Forging the social contract

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The highly personalised, morally coded, loyalty-bound forms of association that were the mainstay of life in communist Europe are proving resistant to efforts to impose a more formal rule of law.

Even in the days when Central Europeans talked about books, politics and ideas, entering into an argument was a perilous kind of undertaking. To bellow your despair was more forgivable because feelings have a dynamic of their own, but it was improper and foolish under most circumstances to address a problem by raising questions or trying to make a better case. Any longer conversation already implied that you were on the same side and shared an inside knowledge of the Right and the True.

Those who like to take the longer view may refer to moralistic, predominantly Roman Catholic, cultural traditions in Poland, Hungary or Slovakia; to stifled ethnic, economic or industrial tensions in the Habsburg, Prussian and Russian Empires before 1918; to 40 years of Soviet-style communism; and to its cruel petrification of language. In all these systems, law was synonymous with central command and choice boiled down to collaboration with unprepossessing regimes, or withdrawal underground into conspiracy and resistance. The oppressed create cultures of glaring moral clarity. God is offset by the Evil One; the Cause – Freedom, Independence say – are highlighted by the Emperor, Party or State. The actors may lose their glossy sheen, of course, acquire shades of grey, switch sides, do rather well in the opposing camp. But that need not affect the strength of the moral culture itself, or the Law by which oppressed communities survive.

Visiting Krakow for the first time in the 1970s I felt envious of other teenagers I met. They lived in two-room flats with parents and siblings, and the cream cheese and paprika every night was a bit samey, but everyone had so many friends. Friends who fixed things and brought sausage, lemons, tights and jokes; friends who appeared with medicines, scarce periodicals or theatre tickets; friends who could arrange a job, a car, a few extra metres of living space. The rules of exchange and association by which people operated under communism were political – as observers always liked to point out – but they were also intensely personal. Formal organisations to protect interests, resolve problems or engage in economic initiatives were forbidden. So it was often a moment of empathy, a sense of being shackled to the same galley, that forged links that made life more tolerable. Friendship networks lasted for decades; they became institutions more robust than bonds of kinship. They had their own laws and formed self-sufficient emotional and
economic havens in a political order that was unpredictable, impersonal, paternalistic and sometimes dangerous. The Czech dissident Milan Simecka described what he called a “special kind of social contract” between the Party and the population by which citizens were guaranteed a minimum of social welfare in exchange for ritualised loyalty and non-interference. Politics was for the Party – that ladder for the ambitious, the opportunistic, the power hungry and the competent. Everyone else took refuge in intimacy.

Outsiders were not easily accepted. They might have mistaken loyalties, and their presence couldn’t satisfy cravings for the strengthening affirmation of real group solidarities and shared meanings. For out there was the Beast that measured and threatened everything you did and thought. If people lived by the Rule of their friendship network, they lived within the rule of the Party. There was legislation on the stability of the state and the security of its citizens, there were constitutions, but law was never conceived as a medium of communication between people or an independent check on government power. Lenin, like Marx, considered legal constraints inapplicable to the revolutionary vanguard. And even once communist regimes stabilised and sought international legitimacy, their legal systems – though conventional on paper – remained subordinate to the Party, its decrees, secret instructions and telephone calls. In the eyes of the public, written law had neither legitimacy nor relevance. It was a “door in the middle of an open field”, the Bulgarian saying went. You could walk through it, but why bother? Connections and the black economy were far more effective for practical purposes and offered additional personalised protection. Crime was contained by police enforcement of which there was plenty, but the assumption that there existed an inverse relationship between law and morality was widespread.

One difficulty the eight central and east European countries joining the EU in May 2004 now face is the transition from localised cultures, which emphasise the moral imperative, to internationally orientated state cultures, which encourage responsibility and competence. This is something of which Wiktor Osiatynski, professor of legal studies at the Central European University, is acutely aware. “Legal cultures deal in debate, controversy, the search for a grey in-between. Moralistic cultures rest on the Curse, the threat of expulsion, with no defence, no due process, no appeal, nothing,” he says. “They may serve well under occupation or oppression, when times are hard, but they are based on the premises of criminal law: their currency is guilt and punishment. Legal culture addresses relations between members of the community, the premises of civil law, and prefers the notions of damage and responsibility. No one calls me evil because I caused an accident or a tile fell off my roof, though I may have been negligent. But they do say I must make redress for the damage done and pay a hefty fine. Next time I’ll make sure the roof is fixed.”

