Introduction

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The purpose of this book is to provide a novel overview of constitutional change from different perspectives and focusing on important phenomena such as constitutional and political transitions, constitutional and socio-legal memory and oblivion. The nexus of all these elements is that they are altering jointly and separately the concept of constitutional revolution. Thus, the book offers multi-discursive analysis of constitutional transition and the role of the constitution as a focal point of constitutional past, constitutional present and constitutional future. The concept of constitutional revolution is a cornerstone of the book. Nevertheless, other forms of rupture of the constitutional order, for example, unconstitutional constitutional amendments, revolutionary constitutional interpretation and issues related to the ways the constitution addresses the past are also central to the analysis provided here.

The starting point of this joint scientific endeavour is the legal, philosophical and political analysis of the meaning, scope and elements of constitutional revolutions. Starting from this epistemological background, the book offers analysis of the interrelation between constitutional revolutions and the processes of constitutional transitions, memory and oblivion.

This book is brought to life in a period when the relations between revolutions and constitutionalism (in a broad sense) are, once again, the object of intense academic and political interest. After the post-Arab spring revolutions Abat and Tushnet,¹ Sultany,² and other, prestigious academics published books focusing on the relation between the concept of revolution and constitutions.³ The current political events in various societies, – Hong Kong, Chile, Bolivia, Colombia, France (*Gilets jaunes*) and Catalonia – for different reasons confirm

¹ Antoni Abat i Ninet and Mark Tushnet, *The Arab Spring: An Essay on Revolution and Constitutionalism* (Edward Elgar, 2015).

² Nimer Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring* (Oxford University Press, 2017).

³ Bruce Ackerman, *Revolutionary Constitutions, Charismatic Leadership and the Rule of Law* (Harvard University Press, 2019); Gary Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press, 2020); Richard Albert (ed.), *Revolutionary Constitutionalism, Law, Legitimacy, Power* (Hart Publishing, 2020).

the need to analyse and update the ancient concept of revolution and its effects on constitutionalism.

The book offers an original approach to the analysis of the relations between revolutions and constitutions by critically assessing how revolutions and contra-revolutions, transitional periods, and the phenomenon of oblivion, influence constitutional order and disorder,⁴ and how constitutional disorder and unconstitutional constitutional amendments undermine the constitutions although from different perspectives. Constitutional disorder is conceptualised on the basis of its main manifestations – revolutions and revolts, replacement of the basic norm, radical fractures in the efficiency and the legitimacy of the constitutional order, but also constitutional oblivion, reflexive rejection of the past. Constitution-making as a phenomenon related to constitutional transition is explored with regard to constitution-making (and unmaking), temporary constitutions, constitutional interpretation and unconstitutional constitutional amendments introduced via constitutional legislation or constitutional interpretation.

The decision to write this book stems from the need to include a new and original approach to the concept of constitutional revolutions updated to the current reality but taking into account the traditional sources from a multi-disciplinary perspective (legal theory, philosophy, theory of the state and constitutional law). We believe that the strength of this book is that it offers the reader a mixture of views on constitutional change: positivist, realist, philosophical and socio-legal. It combines analysis of the conceptual foundations of constitutional revolutions, transition and change with comparative research and case studies.

The analysis is original also in terms of methodology and conceptual approach for the following reasons. It contains multi-discursive approaches to the issues of law and revolution, constitutional order and disorder, constitutional memory and oblivion, which allow for proper, novel and adequate appraisal of the relations between constitutions and revolutions. We offer an insightful analysis of constitutional revolutions and constitutional transitions. The book polemically assesses the effects of legal and political transition. The impact of revolutions on constitutional accommodation offers novelties about the already existing literature on constitutional revolutions. Another novelty is the inclusion of the narratives and discourses on constitutional memories and constitutional oblivion and how these (non-rational) elements of the imaginative and emotional constitutionalism may affect the effects of revolutions on constitutionalism in the long term. The book also includes interesting novel

⁴ Charles Sampford, *The Disorder of Law: Critique of Legal Theory* (Blackwell, 1989).

case studies of constitutional making, unconstitutional constitutional amendments, and the way constitutions and constituent power deal with the past.

