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Constitutions in Transition*

The transition processes in Central and Eastern Europe are radical modifications in political and economic systems. More than ten years after they began, it seems to make sense to ask very simple questions on two levels: on the empirical level, how far transitions have progressed, whether the simultaneous establishment of the rule of law and a market economy was indeed impossible, as some observers had feared (Elster 1991a), how the individual transition countries fare against each other, etc. On a second, more theoretical, level, one can try to take the experiences explicitly into account and reflect upon quality or adequacy of the various scientific disciplines: have the transition processes revealed any conceptual shortcomings? Are there indications that shortcomings in explaining the developments in the region – and also in giving well-founded advice – have led to theoretical modifications or extensions? Has a new demand for interdisciplinary approaches been identified? Such questions led us to organize a workshop on “Constitutions in Transition”.

Before saying something about constitutions in transition proper – and the research program that has evolved in economics over the last few years to analyze constitutional choice and constitutional change – some remarks are in order on deficiencies of economics in general that have become more apparent during the transition processes. Especially in welfare economics, economists took pride in the so-called “institutional neutrality” of their analysis with regard to allocation and distribution (see Furubotn and Richter 1997 with numerous examples). The fundamental theorems were supposed to hold regardless of the concrete institutional structure. In principle, then, it was assumed that it did not matter whether one was dealing with a market economy or a centrally planned one.

This failure to take concrete circumstances – context – explicitly into account had long been criticized by various economists who, however, did not manage to become mainstream. Coincidence or causality: over the last ten years, approaches that do take context explicitly into account have experienced a veritable boost; here, we are thinking not only of the New Institutional Economics but also of Political Economy proper, to which many mainstream thinkers have turned again. It will be hard to prove, but we conjecture that context could no longer be overlooked in the course of transition without serious damage to the latter.

*) Workshop held at the Wissenschaftskolleg zu Berlin from June 28 to July 1, 2000.

Taking institutions explicitly into account, is an important advance. But things can still go wrong: many of those who take institutions explicitly into account now come from highly formalized backgrounds, such as contract theory and mechanism design. Often, they seem to fall prey to the assumption that institutions can induce pretty much any equilibrium, as long as they are designed in a clever fashion. In other words, the conception of being able to steer entire societies with precision has been shifted from the level of individual choices to the level of institutional choice. In many cases, the restrictions that traditions, mores, norms, etc. constitute are neglected. Those who try to incorporate them under headings such as informal or internal institutions (see, e.g., North 1990; Voigt and Engerer 2000 is an overview of the NIE and the transition processes) are often highly skeptical about the possibility of transforming basic rule systems deliberately and radically within a short period of time. A prominent hypothesis reads that formal institutions can be implemented effectively only if they are not in stark contrast with the informal ones. But if the informal ones are not compatible with the rule of law, democracy, and a market economy, one ends up in an aporia. Although their message is not a popular one, representatives of this research program have made some impact on World Bank policies over the last couple of years.

Constitutional political economy starts from the assumption that economics – here defined as a specific approach to analysing behaviour – can be applied not only to choice within exogenously given rules but also to the choice of rules. Until a few years ago, constitutional political economy was primarily a normative endeavour interested in legitimizing the state and its actions in terms of fairness, justice, or efficiency. Moreover, most of the research program's representatives were conceptualizing the constitution as a social contract (e.g. Buchanan 1975). This has changed in the meantime: more and more papers on what can be dubbed positive constitutional economics are published (Voigt 1997 is a first survey) and the constitution-as-contract paradigm has been challenged by scholars such as Russell Hardin (1989) or Peter Ordeshook (1992) who prefer to interpret it as a coordination or equilibrium-selection device. Both of these developments promise to be highly relevant for explaining the constitutional changes that have taken place in Central and Eastern Europe. For the description and explanation of change, the positive branch of constitutional political economy is an obvious precondition. The view of the constitution as a coordination-device might have some definite advantages over the constitution-as-contract view when the difficulties of the process of changing constitutional reality are analysed. Then, social contract theory's implicit assumption that society can agree on pretty much any set of rules and subsequently implement them becomes obvious.