New constitutions have been drawn up to codify the principles of democratic political, administrative and legal orders, but intimate lives have been only mildly affected. The rules of association that count pertain to personal loyalty, rather than any internalised sense of civil legislation. Friends and family carry out many roles that in more complex and varied societies would rest with formal organisations. The broader community does little to encourage public trust and there is an instinctive preference for working with the devil you know. Rules for dealing with strangers are not well understood and no code of honour applies. After a cyanide spill into the River Tisza in Baia Mare, Romania, three years ago, market stalls were found selling poisoned fish; transactions to buy a flat or car...
are made for cash, into a suitcase, with no guarantees; taxi drivers charge arbitrary and hugely inflated rates if they hear an unfamiliar intonation; tenants can be evicted without notice. And just as under communism no one expected the law to vindicate their rights or restrain officials, so now people expect to have to absorb any losses. Courts are overburdened and under-resourced, cases may not be resolved for years, recourse to the law is frightening and in bad taste. “People assume that to be better off, they must break the law,” Hungarian legal sociologist Zoltan Fleck says. “This is as true of attitudes to taxation as it is of road traffic. There is a mystic uncertainty in the economy. It’s time we got to know one another better.”

The social infrastructures of former communist states are not yet bound by the impersonal associations and interests that underpin western “civil societies” where relationships are negotiable and easily severed. In Birmingham, Brussels or Berlin, people find their identities not with one group or hierarchy, but many: a sports club or union bar, an office or prayer meeting; with business contacts, the rock band, a parents’ association, a political party. And they stay only as long as they want. In more traditional societies, to break the Rule that commands and protects a friendship network is to Do Wrong and face excommunication. This is as true of dissident groups under communism, as it is of the communist nomenklatura, of Polish insurrectionists in Poznania and Galicia in the 1840s, or of mafia groups smuggling petrol from Hungary to Serbia during the Yugoslav war in the 1990s.

The post-communist order has not built the trust necessary for people to accept looser forms of bondage. It is marked by insecurity, pauperisation, crime, disappointment, resentment and failure. “We wanted justice, we got the rule of law”, the aphorism goes. “We wanted civil society we got NGOs”. The communist state was a monopoly welfare provider and dependency has proved a hard habit to shake off. People may hunger for legal protection, yet thirst for power, freedom and natural justice. How do you square what you want with everything else you want? Ildi, a young Hungarian mother from a southern province is studying law. It sets precedent and example, she says piously, it defends people. After a while, more subversive thoughts begin to crawl out of the woodwork. Educated people are sharks, especially lawyers. Officials, the judiciary and police are unaccountable and corrupt, white-collar crime is all-pervasive, former apparatchiks and secret police have won the day. “I’d like to push these clever people out and make the life of the poor better. The government says there are no funds for education and health yet money flows constantly from pocket to pocket. It creates bad feeling among people who work in factories 10-12 hours a day for a pittance.” “The law is political,” she says finally, “it serves insouciant élites and is an obstacle to what most people want.”

Corruption is widely denounced, but there is greater tolerance of mafia style entrepreneurs than gays, and more intolerance of minorities than of threats to civil rights. In Hungarian politics, Fleck says, it takes little to persuade people that a reduction in rights is worth the material benefits it might bring. And the desire for a prosperous, holistic community, which politics exploits, is as strong in central Europe as it is in the USA. The Hungarian right argues that a social consensus on moral values is needed before democratic institutions or the constitution can gain legitimacy. The pre-industrial village is a living memory, and throughout the Central European plain people yearn to re-create the rituals of collective belonging in an alienating, apparently anarchic
and rootless market order. Public institutions seem to have little value, and the notion that they could create more effective bonds in the community seems absurd or threatening.

