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Constitutionalized by the Past. The Role of National Identity and Collective Sense of Experience in Central European Constitutionalization**

1. Introduction

More than fifteen years ago, the Czech-British sociolegal scholar Jiří Přibáň already drew attention to a curious tendency. It was revealed in the content of one of the Central European constitutions of the democratic transition period of the 1990s. He noted that "the preamble to the Polish constitution is an interesting mixture of civil and national patriotism [which] re-establishes Polish national heritage and history as a source of common political pride".[1] Consciously or not, he captured the essence of the Central European constitutionalization with these statements.

Even a superficial analysis of existing constitutions and other legislative initiatives of Central Europe's post-communist countries points to the influential role their past plays in the imagery of their internal axiology. The crucial aspect is that rather than the "facts", an "interpretation of the events from the past" was used in the processes of establishing and consolidating political communities in that period. In other words, both

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[1] J. Přibáň, *Legal Symbolism. On Law, Time and European Identity*, Ashgate, Hampshire 2007, p. 85.

at the time of constitutionalization and thereafter, the past (understood as a collective interpretation of the facts) was the main factor in: (a) legitimizing the new order; (b) delegitimizing any attempt to link the symbolic sphere of the old system with the newly established community.

This may stimulate questions about the uniqueness of the Central European[2] approaches to this matter. References to values, ideas or events from the past (constitutive for the communities concerned) can be found in multiple preambles to constitutions from other regions of the world. They are present both in constitutions enacted during other democratic transitions (Portugal, South Africa), in acts establishing new communities and states (Israel), and in fundamental laws introducing radical social change (Turkey). Nonetheless, in all the cases of pre-Central European constitutionalizations, it is characteristic that references to the past are not part of any regional or ideological trend. In other words, the use of such references in the constitutions' texts was solely an autonomous decision of the particular community. The local situation, circumstances and specifics generally dictated it. This is why we can find references to the overthrow of the right-wing post-Salazar regime in the Portuguese constitution. Still, the Spanish constitution has no word about the end of the Francoist regime. However, both belong to the same "second wave of transition".[3]

The collapse of communism in Central Europe is the line of demarcation. The 'third wave of transition'[4] is even over-packed with references to events from the past. These, assumed by the drafters of the particular constitutions, were intended to be a source of legitimacy for the democratic systems created on the ruins of communism. They are currently present in all constitutions of the democratic political communities in the region. This leads to the question: Why is this so? At this stage, a working assumption must be made that it is due to both: (a) the shared experience of the past and (b) the subsequent shared vision of the future, formulated at the time of the collapse of the communist system.

As a key historical experience, which is the source of a common regional trauma, the fact that the countries of Central Europe belonged to the Eastern Bloc after the Second World War should be considered. By contrast, the region's political history from the 1990s and the beginning of the current century, as a period of shared vision of the future, formulated alongside the collapse of communism, should also be considered.

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[2] In this text, concepts such as "East," "West," "North," "South," or "Central Europe" should not be understood in a strictly geographical sense, but rather in a political one. They should also not be seen as fixed entities, as they change in accordance with political processes. Central Europe, which in Kundera's view was, against its will, part of the East for almost 50 years, sought to align itself with the West after the fall of communism and eventually became institutionally part of the West by joining the European Union and NATO, both associated with the West. Thus, the key element here is political fluidity, which determines a country's affiliation with a particular political grouping.

[3] C. Thornhill, *A Sociology of Constitutions. Constitutions and State Legitimacy in Historical-Sociological Perspective*, Cambridge University Press, Cambridge 2017, p. 341.

[4] *Ibidem*, p. 355.

At that time, all the states of Central Europe took the exact same decision to integrate as quickly as possible with the political structures of the Western world embodied by the European Union and NATO. It is also worth noting that these countries, despite almost fifty years of Soviet rule, felt themselves to be full members of the Western world. Not without reason, the Czech writer Milan Kundera in the 1980s called this area a "kidnapped West".[5]

Therefore, the article aims to discuss the constitutionalization processes of Central European political communities after the fall of communism with particular emphasis on references to the local memory codes which only the given community can decode. Those that were supposed to bind the newly established communities together – the memory narratives resulting from interpretations of the past.[6]

Hence, the next section discusses M. Kundera's essay. Crucial for the aim of this article is his vision of Central Europe. Furthermore, it is adapted to study the ideal of the identity of the Central European democratic transition. By picking out the typology of the "kidnapped West", one may be able to break the still prevailing, although dimming, trend of locating the whole of post-communist Europe in a very capacious set called "Central and Eastern Europe". The importance of such a move, especially now when the area is still treated as homogenous, should be out of the question. The proposed division between Central and Eastern Europe will allow a better understanding of why *Russkiy Mir* (which is the political idea that we can affiliate with contemporary understanding of the "East") is not part of the identity of some states that were part of the USSR. The following, third, section focuses on the critical elements of constitutionalization and legitimization in Central Europe. Particularly those that allowed the total rejection of the baggage of communism and integration with the institutional West. Finally, in section four, through combining elements of the previous two sections, the concept of an extended Central Europe as a new phenomenon of regional constitutionalism is proposed.

