of deploying legal concepts in anything that assumes the name of law in our societies is a language game with a downtown. Marginal or exceptional uses of legal concepts can be conceived of only if it is assumed that there are some discursive skills or abilities that are *conditiones sine qua non* for LDP to occur.

---

make a general pragmatist account of language possible. Justification or the attribution of responsibility for Wittgenstein could be just another language game, whereas for Brandom it is implicit in natural language discursive practice.

The second idea is that there have to be some competent participants of LDP whose discursive skills and abilities extend in some respect beyond those of any participant of ADP; such an extension assumes that the skills and abilities exercised by those who can use a natural language are necessary (but not sufficient) to engage in LDP in that natural language. It is adequate to assume that such practitioners hold certain institutional positions in given legal systems and have a special role to play in LDP. Legislatures, administrative bodies, courts, solicitors, counsels, prosecutors, and so on, are all institutional users in the sense that their discursive moves in that practice count only in so far as they take place when such users act in their official, status-related, capacity.

The third idea is that practitioners are reasonable in LDP, just as they are in ADP. This may seem trivial, but the ability to act on reasons is presumed when acting on specifically legal reasons. LDP is built on the ability to use legal concepts in order to form beliefs and/or actions which can be treated by other participants of that LPD as having determinate content. One can easily associate law with LDP, since it is inconceivable without linguistic utterances of different kinds, legal rules or norms having pride of place among them. However, if law is reduced to such utterances, we are left with a distorted and unconvincing picture, according to which people lawfully act or abstain from acting, ultimately, in virtue of utterances, which is as unconvincing as an alternative image, wherein people perform such acts under threat. The central case of human action is acting on reasons, and we would not have developed our ability to prescribe and assess our own conduct and the conduct of other people unless we were first able to treat at least some of our behaviour as prompted by reasons.

The fourth idea concerns the distinction between deontic statuses, which can occur exclusively with regard to LDP. Deontic statuses in ADP must not be confused with deontic statuses in LDP (commitment to legal content), and those LDP statuses must not be confounded with specifically legal deontic statuses (commitment to legal action). There is, to be sure, a close relationship between LDP statuses and legal statuses, just as there is one that holds between statuses established in ADP and inferential roles, expressed by those discursive commitments (and entitlements). This point may be lost from sight in the general practice of using a language, but it is crucial in explaining law where, apart from discursive authority and responsibility, there have to be social structures of specifically legal authority and legal responsibility. One could be discursively committed to a certain legal meaning of a linguistic expression (e.g., as a legal historian of an ancient legal system), and thereby 'picture' assuming one's deontic status, within that LDP, but this is not identical with one's treating it as a legal reason for action. For the

purpose of the present discussion, I am focusing on LDP, yet a broader scheme of our practices must be preserved.

Engaging in LDP (acquiring and ascribing deontic statuses) presupposes a more primitive ability to engage in legal practical reasoning, understood as being able to give and ask for specifically legal reasons. This ability has to do with differential reactions to reasons available in practical reasoning. Yet, just like the general ability to speak is acquired and exercised in a particular local language, so the general ability to differentiate between legal and non-legal reasons for action can only develop in a given local language in a particular socio-legal setting.[3] In short, LDP is about concepts which articulate the law. At the same time, that discursive practice, with all that it has to articulate, makes sense only if legal concepts play a role in giving and asking for distinct legal reasons for acting.

The fifth idea is that, typically, legal reasons for acting are related to the institutional status of an agent. Brandom identifies three types of practical reasons, exemplified by preferences or desires, social statuses and unconditional duties. What follows are three types of practical inferences: instrumental, institutional and unconditional. Each of these can be expressed in the form of a rule or norm. Yet, according to Brandom, a proposition expressing that norm does not prescribe conduct in the first place, but rather explicitly endorses material proprieties of practical reasons (see Brandom 2000, 89). In other words, normative or evaluative vocabulary is to practice as conditionals are to theory. While instrumental inferences are based on preferences acknowledged or attributed to the agent,[4] unconditional inferences, on Brandom's account, are characterised by agent-neutral moral reasons.[5] In the case of institutional inferences, however, premises are articulated by recognizing a particular institutional status of an agent – that status serving as main premise. Alternative institutional inferences

---

3 Such an ability remains universal as long as that given language is a natural one.

4 A given preference or desire is only a *prima facie* reason for a given action, because different preferences may compete, and many alternative actions can be chosen as conclusions of instrumental inferences. E.g. if one's desire is to stay dry when the rain sets in, one *shall* open an umbrella, find shelter under a tree, etc.

5 This account seems to be closely modelled on Kantian categorical imperative, although a Kantian would probably assimilate all three types of reasoning to that pattern. An agent performing unconditional inference has reasons for action which are expressed in a different rational 'ought' than the prudential or institutional one. E.g. if it is *wrong* to harm anyone to no purpose, and repeating the gossip would harm someone to no purpose, one shall not repeat the gossip (Brandom 2000, 84–85).

are usually not available, because it is from a given social status that particular practical conclusions follow. For instance, if one has the status of a bank clerk, and one is going to work, one is required to wear a tie. A deontic scorekeeper would consider it a good institutional inference not only for an individual agent, but also for any other agent who occupies the same status. Thus, the status-based premise should be considered as objective (whether based on further factual or normative premises), because – if the scorekeeper is committed to the other agent's occupying that status – such a commitment would correspond to a good reason for action for that agent (see Brandom 2000, 91). Moreover, the 'goodness' of institutional inferences is not licensed by the norm implicit in such inferences but 'by others associated with the same social institutional status' (ibid.). Legal reasoning can be assimilated to the institutional pattern of reasoning, for obvious reasons: (1) it saves the realm of law from being confused with instrumental or unconditional reasoning without leaving it totally disconnected with either; (2) it affirms the connection of law with social world through institutional legal statuses, being essentially social constructs; (3) it grounds law's claims both to rationality and objectivity.

The same story can be told in a language that is more familiar to legal theorists, but will only prove the validity of the lesson they can learn from pragmatists: legal theorists' interest in utterances is partly understandable. The post-Hartian philosophy of law is generally linked to the problem of language, but that should not impede us from digging deeper beneath the surface of those linguistic practices. It is true that law is immediately available to us through words. LDP consists of words and expressions. In legal theory, particular attention is paid to explicitly normative statements which prescribe conduct (legal rules or norms, depending on convention), and theories of legal interpretation have developed methods of elaborating more or less unambiguous prescriptive statements from legal texts. What is usually lost from sight, however, is the fact that the ability to generate such prescriptions – whether by legislators or by law-applying agents – presupposes the ability to deploy their content in practical reasoning. To be precise, much of contemporary legal theory is about language,[6] pragmatics included,[7] and

6 In a sense Dworkin rightly argued that Hart suffered from a 'semantic sting', because he thought that lawyers follow certain linguistic criteria for evaluating propositions of law (see Dworkin 1986, 45). Jerzy Wróblewski might also have 'suffered' from it, since his interest in language led him to developing a 'semantic conception of a legal norm' (see Wróblewski 1983).

7 Much work in the pragmatics of legal language continues to focus on Gricean and post-Gricean pragmatics (see e.g. Soames 2008; Solum 2013, Marmor 2014).

about practical reasoning.[8] Yet seldom are these problems connected. Semantic pragmatism, in my view, offers a connection to law by setting an order of explanation which does not proceed from words (refined in LDP into prescriptive legal statements) to actions, but from practices of finding specifically legal reasons for actions to statements which codify such practices by licensing certain inferences as distinctly legal. The content of legal concepts is ultimately established within the overall aim of law's practice, i.e., prescribing the right conduct (by providing reasons for acting).

The last set of remarks, concerning the model of legal concepts' determinacy for the purpose of present paper, serves to refine the account of legal practice articulated in the five ideas developed in preceding paragraphs. All of them are of importance as far as the application of law by courts within LDP is concerned. One of the features of law's dimension as discursive practice, different from universal ADP, is applying and forming reasons, which are explicit rather than implicit, striving for both precision and flexibility. This feature is due to justification being required and pertinent to judicial decisions. As Brandom notes, the idea that there is a difference between exercising normative authority by appeal to law and simply exercising power in its name depends on the possibility of distinguishing applications of the law that are rationally justifiable in virtue of the meanings of the concepts that articulate the law and those that are not (Brandom 2014, 20).

Another property of institutional moves in LDP is the existence of special rules for ascribing meaning, particularly through applying legal definitions and decisions of other institutional bodies, with regard to identifying conceptual content through the decisions of courts or legal doctrine. While using legal concepts, 'judges are responsible for the law, and (…) judges are responsible to the law' (ibid. 32). The sense in which judges are responsible for the law has to do with the fact that there is much to that law (more in common law than in civil law) that is the cumulative result of judicial decisions to apply or not to apply the concepts (e.g. 'freedom of conscience') in particular cases.

In selecting the prior uses of such concepts and conceptualizing current facts, the judge both further determines (in the sense of sharpening) the content of the legal concepts involved, and provides precedents and rationales to which future judges are at least potentially responsible. In this way, the deciding judge exercises

8 Interestingly, Hart's successors, J. Finnis and J. Raz, each in his respective way of either New School of Natural Law or Legal Positivism, seem to be focused on practical reasoning at the expense of language (see notably Finnis 1990; Finnis 2011, Raz 2009).

authority over both the content of the legal concepts being applied and, thereby, over the decisions of future judges (Brandom 2014, 32).

Any deciding judge is also responsible to the content of the concept which is inherited from the tradition of prior users and which includes justifications, precedents and considerations. This is because 'the justification of a judge's decision can appeal only to the authority of prior decisions, and so to the conceptual content those decisions have conferred on or discovered in the legal term in question' (ibid.).[9]

A further distinct feature of legal discursive practice is the restraint of the users in changing the conceptual content hastily.[10] Nevertheless, instituting legal norms – including semantic, i.e., content-fixing norms – and applying them, are reciprocally dependent rather than being two different phases of one sequential process. In an uninterrupted practice of adopting discursive commitments and responsibility, that is, the practice taking place under external circumstances where there are no changes amounting to transition, the determinacy of legal concepts seems to be relatively secure and stable. The normal practice of applying concepts is bound by proprieties adopted by legal professionals and officials. Such proprieties, as far as legal concepts' determinacy is concerned, can be called internal, to the extent that the functioning of such proprieties is not affected by states of affairs that occur in the broadly social (political, economic and/or cultural, etc.) setting of that legal practice. This is not to claim that the determinacy of legal concepts in the normal practice remains absolutely secure or stable.

Freedom of Conscience as Legal Concept: When Uses Differ

To characterize the changes that the content of legal concepts may undergo, it is useful to focus on one of such concepts, and to try to trace the developments in the meaning ascribed to it by legal practitioners, that is, judges. In the following paragraphs the meaning associated with 'freedom of conscience and religion' by legal practitioners will be taken under scrutiny through the lenses of Polish legislation and case-law. In order to examine the relationships between the use of this legal expression and its changing content, on the one hand, and political and economic transition symbolically initiated in Poland in 1989 on the other,

9 This statement may require some qualification, especially in civil law systems, where 'prior decisions' should be understood, e.g. in case of newly enacted statutes, as legislator's decisions.

10 This is particularly true as far as judges rather than e.g. legislators are concerned, but there can be some quite radical changes, especially in higher courts.

the most obvious periodization – 'prior to 1989' (early use) and 'after 1989' (contemporary use) will be adopted as a general timeframe for the examination. As a result of the particular focus on transition and the research done, another period (labelled 'middle use') will be added.

Freedom of conscience and religion in Polish legislation. An overview

In 1944, a group of Polish communists was established by the Soviet Union as the de facto government of Poland, despite the existence of constitutional government operating in exile. The communist coup d'état sought, apart from the terrorist methods adopted, to find legitimacy in selective reliance on the provisions of the Polish Constitution of 1921. The Constitutional Law of 19 February 1947 declared that institutions of the state shall act on the legal basis of 'basic foundations of the Constitution of 17 March 1921 and principles of Polish Committee of National Liberation (PKWN) of 22 July 1944'.[11] It must be noted that the former constitution was neither to be applied directly, nor entirely, since referring to its 'basic foundations' explicitly called for a selective approach to that 'bourgeois' document.

The specific law on freedom of conscience was adopted in 1949.[12] In that decree, a new type of crime – the abuse of freedom of religion and conscience for any purposes adverse to the political system of the Republic of Poland – was defined and sanctioned with imprisonment.[13] This was a decisive moment for the LDP, because the former concept of 'freedom of conscience' had been modified by Communist legislators. From that moment on, freedom of conscience was no longer something to be exercised and protected by state authority to the full extent, but in fact, it became a risky enterprise whose enjoyment was threatened by punishment and burdened with the need to take precautions.

A similarly worded provision was included in the 1952 Constitution of the People's Republic of Poland. The last paragraph (3) of article 70, following general guarantees for freedom of conscience and religion, as well as the separation of church and state, slightly extended the limitation clause in comparison with the 1949 Decree. The constitutional formula reads, 'abusing freedom of conscience

11 Constitutional Law of 19 February 1947, Art. 1, Official Journal (Dz.U.) 1947, 18, 71.

12 See Decree of 5 August 1949 on the protection of freedom of conscience and religion, Dz.U. 45. 334.

13 See ibid., art. 8; see also art. 10–13, where related offenses such as preparations, forming agreements aimed at abusing the freedom of conscience or enhancing other people to do so were subject to punishment.

and religion for any purposes hostile to the interests of People's Republic of Poland shall be punished.' The decree was annulled in 1969,[14] along with the new Criminal Code's entry into force. However, the constitutional provision retained its wording until it was removed in 1976,[15] when communist Poland was finally under obligation to implement the UN International Covenant on Civil, Political and Cultural Rights. Following the constitutional revision in 1976, the provision on the freedom of conscience was numbered article 82, and as such it remained there, without the limitation clause referring to 'abuse,' until new a constitution was adopted in 1997.

Early Use: 1944–1976

In a 1951, the judgment of the Supreme Court (SC) declared that one may be subject to punishment 'when the exercise of that freedom [of conscience and religion] degenerates into an abuse which collides with the interest of the State, or with personal interests of individuals, or with interests of individuals or groups of other religion or persuasion.'[16]

In 1953, a district court upheld a sentence[17] for imprisonment, directly applying art. 8 of the 1949 Decree, for a person who 'abused the freedom of religion and conscience' by mere attempts at persuading his fellow members of Jehovah's Witnesses not to sign a 1950 Stockholm Address, which was a product of Soviet-sponsored propaganda against the war in Korea.

In 1963, a SC panel of seven judges adopted a resolution in which a new principle of law was introduced.[18] That principle concerned the limitation of the freedom of religion and conscience with respect to the activities of Jehovah's Witnesses, who were not at that time an officially recognized religion in communist Poland. The SC held:

> taking part in a religious association of Jehovah's Witnesses, to whom legal status was denied by the state authority and whose true organisation and activity remains a secret to the said authority, fulfils the criteria of a crime set out in article 36 of the Shorter Criminal Code. (…) By 'taking part' in an association of the kind one must understand participating, with the awareness of its conspiratorial character, in its organisational activities,

14 Law of 19 April 1969. Introductory provisions for Criminal Code, Dz. U. 13, 95.

15 Law of 10 February 1976 on amending the Constitution of People's Republic of Poland, Dz.U. 1976, 5.29

16 SC Judgment of 10 April 1951, (I K 82/51).

17 District Court in W. Judgment of 17 April 1953 (107/52); nullified by SC Judgment of 4 December 2007 (II KK 88/05).

18 See SC Resolution of 31 May 1963 r. VI KO 48/60.

> and particularly in meetings, drafting instructions and work plans, giving instructions and orders, preparing reports, distributing illegal writings, etc. (…) Mere distribution of writings (…) without their prior submission to control by proper authorities results in criminal responsibility (…).[19]

That ruling followed the same court's decision of a case of two individual Jehovah's Witnesses who were accused of distribution of illegal printed materials.[20] It also served the SC as an opportunity to express itself on the subject of the freedoms of religion and conscience, and more specifically on art. 8 of the 1949 Decree. According to the SC, its provision 'protects all citizens, and protects the People's State against the abuse of freedom of conscience and religion by criminal individuals for political purposes hostile to the political system of People's Poland and its social order.' Many judgments of communist Poland's courts contain other restrictions against the exercise of freedom of conscience and religion.[21] Jehovah's Witnesses would also face criminal charges for their refusal to perform military service.

For the present purpose, however, it should suffice to show how key official practitioners of LDP used to deploy the legal concept of freedom of conscience in the early period. For almost half a century, there seemed to have prevailed a certain understanding of that concept in which two constitutive content determinants would be assumed. First, that once acts undertaken in exercising freedom of conscience enter into conflict with values ascribed to practically any aspect of the wellbeing of the Communist State, such a conflict would have to be solved against the claims of conscience or religious obligations. Second, the concept of freedom of conscience and religion was treated as dependent upon the legal status of the religious community to which belonged the individuals who exercised such a freedom. The case-law does not record any hesitation among judges in asserting such a determinate meaning of the concepts of freedom of conscience and religion.

Middle Use: 1976–1989

Between 1976 and 1989, in the years preceding the fall of Communism in Poland, marked by the Solidarity movement in 1980 and 1981, followed by the last totalitarian spasm of Martial Law, the overall legislative context for the protection of freedom of conscience and religion remained unchanged, with one exception. Following the constitutional revision in 1976, the provision regarding the freedom

19 Ibid.

20 See SC Judgment of 23 May 1963, OSNKW 1963/10/180.

21 See, among others, the following SC judgments: of 22 June 1965, III KR 106/65, OSNKW 1965/11/137; of 14 April 1962, IV K 132/62, OSNPG 1962/1–6/63)

of conscience no longer contained the limitation clause referring to the 'abuse' of that freedom. The constitution, however, was not to be applied directly, and there were no legislative/statutory factors to affect the legal concept of freedom of conscience. It will be shown in the following part of this chapter that, as expected, the changes which were formally initiated in 1989 had their direct impact on the practice of ascribing, by the judiciary, a new content to freedom of conscience. Much more important a task for the present analysis, however, is to examine any changes in the discursive practices of the Polish judiciary occurring before the political milestones set in 1989.

A case, testing my claim that the change in ascribing content to the legal concept of freedom of conscience took place before any legislative changes in substantive law, was decided by the Supreme Administrative Court in Wroclaw in 1984.[22] In March 1983, Józef B. applied to local authorities for an exemption from the requirement to be employed, which was one of the oddities of communist Poland stemming from Martial Law legislation.[23] The applicant grounded his application by the fact that he was a full-time preacher of the Jehovah's Witnesses community, and that he was financially supported by his family and fellow believers. The exemption was not granted and he was presented with several work offers, all of which he declined for the reasons pertaining to his religious duties. Subsequently, the man was registered as a 'person who persistently refuses to work.' The preacher appealed to higher administrative authorities, but the decision to register him was reaffirmed on the grounds that the Jehovah's Witnesses, as in the earlier cases discussed, did not enjoy the status of an officially recognized religion in Poland. As his last resort, the man launched a complaint before the Supreme Administrative Court. The Court supported his claim not only by stating that the preacher did have an employment, but, more importantly, by relying on legal guarantees of freedom of conscience and religion. The Court also noted that the fact of the Jehovah's Witnesses not being an officially recognized religion should not impede their members from enjoying the right to freedom of conscience and religion. Surprisingly, the Court relied directly on art. 82 of the Constitution, which read in paragraph 1: 'The Polish People's Republic guarantees freedom of conscience and religion to citizens. (…)'. The wording of this provision remained more or less unchanged under Communism and afterwards. The novelty of the Court's approach can rather be seen in passing over statutory regulation (or the lack of

22 Judgment of Supreme Administrative Court in Wrocław of 13 January 1984, SA/Wr 701/83.

23 Law of 26 October 1982 on proceedings against persons refusing to work, Dz. U. 35, 229.

it) and applying the Constitution directly. This move was made possible by the Court's interpretation of paragraph 2 of the same art. 82: 'The principles of the relationship between Church and State are, together with the legal and patrimonial position of religious bodies, determined by law.' The Court concluded that 'such law may only specify or elaborate the constitutional principle of freedom of conscience and religion, but not eliminate it or subject to limitation'.

In other words, the Court expressed its grasp of the concept of freedom of conscience and religion as entirely independent of the legal status of a religious community to which belong the individuals who exercise such a freedom. This marks a decisive step from a position previously held by Polish courts that freedom of conscience is a legal situation, a construct tailored tightly by legal provisions, and moreover, as something that could be abused under certain conditions specified by statutory regulations. Formal recognition of a religious community by the state, according to the Court, may result in additional privileges, but it may not affect the essence of religious freedom. The Court added a lengthy passage in which Jehovah's Witnesses are described as model socialist citizens. This, perhaps contrary to the Court's intention, sounds patronizing, but may also be typical of a transition period, where formerly recognized values (in this case – socialist ones) can no longer be treated as obvious and requiring no additional justification. And so, for instance, one could learn that 'both convictions and practices concerning work as an essential value for that community [i.e. Jehovah's Witnesses] greatly surpass the current level of social consciousness', and that the members of that religious group 'in recent years [i.e. during the Martial Law] (…) despite their doctrinal "fundamentalism", have shown greater understanding for the pre-eminent values of the state's integrity than many ministers of recognized churches'.

Under virtually the same axiology of the legal system as in the early period, the Court seems to be ascribing a completely different content to the concept of freedom of conscience and religion. Its interpretation is clearly heading *in favorem libertatis*, although some of the early use connection between individual freedom and institutional status of one's religion is echoed in assessing Jehovah's Witnesses attitude towards the communist state for purposes of justification. It is even more interesting, considering the fact that the Court could have upheld all the administrative measures adopted against the preacher with some statutory justification. Therefore, the 1984 case seems to reflect the judges' hesitation in asserting an established meaning of the concept of freedom of conscience and religion by balancing between constitutional, statutory and extra-legal considerations. In fact, in order to assert a determinate concept, the judges had to challenge the established meaning.

Contemporary Use: 1989 – Present

An entirely new content was ascribed to the concept of freedom of conscience by judges during the period of political and economic transformation after 1989. The Constitutional Tribunal, still referring to the provisions of the communist constitution of 1952, in a 1991 judgment explained the new content of the concept of freedom of conscience: it is 'not just a right to represent a certain set of opinions, but most of all a right to act according to one's own conscience.'[24] It is also noted in the contemporary legal literature that 'the lack of right to express one's convictions in public life renders the freedom of conscience and religion illusory, while partiality of public authorities is annulling unrestricted freedom of expressing one's beliefs by [creating] the fear of discrimination'(Ożóg 2015, 101).

Moreover, a series of revision trials took place before the SC. In 1995 it declared that 'deeds contravening criminal rules which are contrary to the constitutional rule, and disable free exercise of religious practices within the scope of freedom of conscience and religion, guaranteed to all citizens by the Constitution, as an expression of justified disobedience to the law, cannot be treated as a crime'.[25] Even certain acts of violence (attacking a police station, for example) committed in 1959 as reaction to intervening in exercising freedom of conscience and religion, were retrospectively justified by the SC in 2006, and its previous qualification as 'a threat to society' was removed on the grounds that 'the behaviour of the defendants expressed commonly-held social sentiments, and as such it could not have been qualified as a threat to that society.'[26]

In 2007, while reversing the sentence imposed in 1953 for a person who had 'abused the freedom of religion and conscience' simply by attempts at persuading his fellow members of the organization of Jehovah's Witnesses not to sign a 1950 Stockholm Address, the SC noted that even according to the criminal law which was then in force, there were no grounds for the criminalization of such an innocent act as merely expressing an opinion on an issue of public interest and communicating it to other members of one's own religious community.[27]

The contemporary judicial use of the same legal concept of freedom of conscience and religion after 1989 seemed to belong to the tradition of middle use, at least in its initial stage where the old constitutional provisions have to be given a

---

24 Constitutional Court Judgment of 15 January 1991, U 8/90.

25 See SC Judgment of 10 November 1995, II KRN 137/95.

26 See SC Judgment of 7 June 2006, III KK 394/05.

27 See SC Judgment of 4 December 2007 r. II KK 88/05.

new meaning. Apart from the possibility of adopting new justification strategies with reliance on democratic axiology, the content ascribed to that concept is not significantly different from that of 1984. In the mid-1990's, however, a new trend can be observed. Revisions and reversals of prior (early use) content ascriptions are clear marks of the fact that new content of the concept has been fixed to the extent that the early use is not only definitely abandoned, but it even has to be corrected in contemporary LDP.

Conclusions

Drawing conclusions from the developments illustrated by the changes in the use of the concept of freedom of conscience and religion in the Polish case-law requires being able to substantiate two interconnected claims. First, related to the field of transition studies, that the periodization of transition in law, or precisely in the practical grasp of legal concepts, might not be identical with the periodization adopted in political or economic studies. Second, and more important for the accuracy of Brandom-inspired theory, that it is indeed pragmatics that precedes semantics in the job of generating the meaning of legal concepts.

As far as the first claim is concerned, one could examine whether what happens in LPD with regard to the freedom of conscience and religion meets the criteria of transitivity. A transitive relation is the one that holds between a and c if it also holds between a and b and between b and c. This move, based on elementary logic, can serve to elaborate the notion of transition that connects the institutional practices of judges' use of legal concepts with the time-frame. The relationship holds between the expression 'freedom of conscience and religion' in its early, middle and contemporary use, but is the same true about the conceptual content? It was taken from Brandom that while using legal concepts judges are responsible for the law and to the law. If we consider the responsibility for the legal concept, the transitivity seems to hold since judges in any period of use have a sense of exercising authority over both the content of the legal concepts being applied and, consequently, over the decisions of future judges. Yet, in transition, this is not the case as far as responsibility to the legal concept is concerned. The transition of law in the dimension of legal concepts is marked by an interruption in the scope of responsibility to the content of the concept which is inherited from the tradition of prior users and which includes justifications, precedents and considerations.

From this perspective, two types – or stages, in this case – of transition can be identified. The first transition type, characterized by slow change, illustrated by the middle use of "freedom of conscience and religion' and extending to the initial stage of contemporary use, and the second transition type, which is marked by an

abrupt change and denial of prior use, and which is typical of contemporary use. What distinguishes the two types of transition is the users' (that is, the judges') approach to the responsibility model. In the slow change transition, the judges remain responsible both to and for the law, whereas, in the abrupt change stage the judges who adopted the early use decisions are no longer treated as exercising their authority over the content their decisions had conferred on the legal terms in question. Such a distinction may help to clarify the periodization of the transition of a given legal system. In the case of Polish law, one could continue the research focused on particular legal concepts in order to argue that there was a 'transition before the transition' or that, in the middle use, some important changes in the responsibility model can be detected. To substantiate the claim made in this paper, further legal concepts should be examined to see if changes in their use overlap with those described here – and perhaps other actors' usage could be examined, too. It is clear, however, that a political transition as defined in my Introductory Remarks is different from the legal transition described in this paper.

Brandom's pragmatic semantics can be particularly helpful in elaborating the slow transition type by supplementing four auxiliary speech acts associated with the semantic content of assertions. In any discursive practice – LPD included – assertion is a key move in the language game. One could imagine an uninterrupted practice of using legal concepts based primarily on asserting, whereby ascribing certain content to legal concepts by previous users serves as a premise for future users' commitment to such inherited content. Slow transition, however, is characterised by a growing hesitance about the content of legal concepts. Auxiliary acts may facilitate score-keeping, but they also seem to be typical of transition. One of these auxiliary moves can be a deferral, which occurs if an asserter removes his responsibility to vindicate his assertion to a third party. This is what happened in a 1984 case, where the court decided to bypass the statute-based understanding of freedom of conscience and religion, and proceed directly to constitutional considerations. Another auxiliary procedure would be a challenge, which may consist of making an incompatible assertion. Similarly, a disavowal may take place if the asserter repudiates his previously acknowledged commitment. Such a move would be more typical of an abrupt change type of transition, but, in slow transition, it could be preceded by an act of query, used by scorekeepers (judges) to elicit avowal or disavowal of certain claims.

All of these special procedures serve the purpose of protecting the responsibility model, but the responsibility model as applied to judicial practices of using legal concepts has no built-in mechanisms for preserving conceptual content. According to this model, any use is possible at any time, as long as it is justified. If all

means of justification fall short, i.e., if all available auxiliary moves are exhausted, we can no longer speak of transition, and so pragmatic semantics can also account for revolutionary change in legal systems.

I conclude with a general remark addressed to those who may claim that employing Brandomian semantics to the transition of a legal concept, such as freedom of conscience and religion, is an undertaking akin to using quantum physics to prepare a cup of tea. At the end of the day, is not analysing the change in the meaning of a legal term something that analytic legal theory does all the time? In my view, semantic pragmatism provides legal theorists and philosophers with great tools to extend that classical project of analysis. The key to that extension is developing ways of articulating what one must be able to do in order to say what one means, lawyers included.

References

Brandom, Robert B. 1994. *Making It Explicit. Reasoning, Understanding and Discursive Commitment*. Cambridge (MA): Harvard University Press.

Brandom, Robert B. 2000. *Articulating Reasons. An Introduction to Inferentialism*. Cambridge (MA): Harvard University Press

Brandom, Robert B. 2008. *Between Saying and Doing. Towards an Analytic Pragmatism*. Oxford: Oxford University Press.

Brandom, Robert B. 2009. *Reason in Philosophy: Animating Ideas*. Cambridge (MA): The Belknap Press of Harvard University Press.

Brandom, Robert B. 2014. A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges' Chain Novel. In *Pragmatism, Law and Language*, edited by Hubbs, Graham; Lind, Douglas. New York: Routledge: 19–39.

Dworkin, Ronald. 1986. *Law's Empire*. Cambridge (MA): Harvard University Press.

Finnis, John. 1990. Natural Law and Legal Reasoning. *Cleveland State Law Review* 38: 1–13.

Finnis, John. 2011. *Philosophy of Law: Collected Essays*, vol. IV. Oxford: Oxford University Press.

Maldini, Pero. 2007. Introduction. In *Transition in Central and Eastern European Countries. Experiences and Future Perspectives*, edited by Maldini, Pero and Vidović, Davorka. Zagreb: Political Science Research Centre.

Marmor, Andrei. 2014. *The Language of Law*. Oxford: Oxford University Press.

Ożóg, Michał. 2015. Regulować czy deregulować swobodę wyrażania przekonań religijnych, światopoglądowych i filozoficznych w życiu publicznym? Rozważania na tle art. 25 ust. 2 Konstytucji Rzeczypospolitej Polskiej z 2 kwietnia 1997 r. [Regulate or deregulate the freedom of expressing religious, secular and philosophical convictions in public life? Reflections on Art. 25 para. 2 of the Constitution of the Republic of Poland of 2 April 1997], *Przegląd Prawa Wyznaniowego* 7: 101.

Raz, Joseph. 2009. *Between Authority and Interpretation: On the Theory of Law and Practical Reason*. Oxford: Oxford University Press.

Soames, Scott. 2008. Interpreting Legal Texts: What is, and What is not, Special about the Law. In *Philosophical Essays, Vol. 1: Natural Language: What It Means and How We Use It*. 403–424. Princeton: Princeton University Press.

Solum, Lawrence. 2013. Communicative Content and Legal Content. *Notre Dame Law Review* 89: 479–520.

Wróblewski, Jerzy. 1983. *Meaning and Truth in Judicial Decision*, edited by Aarnio, Aulis. Helsinki: Juridica.

Jan Bazyli Klakla

The Rebirth of Customary Law in a Time of Transition. The Case of Albania

Abstract: The rapid disintegration of the socialist order in Albania in the 1990s and the lack of a functioning new administration led to the breakdown of state authority. During that time, the majority of people in the north of the country once again began to practice the ancient customary law called the Kanun. They adapted the customary rules to a post-socialist context. This article addresses the issue of the renaissance of customary law and its role in maintaining a social order in a time of transition. In the article, the most visible manifestations of customary law in society are pointed out. The emphasis is placed on the institution of blood feud, the decollectivisation of the land and exercising rights in the forests.

Introduction

In the 1990s, Central and Eastern Europe experienced sudden and profound social changes which had an impact on almost every aspect of social life. The foundations of the social order based on socialist ideology collapsed and the new ones were slowly emerging. This article addresses the issue of customary law and its role in maintaining social order in a time of transition.

In the beginning, such a transition generates a lack of legal certainty. It may often undermine the reliance on state institutions and it may sometimes result in some sort of social anomie (which was originally described by Emile Durkheim), i.e. the lack of norms which may be applied by an individual in specific social situations. 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, customary law, which was a normative base for the society before the socialist period, can take the same place again, providing clear, simple and deeply-rooted rules for people looking for safety, certainty, and predictability. Customary law then becomes an important historical and cultural factor affecting the process of change and providing a stable and internally consistent normative guidance for the members of society who have been marginalized by the transition process.

In Europe, the model example of such a process is Albania in the 1990s. The rapid disintegration of the socialist order in Albania in 1991 and the lack of a functioning new administration led to the breakdown of state authority. During that time, the majority of the people in the north of the country once again began

to practise the ancient customary law called the Kanun. They adapted the rules coming from the middle ages to a post-socialist context and turned them into the foundation of a social order.

Transformation in Albania

To fully understand this paper, the knowledge of some basic historical background will be needed. The gradually introduced economic reforms started in Albania in 1985 when Ramiz Alia took over the leading position in the Party of Labour of Albania after the death of Enver Hoxha, who had ruled the Socialist People's Republic of Albania for four decades. Despite his effort to open diplomatic ties with Western Countries, Albania as a state and the Albanian society were still in deep isolation. The first major demonstrations started in January 1990 in Skhoder and later spread to other cities. The protests intensified in December 1990 which led to the first democratic general election in Albania's history in March 1991.

Although they may appear to be the results of a quick and relatively peaceful process, the 1991 March elections were just the beginning of a long period of political instability. They were won by the Communists, due to the votes of rural inhabitants constituting 64 percent of the Albanian population. The new government had lasted only three months before it was forced to resign as mass strikes, demonstrations and riots seriously threatened the country's economy.

After the fall of the communist government, a committee of 'national salvation' was established, i.e. an interim coalition government including communists, democrats and three other smaller parties. Although it lasted only six months and then collapsed, it was able to introduce land reforms to which special attention will be given in the next parts (de Waal 2015, 21). President Ramiz Alia resigned from office in April 1992 and was succeeded by Sali Berisha, the leader of the Democratic Party and a former member of Party of Labour of Albania.

The Democratic Party government managed to function until the next scheduled elections in 1996 despite the fact that Sali Berisha was often accused of authoritarian inclinations, including exercising pressure on the opposition, media and civil society (see Human Rights Watch 1996). In the general elections of June 1996, the Democratic Party manipulated the results, which was noted in the report of the Organization for Security and Co-operation in Europe (1996). Nonetheless, the government collapsed one year after the elections due to widespread corruption which had caused disorder throughout the country.

The international mediation led by OSCE resulted in the agreement that the ruling party and the opposition would form a Reconciliation Government and

hold the new elections. As a result, in June 1997 the Socialist Party was brought to power and it managed to rule under various prime ministers until 2005.

A more detailed insight into the political history of Albania is not the aim of this paper and the background presented above is more than sufficient for the understanding of my further deliberations. The bottom line is that Albania in the 1990s was a highly unstable country in terms of state organization and state authorities, which were perceived as very unreliable.

The Kanun before 1991

Another concept that needs to be introduced to understand this paper properly is the concept of the Kanun. The Kanun is the system of customary law that regulated everyday life in Albania from the Middle Ages (or even before) until the 20th century. It is important to note that the Kanun still has a considerable impact on the society of modern Albania. Margaret Hasluck writes that the Kanun was created in the mountains of Northern Albania to ensure equal access to pastures, farmlands, and irrigation for everyone regardless their economic status (Hasluck 1954, 9). Likewise, geographical conditions had a huge impact on the creation and preservation of customary law. The tribes of Northern Albania were basically isolated from the rest of the country for centuries. The mountainous terrain kept this area independent of any kind of state power for most of the year. The suzerainty of Turkish or Austro-Hungarian Empire was only theoretical. The first road that allowed reaching the north of the country regardless of weather conditions was built in 1916 (Grzymała-Moszczyńska 2011, 272).

The lack of strong and unified state authority in this area led to the primacy of customary law over any other normative system (especially the state law) which persisted until the Second World War. Describing the details of the Kanun is not the aim of this paper (see Klakla 2014, Klakla 2015), but some of the main concepts should be noted. The Kanun is based on equality before the rule of blood feud, the primacy of the value of honour, hospitality (seen as both right and responsibility), and eternal character of the world of honour (besa) (Czekalski 1998, 20).

During the communist period, the Kanun was banned because one of its key concepts is the inviolate nature of private property as opposed to the ideology promoted by the ruling Party of Labour of Albania. Customary law was also associated with those parts of the country that had been resistant to the Communist movement. It was called ‘a black spider of backwardness‘. Any reference to the Kanun was made a punishable offence and customary law practice was officially banned (de Waal 2004, 25). Blood feuds and customary marriages were defined

as legacies of feudalism and strong propaganda aimed at eliminating the habits related to the customary law was implemented. The criminal codes of 1952 and 1977 introduced the death penalty for the perpetrators and the deportation of the families of those involved in blood feuds. Although the communists' fight against the Kanun was not entirely successful, the role of customary law decreased. It can be observed for example in the statistics regarding the percentage of blood feud killings compared to total murders which dropped from almost eighteen percent in 1946–1950 to zero in the mid-1980s (Sadiku 2014, 91).

The fight which the communist government led against the Kanun distinguishes the situation of customary law in a time of transition in post-socialist countries from the situation in post-colonial areas, for example in Africa. Customary law was used there as a tool of domination or control; therefore it was not challenged and fought by state authorities. Thus, although customary law played a great role in the transition of such countries as Ghana, Nigeria, etc., this situation cannot be directly compared to the case of Albania. Regarding the transition in Africa, it is inadequate to talk about the rebirth of customary law since it was present and practiced during the colonial times with a tacit or direct support from the colonial governments. In post-socialists countries, as Joireman (2014, 16) writes, 'there was little use for it at all during the socialist era, yet it survived and when the regimes in Albania and Yugoslavia disintegrated, customary law revived as a method of conflict resolution and social organization when the state was weak'.

The rebirth of customary law after 1991 – decollectivisation

In the times of transition from the end of the 1980s until the end of the 1990s, it was possible to observe a phenomenon that may be called the rebirth of customary law. After decades of marginalization, customary law started to play a great role in Albanian society once again. On the following pages, three of the best examples of that phenomenon will be discussed – the renaissance of the blood feud practice, the decollectivisation of land based on the Kanun and the rights regarding forests in Northern Albania. We will see that the Kanun played both positive and negative roles in the tough times of the transition.

In the previous subsection, the data concerning the percentage of blood feud killings in comparison with the total murders were used to demonstrate the decreasing role of customary law during the communist period. The same data show a sharp increase in the number of customary killings in 1989–1991. At the time of the first democratic elections, it was eighteen per cent of murders, even more than in the 1946–50 period. What is interesting is not only the return of a

tradition that had been forgotten for two decades, but also the way in which that practice was realized.

Although the Kanun was written down in the 1930s by Franciscan priest Shtjefën Gjeçov and its copies have been widely available since then, what the Kanun says is not as important as what people think it says (Joireman 2014, 10). It was (and still is) the ultimate authority on Albanian tradition although few have read it (Reineck 1991, 40). Joireman (2014, 10) writes that 'the Kanun is used as a totem, much in the fashion that the constitution is used by some Americans who may refer to their "Constitutional Rights", but never have seriously read or studied the Constitution'. It is also compared to the knowledge of the Bible in Western culture, much in a way that certain metaphors and references are a part of common knowledge and are known even by those who have not read the Bible (see Arsovska 2006). Even Shtjefën Gjeçov himself claimed that during his studies he had not found the 'original Kanun'. Those readings that treat the Kanun as a black-letter law and 'petrified', unified entity, a non-contradictory set of norms, are incompatible with the theoretical position of reading law as a social process (Bardhoshi 2012, 122). Obviously, this understanding generates a significant uncertainty of interpretations and their wide variety. The practice of a blood feud is a model example of a gap between the written text and the actual social behaviour.

The Kanun describes blood revenge as an acceptable reaction to a crime or insult to the honour of a family but specifies that only a perpetrator can be a target. The contemporary understanding developed after 1991 widens the group of potential targets by adding all male or even female relatives of the perpetrator. Sometimes it also includes minors in the family. Gjin Marku of the National Reconciliation Committee in Albania (NGO which works to mediate and prevent blood feud conflicts) states that 'the problem with blood feuds today is that people are using their own personal interpretation of the Kanun to suit their needs […]. They are abusing the laws instead of following the original script, and this is why you see young women […] becoming targets' (Cohen 2012). It is against the rules that were written down by Gjecov as they state: 'Fathers shall not be killed in place of their sons, nor sons in place of their fathers, but each shall die for his own sin' (Fox 1989, 172). Using the Kanun to justify blood revenge was certainly the most negative aspect of the rebirth of customary law that happened in Albania in the times of transition.

Besides the negatively evaluated practice of blood feud, the Kanun became useful and present in Albanian society also in other fields. Probably the most important field was the decollectivisation when customary law was used by people with an actual approval from the state. The collectivization of land was imposed

by Enver Hoxa in the south of the country in the 1950s, but the process was more difficult in the mountainous north where it took ten more years to finish. The decollectivisation started slowly in 1987, as a result of a food crisis, but a proper Land Reform was passed in 1991. According to that law, land parcels should be allocated by a lottery – all the previous ownership was nullified and each family received a quantity of land adequate for the number of family members (including minors). It worked well in the south where the land was outside the village with houses clustered in the centre and where, since land had been collectivized for four decades, the memory of previous ownership was more fully obliterated. In the north, the villagers' houses were surrounded by the land which used to belong to them. What is more, their memory of the former holdings was more vivid because the collectivization came much later. In 1991, it was obvious for both the people and the state that the formally required form of decollectivisation would not be practical in that area (de Waal 2004, 21).

Taking the above into consideration, the northern land committees decided to distribute the land to the hereditary owners, following the rules of customary law. Although according to the 1991 Law on Land, the prior ownership and old boundaries should have nothing to do with the way land would be distributed, the Kanun emphasizes the extreme exclusiveness of private property. Land reforms were introduced by the committee of 'national salvation', which was established after the fall of the first democratically elected government and lasted only for six months. The political situation at that time was highly unstable and the influence of the state authorities in the regions was very weak. The regional land committees were not able to enforce the decollectivisation in the way it was demanded by law. Thus, it was carried out from the bottom up by the people following the Kanun which seemed to be the most reliable source of rules in this region at the time. Harol Lemel (1998, 124) writes that 'in Kukës, […] distribution was carried out on a family not on a per capita basis and with reference to old boundaries; families and clans simply reoccupied their old land and distributed it as they saw fit. This pattern extended to other districts throughout the mountainous northeast'. Such a distribution was deemed illegal by the state authorities for almost two years during which they refused to sanction and document it. Finally, in 1993, because of 'the special circumstances of the region, and the interests of maintaining social peace', the customary model of land distribution was accepted by the state (ibid., 130).

Indeed, entrusting customary law and the village elders with distribution of the land played a huge role in the maintaining of social peace and avoiding conflicts in this particular area. First of all, the Kanun was the only normative system there which had the redistribution of land within its regulating power. Any other solu-

tion would have had to be enforced by the authorities, which did not have the power to do so. Secondly, the elders, as the members of the involved clans, were directly interested in avoiding any possible conflicts. It can be clearly seen when we connect this process to the data concerning the blood feud practice that was chosen as a conflict resolution method more and more often at the time. The rules of Kanun were clear and specific, covering all aspects of decollectivisation, which made the decision based on customary law less likely to be contested.

Distribution of the land was based on two main principles described by Bardhoshi as follows:

> The basic rule followed was that of a balanced reciprocity: you do not touch our property and we do not touch yours! Another practice that had to do with following of rules set down by the Kanun was the permanent use of the common property by the members of that social group that once owned it. Individuals pruned the forest, for example, cleaned the water source every spring or summer, etc. as a means to memorize and mark the land or water source that belonged to their family. (…) [I]f you do not use your property for a long time and someone else does, you lose your right to the property over time. If you use a piece of land, forest or water source for some time and no one came to claim it, it means that this land has no owner and you have won the property or you have publicly reconfirmed your right of ownership" (Bardhoshi 2012, 117–118).

Following these rules, land returned to its previous owners or their legal successors. Those principles were not applied only to private, individual property rights. The Kanun recognises three forms of property: church property, collective property and private property (Mehilli 2015, 177). Collective property, described as 'the pastures, where everybody was able to send the animals there, to cut woods in the mountains for their families, to use the streams in the village, etc.' (Mehilli 2015, 177), was returned to the villagers on the same basis.

In the case of redistributing previously collectivized land, the Kanun, although used as a normative system competitive to the state law, acted in favour of maintaining social peace and was able to provide a desirable effect – the land property in northern Albania was mostly decollectivized by the end of 1992. According to the World Bank, approximately 15–20% of the total agricultural land was redistributed with respect to customary law and pre-1945 boundaries and ownership. After a major political debate concerning the fairness of redistribution and the outcomes of the land reform, there were cases of villages revisiting their first land division and redistributing land again according to customary law and pre-1945 boundaries (Zhllima, Rama 2014, 80).

Although the government's idea of land reform was based on a concept of social equality and distribution according to needs, the legal system of the state failed to meet its goals. Originally, collectivization of land was designed to be a tool of

social change, to help socialist government in its 'struggle against this inheritance system and related household formation system and family ideologies' but the traditional system of inheritance that supported and protected traditional social structure continued to exist. Therefore, social expectations for a land reform and decollectivisation were far from the government's goals. Existing traditional social structures were an efficient mechanism to legitimise the Kanun as a normative system alternative to state law (Bardhoshi 2012, 108).

Those structures consolidate the patriarchal character of Albanian society. When the division of land property was done according to the Kanun, it was shared 'per brother' and women had no right to claim any immobile property (Bardhoshi 2012, 119). There are some arguments that may be used to allow female heirs to a share of their fathers' property. Nevertheless, as Bardhoshi states, 'such norms are part of people's social memory and examples or cases when females have inherited immobile property following such a rule are very rare' (2013, 322). Thus, it can be said that the redistribution of land according to the Kanun failed to meet gender equality standards.

On the other hand, the Kanun provided the mechanism of inclusion and the acceptance of newcomers in the village that was used to manage migration changes which happened during communism and at the beginning of the 1990s. According to customary law, it depends on 'whether they behave according to local customs' (Bardhoshi 2012, 118) whether people from south are allowed to participate in the land division of the north. Nevertheless, the majority of migrants went from north to Tirana, where there was no customary law based decollectivisation. Instead, they developed informal urban areas where they occupied former state farms (Bardhoshi 2011, 12–14) and adapted the Kanun to their new environment (see Voell 2003).

The rebirth of customary law after 1991 – forest rights

There was a different social conflict present in Northern Albania at that time, which was generated by a clash between customary law norms and the state regulations. The area of battle was the rights concerning forests and timber harvest.

The forest usage rights were described precisely in the Kanun. As de Waal (2004, 32) writes, they were based on the recognition of specific areas as the property of a particular group of brothers (vllazni), beyond that of a particular clan (fis). Within a certain distance, the forest was the common property (kujrit) of a village; beyond such distance, it belonged to the bajrak (district). There were several layers of government: clan chiefs, village elders, minor elders, and the people themselves.

This scheme had been used for ages to execute the rights in the forests in Northern Albania. During the communist era, the forests were governed by the Forestry Commission, a department of the Ministry of Agriculture, which was responsible for the administration, conservation, planting and exploitation for domestic use and export. At that time, the strong state prevented any illegal deforestation.

In a time of transition, the previous system of administering the forests was torn down. For example, in 1990, all the members of Forestry Commission in the district of Mirdita were dismissed and nobody was appointed to take their place until 1992. There, in 1993, a new forest law came into operation. It was strongly criticized both by forestry experts and local authorities. It was based on a system of government-controlled licenses granted to the interested individuals and based exclusively on a financial criterion. No past experience in forestry was required (ibid., 34). Unfortunately, the new law turned out to be a failure from both the economic and the social point of view. Only a few auctions gave a profit that was expected by the government because licensees had secretly agreed on which forest areas they would bid for to avoid bidding against each other and increasing the prices. Moreover, the clash of two normative systems – the newly-introduced state law and customary law already exercised by people in the forests – was inevitable.

In the beginning, the villagers kept exercising their customary rights in the forest but they started to sell the acquired wood to licensed operators. They, however, were required to pay high taxes, so the prices they paid for purchasing the wood from the villagers were low. Because of that, the villagers quickly started to establish informal, custom-based groups that sold the wood directly to the middlemen, avoiding the licensees (but competing with them at the same time). The villagers, to avoid taxes, could offer middlemen lower prices, even if they had to include police bribes in their costs. Because of that competition, the profit made by the official licensees was lower than expected and in the period of 1992–2000 many of them resigned. For example, in the Mirdita District in 2001, there were only two licensees left from the original nine (ibid., 35).