In this sense, the book proposes a new approach to the existing literature of constitutional revolutions that fills in a gap from a multidisciplinary perspective. There is a need to complete recent works, including elements of transitology, constitutional memories and legal order and disorder. We offer insights on how this gap can be partially filled. The book puts special emphasis on two groups of issues: first, political transitions and constitutional revolutions; and second, memory, oblivion and constitutional revolutions.

We scrutinise the effects that political transitions and transitional constitutional texts cause in the conceptualisation and understanding of constitutional revolutions. As political transitions evidence, the enactment of a constitution is a crucial stage of the transitional political process and a revolutionary process. In some cases, the revolutionary constitution is considered as the final stage of the process and the starting point of the new regime and the new era. The French Revolution of 14 July 1789 and the Mexican Constitution of 1 May 1917 are good examples of such an approach.

However, in other cases the label of constitutional revolution is not that evident. There is also no clear definition of what a constitutional revolution is. Hence, this book tries to shed some light on this disputed concept by relating the definition to exploration of less analysed elements in the field of constitutional law.

There is a broad typology and use of constitutions and revolutionary constitutions. We must differentiate between transitional constitutional norms that govern the transition and post-revolutionary charters. The transitional constitutional norms aim to provide for legal certainty and transparency during the transitional period of revolutionary constitutions. On the other hand, post-revolutionary charters rationalise and accommodate the principles and values of the new regime. These kinds of constitutions are deeply related to constitutional revolutions. However, practical experience shows that even in these cases not all the post-revolutionary constitutions are actually revolutionary charters. For example, can we really stipulate that the Constitution of Egypt of 2014 has deeply changed the previous Constitution of 30 November 2012? Both constitutions are the result of revolutionary and counter-revolutionary *événements* (Ortega y Gasset, Ricoeur). Thus an apparent presumption is to think that both constitutional drafts involved significant changes in political and constitutional terms.

In other cases, non-revolutions (in the traditional sense of the notion), cause constitutional revolutions. Kelsen's theory is evident in this extreme. It can also be used with regard to unconstitutional constitutional amendments and other constitutional changes. Even non-legal or constitutional changes can cause constitutional revolutions, as the theory of constitutional moments of

Bruce Ackerman or lately Richard Albert's constitutional dismemberment have shown.

In the Greek, Portuguese and the Spanish transitions to democracy, the constitution was supposed to legalise and legally codify the values and principles of the new regime. However, this is not always the case, as the transitions of Chile, Argentina and Poland demonstrate. As Yanaki Stoilov affirms in Chapter 3, as a political act, revolution rejects existing law and the legal system and the revolution seeks and proposes a new legitimacy of law.

Constitutions may also be used as counter-revolutionary tools, aiming to abort revolutionary transitions and revolutionary constitutions. However, the concept of constitutional revolution is always with this political and legal transition. This book aims to present the role that transitions play in constitutional revolutions that has been under-analysed by the constitutional doctrine. It also devotes several references to the specific role that provisional constitutions develop and how this temporary validity is interrelated with the concept of revolution and more concretely, with the typology of constitutional revolutions.

Furthermore, the book explores the interrelationship between constitutional memory politics and the different instantiations of legal oblivion employed to support a narrative serving political and legal interests at the cost of historical truthfulness and precision. Hence, the constitutional politics of memory and oblivion are frequently related to the creative reshaping of the constitutional past. The politics of memory and uses of the past often coincide with efforts to reduce the past to legitimise the current authorities and tend to create new gaps in memory that contribute to the polarisation of societies.⁵ In this sense, the purposeful use of the politics of memory is linked with the teleological programme invested in the constitution.

Memory plays a key role in many areas of politics and law. It is vital to our knowledge, and it underwrites our individual and collective socio-political identities. The central aim of mainstream research on the metaphysics of memory is to develop a *theory of remembering*: a general but informative account of what it is for someone to remember something.⁶ *A contrario sensu* in relation to oblivion, a *theory of forgetting* targets what it is for someone to forget something.

From a Hegelian dialectical approach, memory and oblivion are antithetic concepts, respective negations, and therefore parts of the same conceptual

⁵ Sigrid Kaasik-Krogerus, Viktorija Čeginskā and Nina Sääskilahti, 'Politics of Memory and Oblivion. An Introduction to the Special Issue' 21(3) *European Politics and Society* (2020) 271–6.