The central hypothesis of this article is based on the assumption that, unlike the two previous waves of transitions in post-war Europe, the third one produced a specific model universal to the whole region. It is based on combining the formal constitutional layer of constitutional liberal democracy (institutions and procedures) with local particularisms consolidating the local national communities. These are largely constructed based on interpretations of the memory narratives and on the sense of community of experience they induce. In other words, Central European constitutionalism is characterized by a combination of the formal individualist liberal system with a contemporary interpretation of the nation-state based on the mythical foundations coded in the particular collective memories.

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[5] M. Kundera, *The Tragedy of Central Europe,* "The New York Review of Books", 26 Apr. 1984, p. 33.

[6] See: M. Halbwachs, *On Collective Memory,* transl. L. Coser, Chicago University Press, Chicago 1992; E. Hobsbawm, *Mass-Producing Traditions: Europe 1870–1914*, in: *The Invention of Tradition*, eds. E. Hobsbawm, T. Ranger, Cambridge University Press, Cambridge 2012; B. Misztal, *Theories of Social Remembering*, Open University Press, Maidenhead 2003.

2. Central Europe replaces central and eastern Europe

While drawing on Kundera's vision of Central Europe, it is important to realize that it is not an idea written in stone. It is worthwhile to bear in mind the earlier concept of Mitteleuropa,[7] which was intended to justify the expansion of Kaiser's Germany precisely in this area. Nonetheless, the way Kundera named Central Europe in his essay – a kidnapped West – indicates that, apart from the name, nothing connects these two concepts. Therefore, his vision of a West located in the centre of Europe should be seen primarily as a valuable contribution to typologies of the nature of constitutionalism in this part of the continent. Of course, it should be underlined that his essay was written in very specific circumstances, when the Iron Curtain was dividing Europe. As well as the period, it means just after the violent showdown of the legitimately functioning Solidarity movement in Poland. Moreover, the essay was also written for a particular audience – a citizen of a Western state.

Referring in his essay to the situation created in Europe after the end of the Second World War, Kundera first mentioned the event that, in his view, caused the first fundamental split in the continent. In his opinion, it was the Great Eastern Schism and the division of Christianity into Eastern and Western churches. The year 1945, in turn, produced an even more complicated situation – "that of Western Europe, that of Eastern Europe, and, most complicated, that of the part of Europe situated geographically in the centre – culturally in the West and politically in the East".[8] In other words, the post-WWII change of borders and the shift of the Soviet sphere of influence westwards created a strange situation, in which countries deeply rooted in the Western tradition (deriving from their adherence to Roman Catholicism) were subordinated to Eastern political philosophy. This was to operate both: (a) in the practice of governance and (b) in the consequent systemic issues or approaches to the role of the rule of law. Consequently, the deep, centuries-long rooting in Western Christianity is the first element distinguishing Central Europe from Eastern Europe. The second element is linked to the sphere of values. Central Europe is "a family of equal nations – treating the others with the mutual respect".[9] Milan Kundera thus proposed a formula for regional coexistence. The third element differentiating Central Europe from Eastern Europe is the fact of its diversity: 'the greatest variety within the smallest space'.[10] Finally, the fourth element identified by Kundera is the effect of the other three – "the people of Central Europe are not conquerors. (…) They are victims and outsiders".[11] The reluctance of Central Europeans to accept the post-WWII world order was, in turn, supposed to be

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[7] A. Pelinka, *Mythos Mitteleuropa*, in: *Neuland Mitteleuropa. Ideologiedefizite und Identitätskrisen*, hrsg. P. Gerlich, K. Glass, B. Serloth, Adam Marszałek, Wien – Toruń 1995, pp. 13–17.

[8] M. Kundera, *The Tragedy*…, p. 33.

[9] *Ibidem*.

[10] *Ibidem*.