In the process of drafting the law on forests in 1992, the voice of the villagers was ignored by the government. In response, through the 1990s the village councils and elders clearly paid no attention to the state law regarding forests and continued to exercise their customary-based rights. The weak state authorities were not capable of protecting the legal licensees. The local police and administration were corrupt and unable to help the case, either. As a result of this conflict, the northern Albanian forests were exploited in a way that was far from the optimal sustainable development criteria. By the end of the 20th century, this region had been highly deforested and the failure of the license system was

obvious. At the beginning of the 21st century, a new plan for protecting Albanian forests and providing a better legal framework for forestry was introduced under the auspices of the World Bank. Ironically, it was based on customary institutions and showed great similarities to the solutions rejected by the government in the early1990s (ibid., 36, 39).

Conclusion

In my opinion, the situation in Albania during the transformation process can be described as a case of social anomie. According to the classic definition (associated with Emile Durkheim), social anomie is perceived as a 'condition in which society provides little moral guidance to individuals' (Macionis, Gerber 2010, 97). In a more modern approach, among others presented by Robert Merton (1938), it is seen rather as the discrepancy between the common social goals and the legitimate means to attain those goals. Such a discrepancy can be clearly seen in the cases presented in the paper above. Socialism as a political and social system has fallen, but democracy and civil society have not developed yet. The weak state and its corrupt authorities and agencies were unable to provide a stable legal framework for people to achieve their goals (social justice, reprivatisation, exercising rights in the forests, etc.). Moreover, even the communist regime was partially unable to enforce significant changes in social structure, which allowed the Kanun to be preserved as a normative system alternative to state law (Bardhoshi 2012, 121).

Religion as well, a normative system that has a potential to be a moral guide and a unifying force in society in a time of transition, was not able to do so, then. Albania before the communist times was a country of religious pluralism. It was inhabited by the Orthodox Christians, Catholics, Sunni Muslims, and Bektashi. Bektashija is a Turkish dervish brotherhood that represented 25% of the Albanian Muslim community. It was founded between the 12th and 14th centuries in Anatolia and went from the great influence they had in the Ottoman Empire to prosecution and a ban that was imposed on them in 1925. Bektashija is a syncretic religion combining mostly Christian and Muslim practices (Lubonja 2002, 76). During the formation of the Albanian national identity, the issue of religion was one of the most important. On the one hand, choosing Islam (the religion of the majority of Albanians) as part of the common Albanian identity would not have been well received in the Western European countries and would have been considered as an unnecessary tie with the falling Ottoman Empire. On the other hand, religion had to distinguish the Albanians from the neighbouring Christian nations – the Serbs and the Greeks. Moreover, choosing Christianity as an integrating force would be difficult as it was the religion of a minority (ibid.,

74). After the Second World War, Enver Hoxa and the communist government started the fight with any form of religiosity, together with the prosecution of all organized religions. In 1967, all religious practices were banned and churches, mosques, and tekke (bektashi temples) were transformed into cinemas, restaurants or warehouses. Albania was officially declared the first fully-atheist country in the world (ibid., 78).

Because of the above, religion was not able to play an integrative role in the society after the transition. It could not fill the gap that was left by the lack of state regulations and state presence in general. The integrative role of religion is well described in the literature. Emile Durkheim wrote that beliefs and practices tend to unify people in a moral community (Kehrer 2006, 38). Bronisław Malinowski believed that religion has the power to restabilize group unity in boundary situations (ibid., 44). He gave an anthropological example of the death of a group member, but in my opinion, a general transition from one political system to another can be seen as an example of boundary situation on a larger scale. Thus, it required a strong, preferably deeply-internalized, normative guidance to bring back predictability and stability.

As it can be seen from the examples given above, customary law was the only stable normative system that could provide that kind of guidance at the given time. From today's perspective, some of the regulations may seem ancient and outdated (like a blood feud system) but they were clear, precise and (due to the respect that the Kanun enjoyed in the society) they guaranteed some sort of predictability. As it was presented in the paper above, the shift towards customary law had some positive (decollectivisation) and negative (blood feuds), as well as highly-ambivalent (forest rights) consequences.

Originally, the concept of social anomie was developed to help understand 'the repercussions of rapid social change on social integration and social stability' (Huschka, Mau 2005, 467). We commonly associate anomie with 'great difficulties of individual adaptation, resulting in a loss of general social orientation, the development of feelings of insecurity and marginalization, uncontrolled rising expectations, feelings of relative deprivation and the questioning of the legitimacy of core social values' (Orru`, 1987: 215). As it was demonstrated above, that was the case of post-communist transition in Albania. On the other hand, one key element should be mentioned here, which goes beyond the traditional meaning of social anomie. Lack of trust in state institutions, governments laws and reforms was so strong in Northern Albania, because new regulations proved to be incompatible with the local traditions, the Kanun and some of its core values (Bardhoshi 2012, 122). Therefore, a cultural aspect should be considered as well

when we talk about social anomie in transitional countries (for other examples, see Huschka, Mau 2005 on South Africa, Adnanes 2007 on Bulgaria, Kolarska-Bobitiska on Poland and others).

References

Adnanes, Marian. 2007. Social Transitions and Anomie Among Post-Communist Bulgarian Youth. *Nordic Journal of Youth Research* 15: 46–69.

Arsovska, Jana. 2006. Understanding a 'Culture of Violence and Crime': the Kanun of Lek Dukagjini and the Rise of the Albanian Sexual-Slavery Rackets. *European Journal of Crime, Criminal Law & Criminal Justice* 14:161–184.

Bardhoshi, Nebi. 2011. An Ethnography of Land Market in Albania's Post-Socialist Informal Areas. *Urbanities* 1: 11–20.

Bardhoshi, Nebi. 2012. Albanian Communism and Legal Pluralism. The Question of Kanun Continuity. *Ethnologia Balkanica* 16: 107–125.

Bardhoshi, Nebi. 2013. Legal dynamics in a border area: Between customary law and state law. *Journal of Legal Anthropology* 1: 314–332.

Cohen, Nadia Shira. 2012. Blood feuds still boiling in Albania *USA Today* (07 30). [http://usatoday30.usatoday.com/news/world/story/2012-07-29/Albania-blood-feuds/56580022/1 accessed on 20.4.2017].

Czekalski, Tadeusz. 1998. *Albania w latach 1920–1924. Aparat państwowy i jego funkcjonowanie.* Katowice: Śląska Agencja Prasowa.

de Waal, Clarissa. 2004. Post-socialist Property Rights and Wrongs in Albania: An Ethnography of Agrarian Change. *Conservation & Society, 1*(2): 19–50.

Fox, Leonard. 1989. *Kanuni I Lekë Dukagjini = The Code of Lekë Dukagjini.* New York: Gjonlekaj Publishing Company.

Grzymała-Moszczyńska, Halina. 2011. *Emocje czy rozum, czyli dlaczego Zef Kruec miał zginąć z ręki Gjorga Beriszy?* In *Prawo i ład społeczny. Integralnokulturowa analiza zagadnienia racjonalności*, edited by Jarosław Utrat-Milecki, 267–279. Warszawa: Wydawnictwa Uniwersytetu Warszawskiego.

Hasluck, Margaret. 1954. *The Unwritten Law in Albania.* Nowy Jork: Cambridge University Press.

Human Rights Watch. 1996. *Human Rights in Post-Communist Albania.* [https://www.hrw.org/legacy/summaries/s.albania963.html accessed on 20.4.2017]

Huschka, Denis, Mau, Steffen. 2006. Social Anomie and Racial Segregation in South Africa. *Social Indicators Research, 76*(3): 467–498.

Joireman, Sandra. 2014. Aiming for Certainty: The Kanun, Blood Feuds and the Ascertainment of Customary Law. *Political Science Faculty Publications* 61: 1–21.

Kehrer, Gunter. 2006. *Wprowadzenie do socjologii religii*. Kraków: NOMOS.

Klakla, Jan Bazyli. 2014. *Mediacje w albańskim prawie zwyczajowym*. In *Mediacje w prawie*, edited by Janina Czapska, Maksymilian Szeląg-Dylewski, 71–82. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Klakla, Jan Bazyli. 2015. *Kanun – albańskie prawo zwyczajowe. Główne założenia oraz wpływ na społeczeństwo albańskie w XXI wieku*. In *Wzajemne relacje prawa i kultury*, edited by Ewa Środnicka, 71–95. Kraków: Kasper.

Kolarska-Bobitiska, Lena. 1990. Civil Society and Social Anomy in Poland. *Acta Sociologica,* 33(4): 277–288.

Lemel, Harold. 1998. Rural Land Privatization in Albania: Evidence from the Field. *Europe-Asia Studies,* 50: 121–140.

Lubonja, Fatos. 2002. Religia i Albańczycy (krótki zarys historyczny). *Krasnogruda* 15: 73–80.

Macionis, John, Gerber, Linda. 2010. *Sociology.* Toronto: Pearson Canada.

Mehilli, Mimoza. 2015. The Origine of the Private Property in Albania and Its Restitution to the Legitimate Owners. *Academic Journal of Interdisciplinary Studies,* 4(3): 175–180.

Merton, Robert. 1938. Social Structure and Anomie. *American Sociological Review,* 3(5): 672–682.

Organization for Security and Co-operation in Europe. 1996. *Albania, Parliamentary Elections, 26 May and 2 June 1996: Observations.* [http://www.osce.org/odihr/elections/albania/13567 accessed on 20.4.2017]

Orru, Marco. 1987. *Anomie: History and Meanings.* Boston: Allen & Unwin.

Reineck, Janet Susan. 1991. *The past as refuge: Gender, migration, and ideology among the Kosova Albanians.* Berkeley: Ann Arbor.

Sadiku, Mirjona. 2014. The Origins of the Kanun: Exploring the Development of the Albanian Customary Law. *Balkan Araştırma Enstitüsü Dergisi, 3*(2): 77–91.

Voell, Stephane. 2003. The Kanun in the City. Albanian Customary Law as a Habitus and Its Persistence in the Suburb of Tirana, Bathore. *Anthropos,* 98(1): 85–101.

Zhllima, Edvin, Rama, Klodjan. 2014. Albanian Peasant Economy in the Aftermath of Property Right Reforms – A Review of the 20th Century Tenure History. *Martor,* 19: 75–88.

Petra Burai

Transitioning Boundaries Between Law and Social Practice: Corruption in Hungary Before and After 1989

Abstract: The modern history of corruption in Hungary demonstrates that when social structures and the legal system are in a constant state of flux, turning away from the normative order and focusing on personal values instead is particularly attractive. When official norms are changing persistently, individuals are keen to find stability and reliability in their mutually shared norms and personal relations outside the scope of the laws. The transformation of social structures is a very complex ongoing process causing widespread uncertainty regarding the social, legal and moral perception of which act counts as corruption. Historic evidence proves that the legal understanding of corruption and the specific countermeasures have constantly been changing and developing. While the most important actor regarding anti-corruption measures has always been the state, the exclusive and discretionary power coming from its monopoly position, especially since the socialist era, has turned into a general social demand for the government to take an active lead in such initiatives, while most Hungarian citizens, in a rather passive manner, expect the laws to have a positive impact on their livelihoods.

Introduction: corruption in transition

There is no single definition of corruption due to the different social, economic, legal, historical and cultural understandings of it. The different academic disciplines, instead of providing one unified definition, rather emphasize the different economic, political, social and cultural characteristics, attributes, paradigms and inherent contradictions related to corruption. From a merely economic point of view, corruption is a 'pervasive failure to tap self-interest for productive purposes' (Rose-Ackermann 1999, 2). Furthermore, corruption is also seen as a sign of irresponsibility in the redistribution of resources and thus violates the legal and social norms of public and civic order (Rogow and Lasswell 1970, 54–55). The skewed allocation of resources leads to limited supply and increasing demand in, inter alia, public services and intensifies rent-seeking up to illegal measures (Mauro 1977, 4–6).

However, it would be a mistake to regard corruption as a mere exchange of money or bribe for services carried out for lucrative purposes. It influences several other 'goods', not only in economic terms, that have special value for the society:

properties, salaries, private services, licences, social benefits, employment, as well as behaviour (loyalty, political attitude, kindness) and the 'conditions of autonomous human existence' as lack of fear, feeling of security, human rights, opportunities and choices made in life (Hankiss 1983, 92). To provide the widest possible understanding of the phenomenon for the sake of this study a deliberately broader approach is to be used encompassing any act of *abuse of entrusted power, office or competence for private gain* which might entail pecuniary and non-pecuniary benefits for the parties concerned.

Societies and the norms they enforce are in constant flux under the influence of political, economic and cultural changes. The social balance is easily shaken in case of radical normative transformations, as it happened in Hungary turning from communism to capitalism after 1989. Under the communist rule ideological corruption, taken in a broad sense, caused the disintegration of the belief system and the state by misinterpreting rules to the power holders' own advantage. Due to the systematic and pervasive misinterpretation, exceptions from the legal order multiplied and often became the rule (Friedrich 2002, 17). Hence, the communist era has produced its own social values, norms and customs, such as informal gratitude payments in the health care sector and the tight network of the nepotistic nomenklatura. Even where paying bribes did not prevail in society, the use of contacts, networks and influence to purchase goods and services was widespread. Furthermore, traditional practices as gifts, bargaining and relying on networks or kinship have been largely perceived as inseparable from social reality and corruption.

In the new market societies both ordinary citizens and state employees found themselves overwhelmed by unstructured and unprecedented normative pluralism, hence 'increasingly vulnerable in an unregulated public sphere' (Rivkin-Fish 2005, 63). One way out from the pressure of everyday moral choices and legal contradictions was legitimising corruption as a natural element of state operation and a mutually accepted method to receive services sooner than others in exchange for additional payments (Sedlenieks 2004, 123). Another path of adjustment was following the new, mostly unwritten rules set up by the powerful elite or the underworld extorting the state, especially if the social consequences and sanctions for breaking such rules were much stricter than for breaching legal regulations (Žižek 1996, 100).

Hungary has shared many of such experiences with other post-communist countries. The transformation of social structures has been a highly complex (and still ongoing) process causing widespread uncertainty regarding the social, legal and moral perception of which act counts as corruption. To understand the

distinctive characteristics of the transition of corruption in Hungary after 1989, this study aims to explore how the understanding and perception of corruption have evolved both under socialism and market capitalism, whether the relevant laws and counter-measures were adapted to the drastic social, political, economic and legal changes, and how the Hungarian society and its members reacted to the transformation.

Before the transition: corruption and its legal implications in the socialist Hungary

After World War II fighting corruption became a central subject of the public agenda. Both the legal and the social approach to corruption were dominated by the communist ideology introduced by the Hungarian Workers Party (MDP). The MDP as the 'sole remaining' political force after a few turbulent years after World War II got to absolute power in 1949 and remained there (after 1956 its successor was called Hungarian Socialist Workers' Party [MSZMP]) until the 1989 political transition. While upon the Constitution adopted in 1949, 'on paper, Hungary constitutionally retained a restricted political pluralism in political life and a separation of legislative, executive and judicial powers' (Romsics 2010, 268), in reality, the country became a totalitarian state under the realm of the Soviet Union. Tackling corruption played a significant role in the socialist ideology. Social theorist *Karl Marx*, who (along with *Friedrich Engels*) laid the ideological foundations of socialism, saw corruption as a natural and inevitable accompaniment of each 'exploitive' capitalist society in which the ruling social class, the 'bourgeoisie' aimed to maintain its rule also by using corrupt means (Marx 1852).[1]

The materialist definition of corruption based on historic dialecticism and Marxism-Leninism approached corruption from several aspects. *On the general level* corruption was regarded as a phenomenon determined by economic and social relations, as well as a social mass phenomenon that corrected and distorted the share order of the material and non-material goods produced. *On the specific level* corruption was connected to distinct classes of society that held a separate place in the social order of work share. *On the individual level,* the approach that

---

1 Regarding the inherent corruption in political life Marx noted that in the course of the 19th century parliamentary elections in England '…the Bourgeoisie contended for the principle of moral elections and forced the enactment of laws in that sense, intended, each of them, as safeguards against the local influence of the landed aristocracy; and indeed, from 1831 down, bribery adopted a more civilized, more hidden form, and general elections went off in a more sober way than before' (Marx 1852).

appeared in the legal regulations as well, corruption was an interaction between an active and a passive partner in which the passive partner held the power to act or make a decision, while the active partner provided a pecuniary or non-pecuniary advantage for a manipulation putting him into a better position (ibid., 67–68). Fighting corruption in Hungary was a prominent task and monopoly of the state, while social movements and initiatives falling outside the control of the government were feared, thus were consequently terminated and banned in the 1950s (Kuti 1993, 4).

High importance was given to rooting out corruption threatening the new Hungarian socialist state. Administrative and judicial wrongdoings, red tape and the abuse of hierarchical power were seen as the most severe problems. Despite the criminal regulations the social practice of hiring professional procurers and fixers to ease the bureaucratic procedures was still an inherent part of everyday public administration (Villányi 1947, 27). The communist propaganda machine had a significant impact on the measures against bureaucratic corruption. Councils, the newly established and highly centralized administrative bodies that replaced local governments were expected to 'fight any kind of opportunism, abuse and corruption', because, as a functionary of that time argued, 'we must not let them get into the mood tow fed by the enemy'. Under the oppressive regime of *Mátyás Rákosi* the forms and instances of corruption dropped radically. Not only the general fear from the regime and its leaders prevented such acts, but the perfectly structured spying system and the cruelty of the secret police as well. In the first half of the 1950s more than one million Hungarians became targets of investigations by the law enforcement authorities, 'which meant that practically every third family was a subject to some form of political harassment' carried out by the repressive state and its collaborators (Kolář 2014, 208).

Nevertheless, corruption never disappeared. While the totalitarian state and its leaders had all the means to utilize and corrupt their power, most citizens tried to improve their living standards through petty corruption (Horváth 2001, 73). Following years of retaliation after the defeat of the 1956 Revolution, repression took a different path. *János Kádár* established the so-called soft dictatorship in which the state became more stable and the number of political trials decreased (Skilling 1984, 430). While the state monopolized all segments of business life that resulted in planned and state-owned economy (Holmes 2013, 1165), power was strictly centralized to members of distinguished circles of society who had influence on decision-making, the executive, control bodies and the judiciary (Szamel 1989, 15–16). The political system relied heavily on its so-called nomenklatura, the exclusive network of party functionaries, political and economic leaders, presi-

dents of local councils, public prosecutors, judges and members of the police all appointed upon political criteria and connected through close relationships or even friendships (Schöpflin 1990, 4). The second line of network could also be characterized as outer circle consisted of the implementers of the decisions as well as the leaders of more formal and representative bodies including the trade union, youth organizations and the 'Workers' Militia' (Munkásőrség) (Horváth 2001, 77–78). Furthermore, party leaders selected people to senior positions consciously and influenced the appointments of middle managers, thus creating a tangled network of interests, loyalty and clientelism that allowed them to uphold the system (Pintér 1998, 76).

Soon enough members of society were divided on whether they had access to sufficient power to be corrupt or not (Horváth 2001, 75). Access was particularly important, since all goods, services, privileges and exemptions were selectively distributed to ensure the power of the socialist elite (Hankiss 2001, 17). First, corruption was seen and tolerated as ~~an~~ essential means to grease the wheels of the shortage economy that was lacking important social goods (Horváth 2001, 75). By the time the new economic mechanisms were introduced in 1968 the state basically accepted opaque methods like tipping, gratitude money in the health service, excessive overtime work as advantageous ways of petty corruption helping its citizens to improve their life (ibid., 74). In addition to the evident economic perks corruption was also tolerated to prevent social and political unrest. Economic benefits, regardless of their source or nature, in exchange for the restricted implementation of fundamental rights, like freedom of speech and assembly, could promote loyalty to the system (Holmes 2002, 55). In the parallel economic mechanisms corruption flourished to the extent that by the 1980s it operated as a recognized 'second economy' that everybody was familiar with and used to his own advantage. The 'second economy' was often seen as a mixture of '95% of honest and hard work and 5% of corruption, fraud and theft, that discredited the whole of that segment of life' (Hankiss 1986, 192).

At the same time, the legal system could function in a fairly accountable way as long as the powerful elite remained above the law.[2] According to the socialist

---

2 For example, despite his well-known luxurious lifestyle during the socialist era, *Lajos Czinege*, who was the minister of defence between 1960 and 1984, had only been investigated after the transition. The investigation was launched rather exceptionally in a decision of the Parliament referring to a book written about Czinege's affairs. The decision also emphasized that 'the governments of the Kádár regime did not comply with their constitutional duties regarding the direction and control of the Ministry of Defence, therefore it shall bear the responsibility for each wrongdoing and the immoral

notion of legality, law was considered to be a mean of state control, while its implementers were merely seen as executers' of the state's will. Leaning rather on the law enforcement bodies to uphold the system the Kádár regime did not utilize courts to oppress society directly. The government left the judiciary to work almost independently, but judges still faced serious political constraints and lacked social appreciation (Fleck 1996, 52–53). Parallel to the shift in the economic system, by the 1980s the control over the judiciary and law enforcement had loosened up, as the requirement to hold party membership in order to become a judge, public prosecutor or police officer was lifted. The more lenient new approach was particularly important since party organizations discussing each case were still operating at the bodies concerned, and their decisions were binding for, inter alia, party member judges and prosecutors. Direct informal control was apparent from the investigation until the courts brought their decisions. Only carefully selected people chosen by the Socialist Party leadership could handle cases that were declared politically sensitive. Most judges never gained in-depth knowledge about the background of such sensitive cases they adjudicated. Hence the political elite's escape from criminal proceedings disturbed the judges more than false accusations or judgments (Fleck 1996, 56).

The legal system also reflected the changes in the morphology of corrupt deeds, thus incorporating the widest possible understanding of the public sector as well as the clarity of the economic and cultural life. As the result of the evolution of both corruption and its regulation, the Act IV of 1978 on the Criminal Code (1978 Criminal Code) that had been in force until 2012 differentiated between active and passive as well as official (administrative) and economic bribery (Section 250–252, Section 253–254). While official (administrative) bribery was seen as a threat to the political-social system on the whole, economic bribery had the potential to disturb the order of making business. It regulated the special case of bribery related to the media (Section 255) if an advantage was provided or received to publish or withdraw information through mass broadcasters. The 1978 Criminal Code also included official (administrative) and economic trading in influence, while Section 257 punished the persecution of so-called announcers of public interest, i.e. whistle-blowers. Passive bribery was an immaterial crime, its result, namely the breach of official duty, overstepping competence or misuse of official competence

conditions that evolved among the leaders of the military'. Point 2 of the Decision No. 28/1990. (III. 13.) OGY on the contents of Imre Bokor's book titled *Oligarchs in Uniform* (*Kiskirályok mundérban*) (Translation by P.B.)

was sanctioned severely (Kránitz 1988, 132–135). As to the subjects of the law, on one hand, party officials were not included in the category of public officials. Pointing out the evident contradiction, legal scholar *Lajos Szamel* underlined the importance of the positions senior party members and 'functionaries of other political entities' held, since they were also subjects of special confidence, hence the corruption they committed was 'the most brutal abuse', yet, it was treated less harshly (Szamel 1989, 19). On the other hand, while party functionaries enjoyed the special status of exemption, the scope of the regulation had been extended to members of co-operations and associations as possible perpetrators. The advantage that could have been acquired through corruption implied both material (pecuniary) and non-material, so-called personal advantages under the law. Interestingly, Hungary provided protection for whistle-blowers from quite early on. The Act I of 1977 on announcements of public interest, recommendations and complaints aimed to protect the announcers and obliged the organs to solve the cases lodged to them. However, instead of using the system to blow the whistle on corruption, people regarded any channels of reporting with suspicion due to the operation of the secret state services and their opaque methods of collecting and using data about and against citizens.

Economic corruption flourished in the opaque mechanisms of the second economy that mostly fell out of the realm of the legal system and the competence of the law enforcement authorities (Hankiss 1986, 193). Transactions were either integrated and legally accepted parts of the official system or, being very much apparent and tolerated, hardly punishable under the law. Autonomous acts outside the realm of the state and the scope of the legal regulations were often referred to as the black market (Sík 1992, 156). However, such typologies were only straightforward in theory, since, in reality, transactions were often closely related to each other, practically depending on each other, blurring the boundaries between legal and illegal. Furthermore, the implicit governmental support of hidden transactions encouraged 'cynicism and disrespect for the law when it conflicted with individual interests' (Rose 1998, 67). Deeds adjudicated under economic corruption typically included securing procurements, handling matters out of turn, accepting non-quality products from small artisans and entrepreneurs, enabling admission to technical college or vocational school, as well as issuing permits (Duschek 1968, 30). Corruption risks in the socialist public administration lay in the over-bureaucratisation of permissions, the wide discretion of local officials and the lacking general overview of the official records.

The Hungarian state and corruption after the transition

In the Socialist era most people lived under the 'Paradigm of Prisoners', being 'deprived of the freedom of shaping their own lives and the joys of a self-fulfilling life', but 'the world in which they lived had its comforts and tempting gratifications' (Hankiss 1994, 117). Consequently, when in 1989 the social contract (or rather silent agreement) on maintaining the living standards for general passive obedience could not be upheld, the collapse of the political and economic system became unavoidable (Hollander 1993, 50). The 'the unique and unprecedented nature' of the peaceful, yet heavily compromised transition process had turned out to be extremely complex, with tremendous impact on the national identity and social constructions, the constitutional system as well as the economy (Offe 2004, 505). Furthermore, the dual political and economic transition had a mutual impact on each-other also shaping the level of corruption and the implementation of fundamental rights.

During socialism members of the Hungarian society lived among relatively equal living conditions as same amount of work paid the same salary (Cserta 2000, 89). While socialism operated upon the principle of centralized social redistribution and bargained interests in society, with the introduction of market economy the gap between living standards widened drastically (Hankiss 2002, 246–247). In the socialist era, when clientelism was at its peak, small-scale corruption was widely seen and applied as a 'side effect of the given social organization' (Sajó 2002, 15). Meanwhile, throughout the transition, corruption evolved from the realm of rather petty everyday interactions to a new level, mostly characterized as state capture. Through state capture corrupt stakeholders not only used the existing legal and social order for their own benefit, but shaped 'the basic rules of the game (i.e. laws, rules, decrees and regulations) through illicit and non-transparent private payments to public officials' (Hellman 2000, 2), to the extent that 'corruption has replaced repression as the main threat to the rule of law' (Rose et al. 1998, 219).

Corruption was not limited to scattered occurrences of public and private sector bribery anymore (Nielsen et al. 1995, 14). Instead, it was rather understood as the hardly avoidable network of illegal social interactions without which the new political system could have not operated (Sajó 2001). However, the number of documented corruption cases between 1981 and 1999 decreased, never reaching 1000 cases a year, while the total number of crimes increased from 120,000 to almost 500,000 per year (Kránitz 2000, 11).

The new level and forms of corruption were able to thrive in the nascent new economic order accompanied by insufficient expertise and hasty regulations. At the beginning of the 1990s the restructuring and sale of former state enterprises

was completed in a very short period of time. Initially, though 'the emerging new political elite seemed to be practically independent from business interests', they soon 'lost their innocence' (Hankiss 2002, 253). The legal and institutional framework, as well as the political and economic experience, was hardly sufficient to provide a stable background or control the privatization of socialist state property (Terták 2000, 18). The privatization procedure included many corruption risks that influenced not only the distribution of state, party and private wealth, but has determined the level and nature of corruption in Hungary ever since (Sajó 2002, 7). Through the opaque, spontaneous privatization during the last years of socialism, private persons got hold of parts and shares of state property upon very favourable conditions, mostly using the existing loopholes in the legal system. After 1990 the state agency for privatizations (first called ÁVÜ, later ÁPV Rt.) became responsible for centralized privatization. Political pressure became evident when the final decisions regarding the applications were taken. Most influence was targeted at the administrators handling requests and providing information about each procedure (Mihályi 2000, 33). A comprehensive regulation covering the process was only adopted in 1995, almost a decade after privatization started.[3]

In addition to the disputed ways of gaining state property and, along with it, private wealth, decision-makers of the competent state agency were highly welcomed to take jobs at companies, which they helped through the privatization procedure. Exemptions approved by the government enabled the frequent use of the revolving door between the private and the public sector. As a result, privatization became a hotbed for political corruption. While government jobs, private sector positions and services were offered in exchange for different favours and money, 'the emerging governments acted as clients, in their turn, of the patrons who helped these governing parties to win elections' (Sajó 2002, 7). Beside officials and companies involved in the corrupt practices of third parties including fixers, lobbyists and lawyers who assisted the lucrative transactions also benefitted from the shady procedures. Paradoxically, while scandals were common and the economic transformation was regarded as an advantageous way-out for the socialist nomenklatura to gain new wealth in the enterprises (also called nomenklatura privatization), (former) state officials were also held indispensable for their exper-

3 Act XXXIX of 1995 on entrepreneurial property owned by the state. Previously, privatization was covered by the Act LIII of 1992 on handling and capitalization of the entrepreneurial property remaining permanently under state ownership and Act LIV of 1992 on the realization, capitalization and protection of property remaining temporarily under state ownership. The Act XIII of 1989 on the transition of business entities and companies also applied.

tise in economics, therefore the overall public opinion was more lenient regarding their lacking lustration or purging (Hollander 1993, 47). Public officials who did not have access to the benefits of privatization, on the other hand, mostly had to rely on their personal loyalty to those in power and use the means offered by clientelism to avoid uncertainty (Kulcsár 2006, 191). By the middle of the 1990s, society at large accepted corruption as a necessary phenomenon that accompanied the turn to market economy (Cserta 2000, 89). Paying bribes to front-line public officials (including policemen and, according to the contemporary legal terminology, civil servants) was hardly condemned, instead overall sympathy was shown for their need to compensate low salaries and lost privileges previously enjoyed in the socialist era with petty bribes (Holmes 2002, 55). Public surveys showed similar views regarding the 'necessity' of corruption, putting the maintenance of living conditions and low income high on the list of justifications.

Table: Reasons for accepting bribes compared to the situation before the political transition in 2000 (Gábos 2000, 16)

Reasons for accepting bribes compared to the situation before the political transition	**Affirmative answers in percentage of the respondents**
More money is needed to maintain living standard	44%
Low salary of public officials	41%
The reputation of authorities is damaged for tolerating corruption	27%
People tolerate corruption	22%
It's not certain that authorities are always just	21%
The authorities lack staff and money	19%
Privatisation	18%
The heritage of communism	10%
Lacking confidence in authorities	10%
Market economy	9%
Anomie (it's not evident what is a crime to punish)	8%
Competition in politics	6%
Impact of the West	5%

Despite the expectations the socialist second economy had not turned out to be a well-functioning private sector, rather it evolved to be an 'informal economy' incorporating 'all income-earning activities that take place outside the scope of

state regulation' (Sík 1992, 155). Entrepreneurship was still often taken as a second job; tax evasion was widespread, while unregistered work became the favoured form of employment (Stark 1995, 73). At the beginning of the 1990s, after the liberalization of oil and gas, the competition in the market set the prize. Due to the lacking regulations on importing gas, hundreds of applicants got permission to trade. The gas business proved to be particularly lucrative, as, until the adoption of the Act LVIII of 1993 on the regulation and control of excise custom payment, suspensions could have been requested. From 1995 to 1998 products classified as 'other heating oil' were exempted from paying taxes. Consequently, officials, especially underpaid police and customs officers who granted permissions were constant targets of corruption, as the so-called oil entrepreneurs needed a network of corrupt officials to keep their oil business operating (Terták 2000, 20–21). In extreme cases, the systematic demand for bribes might have established extortive power for the corrupt officials (Sajó 2001). The out-of-date and almost chaotic administrative register systems were typically transitional corruption risks with significant impact on economic development. The court registry recording data on companies could not cope with the overwhelming amount of newly established firms at the beginning of the 1990s. At the same time, the serious delays to record new ownerships in the land registry gave way to many frauds. Clients, eager to speed up the procedures, tried to offer bribes to public officials. Furthermore, properties with pending final registration could have been sold on more occasions, deceiving potential buyers (Terták 2000, 22).

Conclusion: from transition to a constant state of flux

The transition process in Hungary has highlighted that the understanding of corruption is a constantly changing and developing notion. The central actor shaping both corruption and anti-corruption measures has traditionally been the state. Meanwhile, the exclusive and discretionary power coming from that monopole position has turned into a general social demand towards the government to take an active lead in such initiatives, while citizens, in general, expect the laws to have impact on their livelihoods in a rather passive manner. However, the state, in the Hungarian context, is a highly complex actor with paradoxical connotations.[4] The regulation of anti-corruption measures and the extent to which

4 Losing the country's independence first to the Turkish-Ottoman occupation, then being the subject to bureaucratic systems operated by or under the influence of the Habsburg Empire altogether for almost 450 years has had a significant impact on the popular attitude towards it. Deceiving or cheating the government by fraud and cor-

dubious transactions were tolerated has always been dependent on the state's and its leaders' actual political and economic interests. Beside the willingness of the powerful the effectiveness of the legislation has been highly determined by the competence of the authorities concerned to investigate corruption cases, their oversight of other bodies as well as their own institutional integrity and the ability to prevent such deeds.

Admittedly, most anti-corruption measures have hardly been the direct interest of the citizens either. Instead, the deeply rooted traditions of clientelism built upon the trust vested in networks and power have rather seemed to take precedent over the implementation of laws. In such cases, the legal regulations have lost their normativity for being regarded with overall cynicism, due to their lacking social value and personal benefit. One advantageous way to use the weakening legal system for those in power has been drafting and passing regulations for their own sake (i.e. state capture), causing further loss of faith in the laws, the state and economy. As the experiences of the socialist era have proved, such a tendency does not necessarily lead to social anomie but to a chain of secondary transactions in society. However, history has also showed that such parallel normative and economic systems cannot be sustained in the long run.

The Hungarian transitional history has proved that turning away from the normative order and finding own values is particularly relevant if social structures and the legal system is in a constant flux. When the 'official' norms are changing persistently, individuals are keen to find stability and reliability in their mutually shared norms and personal relations outside the scope of the laws. Loopholes were frequently used in more peaceful times to establish personal wealth. Transformation of the social structures is still a very complex ongoing process, while the evident rise in the quantity of legislation alone is hardly sufficient to include all aspects under the law or prevent regulations from failing. Around and after the accession to the European Union the number of regulations and strategies aiming to reduce the level of corruption have increased significantly, but even with the growth of specifically designed and targeted legislation, both the measured and perceived level of corruption exacerbated. That is not to say that the legal measures concerned, in general, do not operate at all, but signals that there are fundamental mistakes in the dominant top-down approach applied in anti-corruption legislation, also influencing the implementation of democratic principles and human rights in Hungary.

---

ruption were rather regarded as patriotic acts and signs of social solidarity than crimes against the law.

References

Cserta, Zoltán. 2000. Közigazgatás és korrupció. In *Korrupció Magyarországon I.*, edited by Mariann Kránitz, 85–100. Budapest: Transparency International Magyarországi Tagozata Egyesület.

Dallos, Ferenc. 1953. Az állami fegyelem néhány kérdése tanácsainknál. *Állam és igazgatás* 5(2–3): 90–104.

Duschek, Lajos. 1968. A korrupciós jellegű bűntettek alakulása. *Belügyi Szemle* 6(12): 28–33.

Decision No. 28/1990. (III. 13.) OGY on the contents of Imre Bokor's book titled 'Oligarchs in Uniform' ('Kiskirályok mundérban')

Fleck, Zoltán. 1996. Bírók a rendszerváltásban. *Beszélő* 7: 51–59.

Friedrich, Carl J. 2002. Corruption Concepts in Historical Perspective. In *Political Corruption: Concepts & Contexts*, edited by Arnold J. Heidenheimer and Michael Johnston, 15–23. New Brunswick, N.J., London: Transaction Publishers.

Gábos, András. 2000. *Elemezések a gazdasági és társadalompolitikai döntések előkészítéséhez 19*. Budapest: TÁRKI. (http://www.tarki.hu/adatbank-h/kutjel/pdf/a026.pdf, accessed on 1 September 2016)

Hankiss, Elemér. 1983. *Társadalmi csapdák – Diagnózisok*. Budapest: Magvető.

Hankiss, Elemér. 1986. *Diagnózisok 2*. Budapest: Magvető Könyvkiadó.

Hankiss, Elemér. 1994. European Paradigms: East and West, 1945–1994. *Daedalus 123(3): 115–126.*

Hankiss, Elemér. 2001. A korrupció játékai Közép-Kelet Európában 1945–1999. In *Korrupció Magyarországon*, edited by Ferenc Csefkó and Csaba Horváth, 13–32. Pécs: Friedrich Ebert Alapítvány and Pécs-Baranyai Értelmiségi Egyesület.

Hankiss, Elemér. 2002. Games of Corruption: East Central Europe, 1945–1999. In *Political Corruption in Transition: A Skeptic's Handbook*, edited by Stephen Kotkin and András Sajó, 243–260. Budapest: Central European University Press.

Hellman, Joel S., Jones, Geraint, Kaufmann, Daniel. 2000. *"Seize the State, Seize the Day": State Capture, Corruption and Influence in Transition*. World Bank Policy Research. Working Paper No. 2444. (http://info.worldbank.org/etools/docs/library/17638/seize.pdf, accessed on 20 April 2016)

Hollander, Paul. 1993. Why Communism Collapsed in Eastern Europe? *Society* 30(2): 43–51.

Holmes, Leslie. 2002. Functions and Dysfunctions of Corruption and its reporting in Central and Eastern Europe. In *Corruption in Asia: Rethinking the Governance Paradigm*, edited by Tim Lindsey and Howard Dick, 50–70. Sidney: The Federation Press.

Holmes, Leslie. 2013. Postcommunist Transitions and Corruption: Mapping Patterns. *Social Research* 80(4): 1163–1186.

Horváth, Csaba. 2001. A korrupció társadalmi gyökerei (a Kádár-rendszer). In *Korrupció Magyarországon*, edited by Ferenc Csefkó and Csaba Horváth, 71–82. Pécs: Friedrich Ebert Alapítvány and Pécs-Baranyai Értelmiségi Egyesület.

Kolář, Paul. 2014. Communism in Eastern Europe. In *The Oxford Handbook of the History of Communism*, edited by Stephen A. Smith, 203–219. Oxford: Oxford University Press.

Kránitz, Mariann. 1988. *A korrupciós bűnözés*. Budapest: Közgazdasági és Jogi Könyvkiadó.

Kránitz, Mariann. 2000. Prológus, avagy néhány gondolat a korrupcióról. In *Korrupció Magyarországon I.*, edited by Mariann Kránitz, 7–13. Budapest: Transparency International Magyarországi Tagozata Egyesület.

Kulcsár, Kálmán. 2006. The New Political System and Hungarian Reality. *Angewandte Sozialforschung* 24 (3/4): 187–200.

Kuti, Éva. 1993. Defining the Nonprofit Sector: Hungary. *Working Papers of the The Johns Hopkins Comparative Nonprofit Sector Project.* Budapest.

Marx, Karl. 1852. Corruption at Elections. First published in the *New York Daily Tribune of* September 4, 1852 and republished in the newspaper *People's Paper of* October 16, 1852. https://www.marxists.org/archive/marx/works/1852/08/20.htm, accessed on 20 September 2016

Mauro, Paolo. 1997. Why worry about corruption? *Economic Issues No. 6.* Washington, D.C.: International Monetary Fund. (http://www.imf.org/external/pubs/ft/issues6/issue6.pdf, accessed on 28 May 2016)

Mihályi, Péter. 2000. Korrupció a magyarországi privatizációban. In *Korrupció Magyarországon I.*, edited by Mariann Kránitz, 26–48. Budapest: Transparency International Magyarországi Tagozata Egyesület.

Nielsen, Klaus, Jessop, Bob, Hausner, Jerzy. 1995. Institutional Change in Post-Socialism. In *Strategic Choice and Path-Dependency in Post Socialism: Institutional Dynamics in the Transformation Process*, edited by Klaus Nielsen, Bob Jessop and Jerzy Hausner, 3–47. Edward Elgar.

Claus Offe. 2004. Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe. *Social Research* 71(3): 501–528.

Rivkin-Fish, Michele. 2005. Bribes, Gifts and Unofficial Payments: Rethinking Corruption in Post-Soviet Russian Health Care. In *Corruption: Anthropological Perspectives*, edited by Dieter Haller and Cris Shore, 47–64. London: Pluto Press.

Rogow, Arnold A., Lasswell, Harold D. 1970. The definition of corruption. In *Political Corruption: Readings in Comparative Analysis*, edited by Arnold J. Heidenheimer, 54–55. New York: Holt, Rinehart and Winston.

Romsics, Ignác. 2010. *Hungary in the Twentieth Century*. Budapest: Corvina, Osiris Kiadó.

Rose, Richard, Mishler, William, Haerpfer, Christian. 1998. *Democracy and its Alternatives: Understanding Post-Communist Societies*. Polity Press.

Rose-Ackerman, Susan. 1999. *Corruption and Government: Causes, Consequences, and Reform*. Cambridge: Cambridge University Press.

Sajó, András. 2001. A vesztegethető államtól a zsaroló államig. *Mozgó Világ* 27(7) (http://epa.oszk.hu/01300/01326/00019/jul1.htm, accessed on 21 September 2016)

Sajó, András. 2002. Introduction: Clientelism and Extortion: Corruption in Transition. In *Political Corruption in Transition: A Skeptic's Handbook*, edited by Stephen Kotkin and András Sajó, 1–21. Budapest: Central European University Press.

Schöpflin, George. 1990. The End of Communism in Eastern Europe. *International Affairs* 66(1): 3–16.

Sedlenieks, Klavs. 2004. Rotten Talk: Corruption as a Part of Discourse in Contemporary Latvia. In *Between Morality and the Law: Corruption, Anthropology and Comparative Society*, edited by Italo Pardo, 119–134. Aldershot: Ashgate.

Sík, Endre. 1992. From the Second to the Informal Economy. *Journal of Public Policy* 12(2): 153–175.

Skilling, H. Gordon. 1984. The Crisis in Eastern Europe Communism: National and International. *International Journal, Twenty-Five Years: 1959–1984* (1984) 2: 429–455.

Stark, David. 1995. Not by Design: The Myth of Designer Capitalism in Eastern Europe. In *Strategic Choice and Path-Dependency in Post Socialism: Institutional Dynamics in the Transformation Process*, edited by Klaus Nielsen, Bob Jessop, Jerzy Hausner, 67–83. Edward Elgar.

Szamel, Lajos. 1989. *A korrupció, a protekció és a többi…* Budapest: Kossuth Könyvkiadó.

Terták, Ádám. 2000. Korrupció a magyar gazdaságban. In *Korrupció Magyarországon I.*, edited by Mariann Kránitz, 18–25. Budapest: Transparency International Magyarországi Tagozata Egyesület.

Slavoj Žižek. 1996. 'I Hear You with My Eyes'; or, The Invisible Master. In *Gaze and Voice as Love Objects*, edited by Renata Salecl and Slavoj Žižek, 90–126. Durham NC: Duke University Press.

Villányi, Pál. 1947. A korrupció elleni küzdelem. *Jogtudományi Közlöny* 2(1–2): 27–28.

Rafał Mańko*

Law, Politics and the Economy in Poland's Post-Socialist Transformation: Preliminary Notes Towards an Investigation

Abstract: The paper aims at analysing the role of law in systemic transformation on the example of Poland's move from Actually Existing Socialism (1944–1989) to capitalism. For this purpose four case studies are analysed: the *lex Wilczek* liberalizing economic activity, the privatization laws of 1987 and 1990, the Round Table agreements of April 1989 and, finally, the establishment of the Constitutional Court (1986). On the basis of each case study, a certain order of causation is established. Drawing on similarities identified between the four case studies, the paper draws the conclusion that in the first phase of transformation, the law was instrumentalised by political decision-makers, motivated by economic factors, in order to bring about changes in the social reality. However, once the law was put into motion, a new dynamic emerged in which the law started to play an independent role. Referring to recent research by Bruno Schönfelder, the paper concludes that this growing autonomy of the law can be seen as the essence of post-socialist transformation as such.

> …legal changes have, in essence, a secondary character with regard to all other changes. They do not commence principal social processes, but rather confirm within the legal system what has already taken place in the economy, politics and other areas of social life.
>
> Jan Wawrzyniak (2011, 12)[1]

Introduction

It can be said that the political and socio-economic transition from Actually Existing Socialism[2] towards capitalism and democracy took the Polish legal

---

* The present paper represents the Author's personal views and should not be attributed to any specific institution or organisation

1 All quotations from Polish texts have been translated by the Author.

2 The element of 'actually existing' in the term serves to emphasise the gap between 'socialism' in the strict sense of the word (as envisaged, e.g. by Marx and Engels or by non-Soviet Marxists) and the actual economic, political and social practice in the Soviet bloc (Sowa 2012). Being aware of a long-standing debate as to the nature of that system, in particular whether it should be described even as 'state capitalism' (e.g. Cliff 1948), I do not wish to enter it here, sticking to a purely descriptive understanding

elites by surprise. Indeed, despite the participation of certain lawyers in the anti-communist opposition movement (especially among advocates), the legal community *en masse* participated in the everyday workings of the system as judges, prosecutors, legal advisors or university professors. The transformation came from outside the sphere of law, originating rather in the spheres of politics and the economy.

The main enquiry of the paper will be whether, in the socio-economic transformation of 1989, the law was merely a 'form' which recorded (more or less faithfully) the changes in the socio-economic and political 'substance' (or, as Marxists would say, was the law merely a 'superstructure' which reflected changes in the 'base')? In other words, can it be said that law was not 'autonomous' in the transformation, being merely 'an expression of the will of the sovereign with nearly no limitation' (Czarnota 2016, 316)? Or, perhaps, was it the other way around, i.e. that the transforming impulses originated in the law itself? Or, perhaps, a middle way answer is correct, namely that the transformation did not originate in the legal sphere, but that sphere contributed to the dynamics of transformation?

In order to answer this theoretical question, the paper intends to give a preliminary empirical look at the interstices of law and transformation in Poland at the turn of the 1980s and 1990s. Four case studies will be analysed: the lex Wilczek liberalising economic activty; early privatisation laws; the Round Table agreement of 1989; and the emergence of the rule of law in the case-law of the Constitutional Court.

It must, however, be underlined that the present enquiry has but a preliminary character, and rather aims at framing questions (something which is often more important than giving answers), making notes towards further investigation, as well as putting forward some working hypotheses. What must be underscored is

---

of the notion of 'actually existing socialism'. According to the late Polish economist Tadeusz Kowalik (1926–2012): 'The most important attribute of really [actually] existing socialism was the combination of closely centralized and hierarchical political authority with state ownership of means of production. This gave the political authority nearly absolute control over the economy. The all-encompassing planning, often called command-distributive planning, was bureaucratic in nature' (Kowalik 2011, 26). Furthermore, I concur with critical theorist Jan Sowa that 'there are strong theoretical and historical reasons to question the communist nature of regimes developed within the Soviet Bloc in the 20th century (…) if we accept the conceptual framework developed by Marx and Engels as a point of reference' (Sowa 2012, 26). Therefore, despite the practice of many other authors, I do not use the term 'communism' to describe the social, economic and political system of actually existing socialism.

that giving a fully fledged answer – even limited to the four case studies – would certainly require an in-depth interdisciplinary (legal, economic, sociological) research, the outcome of which would require (at least) the volume of a research monograph in its own right.

Theoretical and methodological considerations

The paper adopts a tripartite division of social reality into the spheres of law, the economy and politics. The division of human activity into distinct phenomena, including *inter alia* law, politics and the economy, is a commonly held view among social theorists of very different inspirations (e.g. Bourdieu 1986; Berger and Luckmann 1991; Kojève 2007; Luhmann 2013). These spheres are conceptualised differently, as 'fields' (Bourdieu 1986), 'institutional worlds' (Berger and Luckmann 1991), 'phenomena' (Kojève 2007) or 'systems' (Luhmann 2013). Admittedly, the way in which the distinct facets of social life are conceptualised has an impact on an analysis of their mutual relationships, not only through a different terminology, but also through a different understanding of how these spheres interact. This division is not intended to be exhaustive: such spheres as religion, administration (bureaucracy), education or culture are left out from my analysis, although they could also play a role in the transformation processes. The method for differentiating the three spheres rests upon the binary code upon which they are founded, for law it is 'legal/illegal', for the economy it is 'profitable/not profitable' and for politics it is 'friend/enemy' (Paździora and Stambulski 2014, 57), as well as the main principle underlying each sphere, for law it is legality (normativity), for the economy – value, and for politics – it is (political) power. Finally, each sphere has its typical core of social practices which allow to identify it – for law these are predominantly legislation and adjudication (Mańko 2009, 113), for the economy – production, services and commerce, for politics – struggle for power (democratic or not). Finally, decisions taken in the logic of each sphere have a different legitimacy – a decision in the sphere of law is based on *legality*, a decision in the sphere of the economy is based on *profitability*, and a decision in the sphere of politics is based on *effectiveness* (instrumental logic, based on pursuing political goals). Characteristically for our context of post-communist transformation, the official Marxist-Leninist ideology explicitly rejected the division of social reality into distinct spheres of law, politics and economy and one of the aims of communists was to bring them under the hegemony of the political sphere (Schönfelder 2016, 299).