⁶ Kourken Michaelian and John Sutton, 'Memory', *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta (ed.), <https://plato.stanford.edu/archives/sum2017/entries/memory/> accessed 11 August 2020.

reality from which we may obtain a solution or conclusion. As an alternative to this dialectical approach, Paul Ricoeur considers that there is a virtual mélange of both memory and oblivion to go beyond the past and project ourselves into the future.⁷

The use and abuse of the politics of memory and oblivion by official discourses and narratives varies considerably according to the concrete casuistry and determinate period. Sometimes the accent is placed on oblivion, as in those cases in which society decides to ‘break’ with its past. As Emmanuel Cartier remarks in Chapter 8, after the fall of the Vichy regime there was no proper transition or revolutionary break to the fourth Republic and the Constitution of 1948. Political amnesia or oblivion of *hiatus* was also applied by the Constitution of 1958 to Algerian independence. Occasionally, on the contrary, the accent is placed on memory, as happened with the French Revolution of 1789, which is referred to in all the constitutional prefaces of French constitutional history. Such reflective approaches to the past, resulting in constitutional memories, may principally happen in two cases: first, when a society considers that coming to terms with the events of its recent past is an indispensable precondition for being able to freely face the future; or second, when, after trying to break with its past, a society becomes aware of the necessity of coming to terms with it in order to heal its wounds.⁸ The concept of constitutional revolution may contribute as an essential tool to build up the narrative of memory or oblivion. It should be noted that such an approach is usually context dependent.

The book consists of 12 chapters and four parts intertwining the concept of revolution, transitology, the political process of memory and oblivion, and revolutionary constitutional change. In deciding to divide this book into four parts, we aimed to devote a section to each of the interrelated topics of our analysis.

In Part I, ‘Constitution, Revolution, and Law’, we explore the relationship between revolution, constitution and constitutionalism. We offer a critical and multi-discursive account on the constitutional impact, shape and dimensions of revolutions. We analyse how and when constitutions reflect revolutions, what is a revolution from a constitutionalist viewpoint, and which are the best theoretical standpoints to grasp revolutions as constitutionally relevant phenomena. Building upon existing theories – which will be meanwhile critically assessed – the contributions published in Part I explore the use of key legal instruments, such as representation and interpretation, to explain the

⁷ Paul Ricoeur, *La mémoire, l'histoire, l'oubli* (Seuil, 2000).

⁸ Gabrielle Della Morte, ‘International Law between the Duty of Memory and the Right to Oblivion’ 14 *International Law Crime Review* (2014) 427–40.

constitutional shape of revolutions. We offer an epistemological perspective on the discourses on constitutional revolutions stretched between the two phenomena: constitutions and revolutions. Thus, we are not trying to provide a consistent theory of constitutional revolutions. We offer a multi-discursive account of the relationship between constitutions and revolutions. We believe that elucidating this issue from different methodological and conceptual perspectives may produce novelties in the scientific debate. The interplay between constitutions, constitutional law and revolutions is explored from a philosophical, socio-legal, but also from a legal positivist perspective.

In Chapter 1, Antoni Abat i Ninet analyses the epistemological relation between the two components of the locution ‘constitutional revolution’ through three different philosophical theories (existentialism, phenomenology and structuralism). Abat scrutinises whether the concept of revolution has incorporated epistemologically constitutionalism, or if on the contrary, constitutionalism has assimilated revolution. Chapter 1 examines whether after the triumph of constitutionalism around the world, resulting in the fact that only the United Kingdom, Israel and New Zealand do not have codified constitutions, both concepts – revolution and constitution – still have epistemological autonomy.

In Chapter 2 Xavier Souvignet focuses on a rather rare pairing of revolution and interpretation, acknowledging that according to his approach these concepts are not necessarily in conflict. The chapter analyses the multiple meanings of defining a judicial decision as revolutionary from a political and from a legal perspective. In this regard, the chapter is engaged in an intellectual dialogue with the chapters of Monika Zalewska and Monika Florczak-Wątor, who also explore the revolutionary impact of the decisions of the constitutional courts.