[11] *Ibidem*, p. 36.

the reason why, even forty years after the war (this essay was written in the mid-1980s), they still stored in their collective awareness (although here the preferred term should be collective memory) the experience of being part of the Western world, both as subjects (until 1918) and as citizens of independent states (1918–1938/39/40).

It is worth reminding that Kundera limited his analysis to the area of three countries: Czechoslovakia, Hungary and Poland. Nevertheless, he stressed that "Central Europe is not a state: it is a culture or a fate. Its borders are imaginary and must be drawn and re-drawn with each new historical situation".[12] It is precisely, the end of communism in Central Europe that should be seen as the political moment that stimulated processes of change and led to the most extensive and profound democratic transformation in history. The scale of the reorientation of the politics of the entire region and its collective march towards the institutional West was, on the one hand, rooted in the favourable geopolitical situation, but, on the other hand, it must have had some basis stemming from the sphere of values and the historical experience of individual nations. As a consequence, based on Kundera's criteria, Central Europe expanded to include the Baltic states, Bulgaria and Romania. Observing the events of the beginning of the 21st century (especially in Ukraine and Georgia), it is impossible to shake off the impression that this was not the last "enlargement". This issue will be analysed later on.

At this stage, it is necessary to focus on a reflection on Central Europe as a phenomenon located in the "culture of memory", understood as a presentist reflection on the experience of the past. Whether it is a collective experience of the region or the sum of national experiences sharing the same characteristics should remain open for the moment. However, there is no doubt that the experience of communism in the Soviet version and its negative evaluation is a unifying factor for Central Europeans. The way in which the mechanism of collective memory works, in turn, is similar to the Kunderian collective experience of (Central Europe) being part of the West in the interwar period. These two experiences are nothing more than two historical causes (arguments) justifying the region's political choices during the transition. In other words, the unequivocally negative experience of the Soviet version of real socialism, encoded in collective national memories, and the relatively positive experience of the interwar period combined to form the story of the need to return to a place historically correct for which Central Europeans were destinated. In this case, it was identified with the political structures of the Western world, namely the EEC/EU and NATO.

The fact that such mechanisms manifested themselves not only in the three (actually four) countries described by Kundera is interesting, too. Other former satellite states (Romania and Bulgaria), as well as countries that enjoyed complete independence before the war and were annexed by the USSR in 1940 (Estonia, Latvia and Lithuania), had the same superior aim. For all of them, institutional affiliation to EU and NATO structures was synonymous with institutional affiliation to the West. Thus,

[12] *Ibidem*, p. 35.

in spite of the fundamental differences within the concrete experiences of interwar and post-war dependence on the USSR, the shift to the West became the collective cement of the new Central Europe of the 1990s. In such a situation, Kundera's text should be regarded as a checklist to determine whether a given community shares the Central European axiological universe. If all boxes are ticked, the given country should be treated as a Central European one. However, such identification should not be influenced by the dominant state religion. The "Latin" criteria should be considered as flexibly as possible. Above all, it should consider the community's history and the cultural environment in which it functioned until becoming a "real socialist state". The fact of having previously interacted with the West should be the determinant of belonging to the "kidnapped West". Remarkably, Kundera's other four criteria are already of a much more universal nature and in fact constitute Central Europe as an inclusive community.

One more doubt that needs to be discussed. Why is it necessary to conceptually separate Central Europe from Eastern Europe and abandon the so far popular term "Central and Eastern Europe"? It has been used by Wojciech Sadurski,[13] Atilla Agh,[14] and Istvan Pogany.[15] It appeared in different fields of humanities and social sciences.[16] When it penetrated the democratic transition studies of the region, it was justified. All states in this period, including Russia and Belarus, adopted constitutions that formally fulfilled the standards of the constitutional liberal democratic system. This was manifested in the strong position of the judiciary, whose task, according to liberal constitutionalism, is to explain the meaning of general and abstract legal norms.[17] It can be said that it had its rationale in the 1990s. It was connected precisely with the fact that all the states in this area adopted constitutions. In effect, at least at the procedural level, they copied liberal-democratic arrangements.

The fundamental difference between Central Europe and Eastern Europe lies in the subsequent actions of the, broadly defined, actors of political life in the respective states. In some, like Russia and Belarus, representative institutions and the judiciary have become their own caricatures and mere decorations, suggesting the existence of formal limitations of power. In reality, unlimited executive power exists there.[18]

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[13] See: W. Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe,* 2nd ed., Springer, Dordrecht 2014.

[14] See: A. Agh, *Linkage Politics in Central and Eastern Europe*, "Aula" 1992, vol. 14, no. 4, pp. 75–93.