Applying this abstract typology to the historical period from which the four case studies originate, it can be said that the 'legal' sphere refers to the enactment

of legal texts by the Parliament (statutes and constitutional amendments), as well as the judicial activity of the courts (case-law of the Constitutional Court); the 'economic' refers to the economic activity both of individuals (privately-owned) and public (state-owned) enterprises; whilst the 'political' sphere refers to political decisions taken by the Polish United Workers' Party (PZPR), by the opposition, as well as by voters (e.g. 4 June 1989 elections). At least with regard to this concrete historical period, the differentiation of social reality into law, politics and the economy does not seem to cause any practical doubts.

Having thus identified the three spheres both *in abstracto*, as well as *in concreto* for the period under scrutiny, it should be underlined that the object of the enquiry is to answer the question, which of these spheres *influences* the other ones, i.e. which of them exerts *causal effects*. I will resort to graphical representations of such influence, assuming that it will help to conceptualise the research problem and help to identify common elements in all case studies. For this purpose, I will use *L* to denote the legal sphere, *E* to denote the economic sphere and *P* to denote the political sphere. An arrow (→) will denote the direction of influence (causality) in a concrete historical situation.

As regards methodology, the present paper presupposes, firstly, the existence of the phenomenon of *causation*, and secondly, the possibility of its *identification*. Since the paper intends to provide an *interpretation* of historical events in terms of relations between the three spheres under scrutiny (law, politics and the economy), it will rely, as to the *facts* (including causation) on existing literature, focusing on an interpretation of those facts (established by historians) from the standoint of the research question, i.e. the role of *law* in the socio-economic transformation.

Case study I: *lex Wilczek*

In the second half of the 1980s General Jaruzelski – who held political power as 1st Secretary of PZPR – 'gradually adopted the view that in order to get out of the economic crisis, Poland needs deep social reforms, a change in the method of managing the economy, including a certain degree of marketization' (A.L. Sowa 2011, 597). During the period between 1981 and 1986, the number of private enterprises grew from 357.000 to 500.000, and they employed over 1 million people (Kieżun 2012, 113), which reflected a change of the regime's attitude towards the private sector (Poznański 1996, 215). It must be kept in mind that in communist Poland small private enterprises were never fully prohibited, and their activity was even encouraged at times, e.g. after 1956 (Kieżun 2012, 114–115).

In October 1988 a new government was established under the premiership of M.F. Rakowski (A.L. Sowa 2011, 616). The new government aimed at "economic

stability and a deep economic reform' (A.L. Sowa 2011, 616), and instrumental to this aim was an entire economic package, creating 'a new economic order, based on the principles of liberty, equality and competition' (A.L. Sowa 2011, 616–617). Among them was the so-called *lex Wilczek* (Act of 23 December 1988) nicknamed after the Minister who proposed its enactment. In contrast to the whole communist period, *lex Wilczek* abolished most restrictions on private economic activity, making it essentially legal and free to pursue a business for the first time since World War II. It seems plausible to argue that *lex Wilczek* itself was the effect of a *political* decision of the Communist Party. This follows from the well-known and undisputed fact that the legal sphere in general, and Parliamentary legislation in particular, was not autonomous under Actually Existing Socialism, but simply depended on the political will of the Communist Party. Once it entered into force, the *lex Wilczek* caused an unprecedented explosion of social energy, chanelled into economic activity. A symbol of this "heroic' period of Poland's new capitalism was the so-called "jaws" (*szczęki*), simple, easy to open and close one-person shops made from metal, which populated Polish market places and even representative areas, such as the monumental surroundings of the Palace of Culture and Science – the Soviet-style palace in the very centre of Warsaw. Also statistical data clearly indicate a robust expansion of the private sector following *lex Wilczek* (Poznański 1996, 241).

What *lex Wilczek* represents, therefore, is an example of the impact of the the economic sphere (crisis) upon the sphere of politics (decision of the Communist Party), which in turn re-impacts upon the sphere of the economy (explosion of economic activity once the limitations were removed), *via* the legal sphere (the *lex Wilczek* itself). Undoubtedly, it was the *lex Wilczek* (and its enforcement) which allowed for an explosion of economic activity and release of enterpreneurial energy of the Polish society (cf. Schönfelder 2016, 306). This is because the economic history of the period of Actually Existing Socialism reveals that the state repressive apparatus had to invest a lot of effort in supressing the economic energy of citizens (Madej 2010) – 'the communist economic order depended on the coercive powers of government' (Schönfelder 2016, 296). Once this repression was done away with – by abolishing its legal framework on the basis of a political decision – the economic potential of Polish society became unleashed. As Schönfelder (2016, 305) writes, '[w]hen profit-maximizing behavior was no longer ostracized, the economy spurted. After the removal of administrative obstacles, it quickly reintegrated into the world economy (…).'

In a schematic way, the interaction between law, politics and the economy in the case of *lex Wilczek* can be presented as follows: $\boldsymbol{E_1} \rightarrow \boldsymbol{P} \rightarrow \boldsymbol{L} \rightarrow \boldsymbol{E_2}$, where: E_1 = economic crisis; P = political decision to liberalise the economy; L = *lex Wilczek*,

i.e. the legal instrument liberalising the economy, E_2 = mass explosion of private economic activivty.

Case study II: Nomenklatura Privatisation and the Privatization Act of 1990

The second example is the Privatisation Act of 1990, enacted as a step directly following the so-called 'shock therapy' or 'Balcerowicz Plan'.[3] The more or less informal privatisation of state property, by way of the so-called '*nomenklatura* privatisation' started already in the second half of the 1980s and elements of the central planning began to be dismantled. In the 1980s the ruling elite of PZPR functionaries came to the conclusion that the country's economy not only is no longer able to deliver rising standards of living for workers but the deep crisis has threatened the privileged position of the elite itself (Hardy 2009, 23). This led them to the idea that only a reform towards a market economy ('market socialism') could improve the economic situation of the country. Central planning was relaxed and state enterprises were given a large degree of independence, in order to make them self-financing (Hardy 2009, 23). As a result, Poland's economy 'ceased to be a classical planned economy, but decision-making (…) descended into chaos and uncertainty' (Hardy 2009, 24).

These circumstances were in turn used by the *nomenklatura* members to initiate the so-called '*nomenklatura* privatisation', i.e. the appropriation of state assets by private individuals holding managerial positions in the state-owned enterprises. Privatisation processes of this kind began in the second half of the 1980s; Poland officially remained a socialist country, and the legal system was still a socialist one, but the underlying economic system has begun to change.

The legal framework for early privatisation processes was created by the Act of 31.7.1987 'adapting the provisions of certain acts regulating the functioning of the economy to the conditions and needs of further socio-economic development of the country', enabling to transform state enterprises into commercial companies, thus allowing the sale of state enterprises' assets, as well as mergers, divisions of such enterprises and their lease (Zalewa 2008, 67). A further easement in that regard was created by the Act of 24.2.1989 regarding certain conditions of the

3 In considering this example, I am dealing with the role of law *vis-a-vis* politics and the economy (in line with the research question), and therefoe I leave outside my interest the question whether the 'nomenklatura privatisation' hindered or favoured Poland's economic integration with the capitalist world. Whilst this is an interesting research question, answering it would not shed any light on the *role of law* in the transformation.

consolidation of the national economy which simply allowed transferring the assets of a state enterprise to natural or legal persons (Zalewa 2008, 67). According to English political economist Jane Hardy (2009, 24–25):

> these so-called *nomenklatura* privatisations involved the selling of non-core operations such as a computer centre, repair facilities or a sales centre to a group of insiders that included managers and party members. State-Owned Enterprises were often stripped of their most profitable operations (…) The *nomenklatura* used their position to become wealthy owners of what used to be state enterprises through two important legal forms: the leasing of state owned companies and joint stock companies (…).

Polish economist Piotr Zalewa pointed out that *nomenklatura* privatisation, despite being formally legal, was in fact an 'ordinary embezzlement' and that the *nomenklatura* companies 'did not create any added value' but 'served ordinary looting' (Zalewa 2008, 68). He drew attention to the fact that in order to remove any obstacles to a mass appropriation of state property, in 1989 the administrative instruments of control of economic crime were disabled (Zalewa 2008, 68). As Jan Sowa (2012, 175) has observed:

> Party members, even high ranking officials, were becoming private entrepreneurs, mainly by taking control over restructured state enterprises. Jadwiga Staniszkis showed that 80% of the Party elite from the 1980s became private entrepreneurs in the 1990s.

The mass privatisation of state enterprises, in 'direct clash with Solidarity's economic program of worker ownership' (Klein 2007, 177), was based on Act of 13.7.1990 on the privatisation of state enterprises, drafted in very broad terms, without any indications as to the aims, direction and speed of the process, nor the methodology of evaluating the value of the privatised entities (Zalewa 2007, 79). The legal provisions granted special powers to the Government, thus insulating the privatisation process from other stakeholders (employees, society at large represented by Parliament etc.) (Zalewa 2007, 80). Contrary to the convictions of society at large that privatisation should lead to an equitable distribution of wealth (Dunn 2004, 36–37), the process took the form of a bargain sale of the majority of Polish enterprises to international capital.[4]

Looking from the perspective of interaction between law, politics and the economy, the process could be described by the following scheme: $\boldsymbol{E_1 \rightarrow P \rightarrow L \rightarrow E_2}$,

---

4 I omit from my discussion the so-called 'universal privatization programme' (*program powszechnej prywatyzacji*) which, despite a complicated mechanism and the purported aim of giving ownership powers to all citizens, ended up as a complete failure (Zalewa 2007, 85–86). The value of a 'participation certificate' in the programme was equal to a pair of discount shoes (Zalewa 2007, 86).

where E_1 represents the economic crisis of the 1980s, P represents the political decision to start the *nomenklatura* privatisation, L_1 represents the 1987 act and E_2 represents the situation of actual change in the economy (the nomenklatura privatisation itself).

It could also be argued by reference to the discussion below (case study III), that the changed economic situation (E_2) actually led to further political changes, namely the decision to share power with Solidarity (once the first phase of *nomenklatura* privatization, guaranteeing a good economic standing to PZPR elites, was accomplished). Once the former opposition took over, an era of mass privatisation began (Privatisation Act of 1990). This would allow the expansion of the above scheme to the following: $\boldsymbol{E_1 \rightarrow P_1 \rightarrow L_1 \rightarrow E_2 \rightarrow P_2 \rightarrow L_2 \rightarrow E_3}$, where E_1 = economic crisis of the 1980s, P_1 = political decision to start the *nomenklatura* privatisation, L_1 = Act of 1987, E_2 = *nomenklatura* privatisation, *P2* = Round Table Talks, L_2 = Privatisation Act 1990 and E_3 = mass privatisation. Of course, the passage from E_2 to L_2 is simplified here (for a more detailed account, see the next section).

Case study III: The Round Table Agreement

According to Naomi Klein, 'authoritarian regimes have a habit of embracing democracy at the precise moment when their economic projects are about to implode. Poland was no exception' (Klein 2007, 175). Indeed, in the 1980s an ideological consensus between the neoliberal/neoconservative wing of the opposition and the liberal wing of the Polish United Workers' Party (PZPR) enabled a peaceful transformation from actually existing socialism to democracy and a market economy (J. Sowa 2012, 172), and by mid-1988 PZPR leaders had conceded to share their political power and responsibility for the country with the hitherto illegal opposition movement. This unprecedented peaceful transfer of power was first negotiated within the framework of the famous Round Table talks between representatives of the PZPR and opposition leaders, which lasted between February and April 1989 (Sowa 2011, 624–628). The deal struck by PZPR and Solidarity provided for significant political reforms, including partly pluralist parliamentary elections to be held on 4 June 1989 and the legalisation of the Solidarity trade union (A.L. Sowa 2011, 627). It involved an amendment of the 1952 constitution (Act of 7.4.1989 amending the Constitution of the Polish People's Republic). There is no doubt that the constitutional amendment – adopted hastily just two days after the end of the Round Table talks, was a simple 'execution of the political agreement that had been reached' (Szmyt 2010, 123) or its 'implementation' (Stelmachowski 2011, 116). Following the 1989 elections, in which Solidarity won 260 of the 261

seats subject to free voting (Klein 2007, 174–175), a coalition government of PZPR members and Solidarity members was formed in September 1989.

On 31.12.1989 the Parliament of the Polish People's Republic adopted an amendment to the Constitution (Act of 29.12.1989 amending the Constitution of the Polish People's Republic), symbolically changing the name of the country to 'Republic of Poland' (which had also been used until 1952) and reintroducing the crown on the head of the eagle on the national emblem (which had been used in the 2nd Republic). As Szmyt (2010, 136) points out, whilst the April amendment of the constitution 'opened the first stage of systemic transformation', the December amendment 'stabilised that stage still as a temporary form, albeit on democratic foundations'.

The further two steps of the Polish transformation were the pluralist presidential elections (1990) and the first fully pluralist parliamentary elections (1991), followed by the enactment of a 'Small Constitution' the next year (Constitutional Act of 17.10.1992 regarding the mutual relationships between the legislative and executive power of the Republic of Poland and local self-government). Finally, in 1997 a new Polish constitution was enacted, replacing the 1952 constitution (alongside the 'Small Constitution') and creating a system of parliamentary democracy with a president elected in general elections. From the point of view of constitutional law, this moment marked the completion of the process of transformation commenced eight years later.

Examining the role of law (*vis-à-vis* politics) in the process of constitutional transformation, one cannot but emphasise the role of the Round Table agreement, reach between February and April 1989, and immediately enacted by the obedient Parliament (9th term) of the Polish People's Republic. The constitutional amendment of April 1989 was clearly a direct enactment of the political deal struck at the Round Table. Nonetheless, it opened up a new dynamic – through the elections of 4 June 1989 – which later on changed the political sphere itself (new coalition between Solidarity, PSL and SD which replaced the original PZPR led coalition). Furthermore, if we accept the account, expressed inter alia by Klein (2007, 175) that the decision to sit down to talks with the Solidarity opposition were actually caused by an imminent economic implosion, we arrive at an interesting scheme of causality: $E \rightarrow P \rightarrow L$. Nonetheless, the legal changes (amendments to constitution and electoral laws) themselves caused political changes ($L \rightarrow P$), due to the unexpected (for PZPR) result of the 4 June 1989 elections. These political changes led to further legal changes ($L_1 \rightarrow P \rightarrow L_2$), namely the December 1989 amendment to the constitution which went much, much farther than the April amendment. The full order of influence could then be expressed by the following scheme: $\boldsymbol{E} \rightarrow$

$P_1 \rightarrow L_1 \rightarrow P_2 \rightarrow L_2$, where: E = economic crisis, P_1 = Round Table Agreement, L_1 = constitutional amendment of April 1989; P_2 = the 4 June 1989 elections and their aftermath (Mazowiecki government); L_2 = December 1989 amendment to the constitution. If the above representation is correct, it would suggest that economic factors caused the entire change, but later on law and politics interacted with each other accelerating the transformation.

Case study IV: Rule of Law – the Constitutional Court

Under communism, the constitution played only a façade role. This is in line with the negation of a division into a legal and a political sphere under communism (Schönfelder 2016, 301). Hence, communist countries did not, as a matter of ideological principle, have constitutional courts (Sulikowski 2016, 16). The same applied to the public administration which was not subject to judicial review, but rather to manual political steering by the communist party. However, things started to change in Poland already in the 1980s. As Sulikowski (2016, 18–19) explains:

> 'Between 1976 and 1980 there were a significant number of massive strikes. Despite being effectively suppressed it resulted in a downturn in the legitimacy of the authorities. As a consequence, the authorities tried to base their legitimacy on experts and to strengthen law and order. This appeared to be the best ground to implement a constitutional court.'

The decision to create the Constitutional Court (*Trybunał Konstytucyjny*, thereafter: TK) was, therefore, clearly a *political* decision to boost the legitimacy of the regime (Mażewski 2011, 333; Dębska 2015, 130) which was, in turn, motivated by *economic* factors (crisis, strikes). Dębska (2015, 127–128) and Sulikowski (2016, 20) clearly indicate that the direct impulse for the creation of the Constitutional Court was a resolution adopted at the 9th Extraordinary Convention of the PZPR in July 1981. The TK was established formally in the Constitution already in 1982 (Szmyt 2010, 117; Dębska 2015, 132–134), but an appropriate statute giving effect to it was enacted only in 1985 (Dębska 2015, 135–136, 144–149) and the TK became operational in 1986. Until 1997, the TK's decisions were subject to a possible parliamentary veto, which considerably weakened its position in comparison to constitutional courts in capitalist countries (Sulikowski 2016, 20).

During the first years of its existence, i.e. until the transformation, the TK 'was rather reserved and passive, and undertook numerous but cautious decisions to strengthen the rule of law institutions in Poland' (Sulikowski 2016, 20; cf. Mańko 2014, 83). However, after the transformation, the Court, virtually overnight

> 'discovered' in the constitution many unwritten rules such as: the presumption of innocence, the right to justice, the right to life, the right to privacy, the principle of propor-

> tionality (the prohibition of excessive interference in the rights of individuals), the rule of law, the principle of social justice, the principle of loyalty to the state of the citizen, the non-retroactivity of law (*lex retro non agit*), the principle of *lex severior non agit*, the protection of acquired rights, the principle of legal clarity etc. (Sulikowski 2016, 21–22)

Hence, the Court built – in an exercise of unprecedented judicial activism – a complex set of rules laying down the foundations of the Rule of Law ('democratic state of law') in Poland.[5] Here the political element was a clear determining factor – there can be no coincidence in the fact that a timid and passive court suddenly became activist and engaged in judicial law-making in the daylight. However, once the Rule of Law became established, the TK started gaining autonomy from the sphere of politics. A good example is its 1996 decision (Case K 26/96) overturning an Act of Parliament legalising abortion – it was based on an unwritten principle of right to life, 'discovered' by the Court in the constitution (Sulikowski 2016, 22; cf. Dębska and Warczok 2016, 117, 121–128). As Sulikowski (2016, 22) writes, the TK 'took up the role of chief engineer of transformation and made numerous and controversial political decisions'. Whilst the abortion case represents and example of interaction between the spheres of law (TK decision) and politics (parliament's democratic decision), there are also numerous examples of the TK interfering with the sphere of the economy, as in the judgment on maximum rents in housing (TK judgment of 12.1.2000, Case P 11/98).

Hence, in schematic terms, the situations can be described as follows: $\boldsymbol{E \rightarrow P_a \rightarrow L_1 + P_b \rightarrow L_2 \rightarrow L_3}$, where E = economic crisis; P_a = political decision to create CC; L_1 = CC Act; P_b = changed political situation after 1989 (not a consequence of P_a), L_2 = CC's rule of law case-law of the 1990s; L_3 = codification of the TK's rule of law case-law in the 1997 Constitution.

Conclusions

A formal presentation of the order of causation identified in each of the four case studies can be summarised as follows:

Case study I: $\boldsymbol{E_1 \rightarrow P \rightarrow L \rightarrow E_2}$
Case study II: $\boldsymbol{E_1 \rightarrow P_1 \rightarrow L1 \rightarrow E_2 \rightarrow P_2 -> L_2 \rightarrow E_3}$,
Case study III: $\boldsymbol{E \rightarrow P_1 \rightarrow L_1 \rightarrow P_2 \rightarrow L_2}$

5 Cf., however, the critique of Czarnota (2016), who argues that the 'the rule of law in post-communist states plays a façade role for masking the structural corruption of the state', adding that this concept 'has been understood in a formal, positivistic way and reduced to the concept of legality and the rule of the legal text (Czarnota 2016, 318).

Case study IV: $\boldsymbol{E \rightarrow P_a \rightarrow L_1 + P_b \rightarrow L_2 \rightarrow L_3}$

The schematic presentation of the (hypothetical) order of causation allows analysing it in the abstract, in detachment from the specific circumstances of each case. This, in turn, allows for the formulation of more general conclusions, relating to the three respective spheres (*L*, *P*, *E*), and therefore permitting for a broader outlook of the research. The general conclusions are as follows. First of all, economic factors (*E*) are at the very beginning of each scheme. This is not a suprise, given the scale and profoundness of the economic crisis which directly preceded the transformation. Secondly, economic factors impacted political ones in the first link of the chain of causation ($E \rightarrow P$). Again, this is in line with the hypothesis that the elites of PZPR reacted to the economic crisis making various political decisions aimed either at preserving their rule through a boost of legitimacy (case study IV), or at transforming the economic and political system (case studies I, II and III respectively). The next link of the chain of causation is – in all case studies – the translation of the political decision into legal terms ($P \rightarrow L$). Hence, what all case studies have in common is the *indirect* impact of the economic sphere upon the legal sphere, *mediated* by the political sphere ($E \rightarrow P \rightarrow L$). Again, this is not a suprising result given the fact of the supremacy of the political over the legal and economic in communism, as described recently by Schönfelder (2016).

What happens next is different in the individual case studies. The legal sphere may either impact the economic one ($L \rightarrow E$) or the political one ($L \rightarrow P$) or generate a new legal reality intrinsically, via law's internal logic ($L_1 \rightarrow L_2$), or through the intervention of an additional, external political factor ($L_1 + P \rightarrow L_2$). In case study II, the second part of the chain of causation actually replicates the first one ($\ldots E_2 \rightarrow P_2 \rightarrow L_2 \rightarrow E_3$). In case study III, the second part of the chain symbolises a mutual interaction between law and politics ($L_1 \rightarrow P_2 \rightarrow L_2$).

The final, most abstract conclusion would therefore be as follows: in the case of the 1989 transformation, the four case studies analysed in a preliminary manner suggest that the initial phase of transformation always follows the ($E \rightarrow P \rightarrow L$) scheme. This means that the law is only a secondary factor, being influenced in the last instance by the economy, as mediated through politics. In other words, law is *instrumentalized* by the ruling elites to bring about desired changes in the socio-economic sphere (cf. Gromski 2000). However, once the new law is put into place, the situation enters a new dynamic, where law itself can become a decisive factor, impacting the economy, politics or changing itself ($L_1 \rightarrow L_2$). This would tend to confirm the hypothesis put forward by Schönfelder (2016) that the transformation lead to a change from the situation in which law and the economy were subject to politics (no functional differentiation) to a situation where such

a functional differentiation becomes more pronounced and which, in the case of law, means that the legal sphere gains autonomy and its own potential of influencing politics and the economy on its own account. Indeed, on a very rudimental level, this seems intuitively as a correct account of the role of law in the 1989 socio-economic transformation.

Therefore, one cannot but agree with the diagnosis put forward by Wawrzyniak (2011, 12, 14):

> …legal changes have, in essence, a secondary character with regard to all other changes. They do not commence principal social processes, but rather confirm within the legal system what has already taken place in the economy, politics and other areas of social life. (…) One must also keep in mind that the law does not reflect (and should not reflect) all changes actually taking place in various spheres of social and economic life. The law reflects (…) only the most important events of a transformative character.

Ultimately, therefore, law is a 'form' which merely cloaks the 'substance' of political and socio-economic relationships (Pashukanis 1983, 53–64; Balbus 1977), or – to put the same idea in the very different theoretical language of Carl Schmitt – the legal system is a 'special mirror of reality' (Croce and Salvatore 2013, 35), because law's *normativity* presupposes a certain social *normality* (Croce and Salvatore 2013, 36; cf. Schmitt 2004). When this social normality is in flux – as in a time of socio-economic transformation – law reflects the changes at a faster or slower period. Nonetheless, as the case studies seem to indicate, law can be not only a passive form or mirror of reality, but it can also be directly instrumentalised by the sphere of politics in the process of socio-economic transformation.

References

Balbus, Isaac D. 1977. Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law. *Law and Society* 11: 571–588.

Berger, P. and Luckmann, T. 1991 [1966]. *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*. Penguin.

Croce, Mariano and Salvatore, Andrea. 2013. *The Legal Theory of Carl Schmitt*. Abingdon: Routledge.

Czarnota, Adam. 2016. Rule of Law as an Outcome of Crisis. Centra-Eastern European Experiences 27 Years after the Breakthrough. *Hague Journal on the Rule of Law* 8: 311–321.

Dębska, Hanna and Warczok, Tomasz. 2016. The Social Construction of Femininity in the Discourse of the Polish Constitutional Court. In: Rafał Mańko, Cosmin Sebastian Cercel and Adam Sulikowski (eds). *Law and Critique in*

Central Europe: Questioning the Past, Resisting the Present. 106–130. Oxford: Counterpress.

Dębska, Hanna. 2015. *Władza – symbol – prawo. Społeczne tworzenie Trybunału Konstytucyjnego* [Power – Symbol – Law. The Social Construction of the Constitutional Court]. Warszawa: Wydawnictwo Sejmowe.

~~Gerring, John. 2012. *Social Science Methodology: A Unified Framework.* Cambridge: Cambridge University Press.~~

Gromski, Włodzimierz. 2000. Zagadnienie granic instrumentalizacji prawa [The Issue of the Limits to the Instrumentalization of Law]. In: Artur Kozak (ed.), *Z zagadnień teorii i filozofii prawa: Instrumentalizacja prawa*. Wrocław: Kolonia Limited.

Hardy, Jane. 2009. *Poland's New Capitalism*. London-New York: Pluto Press.

Kieżun, Witold. 2012. *Patologia transformacji*. Warszawa: Poltext.

Klein, Naomi. 2007. *The Shock Doctrine: The Rise of Disaster Capitalism*. New York: Metropolitan Books.

Kojève, Alexandre. 2007 [1982]. *An Outline of the Phenomenology of Right*. Plymouth: Rowman and Littlefield.

Luhmann, Niklas. 2013 [2002]. *Introduction to Systems Theory*. Cambridge: Polity Press.

Mańko, Rafał. 2008. The Unification of Private Law in Europe from th.e Perspective of Polish Legal Culture. *Yearbook of Polish European Studies* 11: 109–137.

Mańko, Rafał. 2014. 'War of Courts' as a Clash of Legal Cultures: Rethinking the Conflict Between the Polish Constitutional Tribunal and Supreme Court Over 'Interpretive Judgments'. In: *Law, Politics, and the Constitution: New Perspectives from Legal and Political Theory*. Peter Lang, 2014. Pp. 79–94.

Mażewski, Lech. 2010. *Posttotalitarny autorytaryzm. PRL 1956–1989. Analiza ustrojowo-polityczna* [Post-Totalitarian Authoritarianism. The Polish People's Republic 1956–1989. An Analysis of the Political System]. Warszawa: Arte.

Pashukanis, Evgeny B. 1983 [1929]. *Law and Marxism: A General Theory. Towards a Critique of the Fundamental Juridical Concepts*. Transl. by Barbara Einhorn. London: Pluto Press.

Paździora, Michał and Stambulski Michał. 2014. Co może dać nauce prawa polityczność? Przyczynek do przyszłych badań [How Can the Concept of the Political Contribute To Legal Science? Notes Towards Further Research]. *Archiwum Filozofii Prawa i Filozofii Społecznej* 1: 55–66.

Poznański, Kazimierz Z. 1996. *Poland's Protracted Transtion: Institutional Change and Economic Groth 1970–1994*. Cambridge: CUP.

Schmitt, Carl. 2004. *On the Three Types of Juristic Thought*. Westport CT: Praeger [1934].

Schönfelder, Bruno. 2016. The evolution of law under communism and post-communism: a system-theory analysis in the spirit of Luhmann. *Financial Theory and Practice* 2: 293–318.

Sowa, Andrzej Leon. 2011. *Historia polityczna Polski 1944–1991* [A Political History of Poland 1944–1991]. Kraków: Wydawnictwo Literackie.

Sowa, Jan. 2012. An Unexpected Twist of Ideology. Neoliberalism and the Collapse of the Soviet block. *Praktyka Teoretyczna* 5: 153–180.

Sowa, Jan. 2015. *Inna Rzeczpospolita jest możliwa! Widma przeszłości, wizje przyszłości* [A Different Republic is Possible! Phantomas of the Past, Visions of the Future]. Warszawa: WAB.

Stelmachowski, Andrzej. 2011. *Kształtowanie się ustroju III Rzeczypospolitej*. Warszawa: Łośgraf.

Sulikowski, Adam. 2016. Government of Judges and Neoliberal Ideology: The Polish Case. In: Rafał Mańko, Cosmin Sebastian Cercel and Adam Sulikowski (eds). *Law and Critique in Central Europe: Questioning the Past, Resisting the Present.* Oxford: Counterpress. Pp. 16–31.

Szmyt, Andrzej. 2010. Dokonywanie zmian przepisów konstytucyjnych. In: M. Zubik (ed.). *Dwadzieścia lat transformacji ustrojowej w Polsce*. Warszawa: Wydawnictwo Sejmowe. Pp. 106–174.

Wawrzyniak, Jan. 2011. Nowelizacja Konstytucji PRL z 7 kwietnia 1989 roku – początek transformacji (refleksje prawno-polityczne). In: Maria Kruk and Jan Wawrzyniak (eds.). *Transformacja ustrojowa w Polsce 1989–2009*. Warszawa: Scholar.

Zalewa, Piotr. 2008. *Transformacja ustrojowa a kształt polskiego systemu ekonomicznego*. Lublin: Wyd. UMCS.

Dario Čepo

Between Path Dependence and Political Elite Capture: The Second Chambers in Central and Eastern European Unitary States Explained

Abstract: Research on second chambers (or upper houses) of bicameral legislatures has focused on examples of strong bicameralisms – the United States and Germany – or traditional examples of second chambers, like the British House of Lords. What is rarely researched is the reason why second chambers exist in unitary states with no visible societal cleavages. This paper aims to review the reasons for the establishment of, as well as the necessity of maintaining, second chambers in unitary states of Central and Eastern Europe. It discusses four cases – the Czech Republic, Poland, Romania, and Slovenia – analysing their constitutions and other primary and secondary literature that deals with the establishment and functioning of second chambers. The main findings show that second chambers in unitary states of Central and Eastern Europe were established and/or maintained due to a combination of institutional path dependence and the capture of the institution by a political elite. This paper argues that an institutional framework can maintain and support an atavistic institution, but political actors need to find a function for it in order for the institution to maintain its legitimacy.

Introduction

To be interested in political institutions means trying to understand why a particular society has developed, evolved and maintained a specific set of institutions, and how those institutions help nurture democratic developments in a society. Following the idea of new institutionalism (Peters 1999), institutions are not (or are not only) progenies of socioeconomic determinants, but are also entities by themselves, which have a strong influence on a political system they serve. If we accept the idea that representative bodies are the most important institutions in democratic polities, then we have to understand how they function, what makes them work properly, or how they get into a state of gridlock. We also need to understand what the correct inputs that would yield optimal outputs are, and how to reform them on time, if we notice they stopped serving a purpose society has ascribed to them.

Having that in mind, one can see why so many political scientists have focused on studying representative bodies (Mill 1989), their legislative (Ball and Peters 2005), and representative functions (Nohlen 1992), and the way they coexist and

cooperate with other democratic institutions (Haggard and McCubbins 2001; Laver and Shepsle 1996; Shugart and Carey 1992). It is especially true for bodies which represent all citizens, i.e. the nation as a source of the sovereign will.

Less common are researches of other types of representative bodies, those that represent collective interests – territorial, functional, and societal. With the exception of strong second chambers (Čepo 2013), such as the US Senate, or the German *Bundesrat,* and the oldest second chamber in the world, the British House of Lords (Hartmann 2006), other second chambers have garnered scant interest from political scientists. However, this paper focuses on second chambers of four unitary Central and Eastern European countries – the Czech Republic, Poland, Romania and Slovenia.

As Temperley (1910, viii), wrote more than a hundred years ago, to have any real value, a study of second chambers has to be focused on practice, not theory, i.e. we need to understand why they exist in a political system, how they function, and how their existence and functioning influence the system as a whole. It is especially important to understand whether second chambers, as they presently function, bring benefits to a political system and enhance democracy, or if they destabilize the system, and support the emergence and establishment of defective democracy (Merkel 2011).

Although once all-powerful, because they were established as ways for political and economic elites to protect their interests in face of perceived irrationality of first (people's) chambers, with the passing of time they lost power, and with it the legitimacy to hold sway in the decision–making process (Čepo 2013). In that manner, most of the second chambers (like those in Canada, the United Kingdom, and partly France), evolved into 'dignified bodies' (Uhr, Bach and Massicotte 2011, 81), with a lot of historical weight and almost no real power. There is a myriad of papers, articles, and books covering the process of the modernization, reform, or abolishment (sometimes even introduction) of second chambers, both in federal and unitary states, plural and nonplural societies, and democratic and authoritarian regimes. Just a few examples encompass ideas about reforming bicameralism in Canada (Joyal 2003), Spain (Roller 2002), the United Kingdom (Mitchell and Davis 1993; Russell 2000), Russia (Ross 2003), Germany (Robbers 2005), Italy (Pasquino 2002), Lebanon (Salamey 2009) etc.

Following all of this is the research question of this paper: what is the *raison d'être* of second chambers in four unitary states of Central and Eastern Europe? The analysis starts from the position that second chambers were introduced (or kept), during the transition from autocratic to democratic regimes, as a political necessity of the moment, and not as a requirement a stable institutional frame-

work needed. Hence, the hypothesis of this paper is that the establishment and further existence of second chambers in unitary states of Central and Eastern Europe is a result of the combination of path dependence and the needs of political elites of the time to maintain political power.

The theoretical Framework

Theoretically, Lijphart's (1984) categorization of second chambers is used in order to provide an in-depth understanding of differences and similarities of our cases. Tsebelis and Money's (1997) approach to understanding the necessity of bicameral legislatures will also be used as a framework for extrapolating conclusions in this paper. Longley's and Olson's (1991) justifications for introducing or maintaining a bicameral legislature will be a helpful tool to measure the need for second chambers in our cases as well.

Longley and Olson (1991, 1–3) summarize four main justifications for bicameralism. First, two distinct chambers represent the societal need of representing different estates, classes or other collective groups that form cleavages in the society. In that way, different chambers are used to represent divergent interests of collectives that form a society in question. Second, justification takes into account the geographical factor, insisting that bicameralism is needed in cases where common national interest differs in a major way from specific territorial interests of specific regions of a country in question. Although the parliament represents the interests of an entire nation, particular segments of that nation might have opposing, or unorthodox, or highly specific interests, geographically located, that will need specific representation. Third, functional justification reasons that two chambers will surely be able to give a more optimal solution to a problem than one would be able to, providing diversity of outlook and making the best possible policy under given circumstances. Fourth, justification is linked to the notion of institutional conservatism. Bicameralism exists because there is no political will to change the institutional framework, due to the inertia, conservatism or the unwillingness of decision makers to abolish an institution with lucrative positions for political actors. Even if there are attempts of abolishing the second chamber, the institution itself tries to reinvent itself and tries to show it is needed as a way to further the democracy of the political system it serves.

In his seminal work *Democracies* (1984), Lijphart looked at differences between majoritarian and consensus democracies, trying to discover patterns of similarities as well as differing points. One of the variables he used was the number of legislative bodies a system had. When comparing those systems, he tried to see prevailing factors that led to establishing either a unicameral or bicameral legis-

lature. First, he looked at whether the number of legislative chambers is linked to plural (i.e. complex societies, with one or several societal cleavages) societies (1984, 92), showing that the link is weak. Both plural and nonplural societies have both unicameral and bicameral legislative bodies, although he did conclude nonplural societies tend to have unicameral bodies.

His second question was linked to the size of the country, wondering if larger countries have bicameral assemblies because different parts of a large country have different needs that want representation in the legislative process. Another question is whether a country is a federation, or a federation-like entity (1984, 93). In his study of 21 (later 36) democracies he found a strong correlation between the size of the country and bicameralism, as well as between federalism and bicameralism.

Selection of cases and methodology

Out of 17 bicameral legislatures in Europe seven are situated in Central and Eastern Europe. Of those, five are in democratic countries, measure of "democratic" taken from *Polity IV* (Boix, Miller, and Rosato, 2013). Non-democratic countries with bicameral legislatures are Russia and Belarus. Russia, though, has been excluded due to having a federal political system, while Belarus has not been used as a case because it is, by all intents in purposes, considered "a last dictatorship in Europe" (Bennet, 2011), where no institutions, including the second chamber, perform constitutionally assigned roles (Silitski 2005; Ioffe 2004).

Despite a growing number of research into how hybrid and autocratic regimes function (e.g. Donno 2013; Pepinsky ~~et al.~~ 2014; Morgenbesser 2014), we decided it was opportune not to take into account second chambers of non-democratic regimes, as institutional frameworks need freedom, separation of powers and independence to work properly. Those are only feasible, and sometimes even barely, in ~~a~~ democratic political systems. Nothing would be gained, and, it is presumed, a lot would be obfuscated, if one would look at how a certain institution works without taking into account how 'free' it is to work as was intended. That doesn't mean one cannot gain certain insights into the working of political institutions in regimes different from democratic ones, but that is not the scope of this paper, and hence it is the reason second chamber of Belarus is not a part of this analysis.

Taking into account five remaining second chambers in democratic political systems of Central and Eastern Europe, four are parts of institutional frameworks of unitary countries, with the sole exception being the Parliamentary Assembly of Bosnia and Herzegovina (see more: Čepo 2016). Bearing in mind that

Bosnia and Herzegovina are considered a federation, albeit an asymmetric[1] one (Kasapović 2005), we will exclude it from the analysis as well. Recent scholarship on bicameralism cannot agree on much, but they all agree that federal systems not only legitimize the existence of bicameral legislatures, but consider it a *sine qua non*. Second chambers have a legitimacy in federal countries, because they are the most important institutional mechanisms for the representation of different parts of the federation (states, provinces, regions) on the federal or central level (Swenden 2004, 18).

Therefore, this research is based on four cases – the Czech Republic, Poland, Romania, and Slovenia. All four are Central and Eastern European countries, all are unitary states with no, or little, observable social or political cleavages (cf. the case of Hungarian minority in Romania notwithstanding), and all are democracies.

Methodologically, this paper is based on a qualitative approach. We used the content analysis of primary (constitutions, laws, acts) and secondary literature, in order to focus on a legislative institutional framework, the relations between the two chambers, the powers of second chambers, the electoral rules for second chambers, and any political impetuses that could sway political actors to rule in favour of establishing and/or maintaining a second chamber. As for the selection of cases, we used the most similar case design, considering the similarities within all four cases. New institutionalism, especially historic institutionalism (as well as normative institutionalism), is used as an underpinning of the research design.

Elaboration of case studies

As none of our four cases has been a part of the democratic world until the fall of communism (potentially with the exemption of the Czech Republic), we can only extrapolate their experiences with bicameralism (and its success) from the points in time in which they made a change from an authoritarian to a democratic regime. Therefore, the timeframe of this study is more or less the same. The transformation began in Poland in 1989, continued in Slovenia, and ended in Romania. The case of the Czech Republic is slightly more complex, because we must take into account the independence of the country after the dissolution of Czechoslovakia 1993, and not only the transformation from communism to a multiparty democracy. But the process of transformation lasted no more than

1 In this context, an asymmetric federation is a federal configuration in which different parts of federation (political entities), are not equal in powers, roles, or authorities that they possess. For more in-depth explanation, see Kasapović (2005).

5 years (1989–1993), was driven by similar forces (moderate opposition and/or moderate regime forces), which led the transformation to similar resolutions (from authoritarianism to democracy), and used similar tools (transformation of institutions through the process of constitutional reform).

The Polish Senate

The first constitution of Poland of 1791 established a body with a legislative power – the Sejm – which was composed of the Senate and the Chamber of Deputies. The King was at the helm of the Senate, but sovereignty was vested in the chamber of Deputies (Ludwikowski 1996, 10). Subsequent constitutions kept the bicameral nature of legislature, based, as it was common in that age, on class differences, i.e. the differentiation of the estates. But having enacted the communist constitution of 1946 the Senate was abolished, and Poland's legislative body became unicameral.

The reestablishment of the Polish Senate was a result of roundtable negotiations. Its reason is not particularly clear. As there are no minutes from the negotiation process, one cannot explain the deeper reasoning behind introducing a second chamber into legislature that previously did not have but one house of parliament, and where the country had not had a need for it from the point of view of existing cleavages. Therefore, one can only state that the Polish Senate was established as a way to surpass an impasse between the ruling party and the democratic opposition regarding the best way to proceed with the transition of the political system.

Hence, the Senate was a child of the moment it was conceived in and not of a thoroughly reasoned debate on what the Polish political system needs in order to function properly. Or, as Ludwikowski (1996, 129), concludes, the Senate in Poland was established to counterbalance the communist elite's interests in the first chamber, i.e. it was a novel idea with which to break the deadlock between the government and opposition negotiators – offering the government a way to control the more powerful first chamber, while opening the way for the opposition to participate in truly competitive elections against the ruling party (ibid, 149). Longley and Olson (1991, 14) follow that logic to some extent, noting that the (re)introduction of a Senate into the institutional framework of Poland was a way for the Polish Parliament to try and offer different ideas on resolving economic difficulties that were plaguing Poland at the time, but that had no chance of passing a Communist-dominated Parliament with its rigid economic doctrine.

The National Council of Slovenia

The case of Slovenian second chamber, the National Council, is maybe the most striking. It, in some way, shows a shadow of the past, pointing to the time Slovenia was part of the (socialist federal) Yugoslavia, and where, the last incarnation of legislature was tricameral. In a similar way, the National Council reaffirms the right of sectoral and territorial interests to representation in the legislative process.

The National Council has been (re)established, according to Ramet (1993, 879), as a compromise between leftist parties' desire to establish a bicameral legislature with a second chamber to represent regional differences, and rightist parties who were opposed to such a solution. Compromise was found in establishing an extremely weak version of bicameralism with legislative powers given solely to the first chamber, while the second chamber had supervisory powers, and the right to return a bill to the first chamber for reconsideration.

According to the Constitution of the Republic of Slovenia, the National Council is the representative body for social, economic, professional, and local interests [...] It is composed of: four representatives of employers; four representatives of employees; four representatives of farmers, crafts and trades, and independent professions; six representatives of non-commercial fields; and twenty-two representatives of local interests. Considering the powers of the National Council, it may: propose to the National Assembly the passing of laws; convey to the National Assembly its opinion on all matters within the competence of the National Assembly; require the National Assembly to decide again on a given law prior to its promulgation; require inquiries on matters of public importance.

Although, at first one may see the Slovenian second chamber as the least legitimate of the four, if we consider giving citizens a direct right to elect their representatives as an indication of legitimacy, it may nonetheless be the only one that can successfully exist in an era of the deligitimisation of obsolete political institutions (Russell 2001). The reason behind that afct is that the National Council has a different source of legitimacy than the first chamber of the Slovenian legislature. Other things being equal, different electoral bases allow us to separate the legitimacy of an institution from citizens, as there is no basis of said legitimacy in the direct electoral process.

The Senate of the Czech Republic

After the dissolution of the Austro-Hungarian Empire, and the establishment of an independent Czechoslovakia, the Constitution of 1920 established a bicameral legislature, which was continued during communist times, especially after 1968

amendments to the 1960 Constitution, which created the Czechoslovak federation (Ludwikowski 1996, 29).

According to Ludwikowski (1996, 172), the Senate remained at the centre of constitutional controversies, especially with the constant efforts to abolish it, which failed to gather support in the Chamber of Deputies. That is particularly strange, when one knows that usually (see e.g. the cases of the United Kingdom, Italy, and Croatia), politicians in the second chambers are the actors that are adamantly opposed to the idea of their institution being abolished, not necessarily their counterparts in the first chamber.

But as the Czech Senate had not even been elected until 1996, it is confusing why the Chamber of Deputies was so much against the change of constitution which would abolish the almost stillborn second chamber. That does not mean that there were no attempts at abolishing it, but they were all fruitless, and in 1996 the first Czech Senate was elected.

According to Olson (1996, 47), the Senate was an institution born out of necessity to gather support for a quick constitutional change that followed the dissolution of Czechoslovak federation. The most powerful political actor of the time, the prime minister, was indifferent to the idea of bicameralism, but many parties, some of whom were part of his coalition, strongly supported the idea of establishing the Senate. Political compromise was, therefore, struck to establish a weak second chamber, whose powers, composition and electoral mechanisms were ambiguous.

Olson (1996, 48) elaborates further that two main propelling forces for the establishment of the Senate were the historical narrative of a successful Czechoslovak democracy during the interwar period, and politicians' self-interest. The Senate was introduced, not only as a continuation of the federal practices of the now-dissolved communist federation, but as a reflection of the glorious days of pre-communist Czechoslovakia. The weak Senate of the 1920s and the 1930s, was resurrected as a reflective institution of sorts, in which senators will mull over bills and try to make them better and more inclusive.

Constitutional changes and subsequent laws on the election of the Senate, help us conclude that Czech bicameralism is, in Lijphart's typology, an asymmetrical and incongruent bicameralism. It is asymmetrical, because the powers of the second chamber are strongly curtailed and much weaker than the powers of the first chamber. They are mostly supervisory in role, but are easily overridden by the actions of the Chamber of Deputies (Olson 1999, 49). Incongruent bicameralism, on the other hand, means that the Senate was elected in a manner that differs from the way the Chamber of Deputies is elected. Incongruence is the only aspect of

weak bicameralisms that gives them a semblance of legitimacy, as different ways of electing a second chamber means different public, and therefore different sources of legitimizing legislative action.

The Romanian Senate

Historically, the Romanian parliament, which was first established in 1858, was bicameral from the constitution of 1866 until the introduction of communism, a response of the prevailing practice of the day (Roper and Crowther 1998, 403). Constitutional reforms that Romania undertook after the overthrow of communism were based on the French constitutional tradition, similarly to some other cases in Central and Eastern Europe (e.g. Croatia). That could be a reason, together with the idea of a 'return to historical roots', why the new constitution introduced the Senate as a second chamber of a previously unicameral parliament.

Some authors (Ludwikowski 1996, 129; Čepo 2007) maintain that the reasons for the introduction of bicameralism in Romania were not clear, especially because the roles, the prerogatives, and the ways of establishment of both chambers were virtually the same. Olson (1999, 302) insists that, similarly to other bicameral legislatures in Central and Eastern Europe that had two chambers in interwar period (Poland and the Czech Republic), so too did Romania. Therefore, newly democratic political forces decided on reintroducing a Senate, as a part of the new institutional arrangement.

Comparing the four cases

If we take Lijpahrt's definition of a large state as the one with more than 10 million inhabitants, than among our sample we have three large countries (the Czech Republic, Poland and Romania), and one small state (Slovenia). All of them are unitary states, as previously stated and in the case of Slovenia and the Czech Republic they are rather compact, and don't differ that much geographically, economically or socially. Poland and Romania are larger territorially, with different parts of the country having different needs and interests, from the socio-economic point of view. The large Hungarian minority in Romania (predominantly in Transylvania) also introduces an ethno-political variable into interest differentiation among the different parts of the state.

Considering Lijphart's variables, we see that in our cases, the variable of pluralism has no link with the number of legislatures, i.e. our four nonplural societies all have bicameral legislatures. As all our cases are unitary states, the federalism variable also cannot be used to explain why there are bicameral legislatures.

Taking into account Longley's and Olson's four justifications, our research has shown, similarly to conclusions surmised from Lijphart's variables, incongruence between them and the reasons second chambers exist in four countries of Central and Eastern Europe (with a possible exception of fourth justification). First, societal justification, similar to Lijphart's plural/nonplural society variable, does not explain why any of our four cases needs bicameral legislature. None of them has major social cleavages, and the difference according to estate and class is, of course, not acceptable explanation for a democratic societies. The only differing case of the four could be Romania, with its significant Hungarian minority, but as its second chamber is not established, nor does it function as a way of representing ethno-linguistic differences this justification does not sufficiently explain the reason of the existence of the Romanian Senate.

The second point, geographic justification, is similar to Lijphart's size variable, and can tentatively be used to explain the cases of Poland and Romania, but not those of the Czech Republic, or Slovenia, whose territories are much smaller and more compact, and therefore do not have such great differences which would justify the need for specific representation. The Romanian example, again, does not show that territorial differences were used as a reason for the establishment of its Senate, as the way it is elected and how it functions does not differ from the first chamber. Hence, the sources of their legitimacies are the same. Poland, on the other hand, is sufficiently large in size (and population) and elects its Senate based on territorial separation into regions, so Longley's and Olson's justification, partly, explains bicameralism in Poland. A different question is, of course, whether the interests of those regions differ so much as to need their own representation.

Thirdly, functional justification is questionable as well, considering that all of our countries have second chambers that are significantly weaker than their counterparts in first chambers, i.e. their powers are weaker and their eventual dissent can easily be overruled. Romania's case of completely congruent but asymmetrical bicameralism does not even show that this third justification holds true as the same source of legitimacy but weaker powers hardly make senators equal actors in the process of decision-making in Romania.

Lastly, a status quo/self-interest justification, however, can partly be observed, and is congruent with the conclusion of this paper. Institutional conservatism, historical sympathies for the bygone days of national prominence, inertia, or the interest of political elites in maintaining an institution with lucrative seats with which to reward their supporters and/or maintain their grip on power could be used to explain bicameralisms in all four cases we observed. Poland's case obviously follows the historical narrative, which was used as a way to break the grid-

lock between opposing sides during a negotiation process. The cases of Slovenia and the Czech Republic are closest to the concept of inertia as both, more or less, transferred the institutional framework of their representative institutions from the multinational federations they were part of before becoming independent. The case of Romania is not as clear. All four, however, follow the status quo/self-interest justification in maintaining the bicameral legislature, even with all the evidence that point to the conclusion that the second chamber was not needed. Therefore, it concurs with the underlying hypothesis of this paper.