The experience of the transition processes has made the necessity of positive constitutional economics more apparent. Our knowledge concerning the working properties of alternative constitutional rules and the possibilities of and limits on choosing among a bundle of theoretically possible ones that can subsequently be implemented has proven to be insufficient. More solid knowledge concerning the working properties of constitutional rules is also a precondition for giving well-founded advice to the societies in transition. In that sense, normative and positive constitutional economics should be seen as complementary and not as competitors.

Representatives of Constitutional Political Economy are especially interested in the following three subject areas:

1. Constitutional rules are analyzed as *explanantes* for differential outcomes. At the end of the day, economic growth rates will be most interesting to economists; but variables such as political and economic stability, the distribution of gains that can be attributed to modified constitutional rules, etc. might also be of interest because they will have an intermediate impact on the rate of economic growth that a society achieves. Alternative constitutional rules, that could be compared for the impact on the variables of interest include representative vs. direct democracy, the separation of powers – especially vertical separation, i.e., federalism - and the effects of two or more chambers compared to just one.
2. Constitutional rules are analyzed as *explananda*, i.e. their emergence and modification should be explained drawing on individual action based on individual interest. With regard to Central and Eastern Europe, it could be asked to what degree the preferences of those directly involved in the process of constitution-writing are reflected within the rules of the final constitutional document (see McGuire and Ohsfeldt [e.g. 1989] for numerous studies in this vein on the ratification of the U.S. Constitution). Slightly more subtle, the effects of the procedural rules for the deliberations of the constitutional conventions can be analysed. Possible questions are what effects time-limits have on constitutional assemblies, how constitutional assemblies simultaneously serving as legislatures allocate their resources between the two tasks, what consequences the regular information of the public concerning the state of discussion has, and how various decision-rules affect the outcome of the deliberations (Elster 1991b). It is tempting to propose an empirical test of the use of what Riker (1983, 1984) termed heresthetics, i.e., the art of political strategy.
3. Whereas normative constitutional economics is based on some concept of social contract theory, the way the constitution is conceptualized in

positive constitutional economics is much more open to debate. The social contract conception usually implies substantial optimism about the possibility of making societies choose equilibria vastly different from those its members would have chosen if they had had a different set of constitutional rules (Ordeshook 1992 is rather critical concerning this view). Representatives of the New Institutional Economics are much more critical about the possibilities of reaching radically different equilibria through “institutional politics”; they point toward path-dependency, political transaction costs, inertia and the like (North 1990). With regard to Central and Eastern Europe, it can be asked whether any factors – such as internal or informal institutions – can be identified that prevent these societies from setting and enforcing constitutional rules that have proven to be welfare-enhancing in other environments.

The workshop, held at the Wissenschaftskolleg on June 28 – July 1, 2000, brought together economists, lawyers, and political and social scientists from the transition countries and from Western countries. The majority of participants were Fellows from this and earlier years.

Hans-Jürgen Wagener dealt with the often neglected relation between state and economy and pointed out the particular importance of good governance if the transformation process is to succeed. This implies the question where and how the basic principles of a desired economic order are to be institutionalized. Freedom of contract, freedom of trade, and private property rights are often found in constitutional texts, which begs the question how they are secured. Here it is where good governance and bad governance can be discerned and where the major cause for transformation failure can be located. Transformation, which also implies the transformation of the state, needs a strong state. How rigidly must the state’s role in the economy be defined, lest historical contingencies become unmanageable?

Based on her empirical research on shareholder and creditor rights in transition economies, Katharina Pistor (Kennedy School of Government at Harvard) tried to discern patterns of legal change that could also hold for the development of constitutional law: she compares the relative merits of (constitutional) transplants with that of an internal development. Her focus is on a possible incongruence between law in the books and law in action.