[15] See: I. Pogany, *Constitutional Reform in Central and Eastern Europe: Hungary's Transition to Democracy,* "International and Comparative Law Quarterly" 1993, vol. 42, no. 2, pp. 332–355.

[16] See: M. Bernhard, *Civil Society and Democratic Transition in Eastern Central Europe*, "Political Science Quarterly" 1993, vol. 108, no. 2, pp. 307–326; E. Gruber, *East-Central Europe and the Balkans*, "The American Jewish Year Book" 2005, vol. 105, pp. 455–497.

[17] See: M. Loughlin, *What is Constitutionalisation?*, in: *The Twilight of Constitutionalism*, eds. P. Drobner, M. Loughlin, Oxford University Press, Oxford 2010, p. 58.

[18] How easily Lukashenka took control over the Belarusian constitutional court is described by W. Sadurski. The same process occurred in Russia, where the constitutional court is now just an internally empty body that provides legal justification for Putin's phantasmagorias, see: W. Sadurski, *Rights Before Courts*…, pp. 3–43.

Additionally, it is concentrated in the hands of one person. In others, despite the more or less serious perturbations associated with attempts to destroy the balance between branches of government, it has been possible to build a system which, in principle, meets the minimum standards of constitutionalism. As a result, such a state can be classified as a member in the family of constitutional liberal democracies.

Therefore, the statement is about two fundamentally opposite political-social-legal situations that have emerged over the last thirty years in the area known once as Central and Eastern Europe. The first is Central Europe, which institutionally belongs to the Western world (EU, NATO). Of course, some countries, e.g. Poland and Hungary (especially the second one), are a source of doubt about the fundamental nature of their political communities. In the case of Hungary, the doubts are more vital, as this state explicitly declares the rejection of liberal-democratic axiology in the text of its constitution. Nevertheless, as mentioned earlier, they are still under the umbrella of the supranational law system, which is based on a liberal axiology (Article 2 TEU).[19] Moreover, supranational structures (embodied by EU authorities) have formal control tools, allowing them to influence processes within member states (Article 7 TEU). The second situation is Eastern Europe. There, institutions operating in a liberal-democratic system exist only formally. Functionally, all power is centralized. Civil society there is persecuted and even annihilated. Law as a system of norms, on the other hand, does not fulfil the requirements of the rule of law. It is classically instrumentalized and serves the current interests of those in power. Russia and Belarus are precisely such places.

3. A past that has constituted the present

So far, attention has been paid to issues related to declarations of commitment to a particular axiology and its institutionalization. Now, the main point is to focus on the operationalization of the aforementioned specific character of the area in the core of the acts establishing political communities.

Since 2014, indirect, but most often explicit, references to events from the past (including their assessment and interpretation) are present in all constitutions of Central Europe. The final touch was the enactment of an amendment to the Latvian Constitution in that year, adding a preamble. The amendment was intended to emphasize the ethnic and national character of the country. From now on, the reader of the Latvian fundamental law should not doubt that this is an ethnic Latvian state.[20]

Romanians had already introduced their amendment in 2003. They decided not to add a preamble to their transitional constitution. However, they did change the normative

[19] Consolidated version of the Treaty on European Union of 26 October 2012, OJEU, C 326/13.

[20] The Constitution of the Republic of Latvia of 15 February 1922 (Latvijas Republikas Satversme 1922. gada 15. Februāra), text consolidated by State Language Centre with amending laws, online: https://www.satv.tiesa.gov.lv/en/2016/02/04/the-constitution-of-the-republic-of-latvia/ (accessed: 8.12.2024).

part of the provision defining the democratic nature of the state – Article 1(3). Therefore, from that moment on, Romania became not only a "social state, governed by the rule of law, in which human dignity, the citizen's and freedoms (…) shall be guaranteed", but also a community that follows the liberal axiology "in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989".[21]

The other constitutions of the region also contain similar references. Narratively, as in the case of Latvia and Romania, they contain references to a broader axiology of the West. These references are combined with the national (local) experience of the past. The references to the past fulfil the selective nature of collective memory of the society. They do not refer to individual communities' comprehensive experience of the past, but only to events that are (in the opinion of their drafters) constitutive for the particular community established by a specific constitutional act.