Our conclusion is that the existence of bicameral legislatures in the cases of the Czech Republic, Poland, Romania and Slovenia, is connected to the historical development of respective legislatures, and with the interest of preserving political power. Specifically, second chambers of current, democratic legislative bodies in four states have been established as manifestations of legislative predecessors of those institutions in previous regimes and the nature of their political systems (federalism). The reason of the fact that bicameralisms were maintained, on the other hand, is linked to the political power of vested interests and the political elite's proclivity of accumulating power and dispensing it to their followers. With this, we confirm the cornerstone of the historical institutionalism: Pierson's concept of path dependency.

The Slovenian second chamber is an obvious continuation of the countries' tricameral legislative body, from the time it was part of the socialist Yugoslavia. Even the way the body is elected (indirectly) and whom it represents (special territorial and functional interests) is a continuation of the Council of municipalities, and the Council of Associated Labour, which existed before 1990. Similarly, the case of the Senate of the Czech Republic points to the historical continuation variable. The former Czechoslovakia, as a federal state, logically had a second chamber. The current Czech Senate is a manifestation of that institution, albeit in changed circumstances (the nature of the state changed from federal to unitary). The case of the Polish Senate is linked to the (re)establishment of bicameral legislature from the first Polish state, when the Sejm, was a representative of Polish nobility. Poland is also a case study for understanding how institution-building is connected to negotiations during regime changes, i.e. to the interests of different political groups representing the old regime and new democratic forces (both with radical and moderate wings).

What about the prospects of maintaining bicameral legislatures in our case studies, and its influence on the democratic stability of political systems? Considering Lijphart's variables again, one can conclude that despite unitary countries with nonplural societies having predominantly unicameral legislatures, one can

find a reason for maintaining second chambers in cases when those nonplural, unitary, countries are large, i.e. have a population size over 10 million spread out on a relatively (from a European perspective at least) large area. In that case, both Poland and Romania could realistically retain their second chambers, and legitimize them in the eyes of the electorate as a much needed way to differentiate varying territorial interests. There are, however, limits to that, as was shown in Čepo (2007), hence it is questionable how one could construct a narrative that second chambers bring anything novel or different to a political process dominated by first chambers in such a profound way as it happens in both Poland and Romania.

The case of the Czech Republic is a borderline one, as it just barely fits the great-size variable (having 10.5 million inhabitants), so the critics would have a much stronger case of pointing out that size should not be a reason to keep an institution that obviously gives no added value to the political process.

The case of Slovenia is particularly an outlier. Not only is Slovenia a unitary state, it also has a homogenous society, with no visible socio-political cleavages, i.e. it is a nonplural society. The size (both in territory and population) also does not give a logical explanation of the introduction of a second chamber, as Slovenia is both small (around 2 million inhabitants), and compact, with regional differences, being on miniscule proportions and, hence, of no particular influence in the political process.

Conclusion

The hypothesis of the research was that the establishment, and further existence, of second chambers in unitary states of Central and Eastern Europe is due to the combination of path dependence and institutional capture by political elites. The research has validated the starting hypothesis. Path dependency is a logical explanation of introducing bicameralism in newly-democratic political systems of Central and Eastern Europe. Hence, the first part of the hypothesis has been confirmed, both in the cases of Poland and Romania, where a historical narrative was used to (re)establish their respective Senates, as well as in the cases of the Czech Republic and Slovenia, where institutional frameworks suitable for federal states (which both were parts of), were kept once those countries gained their independence and became unitary in their nature.

But we also needed an explanation that would help us understand why have second chambers survived in our four cases, both in the light of evidence that second chambers do not necessarily enhance the democratic process, and knowing that countries with similar political systems (unitary, parliamentary, states) have already abolished their second chambers (e.g. Denmark, Sweden, and Croatia).

Lijphart (1991, ix–x) concludes that a main reason for maintaining an institution when a system obviously has no need for it can be found in institutional conservatism, i.e. the reluctance of democratic systems to change the institutional framework that has been there for a while, and that obviously has no destabilizing effect on the political system. But it seems that institutional conservatism can be a tool as well, meaning that elites are interested in maintaining the *status quo*, not because they think the system still needs it, or because of some historical sentiment, but because of their intent of using it to gain more power.

The tendency of political elites to accumulate (or capture) power, and to reward loyalty with sinecures, turns second chambers into institutions of empty chairs ready to be filled with followers who will further the interests of the elites, and will help them accumulate or maintain even more power. This question, however, deserves more thorough research focused on in-depth interviews with politicians in the studied countries. As it was not possible at this moment, it remains as a separate hypothesis to be tested. But sufficient examples of the ways second chambers have been elected and how they acted in decision-making processes in their respective countries give us confidence to proclaim political elite capture is a major reason for maintaining (but also for abolishing) second chambers.

All in all, as Olson and Longley (1991, 226), conclude, the decision to abolish a bicameral parliament rests squarely in the hands of political parties and is formulated on the grounds of party interests, as well as self-interests of party members. Bicameralism will be abolished if political actors in the first chamber feel limited in exerting power by the intransigence of their second chamber counterparts, and they see no way of capturing the second chamber for themselves in a short period (due to differing electoral processes). They could decide to introduce unicameralism when they decide powers they could gain from holding an institution are outweighed by the costs of maintaining it. This is especially so if their move to abolish the second chamber could be viewed positively by the public, which sees no reason for keeping an obsolete institution. Even in that case, political parties work with their own interest in mind. If they see obvious gain in maintaining an institution that has obviously lost legitimacy in the eyes of the public, they will try and keep it, even if it destabilizes the system.

As Olson and Longley (1991, 218) state, cameral change is not a normal issue that can be done whenever actors feel like it and without major repercussions. Those changes are, therefore, not done frequently. As previous examples of change from bicameral to unicameral legislatures (New Zealand, Denmark, Sweden, and Croatia) attest, only a few countries have decided to undergo such a profound change. Reasons behind it are different, but can surely be attributed to institutional

conservatism on the one hand, and self-interest of political elite on the other hand. That does not mean one cannot show that without the necessary adjustments, conservatism can lead to intransigence, which can allow for institutional capture and for the destabilization of the democratic foundations of the political system.

References

Ball, Alan R. and Peters, B. Guy. 2005. *Modern Politics and Government.* Basingstoke: Palgrave Macmillan

Bennet, Brian. 2011. *The Last Dictatorship in Europe.* London: C. Hurst & Co.

Boix, Carles, Michael Miller, and Sebastian Rosato. 2013. "A Complete Data Set of Political Regimes, 1800–2007." *Comparative Political Studies* 46 (12): 1523–54. doi:10.1177/0010414012463905.

Čepo, Dario. 2007. Uloga drugih domova u političkim sustavima Poljske i Rumunjske. *Anali Hrvatskog politološkog društva* 4: 171–188.

Čepo, Dario. 2013. Snažni bikameralizam u SAD-u i SR Njemačkoj: izvor za reformu Vijeća Europske unije. *Politička misao* 50: 163–189.

Čepo, Dario. 2016. Parlamenti i skupštine: demokratski deficiti Parlamentarne skupštine Bosne i Hercegovine. *Studia lexicographica* 8: 55–75.

Donno, Daniela. 2013. "Elections and Democratization in Authoritarian Regimes." *American Journal of Political Science* 57 (3)~~. University of~~: 703–16. doi:10.1111/ajps.12013.

Hartmann, Jürgen. 2006. *Politički sustavi Velike Britanije, SAD i Francuske.* Zagreb: Politička kultura.

Haggard, Stephan and McCubbins, Matthew D. (eds.). 2001. *Presidents, Parliaments, and Policy.* Cambridge: Cambridge University Press.

Ioffe, Grigory. 2004. Understanding Belarus: Economy and Political Landscape. *Europe-Asia Studies.* 56: 85–118.

Joyal, Serge. 2003. *Protecting Canadian Democracy: The Senate You Never Knew.* Montreal: McGill-Queen's Press.

Kasapović, Mirjana. 2005. *Bosna i Hercegovina – podijeljeno društvo i nestabilna država.* Zagreb: Politička kultura.

Laver, Michael and Shepsle, Kenneth A. 1996. *Making and Breaking Governments: Cabinets and Legislatures in Parliamentary Democracies.* Cambridge: Cambridge University Press.

Lijphart, Arend. 1977. D*emocracy in Plural Societies.* New Haven: Yale University Press.

Lijphart, Arend. 1984. *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries*. New Haven: Yale University Press.

Lijphart, Arend. 1991. Foreword: 'Cameral Change' and Institutional Conservatism. In: *Two into One: The Politics and Processes of National Legislative Cameral Change,* edited by L. D. Longley and D. M. Olson. Boulder: Westview Press.

Longley, Lawrence D. and Olson, David M (eds.). 1991. *Two into One: The Politics and Processes of National Legislative Cameral Change.* Boulder: Westview Press.

Longley, Lawrence D. and Olson, David M. 1991. The Politics and Process of National Legislative Cameral Change. In: *Two into One: The Politics and Processes of National Legislative Cameral Change,* edited by L. D. Longley and D. M. Olson. Boulder: Westview Press.

Ludwikowski, Rett R. 1996. *Constitution-making in the Region of Former Soviet Dominance.* Durham: Duke University Press.

Merkel, Wolfgang. 2011. *Transformacija političkih sustava*. Zagreb: Politička misao.

Mill, John Stuart. 1989. Razmatranja o predstavičkoj vladavini. In: J. S. Mill. *Izabrani politički spisi.* Zagreb: Informator i Fakultet političkih nauka.

Mitchell, Jeremy and Davis, Anne. 1993. *Reforming the Lords.* London: Institute for Public Policy Research.

Morgenbesser, Lee. 2014. "Elections in Hybrid Regimes: Conceptual Stretching Revived." *Political Studies* 62: 21–36.

Nohlen, Dieter. 1992. *Izborno parvo i stranački sustav.* Zagreb: Školska knjiga.

Olson, David M. 1996. *The Czech Senate: From Constitutional Inducement to Electoral Challenge.* East European Constitutional Review. 5: 47–50.

Olson, David M. and Longley, Lawrence D. 1991. Conclusions: Cameral Change Politics and Process in Three Nations and Beyond. In: *Two into One: The Politics and Processes of National Legislative Cameral Change,* edited by L. D. Longley and D. M. Olson. Boulder: Westview Press.

Pasquino, Gianfranco. 2002. The Italian Senate. *The Journal of Legislative Studies.* 8: 67–78.

Peters, Guy B. 1999. *Institutional Theory in Political Science. The 'New Institutionalism'.* London: Continuum.

Pepinsky, Thomas, ~~Jason Brownlee, Valerie Bunce, Jennifer Gandhi, Barbara Geddes, Kenneth F. Greene, P. A. Hall, et al.~~ 2014. "The Institutional Turn in Comparative Authoritarianism." *British Journal of Political Science* 44 (3). Cambridge University Press: 631–53. doi:10.1017/S0007123413000021.

Ramet, Sabrina. 1993. Slovenia's Road to Democracy. *Europe-Asia Studies*. 45: 869–886

Robbers, Gerhard (ed.), 2004. *Reforming Federalism – Foreign Experiences for a Reform in Germany.* Frankfurt am Main: Peter Lang.

Roller, Elisa. 2011. Reforming the Spanish Senate: Mission Impossible? *West European Politics.* 25: 69–92.

Roper, Steven D. and Crowther, William. 1998. The Institutionalization of the Romanian Parliament: A Case Study of the State-Building Process in Eastern Europe. *Southeastern Europe Political Review.* 26: 401–426.

Ross, Cameron. 2003. Putin's Federal Reforms and the Consolidation of Federalism in Russia: One Step Forward, Two Steps Back! *Communist and Post-Communist Studies.* 36: 29–47.

Russell, Meg. 2000. *Reforming the House of Lords.* Oxford: Oxford University Press

Russell, Meg. 2001. What are Second Chambers for? *Parliamentary Affairs.* 2001; 54: 442–458.

Salamey, Imad. 2009. Failing Consociationalism in Lebanon and Integrative Options. *International Journal of Peace Studies.* 14: 83–105.

Shugart, Matthew S. and Carey, John M. 1992. *Presidents and Assemblies.* Cambridge: Cambridge University Press.

Silitski, Vitali. 2005. Preempting Democracy: The Case of Belarus. *Journal of Democracy.* 16: 83–97.

Swenden, Wilfried. 2004 *Federalism and Second Chambers.* Brussels: Peter Lang.

Temperley, Harold W. V. 1910. *Senates and Upper Chambers.* London: Chapman and Hall.

Tsebelis, George and Money, Jeannette. 1997. *Bicameralism.* Cambridge: Cambridge University Press.

Uhr, John, Bach, Stanley, and Massicotte, Lois. 2011. Bicameralism and the Dynamics of Contested Transition. In: *How Power Changes Hands,* edited by : Hart, Paul and Uhr, John. Basingstoke: Palgrave Macmillan.

Sources

http://democracyranking.org/wordpress/?page_id=738 (last visited on 22 September 2016)

http://www.freedomhouse.org/report/freedom-world/freedom-world-2013#.Uzm-b_l7ISV (last visited on 14 May 2016)

http://www.slovenia.si/slovenia/state/constitution/ (last visited 22 September 2016)

Ketrina Çabiri Mijo and Adela Danaj

Explaining the Trajectories of Post-Communist Democratization. The Case of Albania

Abstract: After the fall of the communist regimes, the countries of Eastern Europe opened their gates to new democratic systems. Democratization started to take place in every country in the region, although unequal steps were taken by each country to start this process from scratch. Our research aims to find out what explains democratization processes after the fall of communism. In order to provide an answer to this, the paper will examine the democratization trajectories in Albania, given that Albania embraced a specific communist regime.
~~Considering the communist legacy, one of the most important characteristics of the regime, the authors use the empirical case to explain how the communist legacy affects the democratization process.~~

Introduction: Democracy and democratization – the theoretical framework

The concept of democracy originates from ancient Greece. 'Democratia' means the rule of the people. From that time the concept has changed and as David Held puts it, 'the history of the idea of democracy is curious; the history of democracies is puzzling' (1996, 1). In this light, the idea of democracy has been advanced over centuries and it is still a dynamic concept that changes over time and space. Scrutinizing the literature one finds that a general and overall definition of democracy does not exist. What makes the concept difficult to define is, as Sartori says, 'the fact that it is both a normative and an analytical concept' (1987, 8). A normative approach to democracy involves telling people what they should do, rather than simply describing what is done. Sartori goes on to explain that 'the democratic ideals do not define the democratic reality and vice versa, a real democracy is not, and cannot be, the same as an ideal one' (1987, 8). However, a consolidated democracy is considered to be very close to an ideal pattern of democracy. When describing consolidated democracy and its categories, scholars' arguments compensate each other and almost reach a sophisticated concept of democracy. According to Cheema, a consolidated democracy means a functioning and respected "political society"; a fair and free electoral system; a social and political environment conducive to the growth of civil society; and the rule of law (2005).

Other scholars of democracy and transition argue that a democracy cannot be called consolidated if the following conditions do not exist:

> First the conditions must exist for the development of a free and lively civil society. Second, there must be a relatively autonomous and valued political society. Third, there must be a rule of law to ensure legal guarantees for citizens' freedoms and independent associational life. Fourth, there must be a state bureaucracy that is useable by the new democratic government. Fifth, there must be an institutionalized economic society (Linz and Stephan 1996, 7).

Linz and Stephan add the two latter categories to the concept of consolidated democracy, allowing for the concept to be more completed. In this vein, one of the most applied definitions of a consolidated democracy is given by Freedom House, which offers additional space by widening the concept into seven categories: electoral process; civil society, independent media, national democratic governance, local democratic governance, judicial framework and independence, corruption. (Countries Report 2008)

Theorizing the communist legacy

Communism was a system that changed world history. According to Ekiert 'communism had the most important impact on specific paths of reform and types of transformations unfolding across the region during the first decade of post-communism' (2003, 89). Eastern European countries adopted a western example that parachuted in the eastern part of Europe. However, it is important to notice that post-communist countries experienced different levels of communist legacies, and as a consequence their approach to democratic norms was different. In countries where communist regime was not very repressive, democratic norms leaked into segmented parts of the society trying to amortize communist rule, while in countries where the communist regime was strongly established by repressing the people, democratic ideas and principles were alien and hostile to the given society. After this diversity of communist experience, countries faced different levels of democratization. In one author's definition democratization in CEE countries is a process that is strongly affected by the legacy of the communist regime. Vachudova points out that 'the most important factors shaping the political and economic trajectories of Eastern European states after communism are found among the legacies of the past' (2005, 21). Having said that, 'the shortcomings of the old regime will excuse faults in the performance of the new regime' (Rose 1998, 63). Thus, claiming that democratization is affected by the type of the previous regime, the current situation on the level of democracy shows that in some countries the divorce from communism was only formal. Scholars like Rupnik are pessimistic

enough to claim that 'for the people of Eastern Europe, the past, to use Faulkner's phrase, is never dead. It is not even past' (1989, 36).

The lack of democratic experience for some countries made it difficult to perform in a democratic environment. Such countries showed enthusiasm in overthrowing the old system, while they didn't have the necessary experience, skills and structures to replace it with a new democratic one. As Holmes puts it 'post-communism is better understood as the rejection of the communist power than as a clear-cut adoption of an alternative system' (1997, 13). According to Rose 'in a post-communist society, there is no escaping from the legacy of the communist regime' (1998, 142). Actually, communist legacy is an available explanation for each post-communist country's trajectory to democracy, but depending on the regime's repressiveness, its legacies are stronger for some countries and weaker for others. According to Rose, 'a new regime can receive a ”soft” or a ”hard” legacy from its predecessor depending on the extent to which the predecessor respected the rule of law, tolerated institutions of civil society and had institutionalized electoral competition and accountability' (Rose 1998, 63). Other authors, including Lijphard and Crawford, explain the types of legacies communist regimes have left behind. They specify six fundamental legacies: 'the history of ”backwardness”, the absence of a successor elite, weak party system, interrupted nation building, the persistence of old institutions, the legacy of the command economy – that may affect post-communist transformations' (1995, 179). Correspondingly, Hanson identified four components of Leninist Legacy: 'ideological, political, socioeconomic, and cultural – that may have different impacts and varying capacities to persist' (1995).

While exploring all these models established in order to explain the type and weight of the communist legacy, we find that the literature does not clearly explain how communist legacy impacts the democratisation. Different variables are offered to explain the trajectory of democracy, for example, the impact of the social-economic structure of communism, the pace of transition, etc. Demography as a social structure and industrialization as an economic structure, shaped under the democratic regime, might impact the development of the new system. However, our research presents a theoretical model which examines the impact of communist legacy in the democracy system. For this reason, the model explains that the lack of opponents and the lack of democratic culture influence the communist legacy (independent variable) that explains democratization process (dependant variable).

The legacy of communist repression and its impact

The model of the impact of communist legacy in the democratic consolidation process considers the former as a paramount factor which explains the democratization process.

Legacy of communist regime → lack of opponents and political culture → weak democratic leader → unstable institutional choices → weak democratization process

Following Rose's terminology, when communist legacy is strong, the communist rule has been highly intolerant of civil society, institutionalized electoral competition, accountability, etc. What is more important is that under such regimes contestation doesn't exist and as a result there are almost no opponents or dissidents of the regime. In such regimes, if dissidents are noted, they are immediately eliminated. Having said this, in order to have a softer communist legacy, the existence of opponents within the communist regime is seen as a very important element. As Vachudova puts it, 'the quality of political competition, which determined whether the state embarked on what she called a liberal or illiberal pattern of change after 1989, was initially determined by the presence or absence of an opposition to communism' (2005, 21). Political culture refers to the collective opinions, attitudes and values of individuals about politics. When people lack democratic culture, they are likely to apply the old communist culture in implementing the new lifestyle of the new regime. In the new emerging system, the cultural patterns starts to change but the mentality of people and new leaders remains the same. Quoting Rose 'the past does not disappear when one constitution supersedes another; it persists in the values and beliefs of politicians and citizens to accept the cultural norms of the previous regime' (1998, 44). Although the institutions can be built according to democratic patterns, the communist culture constitutes a tough component that affects democratic principles. While the regime changes, the new political class is a mixture of the old elites and new politicians. Emerging from a system with no opponents and an inherited communist culture, leaders in newly established democracies come to power by promising a democratic system, without knowing what democracy means. Leaders implement communist patterns while propagandizing that they are walking into a democratic path. They tend to be strong leaders with centralized power. It is further argued that their institutional choices are far from democratic. The party system tends to be a highly polarized two party system, with strong political leaders. Alliances are unstable and parties change the rules of the game in accordance with their interests. Electoral code is usually an expression of big parties' interests and elections tend to be manipulated and corrupted, which means putting in

doubt the legitimacy of the new government. Thus, political actors make choices dictated by their political culture and the so-called democratic institutions remain democratically unstable. As a summary of the above arguments, Kitschelt points out that 'democratic institutions themselves depend on legacies, because they are endogenously chosen by political actors emerging from the old pre-democratic system' (Kitschelt et al 1999, II)

Theories of democratization

When analysing the trajectories to democracy in the CEE countries, scholars try to shed light on factors which might have influenced this trajectory. Among several theories, there are three popular theories found in the academic literature.

The institutional theory explains that 'changing institutions are expected to produce changes in behaviour and values of individuals, because it alters the incentives, rules and constrains' (Rose 1998, 143). This theory supports the idea that the right way of establishing institutions will generate the right response from people, as they are rational and will behave properly in order to maximize the good performance. This theory is contra argued by the legacy theory, which explains that 'historical legacies determines the available alternatives and make some institutional choices more likely' (Ekiert and Hanson 2003, 93). Thus, the institutional choices are not just ones made by neutral actors in neutral environments. They are affected by the political culture of the leader, the socio-economic structures of the county and the mentality of people. In this vein Bunce argues that 'in post-communism, political institutions seem to be more a consequence than a cause of political developments' (1995, 97). Institutional theory provides a weak explanation for the trajectory to democracy, as it fails to explain how institutions emerge and how people perceive the right and the wrong institutional choice.

The other theory that explains democratization is based on political actors' choices. As Michael McFaul wrote, 'inert, invisible structures do not make democracies or dictatorships. People do' (2002, 214). As a matter of fact, something is true in this statement, but democracy is not only about what someone decides, it is more about how this decision is absorbed by the society. Starting from scratch, this theory misleads attention. An actor's choices are a consequence of the actor's political values, their knowledge of the democratic system and their will to implement reforms. All these variables do not emerge in one day, as decisions sometimes do, but they root in the actor's background, which is shaped by the communist regime. Emerging from a strong communist regime, new leaders are former communists who transport the communist political culture from one system to the other. The second argument against this theory is that political op-

tions are set in accordance to the social and economic structures of the society, thus actors are restricted in their choices.

The international factor theory focuses on the influence of international actors like the EU, as the engine of democratization. According to Linz and Stephan 'international factors decisively shaped all phases of transition: the deconstruction of the old regime, the transfer of power, and the consolidation phase' (1996, 235–44). It is true that international factor (EU) was a very important actor in the turmoil of democracy in the former communist countries but there are several reasons that explain why the international factor was not the engine of democratization. Firstly, the EU was more a promoter of democracy that showed the way to democratization. In this perspective Pridham claims that 'EU conditionality trades more on persuasion and temptation than coercion' (2000, 298). Countries were looking at the EU as a democratic model which could help more in the stabilization process than in the democratization process. Another argument against the importance of the EU impact in the democratization process explains that the EU cannot impose rules that can be absorbed by people on a national level on an easy way, unless these rules come from the people. Kubicek points out that 'the effectiveness of international norms is conditioned by the saliency of the norms and the context of domestic policy debate' (Kubicek 2003, 13). Similarly, John Pevehouse claims that 'most democratization studies present regime transitions as the outcome of a domestic political process that is not influenced by actors outside the nation-state. Even literature sympathetic to international factors relies on domestic processes to explain regime change' (2002, 517). While the EU was promoting a similar democratic baseline for each country, CEE countries differed from each other in their implementation of democracy, due to their political past.

The next chapter will describe the democratisation process in Albania, as a study case characterized by a difficult trajectory to democracy. Its aim is to provide a descriptive overview of the democratization trajectory and the state of the consolidation of democracy for the period 1997 (the year of Pyramid Schemes) to 2006 (the year when the Stabilization and Association Agreement was signed), considering the lack of opponents and the lack of democratic culture which hampered the trajectory to democracy.

The Albanian trajectory to democracy

When the old communist system collapsed in 1990, Albania's road to democracy was unavoidable. At the beginning of its journey to democracy, the country was expected to be almost similar to the other countries in the region, but these analyses coming from west, failed in the face of the different reality of Albanian politi-

cal events. Metaphorically, the state of democracy in Albania is described by the Freedom House report with the following metaphor: 'Albanian democratization brings to mind the legend of Sisyphus: It is marked by periods of progress followed by serious setbacks that brings it repeatedly to the starting point' (Freedom House 2006). In the history of Albanian transition, the biggest backward step was the economic failure in 1997, and as a result the political collapse that the country experienced. During the 1997 events, in the country there were no rules, political and state institutions were frozen or destroyed.

In order to describe the democratization process of Albania, the right and freedom, the performance of governance, etc., we have used the Freedom House findings. This decisions is based on the strengths of that research's methodology. Firstly, Freedom House methodology only not measures the existence of laws but also the implementation by the government and secondly, they make tailor-made/multiple interpretations, using specific criteria to decide which category the country or territory falls into.

With reference to the Freedom House fields of analysis, in the following section we will scrutinise seven areas to analyse the state of democracy and the process of consolidation. The table below will show numerically, how the arenas of democracy have been rated based on their democratic performance.

NIT Ratings	1997	1998	1999	2001	2002	2003	2004	2005	2006
Electoral Process	4.25	4.50	4.25	4.00	3.75	3.75	3.75	3.75	3.50
National Governance	N/A	N/A	N/A	N/A	N/A	N/A	N/A	4.25	4.00
Civil Society	4.25	4.25	4.00	4.00	3.75	3.75	3.50	3.25	3.00
Independent Media	4.75	4.75	4.50	4.25	4.00	4.00	3.75	4.00	3.75
Local Governance	N/A	N/A	N/A	N/A	N/A	N/A	N/A	3.25	2.75
Judicial Framework and Independence	N/A	N/A	N/A	N/A	N/A	N/A	N/A	4.50	4.25
Corruption	N/A	N/A	6.00	5.50	5.25	5.00	5.25	5.25	5.25
Democracy Rating	N/A	N/A	N/A	N/A	N/A	N/A	N/A	4.04	3.79

Source: Freedom House, 2006

According to the Freedom House scores, level 1 is a consolidated democracy and level 7 is a consolidated authoritarian regime. For the period studied above, one can realize that Albanian democracy consolidation is approximately in the middle. A slight improvement can be observed over the years in the seven areas. From a Local Governance perspective Albania is very close to a consolidated democracy, but with respect to Corruption, the country is oriented toward a consolidated authoritarian regime. As it will be analysed below, corruption is mainly spread in governance and the juridical framework, which are also ranked as two very problematic categories.

What explains democratization in Albania?

All CCE countries emerged from communist regimes, but as Linz and Stephan argue, the communist regimes were in fact different. (Linz and Stephan 1996).

For five decades Albania was under a communist regime that was established right after World War II as a pure form of the totalitarian regime. In Albania the communist system found it easy to be institutionalised, as the county didn't possess a tradition of statehood and its social, political and economic structures, following the example of other European countries, were fragile or to some extent didn't even exist. Thus, Albania was among the countries that 'had little tradition of civil society before communism-it never developed the liberal, bourgeois class of citizens commonly associated with the flowering of civil society in Western Europe' (Di Palma 1991). According to Linz and Stephan, 'a totalitarian regime is defined as having eliminated all pre-existing political, economic and social pluralism; has a unified, articulated ideology; has intensive and extensive mobilization; and has a leadership that rules, often charismatically, with undefined limits and great unpredictability and vulnerability for elites and nonalike' (Linz and Stephan 1996, 40). Following this argument, Albania presents three aspects which make the country an interesting case study to understand the impact of communist legacy on trajectories of democracy.

Firstly, Albania presents a highly repressed communism. 'Albanian communist regime was considered to be the most repressive and tough regime in the region' (see Bogdani, Loughlin 2007 and Biberaj 1999). Political life was centralized in the hands of one of the most repressive leaders of the world, Enver Hoxha. According to the prevailing ideology, everything was inside the state, nothing outside the state, thus private life belonged to the collective community and it was treated under severe conditions and oppression. 'The communist leadership insisted in society's total obedience to its rule and extended control over all aspects of social political and economic life' (Goldman 2000, 53).

Hoxha was the party general secretary, the prime minister, the foreign minister, and the commander in chief of the military. The party was in charge of keep-

ing the regime 'clean' from capitalist ideology or non-communist elements that were called 'bad seed'. Hence 'the regime was characterized by the elimination of possible political opposition; the elimination of intellectuals and dissidents; the abolishment of religious practices; and the harshest political persecution' (Biberaj 1999). This repression in political and social life was followed by collectivism in the economic sphere as well. As Tafili puts it, the 'private property, was completely banned, and farmers were forced to join cooperatives and to collectivize their livestock, economy'. Following this tactic, the economic situation was getting harder, especially after the late 70s when the collectivist policy was implemented. Because of this policy, Albania remained the least economic developed country in Europe. 'The low GDP per capita put it firmly in the African category of low income countries' (Fowkes 1999, 72).

This small and strange state called Republika Popullore e Shqipërisë (People's Republic of Albania) was never meant to be changed in liberal terms, considering that the regime was strong enough to suppress every little anti-communist movement.

The second aspect is related to the isolation that characterized Albania, especially during the late years of the regime. According to Freedom House, 'former dictator Enver Hoxha's xenophobic communist regime turned Albania into the most isolated country in Europe'[1]. While other communist countries were pursuing some liberal reforms, Albania was more and more closing itself into isolation. In fact, Albanian communism came into power with the help of the Yugoslavian communist party, and initially both implemented the ideology of Marxism-Leninism. However, the Albanian dictatorship was strictly loyal to Stalinism and wherever reforms appeared to liberalize the system, measures were taken for these reforms to stop. After breaking the alliance with Yugoslavia, Soviet Union and finally China, in 1976 communist Albania found itself completely isolated. Hoxha always joined an alliance which provided him with economic assistance. However, he did not accept the economic aid provided by any of the democratic countries, even when other communist countries did. That is a reason why the human rights-based foreign policies of the Western countries, initiated by U.S. President Carter in the 1970s (Bozoki 2008, 5), didn't reach Albania, as a country that was hostile to such democratically inspired initiatives.

The third argument that distinguish Albanian communist regime is its longitude. Albanian communism lasted a longer period than it did in other countries. The Communist Party, later the Labour Party, was founded in 1941 and held a

1 http://www.freedomhouse.org/template.cfm?page=22&year=2006&country=6906

complete monopoly on political power in the country from 1944 to 1990. At this point, it is worth mentioning that 41 out of 46 years the communist system was controlled by the same dictator, Enver Hoxha. Despite the fact that the regime was one of the earliest established in the region, it was also the last to collapse. 'By the end of '80s unlike other countries of eastern communist block where the "velvet revolutions" had started their irreversible way toward democracy, Albania seemed to slumber in a long lethargic sleep un awakened by the events sparked off by Gorbachev in the Soviet Union' (Bogdani and Loughlin 2007, 21). Stalin's statue in Tirana was removed only in December 1990, after all other countries had already entered the transition process.

The communists under the leadership of Alia tried to resist changes but efforts were useless at the time, because there was an urgent need for reforms. There were changes all over the region, especially the revolution in Romania that made the communist leadership in Albania aware that the popular fluster could lead to extreme and risky events. Thinking that some slight reforms would tranquilize the masses, and meanwhile trying to avoid the collapse of the regime, 'in February 1990, Alia was pushed for some degree of economic liberalization, to allow people to travel abroad, to abolish death penalty for illegal emigration and lift the restrictions on religion practice' (Goldman 2000). Nevertheless Alia refused to shed light and liberalize the main factors which would lead to a democratization process, thus the party's monopoly of power remained untouched.

The influence of the communist legacy in the democratic trajectory in Albania

Albanian transition was much more difficult than that of other countries, because the social, political and economic structures that establish the democracy were never experienced during communism in any form. Political culture and institutional choices were strongly shaped according to a pure communist regime. As Biberaj argues, 'the Albanian road to democracy was strewn with land mines in the form of the cumulative political, economic and social legacies of Hoxha's communist dictatorship, which made genuine democratization seem almost impossible' (1999, 71). The communist regime was long and isolated enough not to be criticized by externals and in Linz and Stephan's terminology, communism was the only game in the town. Therefore post 90's Albania was not similar to a democratic country, it was a post-communist country rather, which could be better defined as a hybrid regime finding it difficult to get rid of the chains of the totalitarian past.

The impact of the legacy of communist repression

The tough Albanian communist regime was characterized by strong repression, thus any contestation to the regime was assimilated before it could potentially pose a danger for the system. Linz says that there are two factors that characterize the repression of a non-democratic regime, 'first the extent to which they tolerate or repress a plurality of ideas and institutions and secondly, the extent to which they mobilize their subject or are indifferent to what the masses do' (1975). Knowing that the Albanian communist regime was extremely strong, in Linz's world it didn't allow pluralism, it controlled masses, it caused lack of democratic culture and lack of opponents.

Lack of democratic political culture and opponents

Political culture is a very important factor which can guide successful democratic processes or can become a serious obstacle for the democracy to consolidate. While political structures can be changed by instant decisions, the mentality of politicians requires a long time to change. Thus, when implementing a new political system, old political culture will still remain. 'Kubicek's hypothesis of the 'cultural match' seems to be verified in Albanian case. It appears that the cultural gap between the Albanian elite and the EU was much shaped by Albania's former communist legacy' (Gjomema, 2007).

For five decades communism in Albania shaped people's mentalities to think through communist filters. The people was one single unit; no one was allowed to be against the system. One of the main features of the communist regime was the idea to always have an enemy. This fear threatened the 'we-ness' among people. In this vein, the political system in Albania is characterized by the polarization of political forces, which means looking at everyone who is not 'like us' or 'with us' as a criminal actor. To quote Rakipi, 'the polarization of Albanian politics is largely based on the ideological "baggage" of the social divisions of the communist era' (2004). There were many others cultural aspects of communisms that have influenced the new regime. As Bogdani and Loughlin argue, 'the country's self-imposed international isolation, left a legacy of political passivity and backwardness, thus Albania had no points of reference apart from those given by the regime' (2007, 23–24). This legacy of political passivity and backwardness, associated by the mentality of corruption, disinterest and intolerance, was transmitted to the new regime. As Rose explains, 'the legacy of corruption from the command economy remained' (1998, 67). Corruption was found at the decision-making levels of government and favouritism was common at lower levels also. In

communism appointments were made based on personal interests. This is quite similar to post-communist Albania. Public administration in Albania is composed by militants of the party in power or by people with personal connection to the elites. Even after decades of transition, EU Commission reports still point out a "politically motivated staff turnover" (Commission Staff Working Document: Analytical Report 2010, 15) and that "public service remains overly politicised" (Enlargement Strategy and Main Challenges 2014–15, 20).

Weak democratic leader's performance

The lack of democratic political culture made it difficult for new leaders to perceive democratic system and basically they did not know how to deal with the new alternative that was emerging. To quote Goldman, 'while they wanted democracy for Albania, it looked like they didn't understand the meaning of it or how it worked' (2000, 70). Political leaders of the early years of transitions could be divided into four background groups. There were leaders who, after the communist regime collapsed, stayed in power. They used to hold political positions and with the change of the regime they converted themselves into the new communist-socialist party. The other category of leaders was composed of well-educated people during communism, who held important but non-political positions. Another category was made up of persecuted people, who in one way or another were categorized as dissidents during communism. In the last category there were random activists that became part of the new leadership. In different ways all leaders shared the same characteristics inhered from the communist regime. As Nordlinger points out, 'post-communist isn't so "post". They still think like communists and act like communist. They have not developed democratic ways of living, dealing and governing' (2005). That explains the lack of essential political skills such as tolerance, compromise or negotiation. New political leaders were used to seeing politics as dominated by a strong and charismatic leader, who represents the party. This communist mentality became a real obstacle to the consolidation of Albanian democracy. As Fish would argue the 'creativity of actors, is constrained by the experiences of the past' (1999). The leader of DP, Sali Berisha had been the secretary of the Party of Labour to the medical school of the University of Tirana (Tarifa and Lucas 2006). The leader of SP, Fatos Nano held important political position during the previous regime as well. New leaders were using old government, showing that it was almost impossible to divorce from the past. 'It did not take long for Berisha, like communist Enver Hoxha before him, to turn authoritarian. His political actions, shows how similar he was compared to the successor leaders. He amassed enormous political power, revived the old hate-mongering Bolshevik politics of class struggle, had independent report-

ers and opposition leaders arrested, fired critical voices from university teaching jobs, and used the courts to hound perceived enemies'[2]. Regarding the 'novelty of environment' hypothesis, Gjomema explains that 'although the DP became quickly the party of the new generation, its leader Sali Berisha was a former Communist Party member and his governing performance was shaped by the communist authoritarian system' (2007). Berisha represents an indication that shows how much a leader can be affected by communist methods and how easy it is for him to apply those methods in a country that used to be under a strong leader, full of charisma, intolerance and addicted to the party power. Following this, 'Nano's government made sure to institutionalize its position by undertaking a campaign of political dismissals following on the track of "behaving as they own the state"' (Kajsiu, Bumci, Rakipi 2002, 18).

Albanian post-communist leaders showed a poor performance as far as democracy style of leadership is concerned. In comparison to other leaders, they are ranked among the most authoritarian leaders that have ruled under democratic systems. Harvard scholar Steven Levitsky and Lucan compared Albania under Berisha to Haiti under Jean Bertrand Aristide, Malaysia under Mahathir Mohammad, Peru under Alberto Fujimori, Russia under Boris Yeltsin, Serbia under Slobodan Milosevic, and Ukraine under Leonid Kravchuk and Leonid Kuchma.

This corruptive mentality has existed since the communist rule, where collectivism allowed people to steal and misuse public property. This mentality is dominant among the new elite, as they try to make appointments based on personal networking or on the exchanging of favours. In this light all instruments used by political actors shape institutional choices they make.

Unstable institutional choices (party system, election, division of power)

Communism has shaped the political culture of the new leadership in a way that it is more likely for them to take political decisions and make institutional choices that do not match the democratic requirements of the new system. Communism also built very strong structures within the society that were difficult to be changed by the new regime.

During communism the state was identified by the party in power. Everything was done on behalf of the party that was the promoter of the ideology. The

2 The US-based Committee to Protect Journalists, in its 1997 annual report, listed Sali Berisha and Aleksandr Lukashenko of Belarus among the world's top ten "enemies of the press." See Radio Free Europe/Radio Liberty, *Newsline* 1, no. 24, 5 May 1997, part 2.

party-state formula continues to be a strong characteristic in the post-communist Albania. 'The party winning the elections is perceived as the complete ruler of the state, when it takes power, it reshapes the state by appointing its party members in the armed forces, police, secret services, foreign service, fiscal administration, customs, and even in the universities and other academic institutions. Political appointments are also practiced in the justice system and the courts of all levels'. (Rakipi 2004). Following this description, the state and politics in Albania look like a one man show.

In the communist past elections were fictitious. People used to vote but their will was manipulated by the lack of the right to choose between alternatives. This kind of communist legacy remained the same in the post-communist years. People's choices are manipulated by false promises and practices. On that account a 'political culture is being developed in which manipulation of elections has become the norm and such the unwritten law of Albanian electoral system' (Kajsiu, Bumci, Rakipi 2002, 5).

Manipulation of electoral process made the government's legitimacy doubtful and produce fragile institutions which legitimize leaders to make biased decisions on the democratization process.

Conclusion

After the overthrow of the communist system, countries of Eastern Europe were objectively orientated in establishing a liberal democracy and market economy. During this transition period it was seen that, while democracy was a concept with fixed components, democratization was a process characterized by a variety of trajectories.

Basically, this research raises the burden of the past communist regime to explain the trajectory of the present democratization. The legacy of the communist regime is the factor responsible for the democratization process and consequently gives an explanation to the variety of trajectories that have existed in the region.

When talking about a communist regime, a useful leverage is repression. By repression a communist regime closes all gates that people may have to get in contact with any way of thinking other than totalitarian. It isolates people not only physically but also psychologically. Under a repressive communist regime there are no dissidents or opponents of the regime, thus there is no way for democratic culture to spread. When it comes to building a new regime, society does not provide individuals who carry democratic culture, able to lead the country into the new system. New politicians are part of the old elite or people educated under the strict communist rules which lack any kind of democratic political culture.

In this vein leaders have a weak democratic performance, by implementing the old communist principles in a new democratic system. Their political outcome is measured by the unstable institutional choices they make. The political system is based on the old principle 'winner takes it all' and the electoral process these parties organized are characterized by an unfair electoral code and manipulated electoral process. In this light the executive power that takes the office tend to control and centralize the other powers, as a communist regime does. Thus the legacies of communist repression impact the democratization process, being an obstacle to consolidation.

References

Biberaj, Elez. 1999. *Albania in Transition, the Rocky Road to democracy*. Oxford: Westview Press.

Bogdani, Mirela and Loughlin, John. 2007. *Albania and the European Union: The tumultuous journey towards integration and accession*, London: I.B.Tauris

Bunce, Valeria. 1995. Comparing East and South. *Journal of Democracy* 6(3): 87–100.

Cheema, G. Shabbir. 2005. *Building Democratic Institutions, Governance Reform in Developing Countries*. Westport: Kumarian Press.

Crawford, Beverly and Arend Lijphard, Arent (eds.) 1997. *Liberalization and Leninist Legacies: Comparative perspective on Democratic transitions*. Berkeley: International and Area Studies, University of California.

Di Palma, Giuseppe. 1991. Why democracy can work in Eastern Europe? *Journal of Democracy* 2: 21–31.

Ekiert, Grzegorz and Hanson, E. Stephen (ed.) 2003. *Capitalism and Democracy in Central and Eastern Europe*. Cambridge: Cambridge University Press.

Fish, M.S. 1999. Postcommunist subversion: social science and democratization in East Europe and Eurasia. *Slavic Review* 58(4): 794–823.

Freedom House. 2004. Study: Slow and Uneven Progress in Balkan Democratization. New York [http://www.freedomhouse.org/template.cfm?page=70&release=45]

Freedom House. 2008. Country Report. [http://www.freedomhouse.org/template.cfm?page=352&ana_page=347&year=2008]

Fowkes, Ben. 1999. *The Post-Communist Era: Change and Continuity in Easter Europe*. London: Macmillan.

Gjomema, Eranda K. 2007. The EU and Consolidating Democracy In Post-Communist States – The Democratization Process in Albania. University of East Anglia: PSI Papers in Culture, Ideas and Policy.

Goldman, Milton. 2000. *Revolution and Change in Central and Eastern Europe*. N.Y.: M.E. Sharpe.

Hanson, E. Stephen. 1995. The Leninist Legacies and Institutional Change, *Comparative Political Studies*. 28(2): 306–14.

Held, David. 1996. *Models of democracy.* California: Stanford University Press.

Holmes, Leslie. 1997. *Post-Communism: An introduction*. Cambridge: Polity Press.

Kajsiu Blendi, Bumci Aldo, Rakipi, Albert. 2002. *Albania -a Weak Democracy a Weak State.* Tirana: Albanian Institute for International Studies.

King, Roger and Kendal, Gavin. 2004. *The State, Democracy & Globalisation*. Basingstoke: Palgrave Macmillan.

Kitschelt, Herbert, Zdenka, Mandfeldova, Radoslaw, Markowski and Gabor, Toka. 1999. *Post-Communist Party System: Competition, Representation and Inter-Play Cooperation*. Cambridge: Cambridge University Press.

Kubicek, Paul. 2003. *The European Union and Democratization*. London: Routledge.

Levitsky Steven and Way, A. Lucan. 2003. *Autocracy by Democratic Rules: The Dynamics of Competitive Authoritarianism in the Post – Cold War Era*. Paper presented at the conference "Mapping the Great Zone: Clientelism and the Boundary between Democratic and Democratizing," Columbia University, 4–5 April 2003

Linz, J. Juan. 1975. Totalitarian and authoritarian regimes. In *Handbook for political Science*, vol.3, edited by Fred I. Greenstein and Nelson W. Polsby. 175–411. Reading, Mass: Addison-Wesley.

Linz, J. Juan and Stepan, Alfred. 1996. *Problems of democratic transition and consolidation*. Baltimore and London: The John Hopkins University Press.

McFaul, Michael. 2002. The fourth wave of democracy and dictatorship: Non-cooperative transitions in the post-communist world. *World Politics* 54: 212–244.

Pevehouse, C. John. 2002. Democracy from the Outside-In. *International Organizations and Democratization*, 56: 515–549.

Pridham, Geoffrey and Lewis, Paul G. 1996. *Stabilising Fragile Democracies, Comparing new Party Systems in Southern and Eastern Europe*. London and New York: Routledge.

Rakipi, Albert. 2004. Understanding the Balkan Democratization Processes – a Liberal Approach. *Südosteuropa Mitteilungen* 4, 7893 [www.ceeol.com].

Rupnik, Jacques. 1989. *The Other Europe*. New York: Pantheon.

Redford, Dan, Tafili, Najada, Stefania, Elton and Karagjozi, Blerina. 2005. *One Member One Vote*. *An Essay Summary*. Tirana: NDI.

Sartori, Giovanni. 1987. *The Theory of Democracy Revisited, Part One: The Contemporary Debate*. Chatham, New Jersey: Chatham House Publishers.

Tarifa, Fatos and Lucas, Peter. 2006. Albania: Authoritarianism without Oil. *Mediterranean Quarterly* 17, 32–39.

Tafili, Najada. 2009. Consolidation of democracy: Albania. [politics.as.nyu.edu/docs/IO/7773/NajadaTafili.pdf]

Vachudova, A. Milada. 2005. *Europe Undivided: Democracy, Leverage&Integration after Communism*. New York: Oxford University Press.

Danilo Vuković

The Hollowing Out of Institutions: Law- and Policymaking in Contemporary Serbia

Abstract: In this article, I offer a sociological analysis of the law- and policymaking process in Serbia in the fields of social policy, labor and employment, education, and rural development in the period 2004–2013. The analysis is based on the qualitative data gathered through in-depth interviews with law- and policymakers, analysis of parliamentary sessions' transcripts and qualitative analysis of media reporting. The deficiencies of the law-making institutions and processes in Serbia within all three stages of the legislative process are identified: preparation of the legislation in the executive branch, public consultations, and work on the legislation within the parliament. Due to the weak institutional capacities, the executive branch is outsourcing some of its functions (such as policy analysis, policy planning and drafting, etc.), ultimately leading to the externalisation of the law-making process. Public consultations are undermined and 'form' prevails over 'substance' in this process. Finally, laws are neither prepared nor discussed in the parliament and some of its key functions (e.g. deliberation at committees and plenary sessions, amending the laws, etc.) are being transformed into performances without the necessary content. These are manifestations of the 'hollowing out' of law-making institutions – transferring institutional functions to external actors, be they formal or informal, as well as the precedence of informal over formal norms. As an outcome, institutions are transformed in empty shells; they are ineffective and deprived of their internal content and functions with low or no public trust in them.

Introduction

In this article, I offer a sociological analysis of the law- and policymaking process in Serbia.[1] Relying on qualitative research methodology, I have analysed the

1 This article is part of the project 'Identity Transformation of Serbia', which had been implemented by the Faculty of Law, University of Belgrade. The analysis is based on the qualitative data gathered through: (1) interviews with 15 randomly-selected members of parliament (ruling parties and opposition) and 12 members of working groups who were responsible for drafting laws in the fields of education, welfare, employment and rural development; (2) analysis of parliamentary sessions' transcripts; (3) qualitative analysis of media reporting. The analysis covers a 9-year period, from 2004–2013, but the research itself was carried out over one year, from 2012–2013. Some of the previous results were published in Babović and Vuković 2015; Vuković and Babović 2014; Vuković 2013; Vuković 2013b.

internal perspectives of members of parliament (MPs), politicians, civil servants and experts involved in law-making. My aim is, therefore, to demonstrate key structural features of this process, most notably the 'hollowing out' of law-making institutions. Just as Rhodes expressed in his seminal article, I share the notion that, even though institutions are not being hollowed out (Rhodes 1994, 138), there is still a clearly identifiable tendency to deprive institutions of their internal content. Like Jessop (2002), I refer to external pressures of globalization and a shift from government to governance and even take a step further in analysing a typical transitional and post-transitional experience of institutions that have been depleted of the social function, internal content and formal and informal rules which regulate their behaviour. To some extent, this process is a core element of a society that had been deconstructed during the process of post-socialist transformation (cf. Bolčić, 2013) and subsequently recorded systematically or anecdotally in numerous areas, ranging from education (Baucal andBabić 2009, Jarić ed. 2010) and economy (Arandarenko 2011, Cvejić 2002) to politics (Antonić 2006, Cvejić ed. 2016, Podunavac ed. 2011) and judiciary (Begović et al. 2004, Begović et al. 2004, Vuković, S. 2005, Marinković 2009).

