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Legal change in post-communist states: Contradictions and explanations. Introduction

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ABSTRACT

Reformers had high hopes that the end of communism in Eastern Europe and the former Soviet Union would lead to significant improvements in legal institutions and the role of law in public administration. However, the cumulative experience of 25 years of legal change since communism has been mixed, marked by achievements and failures, advances and moves backward. This special issue of the journal ***Communist and Post-Communist Studies*** documents the nuances of this process and starts the process of explaining them. This introductory essay draws on the findings of the articles in this issue to explore the impact of three potential explanatory factors: regime type, international influences, and legal (or political) culture. Regime type matters, but allows for considerable variation within authoritarian and democratic states alike and the possibility of reversals. The influence of international organizations (like the European Union) is also far from predictable, especially once states have joined the organization. Finally, legal cultures and political traditions play a large role in explaining developments in individual countries, but there is nothing inevitable about their impact.

In the quarter century since the collapse of communist regimes in Eastern Europe and the USSR almost every country in the region has tried to reform its legal institutions and enhance the role of law in public administration. According to conventional wisdom, both democratization and the creation of market economies required the creation of law-based states (or Rechtsstaat), which assured that government officials (including politicians) would be subject to legal restraints, and that citizens could defend their rights and interests in impartial and effective courts (Linz and Stepan, 1996). Accordingly, most countries did make efforts to produce independent and empowered courts and police that served society (Seibert-Fohr, 2012; Kuhn, 2011; Solomon and Foglesong, 2000); and struggled to make public administration more rule-based and less corrupt (Inkina, 2018; Dmitrova, 2009; Meyer-Sahling, 2009; Gadowska, 2018). Before long it became clear that the goals of reformers were fulfilled only in part, in some countries more, others less, and that some achievements had proven short-lived and subject to reversal (Solomon, 2007, 2015b; Hendley, 2017). Differences emerged between authoritarian regimes in the post-Soviet space and democratic ones in central Europe that were part of the European Union. But events of recent years have shown that empowered and independent judiciaries could be threatened even in the countries that had apparently made successful legal transitions – Hungary and Poland, for example (Bugaric, 2015; Bugaric and Ginsburg, 2016; von Bogdandy and Sonnevend, 2015; Scheppele, 2018).

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The cumulative experience of post-communist legal change within Eastern Europe has turned out to be mixed, marked by achievements and failures, advances and moves backward. The challenge to be addressed in this special issue of ***Communist and Post-Communist Studies*** is determining and documenting the nuances of these developments and starting to explain them. The contributors to this issue are all scholars who pursue socio-legal research on Eastern European countries—political scientists and sociologists—who are also members of a new collaborative research network of scholars who share an interest in this subject. We, the co-editors, should stress that the papers are not the product of a conference or directed inquiry but represent the ongoing research of the several contributors. We are pleased that the topics cohere, and that the sum of them will likely prove greater than their parts.

The paper topics range across the region and focus on both the former Soviet Union and Eastern Europe proper. The topics fall nicely into two groups—papers that deal with legal institutions, especially courts but also police; and papers that address law and legal accountability in public administration, including efforts to fight corruption and complaint mechanisms. The extent to which legal reform has improved the accountability of government officials is one broad concern that unites all the papers, including those on legal institutions. Two of these papers deal at least in part with administrative justice (holding individual officials to account) and other two with the accountability of police and the role of supranational tribunals in holding domestic officials to account.

The authors of the articles share a concern with the role and impact on their findings of at least three potential explanatory factors: regime type, international influences, and legal (or political) culture. Most observers assume that the achievement of independent and empowered courts is easier in democratic than in authoritarian regimes. Probably so, but it may well be that democratic government is a necessary but insufficient condition. The impact of political competition also turns out to be variable (Finkel, 2008; Popova, 2012). Just what can be achieved within authoritarian states is another open question (Ginsburg and Moustafa, 2008; Solomon, 2015a). International influence, especially through the processes of linkage and leverage may make a difference (Levitsky and Way, 2006). A prime example is the impact of the European Union and its demands, whether addressed to would-be members or actual ones. It turns out, however, that there have been limits to the impact of the EU, whether in the shaping of legal institutions or the struggle with corruption (Kochenov, 2008; Gadowska, 2010; Boerzel et al., 2012; European Commission, 2016). Finally, as one country or another moves backward and counter-reforms prevail, observers increasingly turn to cultural explanations (Krygier, 1999; Kurkchiyan, 2003; Bobek, 2008). One country lacks a legal tradition or a strong role for law in public life, perhaps because informal relations trump formal institutions; another country has a long heritage of illiberal impulses, which facilitate attempts by leaders to curtail legal accountability.

In the first article Mihaela Serban documents the extraordinary growth of the use of courts in post-communist Eastern Europe, for both litigating conflicts and pursuing rights claims, what she calls a process of legal mobilization. She explores the sources of this mobilization, including the opportunities provided by new courts on the domestic and international levels, and goes on to probe its consequences. While paying special attention to developments in Romania and with the European Court of Human Rights, she demonstrates that the expanded use of the law has involved all the countries of the region. Finally, she argues that the explosion in litigation and the version of an adversarial culture that it represented may temper the effects of the rejection of liberalism that has affected the seemingly most developed democracies, Hungary and Poland, which has resulted in the subjugation of their judiciaries including their constitutional courts.

In their contribution Kriszta Kovács and Kim Lane Scheppele analyze the process and consequences of the illiberal turn for the courts of Hungary and Poland. They start by analyzing and comparing the legal mechanisms used to subjugate the judiciary (including the constitutional courts). These turn out to have been tools that are available to many autocrats. But what distinguishes the situation in Hungary and Poland is the presence of an external check in the form of the European Union. Sadly, the EU failed to take the appropriate measures, and in the process signaled that it would tolerate the changes. In so doing, it conveyed a message that there is such a thing as "autocratic constitutionalism", which it would not oppose.

The terms "autocratic" or "authoritarian" constitutionalism may sound ominous when used to characterize developments within the context of democracies like Hungary and Poland, but they carry a more positive valence when characterizing a constitutional court within an authentic authoritarian state. Alexei Trochev and Peter H. Solomon Jr. see the Russian Constitutional court operating in a dual state, where for some matters the needs of the political leaders have priority and on other issues the Court is free to exercise its discretion. Both the Court and its Chairman Valerii Zorkin have succeeded in making the right choices and following a pragmatic approach. The authors demonstrate that this pattern has been in place for a long time and that loyalty of judges has become the norm where expected. Moreover, by asserting Russia's autonomy from the ECHR in Strasbourg, Zorkin has made the Court even more useful to the regime. At the same time, in the past decade the Court has decided many cases on the merits, gained more respect, and does much better than before in getting its decisions implemented. In short, by adapting to the needs of leaders the Court has gained autonomy and power on some matters.

Not only courts but also police in Russia have had to adjust to changing political priorities and dispositions. Olga Semukhina uses interviews with police officials to track the ups and downs in their self-conception and confidence, which reflected their attitudes toward different rounds of reform. In the 1990s organizational changes, decreased funding, corruption, rising crime rates, and a new emphasis on service led to demoralization. But in the 2000s the situation gradually changed, first with new funding, then with a further round of reforms, which did not achieve most of its goals but did foster a return to paternalistic values. The revived mission of protecting society on behalf of the state gave police officers a renewed sense of value and self-respect. For the short run at least, continuity trumped change.

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