Therefore, Poles decided to build their "Third Republic" recalling the best (and only the best) traditions of the First and Second Republics. At the same time, they are "mindful of the bitter experiences of the times when the fundamental freedoms and human rights were violated".[22] The Czechs seek inspiration in the finest traditions of the Crown of Bohemia and Czechoslovak statehood.[23] What is interesting to note is that the Slovaks seem to discard the heritage of the idea of Czecho-Slovakism. This is even though, alongside Masaryk and Benes, the third father of the first Czechoslovakia was a Slovak – Milan Stefanik. In the constitution's preamble, they refer to the heritage of Cyril and Methodius and the Great Moravian State, which existed in the 9th century.[24] In the Baltic States, alongside the already mentioned Latvian preamble, also Lithuanians decided to root their community in the past. For them, the historical forms of statehood (the Grand Duchy of Lithuania and the interwar republic), the cultural heritage (language and traditions), and the historical legislative heritage (the Statutes of Lithuania) are crucial. Only Bulgarians and Estonians chose to emphasize more strongly their attachment to Western universalism as the (implicit) opposite of Eastern values.

An interesting (and enlightening from the point of view of the processes of retreat of post-communist states from the idea of constitutional liberal democracy) phenomenon for analyses of Central European constitutionalization is the Fundamental Law of Hungary.[25] Regarding the past, the Hungarian fundamental law, known as "Orban's illiberal

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[21] Law for the revision of the Constitution of Romania (Legea de revizuire a Constituţiei României) No. 429/2003.

[22] The Constitution of the Republic of Poland of 2 April 1997 (Konstytucja Rzeczypospolitej Polskiej z 2 kwietnia 1997 r.) (Dz. U. No. 78, item 483).

[23] Constitution of the Czech Republic of 16 December 1992 (Ústava České Republiky ze dne 16. prosince 1992), č. 1/1993 Sb.

[24] Constitution of Slovak Republic of 1 September 1992 (Ústava Slovenskej republiky 1 septembra 1992), č. 460/1992 Sb.

[25] The Fundamental Law of Hungary of 25 April 2011 (Magyarország Alaptörvénye 2011. április 25.), online: https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178 (accessed: 8.12.2023).

constitution",[26] leaves no room for reflection or reinterpretation. The narratives of memory, constitutive for Orban's vision of Hungary, are displayed one-dimensionally. The very replacement of the word *constitution* by the term *Fundamental Law*, as well as the failure to specify the political character of the community (the text of the act implies that Hungary is simply *Hungary* without stating its republican character), indicates a partial deviation from the trend that was evident in the region in the 1990s. The semantics of the preamble itself is also interesting, for in this case, this word does not appear either. The solemn introduction to the Hungarian constitution is called the *National Avowal*. This, in turn, indicates the legislator's desire not so much to present the sovereign will of the free people[27] as to create a national credo and a metaphysical relationship between the individual and the state. The National Avowal categorically specifies what and whom Hungarians should be proud of. At the same time, it lists events from the national past and forms of statehood that Hungarians do not consider worthy of remembering by the established community or consider entirely imposed from the outside (totally extraneous to the community). In the purely normative part of the fundamental law, it is also difficult to find any reference (apart from Article B.1: "Hungary shall be an independent, democratic rule-of-law State") to the human rights system or Western universalism in general.

The nature of Hungary's political system, created by this particular constitution, is problematic. Nevertheless, it is worthwhile repeating that Hungary still remains within the supranational structures embodied by the European Union. This suggests that, from a legal point of view, Hungary nevertheless pursues the organization's values as set out in Article 2 TEU. On the other hand, the constitution's text guarantees Hungarians the right to interpret these values (Article E.2), which may suggest that they do not accept them unconditionally. That shows that the side-effect of Central European constitutionalization after the collapse of the Soviet system was the creation of a dual social, political and legal situation.

The "kidnapped West", to justify its status, declared devotion to Western universalism in the broadest possible sense. Therefore, all transitional constitutions contained such references. While establishing new comprehensive (it means: social, political and legal) systems founded on the ruins of the world order imposed at Yalta, Central European political communities clearly declared that they did not accept the decisions of the so-called Big Three. Firstly, they were in fundamental contradiction to their internal needs and beliefs. Secondly, they did not reflect the expectations that most Central European communities had of their states of most of its "members". They expressed this precisely in the parts of the preambles of the new constitutions that mentioned the fundamental importance of, among other things, human rights.

For some purpose – discussed in the next section – the creators of the new communities tried to refer to the most "certain" elements bonding them together. In effect,

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[26] See: I. Abby, *Hungary's Illiberal Democracy*, "Current History" 2015, vol. 114, no. 770: *Europe*, pp. 95–100.