Institutional transformation and performance is often measured against the background of quantifiable indicators (e.g. Zubek and Goetz 2010) and used to reform existing, or design new, institutions. However, my research does not deal with the institutional performance of the National Assembly of the Republic of Serbia, line ministries or participation and consultation mechanisms. I rely on qualitative data (and official quantitative statistics, when available) as a tool to better demonstrate typical performance patterns of these institutions –which indicate their hollowing out. In the end, my aim is to identify the social and political factors that determine this particular institutional outcome.

Socio-political Context

Post-socialist transformation led to the collapse of state monopoly over social and economic processes. Comprehensive institutional reforms were shaped by extensive new legislature. In a rather radical manner, institutional elements of the old order were often conceived as unworthy of preservation (Elster, Offe and Preuss 1998, 18) and a series of institutional changes (replacements), thus initiated. Needless to say, this made way for an even stronger set of informal structures.

In Serbia, post-socialist transformation followed a peculiar path: transformative processes towards market economy and political pluralism decelerated, and were even stunted, during the 1990s. The political elite used various means to prolong their power and drain out public resources (Antonić 2002, Bolčić 2013,

Lazić 2011). Profound social and political changes began to take place only after 2000, yet, as was visible in other post-socialist nations, they led to the increased impoverishment of large segments of the population and the further deepening of inequalities (Bogićević et al. 2003, Milanović 1998). In the Serbian case, economic recovery was slow and only affected smaller segments of the population, most notably the elite and the middle classes (Arandarenko 2011). By definition, the elite strongly influence and benefit from laws and public policies, but in the Serbian context, the middle classes were also able to influence public policies and capture various state resources (Vuković 2016).

In addition to economic decline and slow recovery, Serbia faced constant political instability: during the 1990s, it was involved in civil wars within the former Yugoslavia and fell under UN sanctions; in 1999 it was a target of NATO aggression and after 2000 it suffered from the 'unfinished' state syndrome, starting from the dissolution of former Yugoslavia, through to the union of Serbia and Montenegro, and the Kosovo and Metohija issue –the latter still remains an unsettled issue. These collective circumstances had an exceedingly negative impact on the legitimacy and the efficiency of institutions and their ability to control social, political and economic processes.[2] As a consequence, informal actors became stronger than their formal institution counterparts. The whole period after 2000 was thus marked by fraudulent privatizations and the stripping of public and state assets without any legal consequences for the new elite (Antonić 2006). Clientelistic relations penetrated all major institutional structures including the parliament, the judiciary, the government, local administrations, political parties and the media (Pešić and Cvejić 2016, 72).

The institutional decline has also taken place as an effect of globalisation and Europeanization – both of which have strengthened transnational institutions and, consequently, weakened the national ones. Globalisation leads to a decline in state sovereignty (particularly states on the periphery) and reduces their ability to make political decisions (Sasen 2006, Vuletić 2006). In Jessop's words, this is the process of 'hollowing out' the state apparatus of the national state.[3] States,

2 As Boda and Medve-Bálint demonstrate, institutional trust ranks lower in Central East Europe than in Western Europe, but in both cases higher income is correlated to higher institutional trust (Boda and Medve-Bálint 2014, 11). In the same manner, those who benefited most from the transition in Serbia were more supportive towards the rule of law. Their ability to adjust their values to the new normative framework was contingent on the new system's capacity to meet their interests (Vuković and Cvejić 2014, 72).

3 The first trend emphasized by Jessop is a general trend towards the de-nationalization of the state (or, better, statehood). This structural trend is reflected empirically in the

and particularly those that are in post-conflict and in-transformation statuses, are facing a decline in their ability to create and implement public policies and laws (cf.e.g. Bickerton et al. 2007, Chandler 2006). This function depends on internal professional and institutional capacities and the quality of the state administration (Evans, et al. eds. 1999, Fukuyama 2004).[4] The insufficiency of local resources in policy formulation has been analysed in, and across, several fields and various territories (cf. Deacon and Stubbs, eds. 2007). In such cases, apart from politicians and civil servants, policies are being drafted by international organizations, local and international civil society representatives (international and domestic NGOs, academia, experts, etc.) and by other actors. Furthermore, there was a strong ideological push towards government openness and civil society participation in law-making as a means of strengthening democracy and the accountability agenda – an initiative that has made these processes more readily available to other actors.

Although parliaments are said to be the supreme legislative bodies, it is the executive body that is typically most important. The majority of legislative proposals come from the executive branch, which usually has the expertise and resources to prepare bills and set the legislative agenda.[5] There are at least two features of post-communist parliamentary democracies relevant to this discussion:

'hollowing out' of the national state apparatus. Second, he claims, there is a trend towards the destatisation of the political system. This is reflected in a shift from government to governance on various territorial scales and across various functional domains. Third, there is a complex trend towards the internationalization of policy regimes. The international context of domestic state action has extended to include a widening range of extra-territorial or transnational factors and processes; and it has also become more significant, strategically, to domestic policy (Jessop 2002, 206–208).

4 Capacity, in this context, is the ability to formulate and carry out policies, to enact laws, to administrate efficiently, and with minimum bureaucracy, to control graft, corruption, and bribery, to maintain a high level of transparency and accountability in government institutions, and, most importantly, to enforce laws (Fukuyama 2004, 8–9).

5 The ability to reject or modify cabinets' legislative proposals, and formulate and initiate its own bills, is what distinguishes the strong parliaments from the weaker ones (Pavlović 2007, 92; Heywood 2000, 215). The strength of parliament is contingent on the electoral laws and statuses of MPs (Pajvančić 2008, Uslaner and Zittel 2006). The position of the parliament – and the relations between the legislative and executive branches – have been adequately captured by Norton: 'What is remarkable about the legislatures is not their power to say no to government but rather their reluctance to employ that power […] Party is thus crucial to explaining the limited capacity, or viscosity, of parliaments to constrain government' (Norton 1998, 192–193).

1. *Cabinets are strong and parliaments are weak*, as opposed to the early days of transition, when parties were not yet consolidated and in which parliaments exercised the ability to amend, or reject, the cabinet's bills. Today, cabinets manage to establish and maintain control over the parliaments, due to various factors: the general strengthening of the executive branch (e.g. ministries, administration, policymaking or advisory bodies), the EU integration process, the need to introduce new legislature, etc. (Zubek and Goetz 2010; Kopecký 2004).[6]
2. *The law-making process is intensive*. In order to meet the requirements of harmonization with the EU legislation, countries have adopted a fast-track legislative procedure (Ágh 1997, Goetz and Zubek 2007, Kopecký 2004, Pettai and Madise 2006). For example, in Lithuania, legislation could be passed using 'urgency' or even 'special urgency procedures', which allow time limits between readings to be reduced to just three hours (Pettai and Madise 2006, 298). In Hungary, the Government overused 'urgency' and proposed many draft laws which had not originally been put on the legislative agenda (Ágh 1997, 425–426). The same findings apply to almost all former socialist countries.

The Serbian parliament fits the pattern of parliaments with strong parties, party voting and a dominant legislative role of the government. The role of parliament in the Serbian democracy is shaped by its internal procedures, budgetary dependence, weak administrative and professional structure, etc. (cf. Orlović 2007, Pajvančić 2007, Stojiljković 2007). In addition to this, the parliament is the subject of constant suspicion and lack of public trust. In 2016, only a third of the Serbian population had trust in parliament, while in 2007, the level of trust was at its lowest (18%) (CeSID, 2008) (Table 1).

It was not only the parliament that had suffered the havoc of post-socialist transformation. In the years following the 2000 political changes, Serbian public administration had been weakened by brain drain and an inability to attract highly-skilled professionals (Eriksen 2005).[7] The internal structure of public administration was not conducive to effective law- and policymaking. It was, and

6 Although governments dominate the law-making process, there are still strong parliaments, such as the Polish Sejm (Goetz and Zubek 2007). As for the others, they have experienced a high degree of institutionalization (Chiva 2007, 298).

7 Although salaries in the public sector had increased after 2000, the salaries of the highly qualified employees in the private sector are still higher than salaries of highly qualified employees in the public sector, while this is not the case with employees with lower qualifications (Laušev 2012).

still is, hierarchically structured and functions in an old-fashioned authoritarian way, in which decision makers rely on top leaders to initiate and design policies. In the often protracted periods when public institutions are without effective leadership – for instance, in the months before and after elections – work actually comes to a complete standstill (Eriksen 2007, 344).

Since 2004, there have been several attempts to reform public administration (cf. Džinić 2011, Rabrenović and Verheijen 2006, SIGMA 2015) but it still faces numerous challenges. Recruitment decisions are largely based on political affiliation and managers' discretion (SIGMA 2012),[8] while the socio-economic position of public servants has deteriorated, due to salary reductions –a result of the ongoing economic crisis and austerity measures.

Law- and policymaking processes are supposed to be fairly open to the general public and involve public consultations. Public consultations and participation are essential in bringing about democracy as there have been growing demands for openness and transparency from civil society and international actors. As a result, various procedures aimed at securing public participation have been established: ranging from public consultation during the law-making process to mechanisms of tripartite negotiation, such as with the Socio-economic Council (cf. Vukelić 2009). However, many of these mechanisms have been criticised for their lack of effectiveness and abundance of political abuse (Jelinčić i Đurović 2011, SKGO 2006, Milovanović et al. 2012).

Law- and policymaking in Serbia

Law- and policymaking primarily take place in the executive branch. However, this analysis often points to the limited institutional and professional capacities of line ministries and the rather strong influence of external actors.

Typically, draft laws are prepared by a working group, formed by the line ministry, which is composed of various civil servants and external members: representatives of the professional community and civil society (e.g. external experts, university professors, NGOs, etc.). Working group membership has often been hardly representative of various social interests that have crystallised around a particular legal or policy-based issue. On the contrary, interviews suggested that one of the main arguments in the selection process of new members seemed to be utilitarian: i.e. to secure financing of the working group, social or political sup-

8 The degree of political discretion in the appointment of top-level civil servants had widely increased after the 2012 government election (Verheijen and Rabrenović 2015, 25).

port, majority in the group for a particular issue, etc. Therefore, it remains unclear whose interests members of the working group represent.

The active participation of external professional cadre in public administration was a profound, and rather distinguishable, characteristic of the first governments after 2000. The lack of expertise and, perhaps, the lack of trust in newly-elected political figures in the existing public administration structures led to the externalization of regular tasks of government bodies and their delegation to consultants. As an example of this, the cabinet of the first minister in charge of social security had been almost completely composed of eternally-employed consultants. As the political situation stabilised, so did the socio-economic position of civil servants, and the role of externally-employed consultants generally shifted from tasks-based performance to reform-oriented involvement within a particular sector (i.e. the drafting of policies and legislation).They were responsible for innovating ideas and solutions, providing advice, securing EU harmonisation, etc. Although these were generally considered short-term assignments, we have identified permanent modes of collaboration between external experts and representatives of line ministries. In some cases, these modes of cooperation were strong, secure and defined by common interests and shared ideological preferences that ensured more stable *policy networks*.[9]

In many cases, individuals were members of policy networks, serving as employees of international organisations (such as the World Bank and UN agencies), bilateral donors, consultancies or international NGOs. These institutions have been influential in designing policies in Serbia and elsewhere (Deacon 2007, Deacon and Stubbs eds. 2007, Podunavac ed. 2011, Vuković 2013). Membership in a policy network is more often reserved for representatives of institutions or organisations than for individuals based on their professional expertise and reputation (hence, institutions appear as intermediary factors in their network membership).

This research has identified several ways in which these external actors and policy networks influence the law- and policymaking process:

---

9 Following Burt, networks are understood as relatively stable sets of actors (individuals, groups or organisations) that exchange various resources (material resources, information, favours, norms, practices, etc.) and have a certain structure (Burt 1982). On the other hand, policy networks are 'sets of formal institutional and informal linkages between government and other actors which are structured around shared or mutually-held beliefs and interests in public policy making and implementation. These actors are interdependent and policy thus emerges from the interactions between them' (Rhodes 2006, 426).

External actors provide direct advice and guidance to policymakers

In several of the observed areas, this has not only taken the shape of direct policy translation and conditionality but has also become uncritically reliant on external consultants. External actors can just *exert influence* as they finance working groups, background studies and analysis, study trips, etc. Sometimes the reliance on and the influence by external actors can take place even in an informal manner, as one public servant proudly confirmed:

> We had here [names] from [international agency] who were still engaged in the project on [policy issue], so we could (ab)use them to help us with the draft law. We have even translated the first version of the law and gave it to [international agency] that was involved directly and all their suggestions were accepted (Interview, public servant 2012).

External actors support the professional development of public servants and experts

They have represented a key platform for professional communication and development over a period that was marked by war and isolation, and a subsequent lack of financial resources available to universities, research centres and public administration. The various projects, trainings and seminars have thus helped to keep public servants and experts up-to-date over the last 25 years with the latest professional knowledge. Furthermore, external actors (mostly international organisations and consultancies) have managed to establish *discursive and ideological monopolies* in many areas (Deacon 2007) and influence the content of laws and public policies.

> Sometimes their ideological monopolies and political influence have led to the securing of policy continuity throughout time, in spite of political changes. This has been the case in education and social welfare. International actors actually secured continuity of public policies even amidst abandonment or opposition due to the prevailing political changes. In these two sectors, conflicting viewpoints – between domestic and foreign actors – were identified and the interplay of international influences and domestic resistance have resulted in a 'policy mishmash' (Babović and Vuković 2014).

There is a solid body of evidence suggesting that international actors exert strong influence on law-making while local actors, conversely, have far less chance to influence laws and public policies (and, thus, fall short of the standards of the practice of participative or social democracies, cf. Huber et al. 1997, Young 2000). Due to a growing demand for more participative and transparent law- and policymaking, the government has been implementing various mechanisms for consultation with the civil society actors. These include both temporary mechanisms

in the shape of public consultations – i.e. those of which are organised for a particular piece of legislation – and more permanent mechanisms such as in the form of the Socio-Economic Council (SEC). However, both are deemed ineffective and are often abused. The flaws of public consultation have therefore been documented below:

They are not organised regularly or in a timely manner

As reported by Milovanović, out of 176 pieces of legislation that were the subject of public scrutiny through consultation, only 43 underwent this process (Milovanović et al. 2012, 113). Furthermore, they were often organised in a short time-frame (e.g. seven days, as was the case with one law studied) or limited to the parameters of Belgrade. The same applies to SEC. Its procedures are incompatible with those of the Cabinet given that SEC requires more time for consultations, due to its rather complex nature and the limited capacities of its members.[10] In their words: 'European experiences are 4 months and we have 20 days for consultations [...] Short deadlines are undermining the consultations'(Interview, SEC 2012).

Participation is not representative

The Cabinet invites representatives of civil society with whom they are on close terms and from whom they can expect a favourable vote (i.e. in support of their law or policy). SEC, which functions as a formal and high-profile tripartite consultation mechanism, also has dubious representativeness. The interests of the employers are represented by the Union of Entrepreneurs whose members are only representatives of small and medium-sized businesses.[11] In the same manner, the work of SEC is marked by constant disputes, among trade unions, on the issue of representation (cf. Arandarenko 2011).

Consultations are just a simulation on both sides. Narratives from our interviews indicate that the Cabinet approaches consultations formalistically, with the mere aim of 'box-ticking.' Civil society, on the other hand, is more disinterested and inactive in the process: 'Qualified public representatives do not come to consultation [...] There are no professors unless they are with NGOs. On the other side,

---

10 SEC Secretariat receives materials, sends it to members, comments on it and sends it back; and only after this procedure, is SEC able to deliberate.

11 According to interview sources, large companies can open the doors to the government themselves without the help of the SEC. We might recall here Franz Neumann's thesis which states that small entrepreneurs need the rule of law, rather than the monopolies, in order to resolve their own issues (Scheurman ed. 1996, 132).

the government is not interested to hear ideas. There is a lack of mutual trust […] The media are also weak and without credibility.' (Interview, politician 2012).

The Cabinet frequently breaches the law and tries to avoid public consultation yet only faces mild criticism. SEC representatives testify: 'We received changes in the labour regulations two days before the telephone session of the Government. This is an abuse of the concept of consultations.' (Interview, SEC 2012).

After the bill passes public consultations and is adopted by the Cabinet, it is sent to the Parliament. The Parliament is extremely effective in producing laws: over the period covered by this study, a total of 1,334 laws were enacted. This analysis identified the following features of parliament's law-making function:

Major political and policy-based decisions are not made in parliament

This is evident throughout the stages of parliamentary life, from caucuses (parliamentary groups) to committee meetings and plenary sessions. First, ruling-party caucuses have no stake in parliamentary life: the crucial role is only played by the parties and key discussions take place outside parliament. 'There are no debates in the caucus. When draft law gets to the National Assembly and the caucus, everything is finalized.' (Interview, MP 2012).

Opposition caucuses seem to have a more important role. MPs use caucus meetings to prepare plans for the deliberation, propose amendments and seek support from party leadership for agreed steps.

Secondly, parliamentary committees have an ambitiously-defined scope of work[12] even though they only play a marginal role. MPs of the ruling parties have few incentives to participate in committee meetings since major decisions are made at party or Cabinet's meetings. On the other hand, opposition MPs are not motivated to become engaged with a particular law, as they expect that their suggestions will be rejected. The government itself holds less interest in the work of MPs. Consequently, committee meetings are attended – as the MP testified – 'not by ministers' but by lower-level civil servants or ministry officials. One of the interviewed MPs summarized the role of committees: 'No analysis is conducted at committee meetings. Opposition is interested in discussions at plenary sessions, where they can be heard. Therefore, discussion rarely occurs at committee meetings' (Interview, MP 2012).

12 According to the Rules of Procedure (Art. 44), apart from discussing legislative proposals, committees are in charge of overseeing the work of the government and the implementation of laws, analysis of work plans of ministries and other institutions, etc.

MPs are particularly interested in the media coverage of their activities and this had been effectively captured by one respondent: 'As soon as the cameras go down, everything stops' (Interview, MP 2012). In recent years, the role and importance of the parliamentary committees have seemingly changed as their sessions are broadcast on the net and meeting transcripts regularly published on parliament's website.

MPs have little room for involvement in legislative work even when they are engaged in the drafting and discussing of the amendments. Opposition MPs complain that their 'amendments are not accepted regardless of how much effort has been invested. Therefore, we seek to win a political score' (Interview, MP 2012). An amendment is only accepted if the Government has approved it.

> Parliamentary committees reflect the opinion of the Cabinet. They wait for the opinion of the Cabinet. In 95% of cases, the Cabinet rejects the amendment. And then we meet at the committee and we are nothing but voting machines […]. After that, the detailed discussion at the plenum starts. What the Cabinet has said in their Opinion is accepted. It rarely happens that an MP convinces the Cabinet to accept the amendment (Interview, MP 2012).

On the other hand, MPs of the ruling parties often have numerous amendments. In reality, these are amendments that are proposed by the government and facilitated by fast track legislation: '[…] the laws are prepared under time constraints. The Cabinet is not able to prepare a proper law. But, in order to avoid submitting (e.g. 50 amendments) to its own bill, it delegates proposing amendments to caucuses and parliamentary committees' (Interview, MP 2012).

Heavy workloads and urgent procedures hamper the law-making role of parliament

After the committee meeting, the legislation is discussed at plenary sessions. However, almost half of the laws (44%) had been enacted using the urgent procedure which left MPs with *less than a day per law* for discussions and voting (Table 2). As the EU integration progresses, there is less time allotted to discussions. MPs testify that sometimes they had only a few minutes to discuss a particular law. Often, several legislative proposals were jointly discussed at the plenary session, thus leaving MPs even less time for deliberation. In conclusion, given that the parliament is enormously overburdened with numerous legislative proposals, deliberation and political discussion in parliament remain virtually absent for one in every two enacted laws.

Under these circumstances of heavy workloads and weak support systems, MPs are unable to be involved in substantive discussion. Research data indicate that

MPs read legislative proposals and prepare for discussions if (a) draft laws are in the field of their professional competencies, (b) they are personally interested in draft laws, or (c) they have been put in charge by their party. 'One reads law if one is interested. Each MP gets all the materials. We get 45 cm of paper and it is not possible to read it all. I read only what I can understand and what I am interested in' (Interview, MP 2012).

MPs have an insufficient professional support system from the employees of parliament

The work of MPs on legislative proposals is further hampered by a series of technical and political obstacles. Preparing a technically correct amendment is a typical challenge facing an MP. This means preparing an amendment that can be incorporated into the law, which contains appropriate phrasing within the text of the law, adequate legal vocabulary, etc. MPs themselves receive minor support from their parties and professional cadre of parliament and are, therefore, reliant on informal networks of friends, experts and interested stakeholders. MPs are without any legislative plan which would allow them to prepare in advance for the upcoming session. Furthermore, they receive bills only just before the session. Thus, they are left ill-equipped and unprepared for the discussion. Below is an illustration of the hollowness and legislative pressures within parliament:

> A law has 300 amendments. Each needs to be read, who proposed it, opinion of the Committee, I do not know the whole bill, I do not know the amendment and then I am lost and the voting lasts for 4 hours. When the amendment we need to support is on the agenda, the Chairperson rings this bell for silence and I know I need to vote (MP, Interview 2012).[13]

Conclusion

This analysis indicates the deficiencies of the law-making institutions and processes in Serbia within all three stages of the legislative process: preparation of the legislation in the executive branch, public consultations, and work on the legislation within the parliament.

First, globalisation makes local law-making vulnerable to external influences due to the political, economic or cultural interconnectedness. However, the research findings indicate an externalisation of the law-making process caused by

13 This practice, which is still used by Parliament today, has been highly criticised by the opposition (*Politika*, 14.10.2016).

other factors. Most notably, these are the weak institutional capacities – both financial and professional – and the informal norms that open up a space for the outsourcing of some of the functions of the executive branch, such as policy analysis, policy planning and drafting, etc.

Secondly, the research has identified that 'form' prevails over 'substance' in public consultations. The Cabinet often deliberately undermines or obstructs the consultation process, using various strategies. Consultations are often quick, with a short notice sent to a carefully-selected and well-controlled list of participants. They are conducted in a formalistic manner and all for the purpose of fulfilling the formal requirements necessary to maintain the consultation process. SEC is similarly inefficient and only an empty shell of tripartism due to ill-conceived procedures, unrepresentative membership and the Cabinet's obstruction.

Finally, the findings presented here reveal a picture of a type of parliament in which laws are neither prepared nor discussed. Furthermore, some of its key functions (e.g. deliberation at committees and plenary sessions, amending the laws, etc.) are being transformed into performances without the necessary content. Parliament seems to be just a complementary function to the hectic executive branch, with a series of informal rules further undermining its role. In that sense, parliament performs a thin legislative role and is deprived of its internal content.

The pro-creative[14] function of a law-making institution, which consists of designing laws and policies and autonomously or actively leading this process, is weakening. The research indicates that their role is being reduced to a mere transmission of received inputs (from domestic or international, formal or informal actors) into various laws and policies.

In a sense, transferring law-making functions from the parliament to other actors – most importantly the executive – is a characteristic of contemporary democratic political systems. The weakening of mechanisms that ensure participation of non-privileged social groups in law- and policymaking might also be identified across modern democracies. However, what we have identified are deficiencies of the whole law-making process, ranging from the performance of the executive to the role of parliament and public consultations and participation mechanisms. Factors leading to these deficiencies include global processes of EU integration and globalisation, as well as the shift from government to governance as identified by Rhodes, Jessop and others. More importantly, in Serbia they own their magnitude to local and context-specific processes related to post-socialist trans-

14 The terms 'pro-creative' and 'transmission function' have been borrowed from a different context, a sociological study on the use of the internet (Petrović 2013).

formation: institutional decline, slow and unsuccessful reconstruction, as well as the strengthening of informal norms, practices and actors. They are, therefore, referred to as the 'hollowing out' of institutional structures, a characteristic of a wider institutional landscape, including the economy, education, the judiciary, etc.

The 'hollowing out' of institutions includes transferring institutional functions to external actors, be they formal or informal, as well as precedence of informal over formal norms. The externalisation of the law-making functions of the executive is an illustration of the first while purely formal as opposed to substantive consultation process is a good example of the second dimensions of the 'hollowing out' process. As demonstrated in the case of the Serbian parliament, what often remains is an empty shell, an ineffective institution deprived of its internal content and functions with low or no public trust in it.

References

Ágh, Attila. 1997. Parliaments as policy-making bodies in East Central Europe: The case of Hungary. *International Political Science Review/Revue internationale de science politique* 18: 417–432.

Antonić, Slobodan. 2002. *Captured Stete: Serbia during Slobodan Milošević* (Zarobljena zemlja: Srbija za vlade Slobodana Miloševića). Beograd: Otkrovenje.

Antonić, Slobodan. 2006. *Elite, Citizens and Weak State: Serbia After 2000 (Elita, građanstvo i slaba država: Srbija posle 2000)*. Beograd: Službeni glasnik.

Arandarenko, Mihail. 2011. *Labour Market in Serbia*. Beograd: Centar za izdavačku delatnost Ekonomskog fakulteta u Beogradu (*Trežište rada u Srbiji*).

Babović, Marija and Vuković Danilo. 2015. Shaping Social Policies in the Western Balkans: Legal and Institutional Changes in the Context of Globalisation and Post-Socialist Transformation. In: *Public Policy Making in the Western Balkans: Case Studies of Selected Economic and Social Policy Reforms*, edited by Thomas, Margo and Bojicic-Dzelilovic, Vesna.17–43. New York: Springer.

Baucal, Aleksandra and Dragica Pavlović Babić. 2009. *Quality and Equality of Education in Serbia: Educational Chances of Poor in Serbia.*Beograd: Vlada RS & Institu za psihologiju (*Kvalitet i pravednost obrazovanja u Srbiji: Obrazovne šanse siromašnih*).

Begović, Boris et al. 2004. *Corruption in Judiciary*. Beograd: Centar za liberalno-demokratske studije (*Korupcija u pravosuđu*).

Begović, Boris et al. 2007. *Corruption in Serbia: Five Years Later*. Beograd: CLDS (*Korupcija u Srbiji: Pet godina posle*).

Bickerton, Christopher, Counliffe, Philip and Gourevitch, Alexander (eds.) 2007. *Politics Without Sovereignty: A Critique of Contemporary International Relations*. London: The University College Press.

Boda, Zsolt and Medve-Bálint, Gergő. 2014. Does Institutional Trust in East Central Europe Differ from Western Europe? *European Quarterly of Political Attitudes and Mentalities* 3(2): 1–17.

Bogićević, Biljana, Gorana Krstić, and Boško Mijatović. 2002. *Poverty and Reform of the Welfare State*. Beograd: Centar za liberalno-demokratske studije (Siromaštvo u Srbiji i reforma državne pomoći siromašnima).

Bolčić, Silvano. 2013. *Destruction and Reconstitution of Society: Serbia in Transition into the 21st Century*. Beograd: Službeni glasnik (Razaranje i rekonstitucija društva: Srbija na prelazu u XXI vek).

Burt, R.S. 1982. *Toward a Structural Theory of Action: Network Models of Social, Perception, and Action*. New York: Academic Press.

CeSID, 2016. In Front of the Elections – Political and Social Situation in Serbia, research results available at http://www.mc.rs/upload/documents/izbori%20 2016/CeSID_Konferencija.pdf

CeSID, 2008. Social and Political Milieu of Presidential Elections, research results available at http://www.mc.rs/upload/documents/izbori_2008/Izvestaj_CeSID_decembar_januar.pdf

Chandler, David. 2006. *Empire in Denial: The Politics of State-Building*. London: Pluto Press.

Chiva, Cristina. 2007. The institutionalisation of post-Communist parliaments: Hungary and Romania in comparative perspective. *Parliamentary Affairs* 60(2): 187–211.

Cvejić, Slobodan. 2002. Informal Economy in Post-Socialist Transformation: Grey Economy in Serbia in the ‘90s (Neformalna privreda u post-socijalističkoj transformaciji: siva ekonomija u Srbiji 90-tih), in: Bolčić, Silvano and Anđelka Milić ed. *Serbia at the End of Millenium: Deconstruction of Society, Changes and Everyday Life*. Beograd: ISI FFB (*Srbija krajem milenijuma; razaranje društva, promene i svakodnevni život*).

Cvejić, Slobodan (ed.) 2016. *Informal Power Networks, Political Patronage and Clientelism in Serbia and Kosovo**. Belgrade: SeConS.

Deacon, Bob. 2007. *Global Social Policy and Governance*. London: SAGE.

Deacon, Bob and Paull Stubbs (eds.) 2007. *Social Policy and International Interventions in South East Europe*. Cheltenham: Edward Elgar.

Džinić, Jasmina. 2011. Public administration reform in Serbia. *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave* 11(4): 1075–1105.

Elster, Jon, Claus Offe, and Ulrich K. Preuss. 1998. *Institutional design in post-communist societies: Rebuilding the ship at sea*. Cambridge: Cambridge University Press.

Eriksen, Svein. 2005. Unfinished Transition – Public Administration Reform in Serbia 2001–2004. Paper presented to the 13th NISPAcee Annual Conference Democratic Governance for the XXI Century: Challenges and Responses in CEE Countries, Moscow, May 19 – May 21, 2005.

Eriksen, Svein, 2007. Institution building in Central and Eastern Europe: Foreign influences and domestic responses. *Review of Central and East European Law* 32(3): 333–369.

Evans, Peter, Rueschmeyer, Dietrich and Skockpol, Theda (eds.) 1999. *Bringing the State Back In*. Cambridge: Cambridge University Press.

Fukuyama, Francis. 2004. *State-building: governance and world order in the 21st century*. New York: Cornell University Press.

Goetz, Klaus H. and Radoslaw Zubek. 2007. Government, Parliament and Law-making in Poland. *The Journal of Legislative Studies* 13(4): 517–538.

Huber, Eveline, Dietrich Rueschemeyer and John D. Stephens. 1997. The Paradoxes of Contemporary Democracy. Formal, Participatory, and Social Dimensions. *Comparative Politics* 29(3): 323–342.

Jarić, Isidora (ed.) 2010. *Bologna Reform of Higher Education in Serbia*. Beograd: IFDT&IP Filip Višnjić (Bolonjska reforma visokog obrazovanja u Srbiji).

Jessop, Bob. 2002. Globalisation and the national state. In: *Paradigm Lost: State Theory Reconsidered*, edited by Stenley Aaronowitz and Peter Bratsis. 185–221. Minneapolis:University of Minnesota Press.

Jessop, Bob. 2002. *The Future of the Capitalist State*. Oxford: Martin Robertson.

Lazić, Mladen. 2011. *Waiting for Capitalism. Emergence of new class relations in Serbia*. Beograd: Službeni glasnik (Čekajući kapitalizam: nastanak novih klasnih odnosa u Srbiji).

Laušev, Jelena. 2012. Public Sector Pay Gap in Serbia during Large-Scale Privatisation, by Educational Qualification. *Economic Annals* 47(192): 7–24.

Marinković, Tanasije. 2009. On the Constitutionality of the General Reappointment of Judges. *Annala of the Faculty of Law in Belgrade* 57(1): 283–291 (O ustavnosti opšteg reizbora sudija).

Milanović, Branko. 1998. *Income, inequality, and poverty during the transition from planned to market economy*. Washington, DC: World Bank.

Milovanović Dobrosav et al. 2012. *Study on the Improvement of Legislative Process in the Republic of Serbia*. Beograd: GIZ (Studija o unapređenju zakonodavnog procesa u Republici Srbiji).

Norton, Philip. 1998. Conclusion: Do Parliaments Make a Difference. In: *Parliaments and Governments in Western Europe. Vol. 1.*, edited by Philip Norton. 190–209.New York: Taylor & Francis.

Orlović, Slaviša. 2007. Authorities of the Parliament (Nadležnosti parlamenta). In: *Dilemmas and Challenges of Parliamentarism*, edited by Vukašin Pavlović and Slaviša Orlović (Dileme i izazovi parlamentarizma). 141–169, Beograd: Fakultet političkih nauka i Fondacija "Konrad Adenauer".

Pajvančić, Marijana. 2008. *Parliamentary Law*. Beograd: Fondacija "Konrad Adenauer"(Parlamentarno pravo).

Pešić, Jelena and Slobodan Cvejić. 2016. Social Reproduction through Informal Sphere – The Structure and The System of Clientelism in Serbia. In: *Informal Power Networks, Political Patronage and Clientelism in Serbia and Kosovo**, edited by Slobodan Cvejić, 65–77. Belgrade: SeConS.

Podunavac, Milan (ed.) 2011. *Public Policies. Serbia*. Beograd: Fondacije Hajrih Bel (*Javne politike Srbije*).

Pettai, Vello and Ülle Madise. 2006. The Baltic parliaments: Legislative performance from independence to EU accession. *The Journal of Legislative Studies*12(3–4): 291–310.

Petrović, Dalibor. 2013.*Sociability in the age of Internet*. Novi Sad: Akademska knjiga (Internet i (ne)društvenost).

Rabrenovic, Aleksandra and Tony Verheijen. 2006. Politicians and top civil servants in former Yugoslav states: back to discarded traditions? In: *Politico-Administrative Dilemma: Traditional Problems and New Solutions*, 15–35. Bratislava:NISPAcee.

Rhodes, Rod A.W. 1994. The hollowing out of the state: The changing nature of the public service in Britain. *The Political Quarterly* 65(2): 138–151.

Rhodes, Rod A. W. 2006. Policy Network Analysis. In: *The Oxford Handbook of Public Policy*, edited by Michael Moran, Marn Rein and Robert E. Gooding, 425–448. Oxford: Oxford University Press.

Sasen, Saskia. 2004.*Losing Control? Sovereignty in an Age of Globalisation*. Beograd: Beogradski krug (Gubitak kontrole? Suverenitet u doba globalizacije).

Scheuerman, William E. (ed.) 1996.*The Rule of Law under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer*. Berkeley: University of California Press.

SIGMA, 2012. Assessment. Serbia. Paris: OECD/SIGMA, available at www.sigmaweb.org

SIGMA, 2015. Basic Measurement Report: The Principles of Public Administration. Serbia. Paris: OECD/SIGMA, available at www.sigmaweb.org

Stojiljković, Zoran. 2007. Parties in the Parliament (Partije u parlamentu). In: *Dilemmas and Challenges of Parliamentarism* (Dileme i izazovi parlamentarizma) edited by Vukašin Pavlović and Slaviša Orlović, 105–128. Beograd: Fakultet političkih nauka i Fondacija "Konrad Adenauer".

Uslaner, Eric M. and Thomas Zittel. 2006. Comparative Legislative Behaviour. In: *The Oxford Handbook of Political Institutions*, edited by Rod A. W. Rhodes, Sarah A. Binderand and Bert A. Rockman, 455–474. Oxford: Oxford University Press.

Verheijen, Tony JG and Aleksandra Rabrenovic. 2015. Civil Service Development in Central and Eastern Europe and the CIS: A Perfect Storm? In: *Comparative Civil Service Systems in the 21st Century*, edited by Frits M. van der Meer, Jos C.N. Raadschelders and Theo A.J. Toonen, 15–37.Basingstoke: Palgrave Macmillan.

Vuković, Danilo. 2013. Interest, networks and institutions: socio-legal analysis of new social legislation in Serbia. *Sociologija* 55(1): 25–46 (Interesi, mreže i institucije – sociološko-pravna analiza novog socijalnog zakonodavstva Srbije).

Vuković, Danilo. 2013b. *How Laws Are Made: The Role of Social Interests and Institutions in Law-making Process.*Beograd: Secons i Institut za sociološka istraživanja Filozofskog fakulteta Univerziteta u Beogradu (Kako nastaju zakoni u Srbiji: uloga društvenih interesa i institucija u zakonodavnom procesu).

Vukovic, Danilo. 2016. Capturing Resources: The Role of Professional Communities and Middle Classes in Fostering Social Reforms Within Serbia. *Sociologija* 58(2): 253–279.

Vuković, Danilo and Marija Babović. 2014. Social Interests, Policy Networks, and Legislative Outcomes: The Role of Policy Networks in Shaping Welfare and Employment Policies in Serbia. *East European Politics & Societies* 28(1): 5–24.

Vuković, Danilo and Slobodan Cvejić. 2014. Legal culture in contemporary Serbia: Structural analysis of attitudes towards the rule of law. *Annals of the Faculty of Law in Belgrade Int'l Edition* 62(3): 52–73.

Vuković, Slobodan. 2005. *Law, morality and corruption.* Beograd: Filip Višnjić (*Pravo, moral i korupcija*).

Vuletić, Vladimir. 2006. *Globalisation: Current Debates* (Globalizacija: aktuelne debate), Zrenjanin: Gradska narodna biblioteka.

Young, Iris Marion. 2000.*Inclusion and Democracy*. Oxford: Oxford University Press.

Zubek, Radoslaw and Klaus H. Goetz. 2010. Performing to type? How state institutions matter in East Central Europe. *Journal of Public Policy* 30(1): 1–22.

Appendix

Table 1. Trust in institutions in % (2016)

	Has trust	Indecisive	No trust
Churches	58	19	21
Military	62	18	17
Police	49	23	26
Government	44	20	33
President of the Republic	34	23	40
National Assembly	33	26	38
Judiciary	23	25	48
Media	18	22	54
NGOs	19	26	44
Parties	14	24	58

Source: CeSID, 2016

Table 2. Legislative activity of the NARS

	Enacted laws	Urgent procedure	No. of sessions	No. of days	Days per enacted law	% of laws in urgent procedure
2001	48	16	15	95	2.0	33
2002	47	23	11	78	1.7	49
2003	47	15	58	79	1.7	32
2004	88	59	33	118	1.3	67
2005	120	30	26	157	1.3	25
2006	52	26	15	63	1.2	50
2007	72	46	19	111	1.5	64
2008	48	44	16	90	1.9	92
2009	265	90	30	164	0.6	34
2010	260	72	21	116	0.4	28
2011	205	92	33	149	0.7	45
2012	130	88	22	71	0.5	68
2013	147	59	33	130	0.9	40
2014	131	115	32	97	0.7	88
2015	196	79	n.a.	114	0.6	40

Source: www.otvoreniparlament.rs

Miroslaw Sadowski

Collective Memory and Historical Determinacy: The Shaping of the Polish Transition

If life cannot be destroyed for good, then neither can history be brought entirely to a halt. A secret streamlet trickles on beneath the heavy cover of inertia and pseudo-events, slowly and inconspicuously undercutting it. It may be a long process, but one day it must happen: the cover will no longer hold and will start to crack. This is the moment when once more something visibly begins to happen, something truly new and unique, something unscheduled in the official calendar of 'happenings', something that makes us no longer indifferent to what occurs and when -something truly historic, in the sense that history again demands to be heard.

Václav Havel

Abstract: In this article, the author tries to explain why, looking back on different factors which determined its shape (in particular, historical determinacy and collective memory), the Polish transition took such a peculiar form, and whether or not a different scenario could have occurred after 1989. In the first part of this paper, the author defines the notions of collective memory and historical determinacy. The second part of the article analyses the historical factors which shaped the Polish transformation. In the third part of the paper, the author focuses on the political factors which shaped the Polish transition, observing how the new political scene was created. In the last part of the paper, the author highlights to what extent the omnipresent history and collective memory have determined the current shape of Polish society and culture.

Our memory is made up of our individual memories and our collective memories. The two are intimately linked. And history is our collective memory. If our collective memory is taken from us — is rewritten — we lose the ability to sustain our true selves.

Haruki Murakami (2013, 322)

Introduction

As we advance into the 21st century, not only the 1980s, but also the 1990s slip further and further away. As Tony Judt so wisely observed, we have started to treat the 20th century just like any other part of the past, 'which has nothing of interest to teach us' (2009, Introduction). The belief that 'that was then and this is now' (ibid., Introduction), perhaps surprisingly, is spread not only in Western, but also in Eastern Europe. Years of successful — at least on paper — transition following the fall of the Berlin Wall, seem to have constructed another wall (this time in our minds), which completely separates us from the previous era (Tokarski 2009).

The famous opening words of British writer L. P. Hartley's novel The Go-Between say: 'The past is a foreign country: they do things differently there' (Hartley, 5). These days, this observation seems to be shared not only by millennials, but also by their parents and grandparents, who, despite having vivid memories of the times of communism, chose to repress them, either by forgetting, or idealising the (in their own words) long-distant past.

This 'memory policy' was perhaps best summed-up by Hungarian Prime Minister Viktor Orbán who, at the opening of the Budapest House of Terror on the 24th of February 2002, said that with the opening of this museum his country has simply 'slammed the door on the sick twentieth century' (cited in Judt 2007, 848).

Poland has also tried to slam its own door on the 'sick' twentieth century. However, it turned out that, unfortunately, the Polish door had enough slits in it for the twentieth century to influence (some would go so far as to say envenom) the course of events in the present-day era. Thus, it is not very surprising that many historians and publicists argue that the Polish transition did not end back in the 1990s — as it would seem at first glance (Dudek 2008). The end of the transition has been announced on various occasions, most recently in 2015, with its last act said to have taken place as late as in 2016, which was declared by one of the biggest weekly magazines on its cover last February, showing a giant hole in the middle of the Round Table, the symbol of Polish transition (Ziemkiewicz 2016, 16–18). Whether or not the above is true (I will try to answer this question later on), the very idea of such a debate shows how peculiar the Polish transition was, and why it is such an interesting subject for a legal researcher. In my essay, I would like to examine the process of our transition from two extremely insightful perspectives: those of historical determinacy and collective memory.

The Notions of Historical Determinacy and Collective Memory

The memory is a living thing — it too is in transit. But during its moment, all that is remembered joins, and lives — the old and the young, the past and the present, the living and the dead.
Eudora Welty (1998, 948)

'The weight of dead generations', 'the nightmare of history' (MacPhee 2011, 4) — historical determinacy is neither an obvious, nor an easily definable term. However, as historical determinacy conceives of the past as a complex and unstable network of contingencies (Clift 2014, Introduction), which to some extent influences the present, it is often a useful tool in researching various processes which took place in history and influence the present day. Historical determinacy makes seeing the connections between various events in the past possible, which might have been overlooked otherwise. It has already been successfully applied, for example, to investigating the lines of thought in present-day Britain, where it has been noted that 'the historical determinacy of a past which has been lost and cannot appear, […] continues to organize the hierarchies and distinctions that underpin the postcolonial present' (MacPhee 2011, 18). I feel that, as one could easily describe Polish history as a 'complex and unstable network of contingencies,' with events seemingly of little importance back in their day having grave repercussions centuries later, and since history was and still is influencing Polish reality, it is worth investigating the process of transition from this particular standpoint.

The other often overlooked factor which, in my opinion, significantly influenced Polish transition is collective memory. It is often said that we are living in the days of 'hypertrophy of memory' or 'memory boom' (Bednarek 2012, 5). As French historian Pierre Nora observed, 'we talk so much about memory, because so little of it is left' (2009, 4). However, despite the popularity of memory-related topics in general, and collective memory in particular, this term is much more complex than it may appear at first glance.

Since its introduction to sociology by Maurice Halbwachs (see Sadowski 2015, 144), who famously said 'I usually recall because others induce me to do it; their memory is trying to help my memory, and my memory finds support in theirs' (2008, 5), collective memory has had numerous definitions. It can be described as 'a pool of shared cultural resources from which a common symbolic canon or the national imagery can be consciously selected or newly constructed' (Wulf 2000, 6), or as an 'elaborate network of social mores, values and ideals that marks out the dimension of our imaginations according to the attitudes of the social group to which we relate' (Hutton 1993, 78). It has also been said that

> collective memory reflects reality by interpreting the past in terms of images appropriate and relevant to the present; it shapes reality by providing people with a program in terms of which their present lines of conduct can be formulated and enacted (Schwarz 2000, 18).

As for the major theories, it is worth noting that they are all derived from Halbwachs' observation that 'it is in the society that people normally acquire and shape their memories and it is also in the society that they recall, recognise and localize the remembered entities' (Halbwachs 1992, 38).

Additionally, it should be observed that nowadays more and more often we analyse not only collective memory, but also collective forgetting. This intriguing term encompasses the memories, which, while not being erased, are 'inaccessible at the time remembering takes place,' usually due to institutional and cultural practices (Stone and Hirst 2014, 315–316) — for example slender memories survive of the Armenian genocide in Turkey, or of the treatment of indigenous people during the colonial period among the Spanish or the Portuguese. This phenomenon may be yet another interesting perspective from which to investigate the Polish transition.

History and the Shape of Polish Transition

> *In the final analysis, the range of life must be determined by history.*
> Walter Benjamin (2004, 1: 204–5)

In Poland, the debates on the past are far from settled. What is the reason behind this controversy? In my opinion, there are at least two, interlinked, possible answers. Firstly, history still is a much more important factor in Poland than in most other countries: permanently a subject of public debate, it often seems to be omnipresent. Secondly, the baffling idea expressed by several historians, that 'the 19th century has not yet finished in Poland,' may be very much true.

Which events in the history of Poland were so significant, that they had repercussions even at the turn of the 20th and the 21st century? Well, a list of such moments in our history could be very long — from the decision of our first historic ruler, Mieszko I to convert to Christianity in 966 to the forming of a Polish-Lithuanian alliance in 1385, to an outlandish idea of the Polish nobility to choose the king in general elections (general: all the nobility, about 10% of the population) in 1573. But if I were to choose just two events which had long-term effects of such magnitude that they partially influenced what happened after 1989, I would opt for the partitions of Poland, which took place between 1772 and 1795 (and their direct impact on the 19th and 20th centuries in Poland), and the Second World War.

In 1795, when Poland disappeared from the European maps, little did anybody realise that (with the exception of the years 1807–1813) it meant losing independ-

ence for one hundred and twenty three years. Years, which for other European countries were crucial for their socio-political and cultural development. This first resulted in Poland's '*dormancy* in relation to European centres of civilization, economics and culture, and then in different routes of reform, *catching up*, *compensation*' (Nowak 2013). On the other hand, since Poland lay far away from said centres of civilization, it also meant it was absent from 'the race for colonies' taking place in Europe at that time, thus sparing Poles the moral responsibility for colonialism, or the destruction of the natural environment, which still has an important place in the collective memories of the British, the French, or the Spanish (ibid.).

What effect did these partitions have on the shape of the Polish transition? First, it is worth pointing out that in Poland the 19th century continued to live on even after the Second World War, 'as in Polish cultural memory the pattern of the image of the time we belong was revived' (ibid.) again with the loss of sovereignty in 1945. It lived on in the collective memory of the people who once more could not commemorate the anniversaries and events they wanted (i.e. the November and January uprisings — in the 19th century, the Katyń massacre, the Warsaw uprising, or the history of the cursed soldiers — in the times of communism); who knew how to preserve different than official versions of history and culture, and how to cultivate them in emigration; who once more turned to the Catholic Church in search of moral support; who on the one hand knew how to organise underground organisations and how to contest the regime, but on the other learned the lesson that military actions against it may result in bloodshed (ibid.).

As a result, when the transition came, its course was not free from 19th century influences. The dilemmas about the question of scope of cooperation with the former communist authorities were reminiscent of thoseof the great reformer, count Wielopolski, in the 1860s. The distrust and disrespect towards the authorities, obvious during the times of partitions and of communism, unfortunately continued to live on in Polish society even after 1989 (Wnuk-Lipiński and Bukowska 2008), which meant that necessary changes (especially economical ones) lacked social support. And, perhaps most surprisingly, all the election results until 2015 confirmed that regional political sympathies varied according to which country had the region belonged to during the partitions — either the more conservative Russian and Austrian, or the more liberal Prussian. (Nota bene, the fact that the 2015 elections broke off with this pattern, confirms in the eyes of many publicists and political scientists that it may have been the end of the transition — if that was the case, it would have been not only a transition from the times of communism, but also from the 19th century.) (Radziszewski 2015).

The other event which has had the strongest long-term effects on (among others) the course of transition in our country, the Second World War, had a tremendous effect on Poland. Due to the Second World War everything changed: from the shape of borders, through the ethnic composition of the society, to the nature of the government. It is no exaggeration to say that Poland virtually lay in ruins — our country suffered the most of all the ones taking part in the conflict: 6,028,000, or 22,2% of the population died (Madejczyk 1970, 371), 40% of cultural monuments were destroyed (GUM 1984) and 84% of the capital (Warsaw) was reduced to debris (Getter 2004). The material losses of Polish citizens amounted to 285 billion dollars (Chmielarz 2012).

Thus, , apart from changing the shape and condition of our society, the Second World War directly and indirectly influenced the transition in several ways. Firstly, it strengthened both traditions, from the times of partitions, of working in conspiracy (the Polish Underground State during the Second World War was the biggest organisation of this kind in Europe) and contesting the unwanted regime — hence Poland was among the first communist countries where protests occurred, ultimately resulting in the rise of *Solidarność* in 1980. Secondly, the disastrous end of the Warsaw Uprising – it was bloodily defeated and 30% of Warsaw was destroyed– only confirmed the previous bad experiences of other Polish uprisings, thus *Solidarność* always ruled out using force against the authorities, which not only helped it gain such broad public support, but also put the communist authorities in a very difficult position. Finally, the behaviour of Polish politicians during the Second World War (all the main pre-war political parties were a part of the government in exile) gave a very good example of how people with different views can work together for the sake of the country, which was later also repeated in *Solidarność*. However, it has to be noted that, while the unity of members of this movement helped to put the transition in motion, the quarrels and animosities among them jeopardised the necessary changes in our country, sometimes even making them impossible.