It is often inferred that constitutions should be short, to make them flexible. On the other hand, they serve the function of reducing uncertainty, and thus also reducing transaction costs. Theoretically, a maximum reduction of transaction costs could be achieved by putting many details into the constitution, which would, of course, make it a very inflexible

document. Similarly, normative constitutional economics seems to argue in favor of defining later on formal processes of which constitutional organs can bring decisions about with what majorities. What is the scope for material content of the constitution from this point of view? The European constitution (Treaty of Rome) precludes fiscal deficits, for instance, a model case? What is the economic rationale used to answer these questions (what are the relevant variables for finding the optimum of the implied trade-off)? How important are unresolved conflicts for defining rights in a vague manner? In his contribution, Stephen Holmes (New York University) dealt with some of these questions, taking a rather critical position about the rational choice approach.

Questions of optimality and efficiency are most frequently asked by economists. In his contribution “On Choosing Sub-Optimal Rules”, legal scholar Alexander Blankenagel (Humboldt University Berlin) entered the economic imperium by asking whether there is evidence for societies in Central and Eastern Europe choosing “sub-optimal” rules.

Ruth Gavison (Hebrew University Jerusalem) dealt with a very fundamental question regarding any theory of the constitution or constitutional design, namely “what belongs in a constitution?” According to Sunstein (1991, 635), the theory of what belongs and what does not belong in a constitution “remains in a surprisingly primitive state”. Candidates certainly include basic human rights (does an extensive list serve anything?), – closely related – the right to individual exit and/or collective secession (on this, see Chen and Ordeshook 1994), the fiscal and monetary constitution and election laws.

Ivan Krastev was one of those participants who have actively participated in the process of writing, discussing, and proposing a new constitution. In his paper, he contributed to demystifying constitutions. They can be enacted and changed at will, and sometimes the reasons for choosing one rather than another possible solution are very arbitrary, mundane reasons. Krastev gave four examples supporting his view: why Bulgaria – unlike most other states in the region – had a constitutional assembly, why a vice-president was introduced, the procedure by which the number of members of parliament was determined, and the determination of the requirements to be able to run for president.

(Substantial) bargaining for new constitutions at constitutional conventions can take place within very different institutional settings. The procedures used by the members of a constitutional convention can be exogenously given or can be the result of their own deliberations. Laszlo Bruszt (Central European University Budapest) dealt with the question whether and how much the results of substantial bargaining are (pre-)

determined by the bargaining process concerned with the procedures to be used during substantial bargaining.

Peter Ordeshook (California Institute of Technology) asked the question whether “Western” constitutions are relevant for anything else than the countries they were meant for, namely whether they can be made relevant for the countries of Central and Eastern Europe. He insisted that the constitution-as-coordination view is clearly superior to the constitution-as-contract notion. Subsequently, he developed a couple of principles that any constitution-maker should follow if she is interested in having the constitution coordinate the behaviour of actors in fundamental ways. In this sense, so his conclusions, experience in the West can be generalised.

Imre Vörös (formerly Hungarian Constitutional Court) reflected on the observation that constitutional change does not have to take place in an explicit way by modifying the text of the constitutional document, but can also be brought about implicitly by the judiciary modifying the interpretation of the unchanged document. In his contribution, Vörös showed that the role of the Hungarian Constitutional Court in bringing about such changes has been quite substantial.

Eli Salzberger and Stefan Voigt were interested in the decision of constitution-makers and legislators to delegate power. More specifically, they analysed the conditions under which one can expect internal (domestic) delegation to occur and under which circumstances one should rather expect external (international) delegation. They conjecture that societies trying to establish radically different political and economic systems will have a higher propensity to delegate because that may give their policies higher credibility. But giving sovereign rights away might appear especially costly to societies that have just (re-)gained their sovereignty.

Dieter Grimm finally asked how the concept of constitutionalism can and should be modified if one does not confine it to the borders of the nation-state but if one takes supranational entities – and especially the European Union – explicitly into account.

Christian Kirchner (Humboldt University Berlin) gave a wrap-up of the workshop in which he stressed that “constitutions in transition”, if taken seriously as a research topic of constitutional economics, leads to “constitutional economics in transition”. The concluding debate focussed on two closely related questions that popped up during the discussion of practically every paper: The adequacy of the rational choice paradigm for explaining constitutional change and the basic presumption of (constitutional) economists, namely that there are gains from exchange out there that can be realized by setting the rules of the game accordingly. A conference volume is planned.

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