There has been some successful institutional grafting however. The Polish ombudsman and the Hungarian Constitutional Court are effective and widely respected. But even though law appeals more to the public imagination in central Europe than in Yugoslavia, Albania or Belarus, Hungarian estimates indicate that 40 per cent of the economy still operates through black and grey market exchanges. In Poland, polls suggest that only 42 per cent of the population think it right to abide by written legislation.

Yet in all post-communist countries words like “Constitutionalism”, “Democracy”, “Law” have an almost symbolic status. The principles of social and political order are broadly agreed even though parliaments, political parties, judges and elections are sneered at. Democratisation is a way of escaping what Milan Kundera once called the sense of being victims and outsiders representing “the wrong side of European history”. People like to talk about a transition from “abnormality” to “normality”. And to gain perceived “normality” they have been prepared to conform to standards existing outside their own societies and histories. Democracy means reintegration into the community of nations, a recovery of self-respect and – in all likelihood – prosperity, if only the cringe, the anxiety that there is so much to learn that westerners already know, can be overcome.

There are unprecedented tensions in the twin process of recovering sovereignty, with its emphasis on nationhood and tradition, and integration into international organisations like the EU or NATO, with concomitant pressures to “harmonise” and modernise. But these are changes in texts. The process of cultural and institutional transformation is necessarily constrained by social practices, habits, fears and mind-sets. The idea that a flourishing private life, not sustained by government, cannot be “legal” for example; the habit of thinking in terms that are rule bound and rule negating at once; opting for conformism and lip service, rather than discourse and questioning; favouring a negative conception of legality, thinking of law solely as a restraint. The letter seems easier to grasp than the spirit. Any idea that law may contain in-built values that should be actualised not just protected (like ensuring the dignity and integrity of minorities) are viewed with scepticism. And anxiety persists that any authority, particularly the state, is an enemy and that its institutions are suspect.

This is where cultural pundits pessimistic about prospects for a fragmented region with a small middle class and an erratic work ethic come into their own. Civil societies are based on mutually restraining institutions that protect people, they say. Laws should mesh with the intuitive rules by which people organise their lives; institutions must be supported by consistent conduct and belief. Yet in central-eastern Europe law is dysfunctional and institutions are quarrelsome and corrupt. Former Soviet states – some, like Estonia, about to join the EU – boast glittering, new constitutions that are implemented only in part. Czech legislative texts (six massive tomes in 2000) have been criticised for being improvised and poorly translated. External structures may seem to “harmonise”, but can the goodwill of government élites be enough? Are the underlying social and political cultures of East and West Europeans compatible?

There are 27 countries and 400 million people in former communist countries. If
language is like a city, a maze of ancient streets surrounded by new boroughs, as Wittgenstein wrote, so is cultural context in all its variety. It impinges on the present but needn’t rule the future. In central-east Europe confidence is highly personalised, true. Organisations lack credibility though individuals may acquire it, which can make a difference. The Hungarian ombudsman is trusted, so is the institution. But most post-communist countries have given no priority to building effective consultation and negotiation channels between public institutions and voters. And, as Stephen Holmes of New York University has pointed out, despite EU involvement in the development of justice systems, judicial education and decision-making practice, the Union has done little to encourage responsive governance or active citizenship in central Europe for fear of derailing economic reform.

If anything is to make democratic institutions credible and a civil society possible, it has to be public trust and public involvement. But these are dangerous times, when levels of participation in western Europe are also under question – which could encourage non-consultative government further east. Marginalised communities are likely to have little incentive to participate helpfully in a Rechtsstaat or community of États de Droit, and to internalise the shape of international legislation. On the other hand, things many westerners take as read – operating in legal loopholes, colluding in inequalities, spinning the story, living with loose connections – often provoke seemingly naïve outrage among east Europeans. If effective channels of communication were allowed to develop, a slow merger between democratic organisations and the personalised, morally coded, loyalty-bound modes of association already existing in central Europe might bring prospects that are more creatively energising and, perhaps, culturally or economically innovative, than anyone dares anticipate.

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