In addition, I would like to remark on the changes in Polish collective memory during both the times of communism and the transition. They provide a good insight into how the perception of Polish history varied over the years, and how it was influenced by the current historical period.

Back in 1965, sociologist Barbara Szacka – the first, who carried out an extensive research on Polish collective memory – distinguished four groups of tradition that Poles of that time identified with: (i.) the tradition of 'strong state' correlated with 'armed combat,' centred around such people as Józef Piłsudski (the 'creator' of independent Poland in 1918) and Stefan Batory (Polish king, who in the 16th century

defeated the Russians, and thus was absent from the main school curriculum at the time); (ii.) the tradition of 'strong state' correlated with 'economic growth', centred around Kazimierz Wielki (the medieval king who modernised Poland in the 14th century) and Stanisław Staszic and Hugo Kołłątaj (18th century reformers); (iii.) the tradition of 'fight for independence', centred around Tadeusz Kościuszko (the leader of struggle against Russia at the time of partitions) and some communist-propaganda 'heroes;' and (iv.) the tradition of national culture, centred around Nicolaus Copernicus, Frederic Chopin, or Marie Curie-Skłodowska (Szacka 2006, 206–212).

However, such a shape of Polish collective memory 'crumbled into pieces' when the first post-war generation grew-up. In the 1970s, the reformist ideas succumbed to the romantic tradition of 'armed combat' and 'fight for independence,' with Józef Piłsudski largely leading the classification of most valued Poles.

1980s brought another redefinition of the national values and collective memories. The nation began to be seen as a 'political community', associated with a 'strong state,' which was chosen as the most important value, along with the tradition of the 'fight for independence,' while the importance of 'national culture' waned (it began to be seen as the least significant value). Józef Piłsudski's popularity rose once more, while the historical figures and events used to legitimise the Socialist Polish People's Republic completely disappeared from Polish collective memory.

Eventually, the research conducted in the last phase of transition (2003), showed another (final?) shift in Polish collective memory. The temporal horizon got much shorter, as Poles now mostly focused on the post-1918 events. Józef Piłsudski's place at the top of national pantheon did not change. However, culture and science were regarded as the most important national values. The perceptions of historical figures also changed, in harmony with global trends, as they became more individualised, with the respondents focusing mostly of the figures' personal virtues.

Politics and the Shape of Polish Transition

I could distinguish only that to repeat what everybody else was thinking was, in politics, the mark not of an inferior but of a superior mind.

Marcel Proust (1919, 1.)

While historical factors, with their influence on religion, politics, and the shape of the society in general, were undoubtedly among the most important factors influencing the course of Polish transition, it were the politicians, not historians, who ultimately shaped it. That is the reason why the political factors behind our transition are also worth investigating.

When the June the 4th 1989 elections came, almost the whole anti-communist opposition seemed unified. However, the cracks in the supposed unity have already begun to show up. They became even more visible during the presidential campaign in 1990, in which the first non-communist Polish Prime Minister after 1945, Tadeusz Mazowiecki, entered the lists against the leader of *Solidarność*, Lech Wałęsa. The election of the latter did not stop further splits in the former anti-communist opposition, which ultimately led to the victory of the post-communist party in the parliamentary elections of 1993, and then of its candidate, Aleksander Kwaśniewski, in the 1995 presidential elections.

However, while the divides between the former *Solidarność* members grew deeper, their influence on the course of Polish transition and politics has remained steady. Three out of five presidents chosen since 1990 and almost half of the prime ministers have had opposition backgrounds. Even today, in 2016, the two main parties in Poland are PiS and PO, both of which have roots in *Solidarność*, and their leaders are former members of the anti-communist opposition.

On the other hand, PZPR (the communist party), albeit defeated in the 1989 elections and soon dissolved (in January 1990) — somewhat symbolically during a congress taking place in the Palace of Culture and Science, which was a 'gift' from Stalin — ultimately transformed into a party called SLD, which exists to this day. The party won the 1993 and 2001 parliamentary and the 1995 and 2000 presidential elections. A number of scandals, however, led to its decline, and finally SLD did not win any seats in parliament in 2015 (which, for many publicists, was yet another sign of the end of the time of transition in Poland).

Somewhat surprisingly, one of the biggest problems in Polish politics after 1989 proved to be the lack of 'real' *lustration*. Lustration was supposed to be a process of public disclosure of collaboration of people running for or occupying public function with the organs of communist secret service during the years 1944–1990. While the process of lustration was carried out successfully in some other post-communist countries, notably the Czech Republic and Eastern Germany, it never really happened in Poland. It seemed as if the words of Tadeusz Mazowiecki's *exposé* about 'separating the past with a thick line' haunted all the lustration attempts.

The 1992 lustration law, which lodged a wide process of lustration, was found unconstitutional. The 1997 one, despite coming into force, was thought by many as not stringent enough. The last, much fiercer, lustration attempt, of 2006, was also found to be partially unconstitutional.

However, the unresolved question of lustration simply would not disappear. It was coming back every few years, eventually erupting in February 2016, when

the widow of the last communist interior minister, Czesław Kiszczak, appeared on the doorstep of the IPN (National Institute of Remembrance, responsible, inter alia, for the archives of former communist secret services), requesting 90,000 PLN for important documents her late husband kept at home. Among them, the investigators found a dossier of agent 'Bolek' from years 1970–1976. He turned out to be none other than former president and legend of *Solidarność*, Lech Wałęsa, who beforehand denied all accusations of collaboration. These events once more sparked the debate on lustration, with many people, who had previously been opposed to it, asking whether doing it back in the 1990s would not have had a *catharsis*-like effect on Polish politics and society.

Lastly, a remark has to be made on the collective memories of the times of communism in Poland. As Barbara Szacka observes (2006, 213–217), the opinion of Poles on the Polish People's Republic, or PPR, drastically changed over the years. While in 1965 44,6% of respondents said they valued the past 20 years more than the interwar period (which, as the sociologist herself acknowledges, may be put down to heavy communist propaganda), in 1977 only 6% of the surveyed chose 'achievements of the Polish People's Republic' as a source of pride in national history. Unsurprisingly, this percentage fell even lower, to only 3% in 1988, with 29.8% of the respondents saying the events which occurred during the time of communism of Poland were the most shameful in the Polish history as a whole.

Nevertheless, as the years passed by, it has become quite visible that perception of the Polish People's Republic slightly changed, which means the collective memories of that time shifted too, as the two are clearly linked. The regime still has mostly bad connotations: 42% of Poles regarded it negatively and only 28% positively in 2004 (CBOS 2014). However, many people (37% in 2003), especially the ones who have suffered economically during the transition, praise this period for its 'achievements' in the areas of work and everyday life (ibid.). What is worth noting, however, is the correlation between the age of respondents and their opinion on the time of communism — while only 24% of the respondents aged 18–39 regard it positively, 45% negatively, and 31% are ambiguous on this matter, 54% of the surveyed aged 40+ regard it positively and 42% negatively, with only 4% ambiguous (ibid.). As the collective memories will be evolving in the future, so will the opinions on the time of communism in Poland. One particularly interesting trend may already be observed — the most recent studies of the younger generation of Poles suggest that they are much more conservative than the rest of the society, which was quite visible in the 2015 parliamentary elections, when almost two–thirds of the youngest voters (from 18 to 29) voted for right-wing parties

(Wojtalik 2015). This prompted Professor Henryk Domański, a Polish sociologist, to suggest that 'there are 30 years of domination of the right ahead of us' (2016).

Society, Culture and the Shape of Polish Transition

We do not truly possess our humanity and culture as long as we live only in the present, in our own accidental environment.

Walter Kaufmann (1966, 117)

We, (to paraphrase Tetmajer and Hillar, two famous Polish poets), the people of the 21st century, often forget that Poland was once a cultural melting pot and treat this statement more as a tourist slogan than anything else. The first Polish Republic (or, more correctly, the Republic of Both Nations, 1569–1795), however, was a truly multicultural country, and only 113 years ago, in 1913, the invisible borders of the partitioned Poland were home to 50 million of people, of which only about 20 million regarded themselves as Polish. The remaining 30 million were Jewish, Ukrainian, Belarussian, Lithuanian, Russian or German (Nowak 2013). Although Polish culture largely influenced other nations, they also cultivated their own customs, creating rich, successful local communities together with the Poles.

Even after Poland regained independence after the First World War, and its borders moved much further to the West compared to 1795, the 1931 census showed that the Polish constituted 68,9% of the citizens, the Ukrainians 14%, the Jews 7,8%, the Belarusians 3,9% , the Germans 3,8%, and other nationalities 3,2% (GUS 1931). The religious landscape was no less diverse, with 64,8% of Catholics, 11,7% of Orthodox, 10,3% of Greco Catholics, 9,8% of Jews, 1,32% of Lutherans, 1,29% of believers of other Protestant Churches, 0,45% of believers of other Christian faiths, and 0,16% of others, among them atheists (ibid.).

Compared to this, present-day Poland seems quite homogenous. 97,09% of Polish citizens declare themselves as Polish, 0,38% as German, 0,13% as Ukrainian, 0,12% as Belarusian, and the remaining 2,28% as other (GUS 2011). In terms of religion, 86,9% of Poles regard themselves as Catholics, 2,41% as atheists, 1,31% as Orthodox, 0,38% as Protestant, and, with the remaining 9% either answering differently or chose not to answer (ibid.).

How could such a diverse society turn into a monolith? The answer is devastatingly simple: due to the Second World War (and its consequences, partly under Communism). With most of the Polish Jews killed by the Germans in concentration camps, the borders moved further to the West, and the national minorities displaced on Stalin's decision mostly to USSR or Germany, Poland ended up, with

collective memories and a cultural history of a multicultural past, in an extremely 'monocultural' present.

What effect did this shift in the shape of Polish society have on the course of events during the transition? On the one hand, it certainly made it easier for the nation to unite against the regime, as the authorities could not stir up the conflicts between different nationality groups and use them to prevent the opposition from gaining the majority of public support. (Latvia, where only half of non-Latvian citizens voted for independence from USSR in 1991, is a good example of problems which might have occurred in Poland if it had still been a multicultural country after the Second World War.) The homogenous structure of society certainly helped the transition to run more smoothly, as there were no great dividing lines within society, which, as the example of Czechoslovakia, or, as an extreme case, Yugoslavia show, may have led to secession or the partition of a country.

On the other hand, in becoming a monolithic society, Poles lost a large share of their collective memories and culture, which, lest we forget, are interrelated.

> For every society sets up images of the past. Yet to make a difference in society, it is not enough for a certain past to be selected. It must steer emotions, motivate people to act, be received; in short it must become a socio-cultural mode of action (Confino 1997, 1390).

It may have been difficult, especially for a generation born in post-war Poland, to act on and 'receive' the multicultural past and relate to some of our cultural monuments (for example, our most famous literary work [Adam Mickiewicz's, *Pan Tadeusz*] begins with the words 'Lithuania, my native land'), while living in a homogenous society. This might have made people much more prone to communist propaganda, but also led to the idealisation of *Kresy* (eastern regions of Poland lost after the Second World War) and fading of many problems and debates which heated up pre-war Poland, further deepening the divide between 'past' and 'the present' (Nowak 2013). Because in Poland, more than anywhere in the world, pre-1939 past really 'is a foreign country,' as they not only 'do things differently there,' but sometimes also seem completely alien there, even as far as their nationality is concerned.

It is also worth noting that Polish society changed not only in terms of nationality and religion, but also in class structure. Both the German and the Russian occupants were trying to execute a plan of 'destruction' of the Polish intelligentsia, with disastrous results. Due to such events as, inter alia, *Intelligenzaktion,* Action AB, or the *Katyń* massacre, Poland, permanently struggling to expand the intelligentsia during the interwar period, lost 39% of doctors, 33% of teachers, 30% of scientists and university scholars (approximately 700 university professors were killed), 28% of priests, and 26% of lawyers during the Second World

War (Sieradzki 2003). These actions and the nationalisation of land (with several other laws passed by the communists at the beginning of their rule) also led to utter disintegration of the Polish gentry, which, while often regarded as behind the times before the war, for centuries has been responsible for spreading culture in the country (PTZ 2013).

The loss of such a large part of the Polish elite had severe repercussions. First of all, it made the taking of the power by the communists much easier, as many people who would have been the most vivacious critics of the new regime were killed, intimidated, or in exile. Secondly, as the Polish intelligentsia had to be largely created from scratch after the war, it was much more dependent on the authorities — its first significant act of protest was a two-sentence 'Letter 34' sent to the prime minister only in 1964. Ultimately, it resulted in a very low esteem of the elites among the Polish, who, even in the present day, do not see people in the public life they can look up to (57%), mostly treating their family and friends as their authorities — 71% of the respondents (CBOS 2009).

In addition, a recent phenomenon which transpired in the course of transition in Poland has to be discussed. As opposed to 'collective forgetting', I would call it 'collective evoking', defining it as a process of bringing certain memories, which have been lost, back to society as a whole, with or without the help of the government, using mass media, most notably the internet.

This phenomenon may be observed in the history of the Cursed Soldiers (or, probably more accurately, Indomitable Soldiers). These are the names given to the members of the anti-communist resistance movements, who, between 1944 and 1963 (when the last partisan was killed by the communists), chose to fight the new, pro-Soviet regime in Poland. They were severely persecuted by the communist authorities, who tortured and killed many of them (*inter alia* Witold Pilecki, who volunteered to Auschwitz in order to investigate it for the Polish Underground Army and create a resistance movement there; general Emil Fieldorf 'Nil', one of the creators of Polish Underground Army during the Second World War; Dantuta Siedzikówna 'Inka', an 18-year old nurse of one of the partisan troops). Usually buried in unmarked graves, called traitors, malefactors and Nazi collaborators, they were supposed to be 'cursed' — forgotten and erased from Polish history and the collective memory.

And so they had been at least until the time of transition. The first mentions of the Cursed Soldiers appeared publicly at the beginning of the 1990s (the term itself was created in 1993). However, it was not until 2011 when the activities of the soldiers' families, numerous organisations, book authors and filmmakers was finally rewarded — since then, every March the 1st is the National Cursed Sol-

diers' Remembrance Day. Perhaps surprisingly, it is gaining popularity every year, particularly among the youth, with multitudinous commemorating events taking place not only in Poland, but also in many places around the world. This process in my personal opinion disproves Pierre Nora's words cited at the beginning of this article, that 'we talk so much about memory, because so little of it is left,' showing that in the times of collective forgetting, 'collective evoking' may also take place.

Concluding Remarks

For hindsight is also a disadvantage. Perhaps the most difficult thing of all for the historian to recapture is the sense of what, at a given historical moment, people did not *know about the future.*
Timothy Garton Ash (1989)

In this paper, I have ventured to answer the question "What made the Polish transition take such a particular form?". In the end, I would like to briefly remark on the fact that further explanation of this problem may be found in the analysis of not only its main events, but also its character, its very nature.

Describing the events of 1989, Timothy Garton Ash was among the first to note that the transition of power in Poland (and Hungary) took a different course than in other Central and Eastern European countries. Instead of a revolution, a 'refolution' — "half-reform, half-revolution" (Ash 1989), a 'change from the above' — took place.

What is particularly notable is that all the main events of 'the Autumn of Nations,' despite their lack of violence, their single class base (the anti-communist movements in Central and Eastern European Countries saw workers aligned with intellectuals), their utopian vision of society, or serious defiance of the incumbent governments, resembled classical European revolutions, and at the same time were something completely different (Marciniak 2009, 15). Hence the concepts of 'velvet revolution,' 'peaceful revolution,' 'rationed revolution' (Antoni Dudek); 'silent revolution,' 'sad revolution' (Andrew Arato); 'negotiated revolution' (László Bruszt); 'self-restraining revolution,' 'revolution from the above' (Jadwiga Staniszkis) were developed.

As Włodzimierz Marciniak so accurately notes (ibid.), all the expressions listed above indicate that the events of 1989 lacked what Hannah Arendt called the 'revolutionary pathos of an entirely new beginning' (2006, 37), which, interconnected with the idea of freedom, constitutes a 'true' revolution. The absence of this pathos in 1989 resulted later on in the loss of continuity and the feeling of chaos among the people of post-communist countries, and also in the 'longing for

the lost time' of political solidarity. This absence, along with the fact that, while many symbolic events boosting the feeling of freedom took place, e.g. the withdrawal of the Russian Army, or the turning of the main headquarters of PZPR, the Polish communist party, in Warsaw into the building of stock exchange, an embodiment of capitalism (Wolak), the functionaries of the previous regime not only remained unpunished, but also often turned into successful politicians or businessmen while unemployment rates soared, triggering very strong emotions in the societies. These emotions led to the creation of the myths of 'stolen revolution,' 'betrayed revolution,' or even 'dissipated revolution' (Marciniak 2009, 212), which only seems to support the hypothesis that some factor or factors were missing from the events of 1989. That is, in fact, no real, true revolution took place.

And nowhere else had these myths been as strong as in Poland, which, in my opinion, in part explains the particular course of Polish transition. Because, while in the collective memory of the years 1989–1991 the images of the fall of the Berlin Wall, of the happy crowds in the squares of Prague, Tbilisi, and Yerevan, or of the singing revolution in the Baltic States continue to live on, the 'revolutionary carnival of *Solidarność*' (ibid., 12) happened in 1980 and 1981, and was not repeated again in 1989. Instead, the new, Third Republic, was born in the course of a 'refolution'. Hence the Polish wish, or even longing, for a 'true' revolution, a bumpy course of transition, and a difficulty in pinpointing its ending.

Has Polish society finally worked through this 'trauma'? Is it ready to move on? And has the Polish transition finally ended? I am sure the course of events in the years to come will give us answers to these, and many other questions, concerning the Polish transition. I hope this paper will also help, at least in a small way, to better understand the political and moral significance of these questions.

References

Arendt, Hannah. 2006. *On Revolution.* London: Penguin Books.

Bednarek, Stefan. 2012. Mnemotopsy. Słowo wstępne. *Przegląd kulturoznawczy* 1(11): 5–11.

Benjamin, Walter. 2004. *Selected Writings: Volume 1. 1913–1926.* Edited by Marcus Bullock and Michael W. Jennings. Cambridge, MA: Belknap Press.

Clift, Sara. 2014. *Committing the Future to Memory. History, Experience, Trauma.* New York: Fordham University Press.

Confino, Alan. 1997. Collective Memory and Cultural History: Problems of Method. *The American Historical Review* 102(5): 1386–1412.

Halbwachs, Maurice. 1992. *On Collective Memory*. Chicago: University of Chicago Press.

Halbwachs, Maurice. 2008. *Społeczne ramy pamięci.* Warszawa: PWN.

Hartley, Leslie Poles. 1997. *The Go–Between.* London: Penguin Books.

Huttom, Patrick. 1993. *History as an Art of Memory.* Hanover: University Press of New England.

Marcel Proust. 1919. *Within a Budding Grove. Madame Swann at Home,* https://ebooks.adelaide.edu.au/p/proust/marcel/p96w/chapter1.html.

Judt, Tony. 2007. *Postwar. A History of Europe since 1945*. London: Pimlico.

Judt, Tony 2009. *Reappraisals. Reflections on the Forgotten Twentieth Century*. London: Vintage.

Kaufman, Walter. 1966. *Hegel, a Reinterpretation.* New York: Doubleday.

Madejczyk, Czesław. 1970. *Polityka III Rzeszy w okupowanej Polsce*. Warszawa: PWN.

Naczelna Organizacja Techniczna (Poland), Centralny Instytut Informacji Naukowo-Technicznej i Ekonomicznej (Poland), Główny Urząd Miar 1984. Data. *Przegląd techniczny, poświęcony sprawom przemysłu i techniki*.

Murakami, Haruki. 2013. *1Q84.* New York: Vintage International.

Nora, Pierre. 2009. Między pamięcią a historią: 'Les lieux de memoire'. *Tytuł robczy: Archiwum* 2: 4–13.

Osborne, Brian S. 1998. Constructing Landscapes of Power: The George Etienne Cartier Monument, Montreal. *Journal of Historical Geography* 24(4): 431–458.

Sadowski, Mirosław M. 2015. Psychological, Social, Cultural, Literary and Legal Dimensions of Memory. *Wroclaw Review of Law, Administration & Economics* vol 5 no 1: 141–161.

Schwarz, Barry. 2000. *Abraham Lincoln and the Forge of National Memory*. Chicago: University of Chicago Press.

Stones, Charles B. and Hirst, William 2014. (Induced) Forgetting to Form a Collective Memory. *Memory Studies* 7(3): 143–155.

Szacka, Barbara. 2006. *Czas przeszły-pamięć-mit*. Warszawa: Scholar.

Tokarski, Jan. 2009. Minione stulecie. Dlaczego trzeba przemyśleć XX wiek. *Przegląd potityczny* 95: 124–129.

Welty, Eudora. 1998. One Writer's Beginnings. *Eudora Welty, Stories, Essays, and Memoir*, edited by Richard Ford and Michael Kreyling, 831–949. New York: The Library of America.

Zamoyski, Adam. 2009. *Poland. A History*. London: HarperPress.

Ziemkiewicz, Rafał. A. 2016. Ucieczka od prawdy. *Do Rzeczy* 9 (160): 16–18.

Online resources

Ash, Timothy G. 1989. Revolution in Hungary and Poland. In *The New York Review of Books* [nybooks.com/articles/1989/08/17/revolution-in-hungary-and-poland, accessed on 8 March 2016].

CBOS 2009. Wzory i autorytety Polaków. Komunikat z badań CBOS BS/134/2009 [cbos.pl/SPISKOM.POL /2009/K_134_09.PDF, accessed on 15 March 2016].

CBOS 2014. PRL — doświadczenia, oceny skojarzenia. Komunikat z badań CBOS 61/2014. In *CBOS* [cbos.pl/ SPISKOM.POL/2014/K_061_14.PDF, accessed on 13 March 2016].

Chmielarz, Andrzej. 2004. Ekonomiczna eksploatacja ziem polskich w latach 1939–1945. In *Polishresistance-ak.org [polishresistance-ak.org/PR_WWII_texts/30_Artykul.rtf accessed on 11 March 2016].*

Domański, Henryk. 2016. Czeka nas 30 lat dominacji prawicy. *Rzeczpospolita* [rp.pl/Spoleczenstwo/304079850-Czeka-nas-30-lat-dominacji-prawicy.html?#ap-2, accessed on 7 April 2016].

Dudek, Antoni. 2008. Transformacja nie skończyła się. *Cooltura. Polish Weekly Magazine* [elondyn.co.uk/newsy,wpis,827, accessed on 20 March 2016].

Getter, Marek. 2004. Straty Ludzkie i materialne w Powstaniu Warszawskim. *BIULETYN Instytutu Pamięci Narodowej no 8–9/2004* [powstanie.pl/?ktory=27, accessed on 1 April 2016].

GUS 1931. Drugi powszechny spis ludności z dn. 9. XII 1931r. *GUS* web.archive.org/web/20140317212240/http://statlibr.stat.gov.pl/exlibris/aleph/a18_1/apache_media/VUNVGMLANSCQQFGYHCN3VDLK12A9U5.pdf, accessed on 14 March 2016].

GUS 2011. Ludność. Stan i struktura demograficzno-społeczna. *GUS* [stat.gov.pl/cps/rde/xbcr/gus/LUD_ludnosc_stan_str_dem_spo_NSP2011.pdf, accessed on 14 March 2016].

Havel, Václav. 'Dear Dr. Husák' [vaclavhavel.cz/showtrans.php?cat=eseje&val=1_aj_eseje.html&typ=HTML, accessed on 1 March 2016].

MacPhee, Graham. 2011. Benjamin, Joyce and the Disappearance of the Dead. [academia.edu/1631473/Benjamin_Joyce_and_the_Disappearance_of_the_Dead, accessed on 5 March 2016].

Mickiewicz, Adam. *Pan Tadeusz: or the Last Foray in Lithuania: a History of the Nobility in the Years 1811 and 1812 in Twelve Books of Verse.* (tr. Leonard Kress) [leonardkress.com/, accessed 20 March 2016].

Nowak, Andrzej. 2013. Nasz wiek XIX. *Uważam Rze Historia* [historia.uwazamrze.pl/artykul/ 858309.html, accessed on 11 March 2016].

Polskie Towarzystwo Ziemiańskie 2013. Nasza historia. *PTZ* [ziemianie.org.pl/index.php?p=1_22_W-adze-PTZ, accessed on 15 March 2016].

Proust, Marcel. *Within a Budding Grove. Madame Swann at Home.* [ebooks.adelaide.edu.au/p/proust/marcel/p96w/chapter1.html, accessed 4 March 2016].

Önal, Elif S. 2010. Collective Memory and National Identification in the Context of Negative Events: The Differentiated Rememberance In Two Contexts. [academia.edu/3620105/collective_memory_and_national_identification, accessed on 5 March 2016].

Radziszewski, Mateusz. 2015. Wyborcze powidoki AD 2015. *Komentarze politologiczne. Instytut Studiów Politologicznych Politologia – Uniwersytet Łódzki* [isp.uni.lodz.pl/2015/11/08/wyborcze-powidoki-ad-2015/, accessed 20 March 2016].

Sieradzki, Sławomir 2003. Niemiecki koń trojański. In *Wprost* [wprost.pl/ar/?O=49330, accessed 15 March 2016].

Wolak, Dariusz. Nowa siedziba GPW była najnowocześniejszym biurowcem w Europie. *Parkiet* [http://www.parkiet.com/artykul/1366608.html, accessed on 8 March 2016].

Wnuk-Lipiński, Edmund and Bukowska, Xymena. 2008. Stosunek Polaków do własnego Państwa. In *PAN Poznań* [pan.poznan.pl/nauki/N_208_01_Wnuk.pdf, accessed on 17 March 2016].

Wojtalik, Mateusz, 2015. Wyniki wyborów: PiS przejmuje Polskę, a prawica młodzież. *Newsweek* [newsweek.pl/polska/szczegolowe-wyniki-wyborow-parlamentarnych-2015-jak-glosowaly-wojewodztwa,artykuly,372966,1.html, accessed 6 March 2016].

Wulf, Meike. 2000. Theory Building: Dynamics of Collective Memory in Estonia. [academia.edu/968407/Theory_Building_Dynamics_of_Collective_Memory_in_Estonia, accessed on 5 March 2016].

Axelle Reiter

Justice (Lost) in Transition: Assessing the ICTY Legacy

Abstract: International law relies on criminal avenues to deal with wartime violence. The need to test the appropriateness of this approach calls for an examination of the effectiveness of international criminal justice in meeting the aspirations of the international community. The ICTY purports to fulfil various functions, some of which are associated with transitional justice. The methods adopted to achieve these goals have resulted in violations of the rights of the accused, the denial of victims' claims, and the undermining of reconciliation in the region. These consequences can be traced back to the hybrid nature of international criminal justice and a lack of insight into the causes of wartime criminality. A switch of emphasis from penal responses to transitional justice mechanisms would help in breaking the vicious circle of war and penalisation and in preventing the resurgence of violence.

Introduction

International law relies on criminal avenues to deal with wartime violence and past human rights abuses in post-conflict societies. The appropriateness of this approach is presumed, rather than grounded on any actual assessment of its benefits, and alternative means of conflict management are sidelined. The need to test this uncritical assumption calls for an examination of the effectiveness of international criminal justice in meeting the aspirations of the 'international community' and generating the outcomes it is meant to bring about; here, 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). Criminal law aims at determining the individual accountability of the accused for past offences. It is punitive and retributive. Besides, the ICTY purports to fulfil various functions, some of which are associated with transitional justice mechanisms and human rights law. The questionable methods adopted in order to achieve these goals have resulted in severe violations of the rights of the accused, denial of victims' claims and the undermining of reconciliation in the region. These consequences can be traced back to the hybrid nature of international criminal justice and a lack of insight into the causes of wartime criminality.

This paper analyses the causes of wartime criminality, the specificities of this form of violence, the adverse consequences of the penalisation of violence in

front of the ICTY, and the social reaction to international trials in the SFRY successor states and entities. It is divided in four sections. The first clarifies the ambitions of the ICTY and how they can be realistically circumscribed to provide standards against which to judge the usefulness of the Tribunal and an operative benchmark for its success. It argues that the mandate and functions of the ICTY may be cut down to the fulfilment of three main purposes: conventional deontic justice, redress for the victims, and the restoration and maintenance of peace in the region. The second examines the roots and distinctiveness of wartime criminality, the challenges posed by the penalisation of acts of systemic violence and the inadequacy of ordinary criminal law mechanisms to establish responsibility for mass atrocities. The remaining sections gauge the ICTY's effectiveness in delivering its three core aims and investigate the reasons of its failure to attain any of these objectives; a failure echoed in the local population's scepticism towards the institution. Finally, the paper scrutinises alternative options and advocates a switch of emphasis from penal responses to transitional justice mechanisms like truth commissions and compensatory solutions.

Standards of effectiveness

Assessment of the success of international criminal justice calls for an inquiry into its aims. One must then investigate what the prosecution of individuals in supranational *fora* effectively achieves, in order to determine whether they fulfil their explicit mandate and the broader expectations of the 'international community'.

International criminal law basically regulates the international responsibility of individual actors. Security Council Resolution 827 purports to establish the ICTY 'for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia'.[1] This allegedly unique function of the Tribunal cannot be divorced from underlying strategic goals. The Security Council adopted Resolution 827 in the frame of its 'primary responsibility for the maintenance of international peace and security' under Article 24 §1 and Chapter VII of the UN Charter. After determining that the situation in the former Yugoslavia constituted 'a threat to international peace and security', it puts forward that the prosecution of international crimes committed on its territory 'would contribute to the restoration and maintenance of peace'.[2] Accordingly, the main criterion to appraise its adequacy from a teleological perspective is its effectiveness in contributing to, on one hand,

1 UN Security Council, *Resolution 827 (1993)*, 25 May 1993, UN Doc., S/25704, § 2.

2 Ibid., Preamble.

the restoration of peace, the deterrence of additional violence and the cessation of military hostilities and, on the other hand, the maintenance and consolidation of peace and security in the post-conflict era (Futamura 2008, 3–4; Kerr 2000, 17); namely, its support for a lasting peace and long term stability in the region through the reconciliation of erstwhile enemies. Yet, penalisation tends to be counterproductive on both counts: the indictment and prosecution of civil and military leaders reduce the realistic prospects of a negotiated ceasefire and prompt settlement of the conflict (D'Amato 1994, 500–501), while the adversarial nature of criminal trials undermines the reconciliation process. In a nutshell, 'peace through justice' often leads to 'peace *versus* justice'.

The ICTY considers that its mandate is 'threefold: to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace', and identifies itself 'as one of the measures designed gradually to promote the end of armed hostilities and a return to normality'.[3] A supplementary purpose was eventually endorsed, that of rendering justice to the victims.[4] The ICTY has also tried to clarify the 'purposes and objectives' of sentencing. In a misguided attempt at exhaustiveness, it has lumped together 'retribution, protection of society, rehabilitation and deterrence' of the accused (special deterrence) and other persons alike (general deterrence). Retribution has been renamed 'just deserts', while deterrence is sometimes mentioned under the label of 'prevention'. In a competing account, the Tribunal emphasises 'public reprobation and stigmatisation by the international community'; which partakes more of the classical symbolic vision of penalisation. It recurrently brings up the fight against impunity, the end of infractions to humanitarian rules, public information and the establishment of 'truth', redress, 'appeasement' for the victims and their relatives, reconciliation and contribution to the peace process.[5] The goals enumerated vary from one

---

3 ICTY, *First Annual Report*, 28 July 1994, UN Doc., A/49/342; S/1994/1007, §§ 11–14.

4 ICTY, *Ninth Annual Report*, 14 Aug. 2002, UN Doc., A/57/379; S/2002/985, § 328.

5 ICTY, *Tadić (Prijedor)*, IT-94–1-T*bis*-R117, *Sentencing Judgement*, 11 Nov. 1999, §§ 7–9.
ICTY, *Karadžić (Bosnia and Herzegovina)*, IT-95–5/18-AR73.4, *Decision on Karadžić's Appeal of Trial Chamber's Decision on Alleged Holbrooke Agreement*, 12 Oct. 2009, § 52.
ICTY, *Jelisić (Brčko)*, IT-95–10-T, *Judgement*, 14 Dec. 1999, §§ 116–117.
ICTY, *Blaškić (Lašva Valley)*, IT-95–14-T, *Judgement*, 3 Mar. 2000, §§ 761–764.
ICTY, *Aleksovski (Lašva Valley)*, IT-95–14/1-A, Judgement, 24 Mar. 2000, § 185.
ICTY, *Furundžija (Lašva Valley)*, IT-95–17/1-T, *Judgement*, 10 Dec. 1998, §§ 288–291.
ICTY, *Delalić et al. (Čelebići Camp)*, IT-96–21-T, *Judgement*, 16 Nov. 1998, §§ 1231–1234.
ICTY, *Erdemović (Pilica Farm)*, IT-96–22-T, *Sentencing Judgement*, 29 Nov. 1996, §§ 58–60, 64–66.

judgement to the next and none refers to this list in its entirety. The exaggerated ambitiousness, irreconcilability and lack of ranking of the professed objectives are striking.

Interestingly, the ICTY appears to be aware of the mutually exclusive character of some of its self-appointed missions. Convictions handed on retributive premises risk disrupting the peace process,[6] while invoking other classical justifications for the prosecution of ordinary crimes in times of peace hardly makes sense in the context of wartime violence. The deterrent power of international criminal justice is doubtful: the ICTY was created before the Dayton Peace Agreement and was already operational at the time of some of the most serious breaches of the *ius in bello* during the Yugoslav civil wars. The ICTY acknowledges that deterrence, social defence and rehabilitation are problematic targets of sentencing. The improbability of opportunities for recidivism renders the consideration of specific deterrence 'unreasonable and unfair' and reliance on general deterrence ignores that 'a sentence should in principle be imposed on an offender for his culpable conduct'. Social protection cannot justify the preventive detention of first time offenders without criminal records, the very nature of international crimes means that they 'can be committed only in certain contexts which may not arise again in the society where the convicted person, once released, may eventually settle', and the 'rehabilitative effect' of imprisonment is controversial at best.[7] Therefore, international justice cannot promote other traditional rationales for penalisation than retribution.

The success of international criminal tribunals essentially depends on their ability to respect the standards of conventional deontic justice, together with their capacity to answer the broader societal concerns that presided over their creation; to deliver redress to the victims and secure peace. Besides, effective justice cannot be attained if it is marred by unfairness or breaches the substantive and procedural rights of the accused. The ICTY was not meant to be only concerned with the punishment of atrocities but also to try the defendants in conformity with international human rights law.[8] Proceedings in front of the ICTY have unfortunately

ICTY, *Kunarac et al. (Foča)*, IT-96–23&23/1-T, *Judgement*, 22 Feb. 2001, §§ 836–842. ICTY, *Plavšić (Bosnia and Herzegovina)*, IT-00–39&40/1-S, *Sentencing Judgement*, 27 Feb. 2003, §§ 79–81.

6 ICTY, *Delalić et al. (Čelebići Camp)*, IT-96–21-T, *Judgement*, 16 Nov. 1998, § 1231.

7 ICTY, *Kunarac et al. (Foča)*, IT-96–23&23/1-T, *Judgement*, 22 Feb. 2001, §§ 840, 843–844.

8 ICTY, *Tadić (Prijedor)*, IT-94–1-AR72, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 Oct. 1995, §§ 4, 46.

failed spectacularly in all three respects, by seriously infringing the basic rights of individual participants in the trials, denying adequate remedies to the victims and destabilising peace and reconciliation. They most usefully serve as a catalogue of judicial *worst* practices, illustrating the hazards of tempering with the rule of law through adjudication, and militate for a complete reform (*voire* the abolition) of the international criminal system.

Ordinary rules for extraordinary crimes

International crimes are tied to the specific circumstances of armed conflicts or situations of widespread societal violence. The transplantation of common (or harmonised) national rules for the prosecution and punishment of ordinary crimes in front of international tribunals creates deep tensions and irresolvable problems.

From a liberal (rights-based) perspective, the sole claim to legitimacy of prosecution and penalisation is to be found in deontological 'desert'-based considerations (Hart 1957, 448–455). Since 'punishment must respect the offender as an end in himself, as a responsible agent called to account for his wrongdoing' (Fletcher 1998, 43), the offence results from an intentional autonomous act of the accused, whose wrongfulness excuses society's retaliation and encroachment upon her personal rights. This conception of the object of penal justice, entrenched in the general principle of personal culpability, is widely recognised by national systems of criminal law. Criminal responsibility requires an element of *mens rea*, the intention to commit the imputed infraction; the deed itself cannot be determinative of guilt in the absence of a blameworthy intent. The vast majority of national legal systems have adopted the concept and it most likely qualifies as a general principle of law under Article 38 of the Statute of the International Court of Justice (Pradel 1995, 251–253; Schabas 2003, 1015). Criminal responsibility targets transgression from established norms and endeavours to rehabilitate and re-socialise estranged or maladjusted members of the community. Retributivism and associated expressive goals are grounded in the idea that punishment is not meted solely to penalise breaches of the law but also to sanction a perceived moral wrong. This framework is structurally disconnected from the realities of wartime violence and the roots of international criminality.

Far from being deviant or in conflict with prevailing values, the perpetrators of international crimes are usually well-adjusted individuals with good social skills,

ICTY, *Delalić et al. (Čelebići)*, IT-96–21-T, *Decision on Zdravko Mucić's Motion for the Exclusion of Evidence*, 2 Sept. 1997, § 60.

characterised by a lack of criminal identity. During armed conflicts, individuals commit atrocious crimes out of survival instinct or patriotism, sometimes under the perception that they are defending their own people from ethnic cleansing and possible extermination (Gaynor and Harmon 2007, 693–695).[9] They do not consider the offences morally wrong but acceptable or right. Whereas particular actors might act out of different motives and use their violent environment for personal purposes, most culprits are moved by loyalty, trust in authority, obedience or conformism. Others do not even act out of their own accord and only cooperate reluctantly under pressure, intimidation, force or coercion. Their crimes cannot be comprehended if divorced from the context of collective violence (Smeulers 2008a, 240–260).

The brutal conditions of warfare, coupled with usual socio-psychological mechanisms, transform many hitherto undisturbed people into willing executors or accomplices of mass scale offences. The limits of sanity are radically redefined; and so are social and moral norms and imperatives. Acts normally perceived as wrongdoings are now considered acceptable, if not commendable. This has a double effect on individual members of affected societies. First, they get progressively and incrementally desensitised to human suffering and eventually to horrendous cruelties. Secondly, they often feel compelled to participate in the spiral of violence. They frequently lose the rational capacity to tell right from wrong or they end up believing in the rightness of crimes (Arendt 1963; Smeulers 2008a, 238–240, 263–264). The international rules that regulate the conduct of hostilities sanction some weighting of humanitarian concerns against military necessity. This aggravates people's perception that anything will do if it serves the general war effort or belligerent imperatives. This situation is exacerbated in internal conflicts, characterised by a higher level of savagery, due to the proximity of the adversary. Civil wars are 'designed to be criminal' and are often accompanied by propaganda campaigns aimed at dehumanising and demonising antagonist groups before the actual start of ethnic cleansing operations (Fatić 2000, 21, 71–73). The entire opponent population becomes the enemy and no atrocity against this newly fabricated enemy is considered barbaric enough.

International 'crimes are manifestations of collective violence and are described by lawyers as structural or system criminality'. They purport to obtain or keep political power and states' apparatuses usually sanction, if they do not encourage,

9 ICTY, *Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia*, 4 May 2006, http://www.icty.org/x/file/Press/PR_attachments/DU-audit.pdf.

the perpetration of international crimes. This casts the particular offenders in the part of simple executioners of 'crimes of obedience' (Drumbl 2007, 33; Smeulers 2008b, 971, 973–980). Because of the banality of the evils committed under extreme circumstances (Arendt 1963; Smeulers and Werner 2010) and the collective dimension of international crimes, the attribution of responsibility for these offences to specific individuals is not easily reconciled with the retributive and expressive purposes traditionally associated with criminal justice. Collective penalisation contradicts any remotely liberal understanding of criminal justice and the core premises of human rights. Picking a few scapegoats to bear responsibility for the actions of an entire regime similarly contradicts the ethical underpinnings of deontic justice. On one hand, 'it fails to hold accountable the full array of people who individually are responsible for the collectivisation of atrocity' and contradicts allegations to the effect that it will put an end to impunity (Drumbl 2007, 37). On the other hand, the arbitrariness of such an indictment process vitiates the most basic conditions of fairness, giving rise to justified charges of partiality and undermining the legitimacy of the trials: 'the need to select challenges the very concept of fair justice and retribution' (Smeulers 2008b, 982).

'International crimes can only be totally captured as state crimes' or 'organisational crimes' (Chouliaras 2010, 548–549). First, they are committed or provoked by states. Secondly, they affect other states' interests and interstate relations because of their interconnection with international peace and security and their negative impact on the consolidation of the international legal order. Thirdly, international organisations meant to represent the international community of states are responsible for their definition and the modalities of their penalisation (Alvarez 1999, 367–368). This supports an interstate mechanism to ascertain liability for the wrongdoings, focusing both on states and international organisations directly responsible for the atrocities and on those causally responsible for the outbreak of the hostilities of which wartime violence is an intrinsic feature. Such a solution would strike straight at the roots of international crimes, take due account of their distinctiveness and help dispel the main concern of the 'international community' (their effect on international peace and security), by tackling the whole phenomenon of wartime violence. Their penalisation in front of international criminal tribunals does not provide a remedy to the broader situation of collective violence and entrusts international lawyers with the difficult task of squaring the accountability circle in relation to individual offences that essentially constitute acts of states. Ignoring the causal link between war and unspeakable crimes hinders any realistic possibility to curb the risks of their resurgence

and bring about effective justice. Regrettably, international responses to wartime criminality completely overlook its causes and underplay its distinctiveness.

Doing injustice

Supra-national courts adhere to policy considerations and forward extra-legal political or ideological goals, at the cost of negating peremptory legal rules, in the fashion of authoritarian models of criminal justice (Fichtelberg 2008; Robinson 2008; Robinson 2010). This is largely due to a lack of insights into international criminology and the inadequacy of ordinary criminal law mechanisms to establish responsibility for mass atrocities. Due to the collective character of the crimes on trial, international prosecutors and courts have relied on unorthodox doctrines to attribute personal responsibility for these offences to actors other than their direct physical perpetrators by lowering the *mens rea* threshold required as an evidence of the criminal intent. They allow imputation of the crimes to people who neither committed nor intended them, on grounds of mere negligence or even on account of the foreseeable character of the infractions. Since they greatly facilitate the work of the prosecutor's office, they have served as the central charge in many indictments; which poses serious legitimacy problems for the ensuing trials and casts doubts on the resulting convictions.

Shortcomings can be identified in the absence of fair labelling, expanding definitions of crimes, sweeping modes of liability, and reticence towards traditional means of defence and causes of exoneration. Denial of the possibility to invoke duress in relation to war crimes and crimes against humanity exemplifies this last point most compellingly.[10] Traditional modes of liability have been construed in an extravagantly extensive fashion and some of their customary constitutive elements ignored, like the 'specific direction' requirement for complicity;[11] which conditions responsibility to a determination that the acts of the accused

10 ICTY, *Erdemović (Pilica Farm)*, IT-96–22-A, *Judgement*, 7 Oct. 1997, § 19.
ICTY, *Kvočka et al. (Omarska, Keraterm, Trnopolje)*, IT-98–30/1-T, *Judgement*, 2 Nov. 2001, § 403.

11 ICTY, *Mrkšić et al. (Vukovar Hospital)*, IT-95–13/1-A, *Judgement*, 5 May 2009, § 159.
ICTY, *Milan Lukić and Sredoje Lukić (Višegrad)*, IT-98–32/1-T, *Judgement*, 20 July 2009, § 424.
ICTY, *Stanišić and Simatović*, IT-03–69-A, *Judgement*, 15 Dec. 2015, §§ 104–107.
ICTY, *Perišić*, IT-04–81-T, *Judgement*, 6 Sept. 2011, §§ 1580–1648.
ICTY, *Šainović et al (Kosovo)*, IT-05–87-A, *Judgement*, 23 Jan. 2014, §§ 1617–1651.
ICTY, *Popović et al. (Srebrenica)*, IT-05–88-A, *Judgement*, 30 Jan. 2015, § 1758.
Contra: ICTY, *Perišić*, IT-04–81-A, *Judgement*, 28 Feb. 2013, §§ 13–74.

were specifically directed to assist the commission of crimes. The provision of logistic and personnel support to allied armies has led to convictions for aiding and abetting all crimes committed by these armies; criminalising the waging of war *per se* and creating a new crime beside those listed in the ICTY Statute.[12] The expansive interpretation of the doctrines of command responsibility and 'co-perpetratorship' promotes a conception of criminal imputation more akin to absolute liability.

Command responsibility requires some correlation between the actions of the accused superior and the crimes committed by his underlings. The ICTY has interpreted this link in a much broader fashion than customarily accepted. The resulting offence combines an *actus reus* of omission with a *mens rea* of negligence or lack of diligence, on the basis of a 'had reason to know' standard. It permits condemning someone for genocide solely 'as a result of his failure to carry out his duty as a superior to exercise control over his or her subordinates', even though she did not share with them the specific intent or *dolus specialis* required as an integral part of the crime of genocide.[13] It does not demand a causal relation between the conduct of the commander and the actual infractions, be it in cases of failure to prevent the culpable acts or punish their authors.[14] A clear-cut example of abusive use of the theory, 'the responsibility of a superior for acts which were committed before he became the superior of the persons who committed them', was seriously considered, with mixed results.[15] Accused have been convicted of murder for aiding and abetting by omission and superior responsibility for their failure to protect prisoners and prevent

---

12 ICTY, *Perišić*, IT-04–81-T, *Judgement*, 6 Sept. 2011, B. Moloto, Dissenting Opinion Counts 1–4 and 9–12, § 3.

13 ICTY, *Brđanin (Krajina)*, IT-99–36-T, *Judgement*, 1 Sept. 2004, §§ 711, 717–721.

14 ICTY, *Kordić and Čerkez (Lašva Valley)*, IT-95–14/2-T, *Judgement*, 26 Feb. 2001, § 447.
ICTY, *Delalić et al. (Čelebići)*, IT-96–21-T, *Judgement*, 16 Nov. 1998, §§ 398–400.
ICTY, *Perišić*, IT-04–81-T, *Judgement*, 6 Sept. 2011, §§ 138–140, 1653.

15 While this dangerous extension of the traditional customary norms was accepted by trial chambers, the majority of the Appeals Chamber ruled it out in an authoritative decision.
Compare: ICTY, *Kordić and Čerkez (Lašva Valley)*, IT-95–14/2-T, *Judgement*, 26 Feb. 2001, § 446.
ICTY, *Hadžihasanović and Kubura (Central Bosnia)*, IT-01–47-PT, *Decision on Joint Challenge to Jurisdiction*, 12 Nov. 2002, §§ 180–202; IT-01–47-AR72, *Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility*, 16 July 2003, §§ 37–57.

their transfer to the custody of the perpetrator in principal;[16] confusing the notions of 'substantial effect on the crime' and failure 'to act in order to render those crimes substantially less likely'.[17] The accused's high rank, support to allied armies and payment of salaries and other benefits to re-subordinated military personnel were deemed sufficient evidence of his operational control over them,[18] although this finding was quashed in appeals on grounds of 'reasonable doubt'.[19] These extrapolations hint at collective responsibility handed on to randomly selected suspects and the ICTY definition effectively boils down to strict vicarious liability.

The concept of 'joint criminal enterprise', invented by the Appeals Chamber[20] and tellingly nicknamed 'just convict everyone' (Badar 2006; Schabas 2006, 429), provides an extreme example of guilt by association. Conjuring up the specificity and collective character of international crimes, the ICTY simply created the doctrine by means of a purposive interpretation of its statute; contradicting the principle of legality and the obligation to strictly construe penal norms. The notion of joint criminal enterprise is an over-inclusive catch-all concept, in the literal sense of the term. It permits convicting the author of an insignificant contribution to a single offence of all the crimes possibly somewhat connected to it, through the prosecutor's invocation of a common plan. The accused might have neither committed the *actus reus* nor possessed the *mens rea* required for the infractions. She might even have had no knowledge of their occurrence. Here again, it has led to discarding the *dolus specialis* required for the commission of genocide.[21] The theory knows of no geographical, structural or temporal limitations. It can apply to an entire region (*voire* a country) and to organisations comprised of thousands

---

16 ICTY, *Mrkšić et al. (Vukovar Hospital)*, IT-95–13/1-A, *Judgement*, 5 May 2009, §§ 45–103.
ICTY, *Popović et al. (Srebrenica)*, IT-05–88-T, *Judgement*, 10 June 2010, §§ 1981–1991; IT-05–88-A, *Judgement*, 30 Jan. 2015, §§ 1725–1765.

17 ICTY, *Mrkšić et al. (Vukovar Hospital)*, IT-95–13/1-A, *Judgement*, 5 May 2009, A. Vaz, Partly Dissenting Opinion, especially §§ 10–11, note 28.