[27] J. Přibáň, *Legal Symbolism*…, p. 5.

they felt that historical experiences known on a mass (national) scale would be the best choice. As far as possible, they wanted to encode them in the collective societal memories in a way that would limit their discursive interpretation. In other words, Central Europeans decided to reach not so much for facts as for stories from the past. Stories, the content of which (understanding) was the same for all community members. Moreover, the sequence of events suggests that regional legislators, rather than retreating (with the deepening of European integration at the political level and the individualization of societies at the social level) from the collective cementing elements of communities, are even drawing towards strengthening the message about them.[28]

After all, the Kunderian vision of Central Europe discussed in the previous section is also rooted in collective national memories and the common collective traumas sewn into them. Coming back to J. Přibáň, such a mixture thus creates an unusual situation. Using memory narratives typical of collective societal memory is no longer a pragmatic choice. In Central Europe, it has become an inherent part of the creation of a political community. It seems even to be necessary for inspiring relative confidence in its successful formation.

4. In the West we trust: Central Europe extended

The determination of the essence of Central European political communities requires: (a) an analysis of regional political history, with a particular focus on the purpose of the established policies; (b) a discussion of the role of law in these processes.

This section draws attention to the conjunction of internal and external expectations imposed on the newly formed communities. In the case of external expectations, it is worth mentioning that what mattered was the strategic aim that Central Europe had set for itself. It was the return of the "kidnapped West" to its rightful place, but this time enriched by solid institutional security. As a result, the content of external expectations was determined by (1) the formal conditions of accession to the institutional West; (2) the politics that the EU institutions (embodying the vision of an institutionalized community of the West) pursued vis-a-vis the applicant countries.

What is the role of the narratives of the past in meeting internal expectations? Anna Młynarska-Sobaczewska pointed out that direct references to the past are part of the search for legitimacy at the moment of constitutionalization.[29] In other words, political transformation alone may not be sufficient, even if its social legitimacy is unchallenged

[28] The sequence of events indicates this. Namely, the past began to be referred to by successive states. Chronologically, these were Romania, Hungary and Latvia. In all of these countries, the internal situation suggested the existence of serious conflicts capable of undermining their way towards the institutional West.

[29] A. Młynarska-Sobaczewska, *Normatywizacja tożsamości zbiorowej w preambułach do konstytucji państw postkomunistycznych* [Normative-making of Collective Identity in the Preambles to the Constitutions of the Post-communist European States], "Filozofia Publiczna i Edukacja Demokratyczna" 2013, vol. 2, no. 2, p. 111.

at first glance. This approach is even more understandable. In the history of European continental constitutionalism, the number of communities that emerged as political elites' projects rather than grassroots community formation based on law is undoubtedly predominant.[30] Therefore, as Młynarska-Sobaczewska rightly emphasized, every political regime in every country tried (and still tries) to present itself as the end product of socio-political processes and the only one with mass legitimacy. Naturally, this is possible when it is based on the promise of a better collective future. It is connected with distancing oneself from the past, as well as with an adequately interpreted story about the past. Nevertheless, the scale of complexity of the post-communist transformation has been unprecedented in the history of modern states. Consequently, as noted by Polish political scientists, while political change itself is possible on the basis of the promise of a better future, the general reconstruction of the collective imagination of the community must focus on "presentation of the common core, the traditions and the experiences that constitute them".[31] Therefore, the collective imagination of the reconstructed community was necessary in the case of the third wave of the constitutions. In Central Europe, in contrast to the two previous waves of democratic transition, it was not only political change that was necessary but general change covering, among other things, the economic system, social interactions and the ethics of the public sphere.

Moreover, operations such as those described above are not merely historical in nature. In other words, they are not only observable in a specific place and time (classic Central Europe of the 1990s, 20th century). In fact, they can be seen in Ukraine at the moment. Moreover, until the political stagnation that prevailed in Georgia under the government of the pro-Russian Georgian Dream, they were also visible there – on both political and social planes. Instead, they are now represented by civil society, which is on a collision course with the government at the moment.

As is typical of the Central European model of constitutionalization, schemas of community building based on the hybridization of declarations of devotion to Western axiology accompanied by the creation of a national myth are present in the Ukrainian fundamental law. The constitution,[32] restored with the victory of the Revolution of Dignity in 2014, contains numerous references to the national community and its past. They mention, on the one hand: (a) "the centuries-old history of Ukrainian state-building", which is based on the right to self-determination of the Ukrainian nation and people; (b) "civil harmony on Ukrainian soil, (…) European identity of Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine"; (c) "responsibility before God, (…) past, present and future generations". On the other hand, we

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30 See: H. Arendt, *On Revolution*, Penguin Books, New York 1990, pp. 141–178.