18 ICTY, *Perišić*, IT-04–81-T, *Judgement*, 6 Sept. 2011, §§ 1753–1769.

19 ICTY, *Perišić*, IT-04–81-A, *Judgement*, 28 Feb. 2013, §§ 77–79, 86–118.

20 ICTY, *Tadić (Prijedor)*, IT-94–1-A, *Judgement*, 15 July 1999, §§ 187–220.

21 ICTY, *Stakić (Prijedor)*, IT-97–24-A, *Judgement*, 22 Mar. 2006, § 38.
ICTY, *Krstić (Srebrenica-Drina Corps)*, IT-98–33-T, *Judgement*, 2 Aug. 2001, §§ 617–618.
ICTY, *Brđanin (Krajina)*, IT-99–36-A, *Decision on Interlocutory Appeal*, 19 Mar. 2004, §§ 5–10.
ICTY, *Đorđević* (Kosovo), IT-05–87/1-A, *Judgement*, 27 Jan. 2014, §§ 73–84.

of participants.[22] All participants in the so-called 'enterprise' are deemed to have 'committed' the abuses and considered to be 'equally guilty of the crime regardless of the part each played in its commission'.[23] At the limits, any member of an army or civilian institution could be held accountable for the whole range of offences perpetuated by this organisation nation-wide; a result which verges on the absurd. As a mode of liability, joint criminal enterprise clearly falls short of the slimmest pretence of respect for the principle of personal culpability. It proves equally wrong from a teleological perspective: it necessarily results in discounted convictions, which trivialise the guilt of the accused and do not vindicate the claims of the victims, and it risks generating further violence in the region; a fact the Tribunal is well aware of.[24]

The ICTY violates basic human rights of the accused to an unprecedented extent, only mirroring the grim precedent of the International Military Tribunals formed after the end of the Second World War. It has claimed a form of international 'exceptionalism' to bypass a stringent construing of the principle of legality and the ban on retroactive penalisation. It heavily resorts to *ex post facto* creation or specification of penal offences and modes of liability, as well as to reasoning by analogy, in violation of the *nullum crimen sine lege* principle. It imposes heavier sentences than allowed under domestic law and possibly under general international law, in breach of the *nulla poena sine lege* rule and Article 24 § 1 of its statute. Clashing decisions concerning international customs and the constant modification and update of its rules of procedure and evidence generate further legal uncertainty, at the substantive and procedural levels (Reiter 2013). The accused are deprived of their right to appeal in certain circumstances. In a case where a conviction for additional crimes was entered at the appellate level, the Appeals Chamber substantially increased the prison sentence instead of sending the case back to a lower level formation for

---

22 ICTY, *Kvočka et al. (Omarska, Keraterm, Trnopolje)*, IT-98–30/1-T, *Judgement*, 2 Nov. 2001, § 307.
ICTY, *Brđanin (Krajina)*, IT-99–36-A, *Judgement*, 3 Apr. 2007, § 422.

23 ICTY, *Stakić (Prijedor)*, IT-97–24-T, *Judgement*, 31 July 2003, § 435.
ICTY, *Krnojelac (Foča)*, IT-97–25-T, *Judgement*, 15 Mar. 2002, § 82.
ICTY, *Vasiljević (Višegrad)*, IT-98–32-T, *Judgement*, 29 Nov. 2002, § 67; IT-98–32-A, *Judgement*, 25 Feb. 2004, § 111.
ICTY, *Milan Milutinović et al. (Kosovo)*, IT-99–37-AR72, *Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise*, 21 May 2003, § 20.

24 ICTY, *Martić (RSK)*, IT-95–11-A, *Judgement*, 8 Oct. 2008, *Separate Opinion of Judge Schomburg*, §§ 2, 5.
ICTY, *First Annual Report*, 28 July 1994, UN Doc., A/49/342; S/1994/1007, § 16.

retrial and sentencing purposes.[25] Likewise, it ratifies the introduction of alternate modes of liability during appeals proceedings.[26] In addition, one must deplore the striking inequality of arms between the parties (Bachmann and Fatić 2015, 55–75); the admission of written summaries of witness statements drafted by prosecution investigators and adjudicated facts from previous trials;[27] the erosion of the right to remain silent and the presumption of innocence by the introduction of a condition of 'reciprocal disclosure' of the parties files and documents;[28] the endorsement of judgements taken on the basis of a single uncorroborated testimony;[29] the exclusion of some accused from the courtroom and the denial of their right to self-representation;[30] the unusual length of the trials, the unacceptably long periods of detention on remand and the possibility of balancing human conditions of imprisonment against the imperatives of security and order.[31] This complete denial of the defendants' rights to personal liberty, fair trial and even physical integrity irremediably frustrates any pretention of the ICTY to deliver effective justice.

---

25 ICTY, *Mrkšić et al. (Vukovar Hospital)*, IT-95–13/1-A, *Judgement*, 5 May 2009.

26 ICTY, *Simić et al. (Bosanski Šamac)*, IT-95–9-A, *Appeal Judgement*, 28 Nov. 2006, §§ 75, 301.
ICTY, *Dragomir Milošević (Sarajevo)*, IT-98–29/1-A, *Judgement*, 12 Nov. 2009, §§ 279–282.
ICTY, *Krstić (Srebrenica-Drina Corps)*, IT-98–33-A, *Judgement*, 19 Apr. 2004, §§ 138–139, 143–144.

27 ICTY, *Slobodan Milošević (Kosovo, Croatia and Bosnia)*, IT-02–54-AR73.5, *Decision on Interlocutory Appeal on the Admissibility of Evidence in the Form of Written Statements*, 30 Sept. 2003.
ICTY, *Tolimir (Srebrenica)*, IT-05–88/2-A, *Judgement*, 8 Apr. 2015, §§ 16–40.

28 ICTY Rules of Procedure and Evidence, Nos 66 (B), 67.

29 ICTY, *Tadić (Prijedor)*, IT-94–1-T, *Opinion and Judgement*, 7 May 1997, §§ 256, 535–539.

30 ICTY, *Karadžić (Bosnia and Herzegovina)*, IT-95–5/18-T, *Decision on Appointment of Counsel and Order on Further Trial Proceedings*, 5 Nov. 2009, §§ 14–16, 19–27.
ICTY, *Slobodan Milošević (Kosovo, Croatia and Bosnia)*, IT-99–37 / IT-02–54-AR73.7, *Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel*, 1 Nov. 2004, §§ 11–14.
ICTY, *Šešelj Case*, IT-03–67-PT, *Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence*, 9 May 2003, §§ 20–21; IT-03–67-AR73.3, *Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel*, 20 Oct. 2006, § 8; IT-03–67-AR73.4, *Decision on Appeal against the Trial Chamber's Decision (No 2) on Assignment of Counsel*, 8 Dec. 2006, § 19.

31 ICTY, *Blaškić (Lašva Valley)*, IT-95–14-PT, *Decision on the Defence Motion Filed pursuant to Rule 64*, 6 Jan. 1997.

Absence of redress and reconciliation

Whereas restorative justice facilitates reconciliation, retributivism hinders both. Criminal law looks backwards and largely ignores reconciliatory considerations. It is centred on the parties to the criminal trial (the prosecutor and the accused or the defence) and downsizes the role of victims to that of third parties in the proceedings. Since victims want to be heard and claim some ownership of the process, international criminal law endorses the aims of transitional justice mechanisms and human rights law. The ICTY Statute and its rules of procedure and evidence create a hybrid regime.

The rights of victims can be divided in two categories. The first group facilitates the victims' participation in the proceedings and enables them to receive some form of satisfaction or reparation. Victims cannot claim any compensation in front of the ICTY, aside from the restitution of their property; which the ICTY has never ordered. If the accused are found guilty, they may bring an action before national courts or other competent bodies to obtain reparation for the damages, pursuant to the relevant national legislation.[32] The second group of rights provides support to victims, through the creation of a victims and witnesses unit within the ICTY registry,[33] and protects them against intimidation or aggravation of their traumas.[34] International criminal tribunals encounter serious difficulties in securing the attendance of witnesses because of their inability to control any given territory and the risks involved for the personal safety of those willing to testify, dangers increased by the highly political context of the crimes and their close relation to unresolved ethnic tensions. International judges regularly discard the legitimate claims, motivations, allegiances and dramatic or traumatic experiences of victims, when supervising their examination or cross-examination. On top of the serious mishandling, harsh questioning and victimisation of vulnerable persons, during what has been described as 'silencing hearings' (Dembour and Haslam 2004), they treat abjectly people unwilling to testify because of threats or out of personal loyalty and patriotism.[35] Witnesses are meagrely reimbursed

---

32 ICTY Rules of Procedure and Evidence, Nos 105–106.

33 Ibid., No 34.

34 Ibid., Nos 69, 75, 79, 81–81 *bis*, 90, 92 *bis-quinquies*, 96.

35 See, for an example of the latter type: ICTY, *Slobodan Milošević (Kosovo, Croatia and Bosnia)*, IT-99–37 / IT-02–54, *Transcripts*, 19–20 Apr. 2005, pp. 38592–38597, 38605–38606, 38615–38617; IT-02–54-T, *Order on Contempt concerning Witness Kosta Bulatović*, 20 Apr. 2005; IT-02–54-R77.4, *Decision on Contempt of the Tribunal*, 13 May 2005; IT-02–54-AR77.4, *Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings*, 29 Aug. 2005.

for their expenses and time spent and completely 'abandoned' post-trial (Stover 2005, 96).

In drafting its rules of procedure and evidence, the ICTY has balanced two sets of objectives: the respect of the rights of the defence and the protection of victims and witnesses, in order to enable them to testify and facilitate the trial.[36] The power to examine prosecution witnesses and the publicity of the trial are limited when they conflict with the safety or the rights of victims and witnesses. Specific provisions are aimed at averting the worsening of the sufferings experienced by victims of sexual assaults and take into account their vulnerability when confronted with their aggressor or the memory of the attack. Unhappily, the measures adopted did not protect victims and witnesses from reprisals or further victimisation. Numerous witnesses have been killed before reaching the court, to prevent them from giving their testimony, or after they had testified, to take revenge on them, and the media sometimes exercises pressure to dissuade witnesses from testifying against 'what the prevailing state of mind considers proper'. A solution would be to grant political asylum to endangered persons and their family but relocation and settlement in a third country is done only in rare instances and witnesses may refuse this protection (Humanitarian Law Centre 2000, 58–63, 69, 134; Stover 2005, 113–114). The ICTY and the office of the prosecutor have actively contributed on several occasions to a serious aggravation of the already dire situation of insecurity facing victims and witnesses. The trial of leaders of the Kosovo Liberation Army, where the climate of intimidation and terrorisation was so pervasive that a retrial was ordered,[37] provides an emblematic illustration of the dangers raised by the prevailing unawareness of the international actors involved. The Trial Chamber disclosed sensitive confidential information, in breach of adopted protective measures,[38] and initiated contempt proceedings against a witness who had refused to answer questions out of fear.[39]

The current fixation of the 'international community' on personal accountability and the fight against impunity hardly masks the confession of its powerlessness to stop the commission of mass atrocities and hints at a greater concern

36 ICTY Statute, Articles 15, 21–22.

37 ICTY, *Haradinaj et al. (Kosovo)*, IT-04–84-A, *Judgement*, 19 July 2010, §§ 34, 37, 48–49.

38 ICTY, *Haradinaj et al. (Kosovo)*, IT-04–84-PT, *Order on Disclosure of Memorandum and on Interviews with a Prosecution Source and Witness*, 13 Dec. 2006, pp. 1, 9; IT-04–84-T, *Decision on Motion for Video-Link*, 14 Sept. 2007, § 3; IT-04–84-A, *Judgement*, 19 July 2010, §§ 41, 48, notes 130, 158.

39 ICTY, *Haradinaj et al. (Kosovo)*, IT-04–84-R77.1, *Order on Contempt concerning Shefqet Kabashi*, 5 June 2007.

for their punishment than their prevention. The consolidation of peace and the stabilisation of the security situation in post-conflict regions pass through a comprehensive process of catharsis, forgiveness and the rapprochement of the warring groups. Restorative justice achieves this by focusing on remedies to the injustice committed and reparation of the wrong done to the victims rather than on punishment. International criminal trials do not normally serve reconciliatory objectives but partake in a vicious circle of war and penalisation. Their adversarial nature contributes to a widening of discords and divisiveness in the recipient societies and a continuation of the conflicts by legal means; 'lawfare' merely substituting warfare. This predicament also affects interstate trials attributing liability for wartime violence, like the genocide cases introduced before the International Court of Justice. The selectivity and formalism of international criminal proceedings endanger the expressive capacity of punishment. Due process requirements may distort historical records (Damaška 2008, 336) and international tribunals can solely establish a judicial or legal 'truth' – not *the* (historical) 'truth'.

Individuation masks the more structural and systematic causal responsibility for wartime violence. This might explain why the 'international community' eagerly embraces international criminal justice. Reducing justice to the penalisation of a few individuals permits hiding discomforting realities and shields international organisations and foreign states that intervene in civil wars from accountability for their role in the commission of international crimes. However, the reconciliatory potential (if any) of penalisation can only be achieved by bringing all responsible agents to answer for their culpable actions, independent of their nationality. Obscuring the faults of the international actors destroys the credibility of the judicial process and any positive impact it might have in the affected societies. The ICTY record is particularly grim in this respect (Bachmann and Fatić 2015, 36–44, 120–121, 236–237; Fatić 2000, 1–3, 9–19, 26–29, 45–56, 81–87, 103–105). The refusal to indict NATO officials for war crimes committed during the bombing of the Federal Republic of Yugoslavia, and summary dismissal of all evidences of the offences, provide the most egregious illustration of the prosecutor's lack of independence and impartiality and of her inability to resist political pressures.[40] The unwillingness of the prosecutor to further investigate NATO's crimes corroborates accusations that the ICTY dispenses 'victor's justice' (Benvenuti 2001; Colangelo 2003, 1425–1436; Darcy 2007, 393) and has been severely condemned

40 ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, 13 June 2000, especially §§ 90–91.

by the International Committee of the Red Cross, in a report that stigmatises the noticeable bias of the office of the prosecutor in favour of NATO member states and reliance on double standards (see for large extracts of the ICRC confidential report, Hazan 2000, 219–225). The flagrant disparity of treatment between the warring factions at the level of indictment, conviction and sentencing confirms this want of integrity (Bachmann and Fatić 2015, 80–92; Scharf 1997, 310–311).

The picture of the Tribunal as an instrument of *realpolitik* at the service of imperial powers widens the gap between the ICTY and the expectations of the SFRY population since 'sincerity' matters immensely for people to accept charges brought against their own leadership and national heroes (Fatić 2000, 28, 81). By opposition, 'victor's justice' usually creates cynicism or reactionary nationalistic attitudes in the targeted population. The social perception of the ICTY is abysmal. According to public opinion surveys, only an extremely small percentage (less than a quarter and, in some areas, less than ten percent) of the population expressed a modest level of trust in the institution, with the exception of Kosovo* and the Bosnian Federation (where it barely amounted to half of the respondents). The majority of the population in most areas overwhelmingly distrusts the Tribunal and sees it as politically motivated, partial and unfair. Local judges and prosecutors view it as a political court that is 'biased and incapable of providing fair trials' and they reject its factual findings and record of the war. Far from improving over time, the confidence in the appropriateness of the institution has substantially decreased after it had become fully operational and started to issue convictions. Victims' surveys reveal that they question its legitimacy, neutrality, procedural fairness and substantive fairness (the fairness of its decisions). In contrast, confidence in the national courts has largely increased over the years and most victims indicate it as the preferred jurisdiction for the remaining cases (Hagan and Kutnjak Ivković 2011, 6–8, 50, 144, 150–152; Stover 2005, 38).

Breaking the vicious circle of war and penalisation

To sum up, the punitive character of penal law and its focus on prosecution totally sidestep the rights of the victims and witnesses. Their participation in the proceedings in front of the ICTY is purely ancillary to the interests of the prosecution and falls short of the slimmest pretence to address their concerns. The ICTY fares equally badly with respect to the peace process. This tainted legacy militates for the abandonment of international criminal justice and the adoption of alternative adjudication strategies. In addition to the possibility of prosecution and punishment before national courts, addressing the various concerns mentioned above might involve abandoning the criminal justice approach or developing parallel strate-

gies. The specificities of wartime violence and reconciliatory imperatives argue for the endorsement of transitional justice mechanisms like truth commissions and restorative justice instruments. The transitional and restorative frameworks focus on shared values in the community and reparation of the harm done to promote reconciliation. Victims' narratives have a central role in this inclusive process. Truth commissions investigate the wider patterns of crimes and address impunity at the collective level. Usually, they have quasi-judicial functions, including the possibility to make recommendations concerning reparations (Mc Gonigle Leyh 2011, 51–52, 62). Besides, local civil courts and tribunals can order restitution or compensation.

Victims of international crimes have followed two promising approaches to obtain compensation in front of domestic or hybrid courts. First, internationally wrongful acts trigger state responsibility.[41] In two cases brought up by relatives of people killed in Srebrenica, a national court judged the Netherlands liable for the fate of several individuals whom Dutchbat soldiers had evicted from their compound after the fall of the enclave.[42] The Human Rights Chamber for Bosnia and Herzegovina condemned Republika Srpska and ordered reparations on account of the fact that its 'failure to make accessible and disclose information requested by the applicants about their missing loved ones constitutes a violation of its positive obligations to secure respect for their rights'.[43] A second solution is to be found in more individuated compensatory and restorative mechanisms, grounded in tort law, contract and restitution (Drumbl 2007, 195–196). In this frame, a French tribunal found Radovan Karadžić and Biljana Plavšić guilty of wartime abuses against a Bosnian family, who had fled to France, and awarded some monetary compensation to the plaintiffs.[44] Proceedings have also been introduced against Radovan Karadžić under the US Alien Torts Claims Act, which permits trials before American civil courts, for compensatory and punitive damages.[45] State responsibility, civil liability and corrective justice offer avenues for bypassing the

41 ILC, *2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, UN Doc., A/CN.4/L.620/Rev.1.

42 Court of Appeal of The Hague, *Mustafić*, No 200.020.173/01, & *Nuhanović*, No 200.020.174/01, 5 July 2011.

43 HR Chamber BiH, *Selimović et al. v. Republika Srpska (Srebrenica)*, 7 Mar. 2003, §§ 202–203.

44 Tribunal of Great Instance of Paris, *Kovac v. Karadžić and Plavšić*, 14 Mar. 2011.

45 New York District Court, *Doe v. Karadžić*, *Kadić v. Karadžić*, 1994.
US Second Circuit, *Doe v. Karadžić*, *Kadić v. Karadžić*, 1995.
US Supreme Court, *Doe v. Karadžić*, *Kadić v. Karadžić*, 1996.

insurmountable challenges raised by the ascription of personal responsibility for structural crimes and for adequately compensating the victims. Truth commissions and compensatory solutions, inherited from civil liability adjudication, give victims an important place in the process and the possibility to voice their concerns and grievances in a more appropriate *forum* than a penal trial. Finally, civil processes and remedies like restitution or compensation foster reconciliation and contribute positively to the consolidation of peace and security.

The sinister legacy of the ICTY and its inability to fulfil any of its core functions commands scepticism towards the international prosecution and punishment of individuals for wartime violence and militates for the adoption of higher standards or alternative solutions, which would satisfy the requirements of effective justice and the wider aspirations of the international community. While local courts are more legitimate and better equipped to deliver effective criminal justice, the intrinsic connection between international criminality and wartime violence supports reliance on a combination of judicial and quasi-judicial avenues to help in preventing the resurgence of violence by breaking the vicious circle of war and penalisation.

References

Alvarez, Jose E. 1999. Crimes of States, Crimes of Hate: Lessons from Rwanda. *Yale Journal of International Law* 24: 365–483.

Arendt, Hannah. 1963. *Eichmann in Jerusalem: A Report on the Banality of Evil*. New York: Viking Press.

Bachmann, Klaus and Aleksandar Fatić. 2015. *The UN International Criminal Tribunals: Transition without Justice?* London: Routledge.

Badar, Mohamed Elewa. 2006. Just Convict Everyone! – Joint Perpetration: From Tadić to Stakić and Back Again. *International Criminal Law Review* 6: 293–302.

Benvenuti, Paolo. 2001. The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia. *European Journal of International Law* 12: 503–529.

Chouliaras, Athanasios. 2010. From Conspiracy to Joint Criminal Enterprise: In search of the Organisational Parameter. In *Future Perspectives on International Criminal Justice*, edited by Carsten Stahn and Larissa van den Herik, 545–582. The Hague: Asser.

Colangelo, Anthony J. 2003. Manipulating International Criminal Procedure: The Decision of the ICTY Office of the Independent Prosecutor Not to Investigate NATO Bombing in the Former Yugoslavia. *Northwestern University Law Review* 97: 1393–1436.

Damaška, Mirjan. 2008. What Is the Point of International Criminal Justice? *Chicago – Kent Law Review* 83: 329–365.

D'Amato, Anthony. 1994. Peace *versus* Accountability in Bosnia. *American Journal of International Law* 88: 500–506.

Darcy, Shane. 2007. Imputed Criminal Liability and the Goals of International Justice. *Leiden Journal of International Law* 20: 377–404.

Dembour, Marie-Bénédicte and Emily Haslam. 2004. Silencing Hearings? Victim-Witnesses at War Crimes Trials. *European Journal of International Law* 15: 151–177.

Drumbl, Mark A. 2007. *Atrocity, Punishment, and International Law*. Cambridge: Cambridge University Press.

Fatić, Aleksandar. 2000. *Reconciliation via the War Crimes Tribunal?* Aldershot: Ashgate.

Fichtelberg, Aaron. 2008. Liberal Values in International Criminal Law: A Critique of Erdemović. *Journal of International Criminal Justice* 6: 3–19.

Fletcher, George P. 1998. *Basic Concepts of Criminal Law*. Oxford: Oxford University Press.

Futamura, Madoka. 2008. *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*. London: Routledge.

Gaynor, Fergal and Mark B. Harmon. 2007. Ordinary Sentences for Extraordinary Crimes. *Journal of International Criminal Justice* 5: 683–712.

Hagan, John and Sanja Kutnjak Ivković. 2011. *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts*. Oxford: Oxford University Press.

Hart, Herbert L.A. 1957. Murder and the Principles of Punishment: England and the United States. *Northwestern University Law Review* 52: 433–461.

Hazan, Pierre. 2000. *La justice face à la guerre: De Nuremberg à La Haye*. Paris: Stock.

Humanitarian Law Centre. 2000. *Spotlight on: Proceedings of the International Conference on War-Crimes Trials (Belgrade, 7–8 November 1998)*. Belgrade: Humanitarian Law Centre.

Kerr, Rachel. 2000. International Judicial Intervention: The International Criminal Tribunal for the Former Yugoslavia. *International Relations* 15 (No 2): 17–26.

Mc Gonigle Leyh, Brianne. 2011. *Procedural Justice? Victim Participation in International Criminal Proceedings*. Cambridge: Intersentia.

Pradel, Jean. 1995. *Droit pénal comparé*. Paris: Dalloz.

Reiter, Axelle. 2013. Kafka's Legacy: International Criminal Justice, Evangelical Law Making and the Rights of the Accused. In *Međunarodna Krivična Dela:*

Dvanaesti Tematski Međunarodni Naučni Skup. Belgrade: International Criminal Law Association.

Robinson, Darryl. 2008. The Identity Crisis of International Criminal Law. *Leiden Journal of International Law* 21: 925–963.

Robinson, Darryl. 2010. The Two Liberalisms of International Criminal Law. In *Future Perspectives on International Criminal Justice*, edited by Carsten Stahn and Larissa van den Herik, 115–160. The Hague: Asser.

Schabas, William A. 2003. *Mens Rea* and the International Criminal Tribunal for the Former Yugoslavia. *New England Law Review* 4: 1015–1036.

Schabas, William A. 2006. International Justice for International Crimes: An Idea Whose Time Has Come. *European Review* 4: 421–439.

Scharf, Michael P. 1997. A Critique of the Yugoslavia War Crimes Tribunal. *Denver Journal of International Law and Policy* 25: 305–312.

Smeulers, Alette. 2008a. Perpetrators of International Crimes: Towards a Typology. In *Supranational Criminology: Towards a Criminology of International Crimes*, edited by Roelof Haveman and Alette Smeulers, 233–265. Antwerp: Intersentia.

Smeulers, Alette. 2008b. Punishing the Enemies of All Mankind. *Leiden Journal of International Law* 21: 971–993.

Smeulers, Alette and Wouter Werner. 2010. The Banality of Evil on Trial. In *Future Perspectives on International Criminal Justice*, edited by Carsten Stahn and Larissa van den Herik, 24–43. The Hague: Asser.

Stover, Eric. 2005. *The Witnesses: War Crimes and the Promise of Justice in The Hague*. Philadelphia: University of Pennsylvania Press.

Martin Belov

The Opening of the Constitutional Order of Democracy in Transition towards Supranational Constitutionalism: the Bulgarian case

Abstract: This paper is devoted to the complex issue of how a national constitution of post-communist democracy in transition performs its opening function to the supranational constitutionalism of the EU in a pluralist, multi-layered, globalised and post-Westphalian idea and institutional context. It tries to conceptualise the interrelation between the European and the domestic legal order through the analysis of the opening function of the Constitution. The role of the national constitution for the constitutionalisation of the bond between the supranational and national constitutional orders will be exemplified by Bulgaria as a case study. The paper is structured around several important issues – the need for the conceptualisation of the opening function of the national constitution, the problems for defining the rules of recognition of supranational constitutional standards, the broken pyramid of the national system of the sources of law and the role that the constitutional identity and the substantive, formal and procedural limits to the transfer of sovereignty may have in the maintenance of the functionality and the importance of the constitution of an EU member state which is at the same time a democracy in transition.

Introduction: The constitutionalisation of the bond between supranational and national legal orders – the opening function of the national constitution

The influence of supranational legal orders on the domestic legal order of the state is possible only if it is explicitly or implicitly allowed by the national legal system. Such recognition has to be based on rules which are contained in the national legislation, preferably at constitutional level. In fact, the opening of the domestic order and the establishment of the legal ground for the justification of the penetration of supranational law into the domestic legal order is one of the main tasks of state constitutions in the post-Westphalian age.

Recognition of the validity of supranational law in the domestic legal system through rules provided by the supranational law itself can be exceptional. It could be based on presumed or implicit recognition or tacit permissive consensus. Such recognition and consensus can be extracted and defined through the interpreta-

tion of constitutional texts in combination with the analysis of the factual self-restraint of state institutions to prevent such influence of the supranational law on the domestic legal order. However, such implicit recognition does not possess sufficient democratic legitimacy and is open to arbitrary interpretation. Thus, it has to be avoided, even though in some cases it might appear to be a suitable solution.

The explicit recognition of the penetration of the supranational in the domestic legal order is typically grounded on provisions of the national constitution. The opening function of the constitution (see Bliznashki 2009, 184) towards the supranational legal order is legally based on this system of constitutional rules of recognition (see Hart 1997, 100 ff.). They explicitly connect the supranational legal orders with the national legal order and usually set the formal, procedural and substantive limits to both the transfer of sovereignty and the introduction of supranational constitutional standards in the domestic legal system.

The opening of the domestic constitutional and legal system towards the supranational law can be accomplished not only via explicit constitutional provisions but also through the activist jurisprudence of the constitutional courts. Thus, for example, the Bulgarian Constitutional Court pronounces in the motives to its Decision № 3 of 2004 the 'opening of the Bulgarian state towards the international law'. Such jurisprudence of the constitutional courts may be adopted and developed with a view to specific national issues and as unilateral praxis but it is much more frequently part of 'judicial dialogue' (for the concept of judicial dialogue see Martinico and Pollicino 2012, 1–272) with other national or supranational courts.

Another form of influence of supranational constitutionalism on the domestic legal system consists in the adoption of behavioural standards by the domestic constitutional actors which are typically defined and shaped as 'soft law' (for the concept of "soft law" see Abbott and Snidal 2000, 421–456). Moreover, the implicit, tacit or indirect opening of the domestic legal order, apart from the compliance with "soft law" standards, may also consist in the adoption of ideas or institutions in the form of reception or transplantation (see Watson 1993) in the national or subnational legislation or in the case law of the domestic courts. The influence of legal standards set by non-state actors, which can be observed in the course of the development of the global governance, is also a form of opening of the national legal order towards standards with a supranational origin (see Good 2016, 149–165).

All contemporary constitutions of the states belonging to the Western legal tradition preform an opening function. This function develops in three directions. The first direction consists in the establishment of a legal background for the direct or mediated validity of supranational sources of law in the domestic

legal order. An important prerequisite for that is the provision of a system and procedure for implementing international treaties and other supranational and international sources of law in the domestic legal system.

The second direction of the opening function of the constitution consists of the definition of formal, procedural and substantive limitations for the penetration of the supranational law in the domestic legal order and for the transfer of competences stemming from the national constitutions to supranational institutions. The third direction results in synchronising the constitutional axiology of the state with the axiology of supranational systems and regimes. Hence, these three directions of the opening function can be defined as procedural, limit setting and axiology coordinating respectively.

The constitution is the instrument for both linking and dividing legal orders. It is the factor that establishes the general ground for the validity of the international and supranational sources of law and for the membership in international and supranational organisations, and vice versa, the constitution can define borders that cannot be infringed by the supranational legal orders. They can be structured as counter limits (see Martinico 2007, 205–230), as elements of constitutional identity and as unamendable or entrenched clauses (see von Bogdandy and Schill 2011, 15–17). Thus the constitution usually defines or should define the sphere of preserved (substantive) sovereignty of the state and (formal) supremacy of its constitution.

From that point of view, the opening function of the constitution can also be defined as both linking and validating. The linking aspect of the opening function consists in the establishment of constitutional foundations for the state's membership in international organisations and in the EU. The validating function results in the constitutional provision of rules of recognition for the validity of supranational sources of law.

The opening function of the constitution can be interpreted in a legal positivist sense as well as from the point of view of the socio-legal and political theories for the state and the statehood such as the 'three-element theory' of Georg Jellinek (see Jellinek 2010). From a legal positivist point of view the opening function concerns the principles for linking the domestic with the supranational legal orders (monism, dualism or pluralism) (see Kalisz and Zalewska 2016, 115–129). Moreover it encompasses the (re)construction of the Kelsenian normative hierarchy and the safeguarding of the balance between the principle of supremacy of the constitution and the integration of the domestic legal order in the emerging global constitutionalism and global legal order. The opening function in its Hartian

interpretation highlights the constitutional provision of the rules for the validity and recognition of the supranational sources of law in the domestic legal system.

Moreover, with regard to the theory of Georg Jellinek, the opening function reflects the state's ability to provide for, to construct and to reconstruct the match between the public power, the people and the territory. The post-Westphalian problem here is whether it is possible and necessary to preserve the state as a 'territorial container' (see Brenner 1999, 55) and how the constitution should reflect and regulate the 'decompression' and the 'leaking of the container'.

The opening function of the 1991 Bulgarian Constitution – recreating European identity in multi-layered and pluralist setting

The 1991 Bulgarian Constitution performs an opening function for the Bulgarian constitutional and legal system in two directions: first, with regard to the constitutional and legal order of the EU and second, with view to the 'classical' international law and international relations. One can suppose that the opening function of the Bulgarian Constitution towards the EU and the EU law is grounded in its article 4, paragraph 3 which contains its EU integration clause, whereas the opening function towards the international law is based on its article 5, paragraph 4 that provides for the hierarchical status of the international treaties which are ratified by the Parliament, published and entered into force in the Bulgarian legal system. Moreover, article 85 of the Constitution clarifies which international treaties must be ratified by an act of Parliament and which can be introduced in the Bulgarian legal order through an act of the government.

This distinction is logical. However it is not absolutely valid in the Bulgarian legal order. The reason is the vagueness regarding the place of the EU law in the Bulgarian hierarchy of sources of law. This vagueness is produced by the lack of any concrete constitutional provision on that matter and the subsequent implicit and indirect, but not sufficiently consistent subsuming of EU law under the category of the international treaties by the Constitutional Court.

The distinction of the constitutional ground for the dual opening of the Bulgarian legal order towards the EU legal order and the international law is problematic in two additional aspects. First, international law is not a homogeneous category. Quite different phenomena coexist in the framework of the currently extremely broad and internally controversial concept of international law. Supranational quasi-federal constitutional regimes as the EU, international regimes with sectoral constitutionalisation, e.g. the WTO and the Council of Europe, institutional forms of global constitutionalism such as the UN and classical international or-

ganisations are all elements of the international legal order. They are all based and produce in one form or another 'international law' in this broad and almost all-encompassing sense. The legal standard-setting activity of the non-state actors of global governance is also on the rise at the beginning of the XXI century (see Saporiti 2016, 97–115 and Good 2016, 149–165).

Consequently article 5, paragraph 4 and article 85 of the 1991 Constitution are devises for opening of the Bulgarian legal order and for its linking only with the classical sources of law and actors of international law – the international treaties and the states and the international organisations respectively. However, they do not have a regulative effect on the relations between the state and the actors of global governance which are not states or international organisations. Moreover, these constitutionally enshrined rules of recognition do not reflect the influence of the 'soft law' on the Bulgarian legal order.

Second, the opening of the national legal and constitutional system cannot be limited to rules of recognition of the validity of supranational sources of law. It concerns also the constitutional provision of the prerequisites and conditions for membership of Bulgaria in international and supranational organisations and for its representation in the international relations. Elements of the national constitutional identity may also be components of these conditions. This is especially true for those parts of constitutional identity which establish substantive limitations for the transfer of the state sovereignty. Thus, the opening function of the constitution is the main manifestation of the external power of the state in the context of the supranational constitutionalism and the global governance.

The 1991 Constitution establishes the prerequisites for 'open statehood' (see Hobe 1996, 127–154) in Bulgaria. This is a post-communist constitution that was born in the epoch of optimistic globalisation and Europeanisation in the early 1990s. This is one of the factors for its EU friendly attitude, for the adoption of the monistic system for implementation of international treaties, for the facilitated procedures for transfer of sovereignty to the EU and for the general lack of substantive limitations for the transfer of sovereignty to the EU.

Another determinant of the openness of the 1991 Bulgarian Constitution to the supranational legal order and more precisely to the EU is the fact that 'Europe' as normative ideology has served an important role in forming the Bulgarian legal and constitutional tradition. The inclusion of the code of European civilization in the Bulgarian constitutional identity prevents its use as substantive limitation to the transfer of sovereignty to the EU. Thus, the openness of the 1991 Constitution does not offer any coherent set of indicators for the axiological and institutional

core of Bulgarian constitutionalism that has to be safeguarded against the uncritical imposition of supranational standards.

Therefore, the opening function of the 1991 Bulgarian Constitution concretely aims at the reestablishment of the European identity of the post-communist Bulgarian state and society and for the establishment of conditions for democracy and rule of law. The reintegration of Bulgaria into the European constitutional tradition, institutionalised in the form of EU and Council of Europe, has been accomplished in the multi-layered and pluralist setting of the late Westphalian and early post-Westphalian European civilization and in the context of emerging supranational constitutionalism and global governance.

However, several types of simultaneously existing crisis, experienced by European societies in the early XXI century, are among the most important external macro factors that serve as obstacles for the establishment of a fully-fledged democracy and rule of law in post-communist Bulgaria. These are the crisis of representative democracy, the crisis of territoriality, the crisis of authority and the crisis of hierarchy. By crisis of hierarchy I understand the increasing dysfunctionality of the hierarchy as an explanatory paradigm with a central place in modern Western statehood.

The combination of all these factors makes the Bulgarian post-communist constitutional project for the establishment of democracy and rule of law almost fully dependent on the destiny of the European political and constitutional project institutionalised in the form of the EU. In other words, the explicit and implicit EU friendliness of the Bulgarian Constitution, the lack of a national constitutional identity which is inherently distinct from the European identity of the 1991 Constitution and the creative importance of the European ideal for the establishment of the Bulgarian legal and constitutional tradition both open the Bulgarian constitutional order to the influence of the supranational constitutionalism of the EU and expose it to the crisis phenomena which are developing at an EU level.

The existence of such complex interrelated factors for the EU friendliness and the European identity of the 1991 Bulgarian Constitution does not mean that there is no Bulgarian constitutional identity. It only serves as an impediment to the development of the Bulgarian constitutional identity in contrast to the constitutional axiology and teleology as well as the constitutional design of the European supranational constitutionalism. By European supranational constitutionalism I understand both the developed and almost fully-fledged EU constitutionalism and the fragmented and sectoral human rights oriented constitutionalism of the Council of Europe. Consequently, the current Bulgarian constitutional identity has not been developed in contrast to the European supranational constitutional-

ism but rather as a result of the adoption its basic principles as structural core of the post-communist Bulgarian legal order.

Naturally one can suppose that there are implicit and ad hoc limits to the influence of the supranational law in general and to the EU law in particular which also set the framework for the transfer of sovereign competences to the emerging supranational regimes and more precisely to the EU. Such limits may be extracted and defined, e.g. by the constitutional court, as the ultimate safeguard of the constitutional autonomy of the Bulgarian legal order. However such limits have not yet been determined by the Bulgarian Constitutional Court due to the above mentioned factors. Moreover, the framing function of the 1991 Constitution as general implicit limit to the EU integration based on its supremacy is rather ineffective because of its EU friendliness.

The unclear hierarchical status of the EU law in the Bulgarian legal order – 'broken pyramid' and crisis of hierarchy, implicit Euro-optimism or hidden protectionism of the national constitution?

The opening function of the 1991 Constitution towards the EU legal system is based, as it has already been mentioned, on the Bulgarian EU integration clause. It is enshrined in article 4, paragraph 3 of the Bulgarian Constitution according to which 'the Republic of Bulgaria shall participate in the construction and development of the European Union'. Obviously the Bulgarian EU integration clause is laconic. It is formulated much more as general political declaration of the will of Bulgaria to participate in the EU than as concrete legal rule (on the vagueness of this provision see Vatsov 2015, 1604).

This abstract political wording of the EU integration clause does not allow for the extraction of a concrete rule of recognition of the validity and the hierarchical status of the primary and secondary EU law in the Bulgarian legal order. No immediate conclusion can be made on the basis of the EU integration clause regarding the primacy, the direct effect and the direct applicability of the EU law in the domestic legal system.

What is particularly problematic is the lack of clarity regarding the relationship between the EU law and the Bulgarian Constitution. A comparison between article 4, paragraph 3 of the Constitution which contains the EU integration clause and article 5, paragraph 1 and 4 of the Constitution providing for the constitutional supremacy and the primacy of the international treaties over the Bulgarian sub-constitutional legislation shows the great difference which exists between the general political declaration of will for EU membership (article 4, paragraph 3)

and the concrete rules of recognition and hierarchy (article 5, paragraph 1 and 4). Such comparison may lead to quite different conclusions regarding the place of the EU law in the Bulgarian normative hierarchy.

Indeed article 4, paragraph 3 does not provide for the hierarchical place of EU law in the Bulgarian system of sources of law. However, the primary EU law from a formal point of view is composed of a system of international treaties whereas the secondary EU law contains sources of law which are adopted on the basis of the primary EU law. Consequently, one possible hypothesis could be that the whole EU law – both primary and secondary – has sub-constitutional status in Bulgaria but enjoys primacy over the rest of the Bulgarian legislation apart from the Constitution. In that case, the rule of recognition of its validity will be article 5, paragraph 4 which provides for the validity and the hierarchical status of the international treaties.

Arguments in favour of the hypothesis of the sub-constitutional but supra-legal status of the EU law can be drawn also from the case law of the Constitutional Court of the Republic of Bulgaria. The Bulgarian Constitutional Court has not yet directly pronounced on the hierarchical status of the EU law in the Bulgarian legal order. More precisely, there is no decision of the Constitutional Court on the relationship between the EU law, the international law and the Bulgarian Constitution. This passiveness of the Bulgarian Constitutional Court and its full self-restraint from entering into judicial dialogue on the issues of the supremacy of the national constitution and the absolute or relative primacy of the EU law with view to the national constitutional identity (for the passiveness of the Constitutional Court on EU matters and its self-restraint in entering into judicial dialogue see also Vatsov 2015, 1621–1622) is in contrast to its generally activist attitude in domestic matters.

At the same time, the Constitutional Court has accepted for consideration several demands for declaration of contravention of acts of Parliament to the EU law. The Bulgarian Constitution and the Constitutional Court Act authorise the Constitutional Court to accomplish control for the compliance of the acts of Parliament only with the Constitution and the international treaties. There is no explicit competence for such control with regard to the EU law. That is why the Constitutional Court implicitly and tacitly subsumes the EU law under the category of international treaties by taking them into consideration in the context of the above mentioned cases.

However, such subsuming is rather doubtful with regard to its constitutionality. Moreover, it remains unclear what is the reason for such equalisation of the EU law to the international treaties. It can be driven by either the belief of the Constitutional Court's judges in the sub-constitutional ranking of the EU law or

by their desire to defend the EU law from legislative violation by using the only existing constitutional procedure for that purpose.

In the motives to Decision № 3 of 2004 the Constitutional Court considers that: 'the acts of the primary law of the EU are international treaties in the sense of article 5, paragraph 4 of the Constitution and they become part of the domestic law of Bulgaria after complying with its requirements'.

On the other hand, in the motives to the same decision the Constitutional Court explicitly admits that secondary EU law is not equivalent to the international treaties. Thus the Constitutional Court leaves open the question what exactly is the standing and the hierarchical rank of the secondary EU law in the constitutional order and the legal system of Bulgaria.

The thesis for the coequal hierarchical standing of the EU law and the international treaties has three main disadvantages. First, it contravenes the jurisprudence of the Court of Justice of the EU (CJEU) on the primacy and the direct effect of the EU law as an autonomous legal system.[1] It is not in line with either the doctrine of absolute or that of the relative primacy of the EU law which are elaborated in the context of the judicial dialogue between the CJEU and the national constitutional courts.

The Bulgarian Constitutional Court does not engage in any judicial dialogue either with the CJEU or with the other EU member states' constitutional courts on defining the Bulgarian constitutional identity. Thus, it seems that the Bulgarian Constitutional Court tacitly approves the absolute primacy of all provisions of the Bulgarian constitution over the EU law.[2] This is a standing which might be correct from the viewpoint of the classical Westphalian absolute version of the sovereignty but it is irreconcilable with the current stage of the constitutionalisation of the EU.

Second, the equalisation of EU law to the international treaties is incorrect also because the international treaties themselves are not a coherent category. Thus, the different types of international treaties have different hierarchical standings in the Bulgarian legal system.

---

1 See Case 6/64, Flaminio Costa v. ENEL (1964), Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen(1963) and Case 11/70, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel (1970).

2 According to M. Vatsov the Bulgarian Constitutional Court develops through Decision №3 of 2004 a kind of Bulgarian version of the 'controlimiti' doctrine. In his reading of this decision the Constitutional Court implicitly provides that the EU law has primacy to the Bulgarian Constitution 'to the extent to which the Constitution of the Republic of Bulgaria explicitly allows it'. See Vatsov 2015, 1596–1597.

Third, the equality in the hierarchical standing of the EU law and the international treaties raises the question how we can identify the principles and the criteria for the elimination of eventual collisions between them. The principle *pacta sunt servanda* and the obligation for loyal membership in the EU and in different international organisations require that the Bulgarian institutions must abide by both types of supranational legal acts.

Indeed article 103 of the Charter of the United Nations provides that in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail. However, most of the international treaties do not contain such a provision. Moreover, even if they did provide for such safeguard for their preferred application its existence could have led to irreconcilable conflicts between provisions stemming from mutually exclusive international treaties. This is one of the reasons why the supranational courts try to adjust the international and the supranational legal orders and their concrete provisions by applying a constitutional pluralist methodology of interpretative disregard of such rigid provisions. This is what the CJEU did in the Kadi case (Case 402/05) and what the European Court of Human Rights did in Nada v. Switzerland and Al Dulimi v. Switzerland[3].

It is clear that the use of formal rules for the removal of normative collisions such as 'the newer norm derogates the older one' or 'the special norm derogates the general one' are not applicable here due to the risk of normative chaos that would endanger the legal predictability. The solution offered by the constitutional pluralism (see Krisch 2011, Stone Sweet 2009, 631 and Avbelj and Komarek 2012) might seem to be the most appropriate one in the context of the inexistence of a clear rule for the ascription of hierarchical superiority. It consists in differentiating the recognition of the supranational sources of law and in balancing of arguments stemming out of them in a manner which would allow the abidance to both the EU law and the international law. However, this solution generates conditions for arbitrariness and chaos as well. This is due to the lack of clear and universal criterion for giving precedence to either the EU law or the international law.

The Republic of Bulgaria may give principle preference to the EU law over the international treaties by denouncing such international treaties that contravene EU law. However, the option of denouncing such treaties is also not universal

---

3 I am grateful to the anonymous peer reviewer of my paper for his or hers suggestions regarding the case law and the role of the supranational courts on relativising article 103 of the Charter of the United Nations.

solution to the problem and in some cases it is not solution at all. Article 56 of the Vienna Convention on the Law of Treaties clearly limits the power of the states to denounce international treaties. Moreover, even if the international treaty can be denounced because it meets the requirements provided by article 56 of the Vienna Convention on the Law of Treaties, the denouncement of the international treaties is a result of the principle political preference by the Parliament and the government to one of the two above mentioned types of supranational acts. However, such political and discretionary choice which is applicable only to a limited number of cases anyway does not contain a sufficiently certain and practicable criterion for solving normative collisions between EU law and international treaties on pending cases in front of the domestic courts. The domestic courts cannot refuse to deliver justice and thus in many occasions they cannot wait for the denouncement of the international treaty.

It is not clear why the Bulgarian Constitution remains tacit on the issue of the hierarchical status of the EU law despite the fact that there have been five waves of constitutional reform and the predominant part of the constitutional amendments are directly or indirectly related to the EU membership of Bulgaria and to the compliance with the standards of the EU law. One possible suggestion is that this is a form of implicit and tacit approval of the primacy of the EU law over the Bulgarian law including the Constitution. Such primacy could be justified through extensive teleological and systematic interpretation of the EU integration clause of the 1991 Constitution in conjunction with the jurisprudence of the CJEU.

Another explanation runs in the opposite direction. The lack of explicit constitutional provision on the hierarchical status of the EU law may be considered as tacit subsuming of the EU law under the category of international treaties. That hypothesis is to some extent supported by the rather inconsistent and oblique jurisprudence of the Bulgarian Constitutional Court.

Anyway, the vagueness of the Bulgarian Constitution on this particular issue contrasts to a great extent with its rather clear standpoint on the other components and levels of the pyramid of sources of law in Bulgaria. Hence this pyramid seems to have been broken without being subsequently well repaired on its top with the EU accession on Bulgaria. Furthermore the lack of clarity on the issue of the relationship between the Constitution, the EU law and the international treaties is not produced by the constitutional legislator or the Constitutional Court being consciously involved in political or judicial dialogue on constitutional pluralism, multilevel constitutionalism or constitutional protectionism. It is much more a result of semi-conscious tactical evasion to take an explicit stance on the problem (see Vatsov 2015, 1621–1622).

The transfer of sovereignty from Bulgaria to the EU – is it a 'carte blanche' or there are some constitutional counter-limits to it?

The opening function of the 1991 Constitution consists not only in the just analysed issue of the opening of the national legal order to sources of law with supranational origin. It concerns also the opening of the statehood through the opening of the three elements of which it is composed according to the theory of Georg Jellinek – the state power, the territory and the people. Here the 'opening' consists of the influence of processes and phenomena related to globalisation, transnationalisation, supranationalisation on the national legal order and on the society. This is due to the fact that the constitution is not only the supreme legal act in the national hierarchy of the sources of law which contains the rules of recognition for both the national and supranational sources of law but also a political document (see Tanchev 2003, 158–181) containing the fundamental political decision (see Schmitt 1970) or the social contract (see Locke 1988 and Rousseau1968). That is why the opening function of the constitution concerns not only the legal system but it also has a socio-political impact. Due to space constraints here I will discuss only the opening of state power and the influence of the above mentioned phenomena on the Bulgarian legal order.

The opening of the state power as a state building element is accomplished through the transfer of sovereign competences from the state to supranational regimes. The most feasible and intense form of such transfer concerns the EU. According to article 85, paragraph 1, point 9 of the 1991 Constitution the National Assembly (the Bulgarian Parliament) can concede to the EU competences which stem out of the Bulgarian Constitution. The constitution is simultaneously the product of sovereignty, the crystallisation core of sovereignty and the safeguard of sovereignty. That is why the competences provided by the constitution are also sovereign competences, because they are directly related to sovereignty. The constitutional competences are expressions of sovereignty and instruments for the accomplishment of sovereignty. Consequently, the Bulgarian Constitution permits not only transfer of constitutional competences but also transfer of Bulgarian sovereignty to the EU as a supranational constitutional system.

It has to be taken into account that the 1991 Constitution does not allow for transfer of sovereignty via transfer of constitutional competences to any other international organisations or supranational regimes (see also Drumeva 2008, 138). This is additional evidence for the specific character of the EU and for the fact that the constitutional legislator realises that the procedure regulated in article 85, paragraph 2 provides for transfer of sovereignty to a supranational constitutional

system with its autonomous constitutionalism and not just for granting some competences to a classical international organisation.