31 J. Marszałek-Kawa, A. Ratke-Majewska, P. Wawrzyński, *Polityka pamięci i kształtowanie tożsamości politycznej w czasie tranzycji postautorytarnej* [Politics of Memory and Emergence of a Political Identity in Times of Post-Authoritarian Transition], Difin, Warszawa 2016, p. 111.

32 Constitution of Ukraine of 28 June 1996, online: https://www.refworld.org/pdfid/44a280124.pdf (accessed: 8.12.2023).

find mentions of: (a) "guarantee of human rights and freedoms"; (b) the intention to "develop and strengthen a democratic, social, law-based state".

In the case of the Georgian Constitution,[33] we can also observe elements of the search for historical legitimacy and direct references to the values constitutive of the Western political communities. In the first case, these are (a) "the centuries-old traditions of statehood of the Georgian nation"; and (b) "historical and legal legacy of the Constitution of Georgia of 1921". The second catalogue is embodied in declarations of willingness to safeguard universally recognized human rights and freedoms, the promotion of a democratic social order, economic freedom, and finally, the rule of law and the social state.

Recently (it means until mid of 2024) declarations about the draw towards the West in Ukraine and Georgia have not been secrets. They were real political declarations arising from the democratic transitions (the narrative of a better future), which are currently or backsliding to the authoritarian form of government (Georgia) or are frozen by geopolitical situation (Ukraine). The recent Euro-Atlantic course of both countries was adopted even before the emergence of open armed conflicts between them and Russia. Moreover, as can be seen from the preambles discussed above, in both cases, there is a reproduction of the typical Central European ethno-liberal hybrid of narratives constituting political communities after re-constitutionalization and (at least declared) democratization. This can once again be summed up by the observation that subsequent post-communist states would like to maintain the communitarian and national, rather than individualistic, orientation of the political community and meet the requirements of belonging to Euro-Atlantic structures.

This, in turn, leads to the question of whether Central Europe is a purely geographical concept and whether the experience of communism, although shared, was caused by the location of these countries closest to the USSR. Nevertheless, it is precisely this question that seems crucial to the claim that nowadays we can return to the notion of Central Europe. Still, as a community of (a) experience, (b) [political] purpose, (c) [which is] trying to formulate its own approach to the axiological sphere.

While the first two points fit perfectly into the Kunderian vision of Central Europe, the question of axiology needs to be considered. It demands a brief discussion of the preceding points: (a) and (b). The commonality of experience as a constitutive factor of Central Europe seems to be beyond discussion. All these states experienced instrumental treatment during the Second World War, no matter which side they took. Moreover, they became mere objects instead of subjects of the Yalta-Potsdam world order established by the superpowers. Finally, they all experienced the system of real socialism, as well as the profound transformation processes after its collapse. These, in turn, determined a common political aim: using Kundera's language, a return to the West (point b).

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[33] Constitution of Georgia of 24 August 1995, Doc. No. 786, online: https://matsne.gov.ge/en/document/view/30346?publication=36 (accessed: 8.12.2023).

5. Conclusions

In studies on institutionalism, we meet the category of "unintended consequences", especially in the context of changing institutional arrangements. According to the adage, "small changes of institutional arrangements led to an avalanche of consecutive changes".[34] In Central Europe's case, such a seemingly harmless small change should be regarded as supplementing a comprehensive understanding of constitutional liberal democracy with the communitarian "juice". On the one hand, the presumption was correct. On the other, it has already led to serious consequences and has the potential for even greater ones.

Jiří Přibáň, mentioned in the introduction (following the thinking of Niklas Luhmann), stated that preambles to constitutions contain the "ceremoniously codified will of the sovereign people".[35] Translating this into the problems discussed in this text, we should assume, after analysing the textual layer of the individual constitutions, that the will of the founders of Central European political communities was to politically join the West, while attempting to preserve the constituent elements consolidating the particular communities. Additionally, historically proven references to national elements were considered the most effective. The narratives that constitute them are, in turn, not located in facts but in their interpretation. They are coded in collective memories, a societal construct characterized by a presentist evaluation of past events. Their evaluation depends on the consequences already known to those evaluating them.[36] It is worth mentioning at this point that in Central Europe, historically, the narratives creating collective memories were overwhelmingly formulated by elites, known as inventors of myths[37] and traditions.[38] Such interdependence leads to a situation in which the creators of particular constitutions choose to locate narratives of memory in their text, most often in their preambles. They do not seem to find any other way to declare the imagined axiology of respective political communities. In this way, they create a symbolic framework for the functioning of their societies, and it does not matter whether the preamble is normative or not. It is sufficient that, in the massive popular perception of this situation, the symbolic sphere is established and reinforced by the authority of the generally understood term "law".