It is possible that membership in a supranational organisation could contravene the Bulgarian Constitution. In such a hypothesis the only possibility for Bulgaria to become or to remain a member of that organisation is to amend its own Constitution. This requirement is explicitly fixed in article 85, paragraph 4 of the Bulgarian Constitution.

In the case of the EU membership the constitutional legislator provides also for the option for transfer of constitutional competences and thus of sovereign power to the Union. In that case it is not impossible that the mismatch between the Bulgarian Constitution and EU law would be adjusted not via the instruments of the constituent power, resulting in an explicit constitutional amendment, but through the combined application of two procedures. The first one is the procedure provided by article 85, paragraph 2 of the Constitution for transfer of constitutional competences to the EU. The second one is the judicial dialogue between the Constitutional Court of Bulgaria and the CJEU or through a 'constitutional monologue' of the Bulgarian Constitutional Court whereas the latter will be based most probably on decisions for abstract interpretation of the Constitution. In other words, the pro-European and pro-integration activist jurisprudence of the Bulgarian Constitutional Court can establish 'creeping' and informal constitutional reform.

Such 'hidden deconstitutionalisation' of Bulgaria paralleled by transfer of sovereignty to the EU via legislative and jurisprudential means contravenes the concepts of the constituent power of the people and the people's sovereignty enshrined in article 1, paragraph 2 and in Chapter IX of the Bulgarian Constitution. Such a practice will be doubtful with regard to its constitutionality insofar as these concepts are valid parts of the Bulgarian constitutional law.

Through the procedure for transfer of constitutional competences provided by its article 85, paragraph 2 the Bulgarian Constitution not only opens the power as a fundamental element of statehood but allows for the transfer of sovereignty to an upper governmental level. In that sense the sovereign limits himself by agreeing to give up some of its power in favour of the EU. Such self-denial of sovereignty is very problematic from a democratic viewpoint, if it is realised without the accomplishment of either referendum or an electoral campaign devoted especially to that issue. This is due to the fact that the transfer of sovereignty from the National Assembly to the EU, without any direct or indirect opportunity for the citizens to express their opinion on it, has the character of a pure elitist decision (see Tanchev and Belov 2017).

The transfer of sovereign competences can be partial, restrained and it can be bound to some formal or substantive conditions and modalities. In fact one of the most popular theories in constitutional doctrine suggests that the transfer of sovereignty to the EU does not lead to loss of sovereignty but to 'pooling of sovereignties' (see MacCormick 1993, 1–18) which even enhances the capability of the state to respond to the global challenges and to adjust to the shifting global context. Something more, R. Toniatti believes that the traditional 'sovereign sovereignty' in the context of the European constitutionalism is getting transformed into 'participatory sovereignty'. Thus state sovereignty is not lost but just transformed and the 'non-sovereignty of the EU overshadows the sovereignty of the member states' (see Toniatti 2013, 55 and 62).

The mechanism for transfer of sovereign competences from Bulgaria to the EU is very problematic in several aspects. The procedure provided by article 85, paragraph 2 of the Constitution is much more relaxed than the procedure for introduction of constitutional amendments. The National Assembly may decide to transfer constitutional competences to the EU on two reading with 2/3 majority of all MPs whereas the adoption of constitutional amendment can be done either by a special covenant (the Grand National Assembly) in the case of the most important constitutional amendments or by the National Assembly on three readings with ¾ majority of all MPs with regards to the constitutional amendments of secondary importance. Such approach is illogical from the point of view of the principles of state sovereignty, the people's sovereignty and the separation between the constituent and the constituted powers (see Tanchev and Belov 2017).

Moreover, the 1991 Constitution does not provide for any concrete substantive limitations to the transfer of sovereignty to the EU. Actually article 85, paragraph 4 of the Constitution provides for the need for the amendment of the Constitution prior to the conclusion of international treaties that require such an amendment. In addition article 158 of the Constitution contains several important issues such as the form of governance, the form of territorial distribution of power, the direct effect of the Constitution, the primacy of the international treaties etc. that have to be amended by the Grand National Assembly. The systematic interpretation of these constitutional provisions may lead to the conclusion that the issues enlisted in article 158 of the Constitution and reserved for amendment by the Grand National Assembly are in fact substantive limitations to the transfer of sovereignty to the EU. This conclusion is not correct due to several reasons.

The most important and at a first glance formal reason is that transfer of sovereignty related to the issues enlisted in article 158 of the Constitution is neither prohibited, nor impossible. It can be accomplished by the National Assembly after

constitutional amendment adopted by the Grand National Assembly. The provision of article 85, paragraph 1, point 9 in conjunction with article 85, paragraph 2 is misleading. It may lead to the suggestion that transfer of competences related e.g. to the form of governance or the form of territorial distribution of power can be done also by the National Assembly without former constitutional amendment accomplished by the Grand National Assembly.

Actually with the provision in 2005 of the new paragraph 2 of article 85 of the Constitution the constitutional legislator has created a vicious circle and thus preconditions for serious misunderstandings on fundamental issues related to the constituent power and the transfer of sovereignty. On the one hand, he has tried to introduce practically functioning and efficient mechanism for transfer of sovereignty through ratification of an international treaty aiming at such transfer by the National Assembly. On the other hand, he could not make that in a logical and non-controversial way because this would have required the summoning of the Grand National Assembly which is the institution that can allow such transfer to be accomplished by the National Assembly. Moreover, even if such procedure has been correctly followed the doubt whether the distinct acts of Parliament transferring constitutional competences and sovereignty concern the form of governance and the form of territorial distribution of power will remain. Such acts need again the sanction of the Grand National Assembly, except if the exclusive competence of this covenant to amend the form of governance and the form of the territorial distribution of power is abolished through constitutional reform.

The main issue here consists in the rigidity and the complicatedness of the procedure for constitutional amendment by the institution of the Grand National Assembly. The very existence of this institution and its relatively wide competence according to article 158 of the Constitution creates the peril of unconstitutionality not only for the transfer of constitutional competences to the EU by the National Assembly but also for the participation of the Constitutional Court in judicial dialogue that might concern some of the issues falling into the scope of competence of the Grand National Assembly. Consequently, the very existence of the Grand National Assembly casts the shadow of latent and potential unconstitutionality of the activity of the state institutions related to the opening function of the constitution realised through transfer of constitutional competences, judicial dialogue and participation in different forms of supranational constitutionalism in case they are related to the broad scope of issues provided by article 158 of the Constitution.

The issue that has just been discussed is part of a broader conceptual problem namely whether the rigid constitutions, the procedures for difficult amendment of the constitutions and the entrenched clauses are compatible with the dynamics

and the compromise based character of the contemporary supranational constitutionalism. According to E. Tanchev:

> After the accession to EU rigid constitutions in some of the countries joining the EU during the first decade of the new millennium might lead within the constitutional identity concept to malfunctioning in the EU membership by opposing EU law supremacy, direct, immediate and horizontal effect. This might pose a danger to EU legal integration by eroding the constitutional *acquis communautaire.* (see Tanchev 2014, 75).

The second reason why the entrenched clause provided by article 158 does not constitute substantive limitation of sovereignty is that the catalogue of exclusive competences of the Grand National Assembly is internally inconsistent. It includes constitutional amendments on a macro level (adoption of a new constitution), on a meso level (amendment of the form of governance and the form of territorial distribution of power) and on a micro level (amendments of some issues concerning the human rights).

The issues enlisted in the catalogue of article 158 of the Constitution are neither substantive limitations to the transfer of sovereignty, nor elements of Bulgarian constitutional identity. They are not substantive limitations to the transfer of sovereignty due to the fact that they do not constitute an unamendable clause. Moreover, there is the procedure provided by article 85, paragraph 2 of the Constitution which does not make any distinction between the transfer of constitutional competences that can be amended by the National Assembly and constitutional competences reserved for amendment by the Grand National Assembly.

Hence the Bulgarian Constitution does not provide for substantive limitations for the transfer of sovereignty to the EU. It does not provide explicitly concrete substantive parameters and requirements with regard to the participation of the state in the international relations and the accession to international treaties. It is doubtful whether the 'establishment of just international order' stipulated as a principle of the participation of Bulgaria in the EU and in international relations by the Constitutional Court in the motives to Decision № 3 of 2004 can be interpreted as substantive limitation to the transfer of sovereignty to the EU.

References

Abbott, Kenneth and Snidal, Duncan. 2000. Hard and Soft Law in International Governance. *International Organization* 54: 421–456.

Avbelj, Matei and Komarek, Jan (eds.) 2012. *Constitutional Pluralism in the European Union and Beyond*. Oxford: Hart Publishing.

Belov, Martin. 2014. Separation of Powers reconsidered: a Proposal for a New Theoretical Model at the Beginning of the 21st Century. In *Law, Politics and*

the Constitution. New Perspectives from Legal and Political Theory, edited by Antonia Geisler, Michael Hein and Siri Hummel, 47–63. Frankfurt am Main: Peter Lang.

Belov, Martin. 2015. Can We Still Drive the State Machine the 'Old School' Way? Structural and Functional Deficits of the Modern State. In *Law and State. Classical Paradigms and Novel Proposals*, edited by Luka Burasin, Dorde Gardasevic and Alessio Sardo, 153–171. Frankfurt am Main: Peter Lang.

Bliznashki, Georgi. 2009. *Constitutionalism and Democracy (Конституционализъм и демокрация)*. Sofia: St. Kliment Ohridski University Press (in Bulgarian).

Von Bogdandy, Armin and Schill, Stephan. 2011. Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty. *Common Market Law Review* 48: 15–17.

Brenner, Neil. 1999. Beyond state-centrism? Space, Territoriality and Geographical Scale in Globalization Studies. *Theory and Society* 28: 39–78.

Drumeva, Emilia. 2008. On the Primacy of the EU Law over the National Law. In *Lisbon treaty – A (Non)finished Reform*, edited by Atanas Semov (Относно примата на правото на Европейския съюз над националното право. – в: Семов, А. (съст.) Лисабонският договор – една (не) довършена реформа). Sofia, University of Sofia "St. Kliment Ohridski" Press (in Bulgarian).

Good, Christoph. 2016. Corporate Human Rights Initiatives – From International Law to Global Governance and Back? In *Global Governance and Its Effects on State and Law*, edited by Martin Belov, 149–164. Frankfurt am Main: Peter Lang.

Hart. Herbert. 1997. *The Concept of Law*. Oxford: Oxford University Press.

Hobe, Stephan. 1996. Statehood at the End of the 20th Century – The Model of the 'Open State': A German Perspective. *Austrian Review of International and European Law* 12: 127–154.

Jellinek, Georg. 2010. *Allgemeine Staatslehre*. Charleston: Nabu Press.

Kalisz, Anna and Zalewska Monika. 2016. Hans Kelsen in a Multicentric (Legal) World. In *Global Governance and Its Effects on State and Law*, edited by Martin Belov, 115–128. Frankfurt am Main: Peter Lang.

Krisch, Niko. 2011. *Beyond Constitutionalism. The Pluralist Structure of Postnational Law.* Oxford: Oxford University Press.

Locke, John. 1988. *Two Treaties on the Government*. Cambridge: Cambridge University Press.

MacCormick, Neil. 1993. Beyond the Sovereign State. *The Modern Law Review* 56: 1–18.

Martinico, Giuseppe. 2007. Complexity and Cultural Sources of Law in the EU Context: From the Multilevel Constitutionalism to the Constitutional Synallagma. *German Law Journal* 8: 205–230.

Martinico, Giuseppe and Pollicino, Oreste (eds.) 2012. *The Interaction between Europe's Legal Systems. Judicial Dialogue and the Creation of Supranational Law*. Cheltenham: Eduard Elgar.

Rousseau, Jean-Jacques. 1968. The Social Contract. London: Penguin books.

Saporiti, Michele. 2016. The Concept of Sovereignty and the Transnational Challenge of Global Religions. A Theoretical Framework. In *Global Governance and Its Effects on State and Law*, edited by Martin Belov, 97–114. Frankfurt am Main: Peter Lang.

Schmitt, Carl. 1970. *Verfassungslehre*. Berlin: Duncker&Humblot.

Stone Sweet, Alec. 2009. Constitutionalism, Legal Pluralism and International Regimes. *Indiana Journal of Global Legal Studies* 16: 621–645.

Tanchev, Evgeni. 2003. *Introduction in Constitutional Law (Въведение в конституционното право)*. Sofia: Sibi (in Bulgarian).

Tanchev, Evgeni. 2014. The Primacy or Supremacy of International and EU Law in the Context of Contemporary Constitutional Pluralism. In *Modern Tendencies of Constitutional Justice: the Relation Between National and International Law*, edited by Toma Birmontiene, Vilnius: Constitutional Court of the Republic of Lithuania.

Tanchev, Evgeni, Belov, Martin. 2017. Supranational Constitutionalism, European Governance and the Bulgarian Constitutional Order. In *National Constitutions in European and Global Governance: Democracy, Rights and the Rule of Law*, edited by Anneli Albi and Samo Bardutzky, The Hague: T.M.C. Asser Press (forthcoming).

Toniatti, Roberto. 2013. Sovereignty lost, constitutional identity regained. In *National Constitutional Identity and European Integration*, 49–74. edited by Alejandro Saiz Arnaiz and Carina Alcoberro Llivina, Mortsel: Intersentia.

Vatsov, Michail. 2015. European Integration Through Preliminary Rulings? The Case of the Bulgarian Constitutional Court. *German Law Journal* 16: 1591–1622.

Watson, Alain. 1993. *Legal Transplants: An Approach to Comparative Law*. Athens: University of Georgia Press.

Ferenc Hörcher

The V4 Cooperation and the European schism over the migration crisis: The history of political thought in the service of political analysis

Abstract: This paper is interested in the methodological question of making sense of politics by referring to the discourses and practices of the past with the help of the history of political thought. It suggests that a proper understanding of the V4 countries' common political stances on issues like the so-called "quota question" in the EU is better understood if we analyse them with the help of the toolkit of a historical and cultural translation formula. In order to show how to get this formula, the paper first looks at the aims behind the V4 agreements in the transition period. Relying on the historical perspective, this agreement suggests that this region has a historically rooted self-identity which should be understood on its own, without a direct comparison with a supposed "ideal" western model. The paper itself makes an effort to show the relevance and content of this historical self-perception by referring to the concept of Central Europe in the works of by now classical Central European intellectuals in the late Communist period (the '70s and '80s) and in the works of young Central European historians from the early 21st century.

Introduction to the topic and its methodology

One of the unintended consequences of what came to be called the recent European migration crisis is a renewed interest in V4 cooperation among members of the group itself and also among other European countries. It might, therefore, be useful to try to explain this cooperation from a rather unusual perspective, i.e. on the basis of the history of political thought – with the background supposition that the history of political thought might be useful for the analysis of contemporary politics.[1]

1 For a description of the connections between political philosophy, contemporary politics and the history of political thought see Hörcher 2015. For the Cambridge school, see the present author's Hungarian language collection: Hörcher 1997, which consists of selected papers of the Cambridge authors mentioned in the title, together with an explanatory introduction by the editor of the book. For an English language introduction to the topic, see Müller 2011.

In what follows, therefore, the reader will find an interpretation of the possible reasons behind the political conflict over the recent European migration crisis from the point of view of the history of political thought. In order to prepare the analysis, this paper will first ask how to make sense of the geography of the continent, with an emphasis on the Central European region. With the help of the conclusions of such a spatial, geopolitical overview one can more or less reliably make an effort to define the concept of Central Europe for the present purposes by reviewing some of the recent scholarly achievements.

In search of the birth of the historical category of Central Europe, we shall rely on three recent efforts to reconstruct the region's history as far back as its Medieval, Early Modern and 20th century past is concerned. From the perspective of this paper, when digging into the past one should be rather pragmatic and ask history's help only for one's own purposes. This programme might sound rather risky or even sacrilegious to a historian, but this paper is an exercise in the history of political thought, viewed from the perspective of political philosophy and not from the discipline of history. This paper concentrates on the hypothesis that present-day political conflicts can be fruitfully analysed with the help of historical investigations. In this sense, this paper tries to avoid two pitfalls: the value-neutral discourse of some historians and the anachronism of some contemporary political analysts.

This procedure can be labelled applied historical enquiry: its aim is to comprehend the present rise of interest in the Visegrád region's activities in recent European debates from a 500 years perspective. The proposal is that the divide between Old Europe and New Europe is not a contemporary development, it is based on longstanding differences of mentality and practice in the countries of the two regions. One can hardly hope to make sense of present-day European conflicts without looking into the long-term past of the issue.

The V4 cooperation and its historical antecedent

It was in the feverish political context of the migration crisis of 2015 that the V4 countries got closer to each other and expressed and accepted a regional call for cooperation in the Europe-wide negotiation processes. The Visegrád cooperation is based partly on the fact of a longstanding historical connection (the inhabitants of these countries have lived on the same territory under the same, often rather unfriendly rule for centuries) and partly on the shared political vision of their political elites. They all seem to favour strong national defence along state borders and a hard-line position on issues like national sovereignty and national security, and they tend to refuse any quotas or other forms of European-level distribution of foreign subjects.

The institutional origin and framework of the cooperation date back to a 1991 agreement of the three (by now four) Visegrád countries. These states are obsessed by their once great but by now tragic history. This new-born cooperation was based on a historical antecedent. 'The Congress of Visegrád, held in 1335, was one of the outstanding diplomatic events in Central Europe in the fourteenth century' – as a recent historical account states (Rácz 2013, 261). Then, as now, the aim of the cooperation was regional conflict-resolution: the monarchs' efforts aimed 'at eliminating the political and territorial conflicts which opposed Poland and Bohemia on the one hand, and Poland and the Teutonic order on the other hand, through the mediation of Charles I of Hungary, the senior ranking ruler of the region' (Rácz 2013, 261).

The new, late 20th century agreement also invoked the common historical background of the countries involved: 'The Czech Republic, Hungary, Poland, and Slovakia have always been part of a single civilization sharing cultural and intellectual values and common roots in diverse religious traditions, which they wish to preserve and further strengthen.' (About the Visegrad Group). It is this historical grounding that the present cooperation is expected to rely on: 'to work together in a number of fields of common interest within the all-European integration' (About the Visegrad Group). The treaty was clearly not an alternative to the all-European integration efforts, nor against any other political entities within or outside the EU. On the contrary. 'It was meant optimum cooperation with all countries, in particular its neighbours, its ultimate interest being the democratic development in all parts of Europe.' (About the Visegrad Group).

As a result of the unexpected political chaos caused by the migration crisis, together with the election of conservative or right wing candidates to government both in Hungary (in 2010) and in Poland (in 2015) and in the presidential election in Poland (2015), the Visegrád cooperation has also been enlivened, politicised, and has experienced a perhaps unexpected invigorating turn. In other words, step by step the V4 countries have reoriented their political maneuvering and showed a lively interest in becoming an alternative power centre within the European political arena. They have got supporters in the Western world, too, who look at it as the promising example which should be followed by their own governments as well.[2]

This new self-definition of the V4 countries was signalled by Robert Fico, the left-wing Prime Minister of Slovakia, whose government filed a lawsuit at the European Court of Justice against the 22 September decision by the Interior Min-

2 Of course, there can be substantial differences between the V4 countries, as far as their self-perception is concerned, as agents in European power politics.

isters of the EU which mandated that 120,000 migrants have to be divided, by quota, among member states in December 2015 (Slovakia v Council Case). This lawsuit was supported by the Hungarian government as well, also in December 2015 (Hungary v Council Case). Poland, so far not particularly involved in the migrant crisis, also soon expressed their full support of Hungary's lawsuit against the Council in April 2016 (Hungary and Poland…, 2016).

The story of the alliance of the V4 countries seems to have Europe-wide popularity. As stated above, it is basically a story about national autonomy and independence, self-defence and security issues. The reason behind the popularity of their cause is not simply the presence of large quantities of newly arrived, legally unidentified migrants in European cities, and the millions that are pushing them forward in Asia and Africa, but also the recent terrorist threat with the attacks in major European towns including Berlin, Paris, Brussels, Nizza, and Istanbul. Even the Merkel Government had to reshuffle its migration policy before the actual election campaign. The pressure on the European political elite is increasing as elections in major European countries (namely Germany and France) are approaching. Elections mean the moment of truth in democracies: when the electorate can pronounce by their votes that the emperor is naked, i.e. they act as reality-checks on political parties. They can prevent politicians from going astray into utopian visions instead of confronting harsh realities. In this sense, 2017 might be a year of political reality-checks in Europe.

Central Europe in the eyes of the West

Given all the differences of the experiential horizons, and the weight of political pressures, the two parts of Europe will not easily come closer. On the contrary, the conflict might deepen the division between them. This has been shown by an American observer of the recent European tensions. Anne Applebaum, a historian whose family roots can be traced back to this region, a Pulitzer Prize-winning journalist[3] well versed in the recent past of the continent, including its totalitarian regimes, and the wife of Radosław Sikorski, foreign minister of Poland, she has a special vested interest in this region. Mrs. Applebaum was ready to say the following in an interview published in the Hungarian digital political journal, *Mandiner*:

The Visegrád Four successfully identified themselves with one issue. They have no positive project for Europe, no ideas; they do not want to add anything to

3 Anne Applebaum's *Gulag: A History* (2003) won the 2004 Pulitzer Prize for General Non-Fiction writing. Her *Iron Curtain: The Crushing of Eastern Europe 1944–56* (2012) has also made substantial noise among the readers.

Europe: their only message for the moment is that they want to stop the refugees. Even if someone – like me – would think that Merkel made a mistake when she opened the gates for the refugees, and that this gesture was not thoroughly considered. The message of Central Europeans is too simple: we hate Muslims, we detest Western Europe, which otherwise helped us in the last years of our integration, and we want to back out. This is what Western Europe hears as the message of Central Europe. (Applebaum 2016)

This is obviously a rather harsh criticism of the Visegrád countries' position, and not simply a different political perspective. It is no less than a moral charge of dishonesty and ingratitude. Its edge is made sharper by the fact that it comes from a historian well-versed in the past of the region and from someone who is also personally tied to the region.

According to the hypothesis of the present paper, the reason behind this sharp conceptual antagonism between the American journalist and the V4 perception of the crisis might be the difference in the interpretation of recent and long-term history, which is based on the experiential horizon of someone labelled in this region as a 'Western intellectual'[4] compared to the views of a Central European survivor of Communism. The assumption is that if you were brought up in the second half of the 20th century in the Western hemisphere, your perception of reality is dramatically different from the one which is available to those who were brought up in the Soviet interest sphere. In what follows I would like to elaborate on this last point, showing the reasons for this discrepancy and after that, I shall offer thoughts about the East-West duality, relying on the historical reconstructions of young scholars originating from this part of Europe.

Historical demarcation lines in Europe

Europe is certainly not a homogeneous political, social and cultural entity. Just the opposite. This paper argues that no European level compromise can be achieved if we disregard the simple historical fact of the distance between the different political cultures of a multicultural continent. Although Marxism promised to overcome the past, the political reflexes of the people, which build up their political culture, can still differ and will still differ dramatically (for a historical overview of political culture in this region, see Manikowska, Pánek, and Holý 2005; and Plasser

4 In the countries of the former Soviet zone, Western intellectuals are sometimes harshly criticised and charged with a sort of intellectual blindness, due to their different educational experience, and their lack of direct knowledge of the parts of the region, missing first-hand impressions during the Soviet period.

and Pribersky 1996). Although the attempt to get rid of the shadows of the past after so much tragedy – on the part of the founders of the European Union – is perfectly understandable, no realistic political power should try to avoid making sense of the historical heritage of the people, including the wounds and traumas in the public mentalities of the citizens, they have to govern.

By now, the most obvious demarcation line within the mentalities of European nations is the one introduced after the end of WWII. This is due to a tragic dilemma of the past. When challenged by two totalitarian threats at the same time (German Nazism and Russian Communism), Western leaders decided to take on board one of them (Russian Communism) as an ally to overcome the more immediate (and closer) threat: Nazi Germany. Although from the perspective of the millions of victims of war crimes and of the battlefields, no doubt too late, the strategy led to the final victory of the allies against the Nazis, but it also led to an unprecedented division within Europe, as a result of the Soviet occupation of a portion of Europe.

The division, of course, was not accidental. It had been prepared by a number of historical factors: for example by the fact that the Western part of the continent developed much faster than the Eastern part. Economic success was soon translated into a centre-periphery political relationship. However, the Iron Curtain separated the two hemispheres in an unprecedented way, which allowed the Soviet power to exercise full control over those territories and their political communities to establish an unparalleled political (and, as this was a totalitarian regime, also mental landscape). To achieve this aim was made easier by the fact that, for historical reasons, this region had been accustomed to the rule of authoritarian regimes and had no high expectations for the establishment of more democratic political systems. Surprisingly, some countries could get out of the grip of Soviet Russia (Austria as a result of a deal, Yugoslavia and Albania thanks to their leaders' political strategies). However, the group of countries that signed the Warsaw Pact was kept together by the combined effect of sheer military power (as was made obvious in the Hungarian uprising of 1956), ideology and geopolitical necessity – one cannot easily change the geographical location of a country, after all. The result of combined physical and mental oppression was a decline of political and civil manners in these countries. This is the cause of the first demarcation line in contemporary Europe, dividing, on the one side, Austria and Germany, and on the other side Poland, earlier Czechoslovakia and Hungary in Central Europe. Behind the former ones we find the 'core Western European countries', while behind the second ones we find the Russian sphere of influence.

The difference in political manners is only one type of segmentation on the continent. A further one, a natural part of a post-colonial situation, separates the economically more developed regions from the less developed ones, even after their integration into the EU. The problem is that, except for some parts of Portugal and Southern Italy, inhabitants of the countries formerly west of the Iron Curtain are still much better off than those of the countries east of it. In other words, the unfortunate fact is that the political division follows the same pattern as the division in economic development. The political separation only reinforces and is itself reinforced by the economic divide. The long-term handicap (in economic development) is translated into a short-term disadvantage (in the European political arena) and the dynamics works the other way round as well. All in all, the development gap of the Central European region is due to its slow social adaptability to the changing environments of the modern or post-modern, globalised paradigm.

Central Europe as a conflict-zone

So far we have considered the conflicting relationship between these large blocks: to put it bluntly, the West as opposed to the Central- and Eastern European block. Both the political and the economic division have followed this pattern. The third issue of the regional stratification in Europe concerns, however, the question of intra-regional connections. Obviously, contemporary Western Europe is famous for different types of interstate cooperation, starting out from the coalition of the Benelux countries, and including also the cooperation among the Scandinavian countries or the Mediterranean initiative. Not to mention the Franco-German alliance after WWII, or the trio, when the two aforementioned were joined by Britain. In Central Europe, historically, the situation was characteristically different. Although there is a historical sympathy between Hungary and Poland, before the establishment of the Visegrád Group no institutional cooperation existed, except for the 'Little Entente', the anti-Hungarian coalitions of the two world wars.[5]

In modern history, there were some very pronounced enmities between the neighbouring states of the region. Hungary, for example, always felt surrounded by hostile countries joining their powers during the world wars against Hungary. This was the 'Little Entente', a joint effort of neighbouring countries to keep Hungary under control, supported by French diplomacy which signed bilateral

5 Of course, the newly formed, post WWII artificial state-conglomerates of Yugoslavia and Czechoslovakia cannot be regarded as simple interstate cooperations.

treaties with each of them. The aim of the group was to circumscribe and isolate Hungary diplomatically. The coalition was formed in 1920 and 1921 and consisted of the following countries: Czechoslovakia, Romania, and Yugoslavia. As one can easily recognise from maps about the Trianon Treaty all three of them were winners of the new international settlement. Looking back from the 21st century we can give an assessment of the issue in the following manner: Hungary had to give up certain parts of its territory and population, but the dictum of the treaty was clearly disproportionate (For a detailed and reliable recent account, see Romsics 2002.).

While from this historical angle Central Europe might look like a doomed conflict-zone, and this suspicion has a more or less historically solid basis, during the decades of Soviet rule this cultural area quite surprisingly witnessed the birth of an alternative narrative of the region.

The idea of Central Europe as a form of protest

After the Soviet invasion of the Central European region at the end of WWII, which was followed – after three years of transition – by 42 years of Soviet colonisation, a new sensitivity was born among the intellectuals of the region, which produced the outlines of an alternative Central European identity. Soviet power did not distinguish between winners and losers of the world wars; it exercised the same inhuman, totalitarian oppression in the whole region. Communist power did not even differentiate between the Slavic and the non-Slavic elements in the population of the region. This 'equality' of oppression created a sense of solidarity among the oppressed nations and – as soon as the oppression was not as aggressive as before – that led to the establishment of a network of underground cultural centres which was organised to oppose the ideological influence of the oppressors among the public intellectuals and the youth (Falk 2003). Also, the returning pattern of revolts and uprisings in the Soviet zone (in East Germany, Hungary, Czechoslovakia, and Poland) was also helpful to wake up the elites of these countries, and even ordinary people could experience a sense of solidarity beyond the national borders.

But historians and political theorists tried to contribute to the rise of a discourse about an independent regional identity between the West and the East. In Hungary, the example in this respect is a pair of authors: István Bibó and Jenő Szűcs. Bibó was, for a short time, a politician: his iconic role was his participation in the last government of the revolutionary party leader Imre Nagy, during the last days of the 1956 revolution against Soviet rule, and his lonely stay in the houses of Parliament during the Soviet attack. He suffered long years of imprisonment

for that. But, somewhat independently from that experience, as a thinker he was quite critical of the democratically underdeveloped small states of Eastern Europe. Because of his critical stance, his theory was permissive towards a kind of regional identity (Bibó 1946). Jenő Szűcs, taking inspiration from Bibó but tracing his ideas back to their historical roots, first in a long article and later in a complete book, defended the historiographic position that Europe has three different, well-distinguishable long-term cultural-, social- and political-historical traditions: the West, the East and the region in between the German and the Russian areas of influence: Central Europe (or in the German-language context *Mitteleuropa*) (Szűcs 1981; 1983 and 1983b).

Intellectuals, mainly writers and artists, were also helpful in other parts of the region to create the new image of Central Europe. One of them was Milan Kundera, the Czech writer, who went into exile after the brutal suppression of the Prague spring and became a Parisian. In a rather influential essay in the eighties, he presented the new myth of Central Europe as the opposite of the myth of mother Russia. His Tragedy of Central Europe is a characteristic piece, which presents powerful arguments and mobilises an emotional rhetoric to show that the region has a common interest and shares the same tragic fate in the second half of the 20th century – for which he partly blamed the Western powers, who simply sold Central Europe to Stalin and his successors. (Kundera, just as Bibó, was also self-critical: an important part of this historical fabrication is a reflection on the failures of the states and civic societies of Central Europe, too.) (Kundera 1984, 33–34)[6]

Let us turn finally to another fictional vision of a (past or future?) Central-Europe. Miklós Mészöly, one of the path breaking novelists of the new Hungarian prose, and one of the most open rebels against the social realist canon, collected some of his short pieces under the title Once there was a Central Europe, with the subtitle Variations on beautiful hopelessness (Mészöly 1989 and 1997). The English-language collection under this title brought together nine short stories, fifteen 'video clips', as the author called them, and five studies. None of them specifically addressed the geographic region's history directly, but all of them contributed to describing a specific Central European cultural identity. On the cover of the book we read: 'Central Europe – to put it in a simplified way – has not existed so far, but it could perhaps exist once, if roots would grow out of its sole. What has existed so far? A question mark longs to be at the end of it.' (ibid., back cover).

6 The present author recently gave a talk on Kundera's essay, see Hörcher 2016.

The idea of Central Europe as a historiographical toolkit

So far, we have seen the ways in which the idea of Central Europe was mobilised by Central European intellectuals in the 1980s to trump the official doctrines of the ideology of the Socialist state and to reconfigure the self-perception of the nations about their common geopolitical region. In what follows I would like to present three recent volumes by researchers whose careers are characteristically post-1990. This is a generation whose mindsets are rather different from those of Bibó, Szűcs, Kundera, Mészöly, or for that matter, of Anne Applebaum. In their case, there is no need to suppose the sort of political partisanship that we could sense (for better or worse) in the former authors' writings. Rather, they seem to regard the concept of Central Europe as simply useful in their own history-writing practice for its own sake. I regard their pieces taken together as a concerted revisionist effort in Central European historical scholarship, developing a common proposal through different periods of Christian Europe.[7]

Central Europe in the Middle Ages

Central Europe in the High Middle Ages by Nora Berend and her colleagues, Przemysław Urbańczyk and Przemysław Wiszewski, deals with the region (meaning by the term Poland, the Czech lands and the Hungarian Kingdom) in a medieval context. The relevance of the term Central Europe in a medieval context, however, is far from obvious. As William Chester Jordan admits: 'present-day Anglophone medievalists are woefully ignorant about the region' (ibid., back cover). His comment obviously points at the relevance of Central Europe – he claims that the book provides an opportunity to other medievalists to ask questions 'involving comparisons between Western Europe […] and the Central European territories discussed by the authors'. The same conceptual pair is presented in a slightly different wording by a specialist of Central European past, Martyn Rady, who also claims that the book facilitates comparisons, but adds that it helps to redefine 'Central Europe's place within medieval European history as a whole'. (ibid., back cover) This is a slightly different scenario, where Central Europe seems to be a variant within a pool of different varieties of the European Middle Ages.

Nora Berend has written an introduction to the book in which she asks questions about the utility of the term itself in that period. He refers back to, beside

7 For a Hungarian ~~legal~~ scholar from the late 20th century turning back to the historical idea of Central-Europe, relying on the authoritative voice of a predecessor see the writings of the late Professor László Péter. On him: Fekete 2015.

Jenő Szűcs, two earlier scholarly achievements from the region, those by Francis Dvornik and Oskar Halecki, in order to distinguish her and her colleagues' efforts from these predecessors (ibid., 24). In her view, the earlier efforts to uncover a Central European paradigm provided anachronistic, Whiggish[8] interpretations of regional phenomena, in other words, they read history directly from the perspective of the present moment.[9] The result of this methodology is that 'none of these works were divorced from the current politics' (ibid., 24). Her sympathetic suggestion is a kind of strict historicism: 'we should not look at medieval Central Europe as the predetermined cradle of undemocratic and economically backward modern states, nor try to prove that back then, the region was the same as "the West"; but try to understand medieval developments in their own context' (ibid., 31).

Berend calls attention to a further danger besides anachronism: that we use Western standards to understand this region. The pitfall of this method is that we would always find these countries lagging behind a more developed West, pointing at signs 'of backwardness and failure' (ibid., 31).[10] Only if we can get rid of these artificial and external standards might we hope for a deeper and more reliable understanding of the *differentiae specificae* of the region. In order to do so, she claims, we do not need a strong concept of the existence of a well-defined Central European region in medieval Europe. Rather, we need to look for something like a comparative history of the region, based on the assumption of the existence of a common benchmark. In her view, enough historical evidence is in our hand to suppose the existence of this common benchmark:

> Although this book does not claim the existence of Central Europe as an essential unit of European history, let alone as a conscious identity of the countries in question in the Middle Ages, it does argue that, despite differences, enough significant similarities existed in political, socio-economic and cultural terms to warrant examining the early history of this region together, in a comparative perspective (ibid., 37).

In other words, in Berend's view, their book on Central Europe in the Middle Ages is a proof that it is fruitful to examine this region 'in a comparative perspective' already in the High Middle Ages.

---

8 This term comes from Butterfield's masterly historiographical criticism (Butterfield 1931.)

9 Once again, this is exactly the aim of the present paper – the difference being that this paper does not claim to be a piece of historical scholarship, but more one in the history of political thought, viewed from the perspective of political philosophy.

10 Berend is specifically critical of German scholarship because they looked at the German invaders of this region as carriers of civilisation and culture.

Central Europe in the early modern period

If we move one step further in history and look at the early modern period, another recent book might be of interest for us. Balázs Trencsényi and László Zászkaliczky (Trencsényi and Zászkaliczky 2010) edited a fine volume of scholarship on this period in the history of political thought. The aim is to reconstruct the early modern discourses (mind you: the term is in the plural!) of patriotism available in the East Central European context. It is noteworthy that these scholars, who were close to the so-called Cambridge school of intellectual history during their doctoral research (Trencsényi 2004, Zászkaliczky 2004, and Zászkaliczky 2013), are cautious enough to add the little modifying term East to the concept of Central Europe – presumably to avoid any misunderstanding of the term to include German territories or the German speaking inner Habsburg lands. They do not think that the term they have chosen is undebatable. However, they find it – when referring to Poland, Bohemia, Hungary, and Croatia – a construct which is useful as a comparative kit for the historian:

> far from seeking to essentialise the region as such, the East Central European patterns could be used to show a specific dynamism which is markedly different from the Western European developments but also can be clearly distinguished from, for instance, the evolution of Russian political discourse in the same period. (ibid., 44).

They are also brave enough to offer certain criteria which helped them to delineate this region. Their list of criteria includes the fact that the countries of this region had been 'formed at the confines of the Latin-German imperial framework, penetrated by Latin Christianity but retaining certain specificities linked to their spatial and temporal birth condition' (ibid., 44). They also find in the region 'a rather similar evolution of the relationship of king, estates and the peasantry, producing among others a sizeable nobility by the eve of the early modern period' (ibid., 44).

Of course, the logic of this argumentation is circular: our authors found enough historical parallels in order to establish a regional comparative methodology, which helps them to find even more phenomena in common. But this is the heuristics of most historical research in the humanities: you have an intuitive grasp of comparable phenomena, which you investigate, and your investigation will help you to find more proof or leads you to the conclusion that the comparison does not hold. The scholarly reception of our authors' approach seems to be quite positive: in her penetrating review of the collection of essays edited by Trencsényi and Zászkaliczky, Iva Manova (Manova 2011) emphasises, as the key strength of the book, the effort to 'recontextualize from a comparative perspective' classical texts of particular national patriotic traditions – and this might have been the most important aim of the editors.

Central Europe in the modern context

Finally, the last epoch in this overview is modern (as opposed to postmodern, contemporary, etc.) political thought. It is again Balázs Trencsényi who, with an international team of similar-minded, young and ambitious scholars from the region (Trencsényi, Janowski, Baar, Falina, and Kopecek 2016), worked on a fine history of modern political thought in East Central Europe published by Oxford University Press. This is again a collective effort, an exercise in intellectual history which strives to reframe the narrative about the region we are talking about. With them, once again, the key term, the name of the region is East Central Europe, presumably in order to show that we are talking here about the less successful part of the region, both as far as their political and social achievements are concerned and as far as the roles played by them in major academic narratives are concerned.

Trencsényi and his co-authors have two aims with this enterprise. First of all, they think that the total neglect of the region in the grand narratives of the period is unacceptable and probably due to the short-sightedness of scholars who as a default case only deal with the Western and more developed part of Europe (ibid., 2).[11] This team wants to address the problem in a very brave manner. They have the following two aims with their work: 'to globalise the history of East Central European political thought, while at the same time to "renegotiate" the European intellectual canon.' To achieve this, however, they think a grand revisionist programme is required. They think 'we must go beyond the task of expanding the pool of "shared" references. We need to rethink the very categories in which the history of modern political ideas — and thus of political modernity, as such — has traditionally been formulated' (ibid., 1).

They think that the silence and the misconceptions about this part of Europe in the secondary literature are partly due to the narrowness of the vocabulary of

11 In the introduction, the examples of this returning ignorance include 'the otherwise excellent *Cambridge History of Twentieth-Century Political Thought*' and 'the synthetic *European Political Thought, 1815–1989*'. It is claimed here that even 'In the newly published eight-volume *Encyclopedia of Political Thought* one can find only nine political thinkers from this part of the world…' And where Trencsényi et al. seem to praise, like in the case of Jan-Werner Mueller's, in fact, they do not find too much to praise. Mueller's history of twentieth-century political thought 'included Lukács, Bibó, and Patočka in his overview', which is more than nothing. The introduction searches for an excuse why no more great names appear even in this volume from this region, and this is the somewhat unsatisfying reason offered: 'obviously such a work could not aim at a more detailed and contextual analysis of the various intellectual traditions present in the region'. (ibid., 2)

the available scholarly meta-narratives and the failures of the canon-constructors of modern Western European political thought. Therefore, they find that it is not enough to fill in the gaps of the narratives with a few names, a few book titles and a few basic concepts. What is required is a more-or-less total revision of the intellectual framework of the description of the political thinking of the age. 'Approaching political questions from the semi-periphery has often meant that the paradigms originating in Western European contexts had to be "negotiated" in a setting marked by radically different local conditions.' To do so, not only new concepts had to be introduced into the discussions, but also what was needed was 'testing the heuristic power of analytical concepts in our specific contexts' (ibid., 3). This testing led them to a reconfiguration of the narrative framework itself, giving a more pronounced voice to this region in the common European concert.

Conclusion: Rethinking historical Central Europe as a toolkit of political analysis

As we have seen, Central Europe was and remains a political arena where political ideas, patterns of political practice and institutional frameworks have historically developed autonomously, in other words differently from both the usual Western and Eastern European patterns. If a political analyst (intellectual historian or, for that matter, a political thinker) can accept this fact, she will certainly reshuffle her strategy to make sense of this political arena. This is an obvious and rational conclusion because, according to the recent historical scholarship of the region – as we have seen –, the usual reflexes of Western interpreters of Central Europe do not seem to work. Presumably, in crisis situations, these assumptions can be supposed to work even less than in ordinary ones. But how exactly can we arrive at a formula which would define for us how to engage in the interpretative work of a recent political situation in a historically correct manner in this region?

The suggestion of this paper is that although there are no *a priori* guarantees to find the suitable solutions, a key component of a workable historical and cultural translation formula is to work out a reliable (therefore testable) historiographic method of dealing with the past of this region. But the tricky thing is that to arrive at such a reliable reconstruction of the regional past (in order to historically legitimise your own present analysis) you had better avoid any references to present-day dilemmas. For, paradoxically, you can only expect an authentic interpretation of the present if you are first ready to abstract from it, then go back deep enough, but not too deep into the past of your region, in order to recollect the required historical experience which you will have to rely on in the next move, when you try to make sense of the present conditions with the help of this histori-

cal background knowledge, which you gathered without falling into either of the two mistakes of anachronism and historical relativism. You are required to rely on a dual approach, combining the history of political thought with a normative contemporary political sensitivity. First, you gather the right vocabulary for the political analysis. Second, you try to apply, in a delicate manner, the historical background knowledge to the interpretation of the actual political situation. This method can provide clues to any phenomena of the Central European *Sonderweg* (this is again one of those region-specific concepts) if your analytical sensitivity and historical awareness form a good combination.

According to the main supposition of this paper, the phenomenon of a stubborn Central European position in the debate on the 'quota solution' of the migration crisis can only make sense if we apply the methodology suggested above: combining a historical recovery of basic local concepts and their practical use with a refined application procedure whereby these concepts are utilised by the interpreter to enlighten the contemporary peculiarity of this region. To fully analyse the current political question, however, is already beyond the scope of this paper, which was more interested in the methodological question of making sense of politics by referring to the discourses and practices of the past.

References

Court Cases

Hungary v Council Case C-647/15

Slovakia v Council Case C-643/15

Secondary Literature

[http://mandiner.hu/cikk/20160417_ezert_nem_allok_szoba_magyarokkal_anne_applebaum_interju_mandiner]

[http://universa.filosofia.unipd.it/index.php/Universa/article/viewFile/81/85, accessed on 1. 03. 2017]

About the Visegrad Group. Unauthored, undated document at Visgradgroup.eu [http://www.visegradgroup.eu/about, accessed on 1. 03. 2017]

Applebaum, Anne. 2016. Stumpf András: Ezért nem állok szóba magyarokkal (That is why I do not talk to Hungarians), *Mandiner* 18 (April 2016).

Berend, Nora, Urbańczyk, Przemysław, and Wiszewski, Przemysław. 2013. *Central Europe in the High Middle Ages*. Cambridge: Cambridge University Press.

Bibó, István. 1946. *A kelet-európai kisállamok nyomorúsága*. English language version: 2015. *The Miseries of East European Small States.* In *The Art of Peace-*

making: Political Essays by István Bibó. Edited by Iván Z. Dénes. Yale University Press.

Butterfield, Herbert. 1931. *The Whig Interpretation of History*. London: G. Bell.

Falk, Barbara J. 2003. *The Dilemmas of Dissidence in East-Central Europe, Citizen Intellectuals and Philosopher Kings*. New York, Budapest: Central European University Press.

Fekete, Balázs. 2015. Péter László Közép-Európáról: tanulhat-e a jogtudomány egy történésztől? *Közjogi Szemle* 8:(4): 18–22.

Hamann, Ulrike, and Karakayali, Serhat. 2016. Practicing Willkommenskultur: Migration and Solidarity in Germany. *Intersections. EEJSP* 2(4): 69–86.

Hörcher, Ferenc. 2015. Skinner and Rosanvallon: Reconciling the History of Political Thought with Political Philosophy. *Przegląd Politologiczny* 4: 177–190.

Hörcher, Ferenc. 1997. *A koramodern politikai eszmetörténet Cambridge-i látképe: John Dunn, John G. A. Pocock, Quentin Skinner és Richard Tuck tanulmányai.* Pécs: Tanulmány Kiadó.

Hungary and Poland unite against mandatory EU migrant quotas. 2016. *Hungary Today* (8 April 2016). [http://hungarytoday.hu/news/hungary-poland-unite-mandatory-eu-migrant-quotas-52550, accessed on 1. 03. 2017]

Kundera, Milan. 1984. The Tragedy of Central Europe. *The New York Review of Books* (26 April): 33–34.

Manikowska, Halina, Pánek, Jaroslav, and Holý, Martin. 2005. *Political culture in Central Europe: (10th-20th century)*. Prague: Institute of History, Academy of Sciences of the Czech Republic, Warsaw: Institute of History, Polish Academy of Sciences

Plasser, Fritz, and Pribersky, Andreas. (ed.) 1996. *Political Culture in East Central Europe.* Aldershot: Avebury.

Klingemann, Hans-Dieter, Fuchs, Dieter, and Zielonka, Jan. (ed.) 2006. *Democracy & Political Culture in Eastern Europe*. London: Routledge.

Manova, Iva. 2011. Whose Love of Which Country? Composite States, National Histories and Patriotic Discourses in Early Modern East Central Europe. Edited by Balázs Trencsényi, and Márton Zászkaliczky. Brill.; *Universa. Recensioni di filosofia* 1(1) 2011., available online: [http://universa.filosofia.unipd.it/index.php/Universa/article/viewFile/81/85, accessed on 1. 03. 2017]

Mészöly, Miklós. 1989. *Volt egyszer egy Közép-Európa, Változatok a szép reménytelenségre*. Budapest: Magvető.

Mészöly, Miklós. 1997. *Once There Was a Central Europe. Selected Short Stories and Other Writings.* Budapest: Corvina.

Müller, Jan-Werner. 2011. European Intellectual History as Contemporary History. *Journal of Contemporary History* 46(3): 574–590.

Rácz, György. 2013. The Congress of Visegrád in 1335: Diplomacy and Representation. *Hungarian Historical Review* 2(2): 261–287.

Romsics, Ignác. 2002. *Dismantling of historic Hungary: the Peace Treaty of Trianon*. Translated from the Hungarian by Mario D. Fenyo. Boulder (CO): Social Science Monographs.

Szűcs, Jenő. 1981. Vázlat Európa három történeti régiójáról. *Történelmi szemle* 3: 313–359.

Szűcs, Jenő. 1983. *Vázlat Európa három történeti régiójáról*. Budapest: Magvető.

Szűcs, Jenő, and Parti, Julianna. 1983b. The Three Historical Regions of Europe: An outline. *Acta Historica Academiae Scientiarum Hungaricae* 29(2/4): 131–184.

Trencsényi, Balázs, and Zászkaliczky, Márton. (ed.) 2010. *Whose love of which country? Composite states, national histories and patriotic discourses in early modern East Central Europe*. Leiden: Brill.

Trencsényi, Balázs, Janowski, Maciej, Baar, Monika, Falina, Maria, and Kopecek, Michal. 2016. *A History of Modern Political Thought in East Central Europe Volume I: Negotiating Modernity in the 'Long Nineteenth Century'*. Oxford: Oxford University Press.

Trencsényi, Balázs. 2004. Unpublished PhD thesis: *Discourses of Nationhood in Early Modern Europe.*

Viktor Orbán Says 2017 Will Be A Year Of Rebellion. 2017. április 10. Visegradpost, 01.02, 2017. [https://visegradpost.com/en/2017/01/02/viktor-orban-says-2017-will-be-a-year-of-rebellion/, accessed on 1. 03. 2017]

Zászkaliczky, Márton. 2004. Unpublished Master's thesis: *Resistance and obedience in the 16th century Hungarian political theology.*

Zászkaliczky, Márton. 2013. The language of liberty in early modern Hungarian political debate. In *Freedom and the Construction of Europe – New perspectives on philosophical, religious and political controversies*, edited by Martin van Gelderen and Quentin Skinner. 274–295. Cambridge: Cambridge University Press.

Talk

Hörcher, Ferenc. 2016. Hungary, 1956: The Role of the Tragic in the Construction of Central European National Identities. The Center for Slavic, Eurasian and East European Studies (11 October 2016).