Consequently, the past (identified with collective memory founded on state-based mechanisms of formulation and transmission of the narratives) is still an influential element of regional constitutionalization processes. It is a kind of ultimate reference point for legal and political decisions. This means that, according to the principles of liberal

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34 M. Pawlak, *Unintended Consequences of Institutional Work*, in: *Sociology and the Unintended, Robert Merton Revisited*, eds. A. Mica, A. Peisert, J. Winczorek, Peter Lang, Berlin 2011, p. 366.

35 J. Přibáň, *Legal Symbolism*…, p. 5.

36 See: M. Halbwachs, *On Collective Memory*…

37 See: E. Hobsbawm, *Mass-Producing Traditions*…

38 See: P. Connerton, *How Societies Remember*, Cambridge University Press, Cambridge 1989.

constitutionalism, the interpretation of the legal norm in a particular case lies upon the judiciary. In such circumstances, any decision dealing with the fundaments of the particular political community's functioning would always be, to some extent, infected by an imaginarium derived from the current narratives of the past. This, in turn, can have two consequences. If a society maintains the rules of discourse typical of a pluralistic democracy, then maximally cohesive narratives will be sought in the process of law application. This may help to legitimize a particular legal decision. However, if the principles of pluralism are infringed, then indeed, such references, adequately formatted (to meet the current political need), add fuel to the fire.

In the title of this article, the following question was raised: does the past constitutionalize the political communities of Central Europe? In other words, was (and still is) this an inherent feature of regional transition? It seems that to proceed with an answer to this question, it is necessary to consider a fundamental question. Namely, whether it was based on a broad social basis or imagined by the particular national elites and subsequently transferred to societies.

There is no doubt that individual societies widely legitimized democratic transitions. First, this happened through mass resistance to the communist system. It then found manifestation in electoral acts, where the communists lost absolutely no matter how marked cards they played (at least in the first elections). Such a pattern occurred both in classical Kunderian Central Europe and later in the countries classified as its extended version (first wave: Baltic States, Romania, Bulgaria; second wave: Ukraine, Georgia).

On the other hand, the collective image of the West, which either determined or, in some cases, still determinates strategic political objectives, did not always match up with reality either. The West was a promised land that would solve all the problems of Central Europe. As a consequence, the hybrid model, which was feeding external expectations on the one hand (a declaration of devotion to the values of Western political communities) and internal expectations on the other (collective mobilization around a political objective based on communitarian narratives and elements), appeared as an interesting pragmatic choice. However, once the aim is fulfilled, the model begins to generate problems. Consider, for example, the EU Charter of Fundamental Rights preamble.[39] This is part of the legal system of contemporary Central Europe. It may also become that for the states included in its extended version. It says explicitly that the EU "places the individual at the heart of its activities by establishing the citizenship of the Union and by creating an area of freedom, security and justice". The conflicts that have arisen against the core values of the supranational organization between the EU institutions and some Central European states, as well as the narratives accompanying such conflicts, clearly demonstrate that the last thing the European institutions want is precisely the existence of "national filters" affecting the interpretation of fundamental

[39] Charter of Fundamental Rights of the European Union, OJEU, C 326/391.

rights. Moreover, an unexpected result of using collective narratives as a community connector could be either an easier legitimization of populism (in the short term) or even (in the long term) a creeping process of formation of a non-Western constitutional identity.

Summary

Filip Cyuńczyk

Constitutionalized by the Past. The Role of National Identity and Collective Sense of Experience in Central European Constitutionalization

The primary aim of this article is to show the particularities of Central European constitutionalization after the fall of communism. Its peculiarity lies in the systemic search for the legitimacy of new communities in experiences of the past. This particularity is examined within the framework of a consideration of the contemporary understanding of the concept of Central Europe. This is particularly necessary in the light of attempts (in this area) to combine the universal values of the Western world with references to communitarian elements, usually national ones. The main idea of the article is to identify the hybrid character of Central European political communities. This is because, at the moment of constitutionalization, they decided to merge national and liberal-democratic values.

Keywords: Central Europe, constitutionalization, law and memory, memory politics

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