In Chapter 3 Yanaki Stoilov starts from a definition of the concept of revolution as a social process and as a political act that alters or rejects the grounds for the validity of the legal systems. However, at the same time, he proposes a new basis for legitimacy of law which is not bound by the established rules of the validity of core legal acts. The chapter goes further by analysing the fact that many revolutionary constitutions were not created and implemented by the procedure for adopting new or amending existing ones, but by rejecting the previous ones. Stoilov offers an account on revolutions in law based on the revolutionary impact on constitutional principles.

Acar Kutay’s contribution in Chapter 4 proposes a realist interpretation of constitutional change, in particular in the field of comparative constitutional law, by focusing on constitutional revolutions belonging to the Arab Spring. Kutay critically engages with constitutional and political processes through the vision of achieving social and political transformation employing a liberal constitution. He argues that constitutional and political transformations have

recently been primarily shaped and evaluated by a hegemonic interpretation of liberal constitutionalism. However, according to him, such a vision is ahistorical, moralist and depoliticising. Kutay critically assesses the project of liberal constitutionalism as a universal project. He points at its political implications that are important for grasping and evaluating the constitutional revolutions and changes.

In the centenary of the enactment of the Federal Constitution of the First Republic of Austria of October 1920, Hans Kelsen's '*Liebstes Kind*' (favourite child),⁹ we present an in-depth analysis of Hans Kelsen's conceptualisation of revolution and theory of Basic Norm, a mandatory reference and reflection that every work on constitutional revolutions must contain. We believe that this is a very productive counter position to the methodological approaches to the problem. Hence, Part II of the book, containing the chapters of Monika Zalewska and Simeon Groysman, is especially devoted to Kelsenian analysis of revolutions. However, other chapters of the book, for example the chapters of Xavier Souvignet, Yanaki Stoilov and Aleksandar Tsekov, also refer to normativist approaches to constitutional change and revolution in constitutional law.

The analysis of the normativist discourses on legal and constitutional revolution begins with Chapter 5 written by Monika Zalewska. She explores what happens with the core concept of Kelsen's pure theory of law, the Basic Norm, in times of revolution. In order to understand the Basic Norm one should be aware of the fact that it refers directly to a specific constitution. This is what Kelsen defines as transcendental-logical presupposition that furnishes the reason for the validity of a constitution and the coercive order created in accordance with it.¹⁰ Zalewska examines the assumption that considers the constitution as a valid document. She follows by analysing the Basic Norm functions in the case of revolution or when the law breaches a constitution situated lower in the normative hierarchy. The chapter goes further by discussing the relations between the validity and efficacy of the Basic Norm at the time of revolution.

Part II continues with Simeon Groysman's Chapter 6, where the Kelsenian concept of revolution and the emergence of the 'historical first constitution' is studied and confronted with the Bulgarian constitutional transition from a monarchical regime to a socialist one (1944–1947). Groysman presents a normative (Kelsenian) definition of revolution consisting in non-empowered legal acts with self-proclaimed validity that sets the law creating organs of

⁹ R. Marcic, *Verfassungsgerichtsbarkeit und Reine Rechtslehre* (Verlag Franz Deuticke, 1966) 58.

¹⁰ Hans Kelsen, *Pure Theory of Law* (The Lawbook Exchange Ltd, 2005) 201.

a new order and gives the beginning (Arendt) of all chains of validity in a legal system. The chapter contends that this description of revolution faces the problem of the ‘invisible momentary boundary’, a period between a coup and the revolution. To enlighten this theoretical penumbra of one of the critical axioms of normativism about the role of the Basic Norm, Groysman exposes the Bulgarian constitutional experience in the aftermath of the Second World War, and the symbolic and legitimating role played by the Tarnovo Constitution, the first Constitution of Bulgaria adopted on 16 April 1879.

Part III of the book explores constitutional revolution and constitutional transition from the viewpoint of the constitutional politics of memory and, vice versa, oblivion. This part opens with a discourse devoted to the rather novel concept of constitutional memory. In Chapter 7, Martin Belov provides a theory of constitutional memory and constitutional oblivion. On its basis, the ways constitutions reflect and cope with a revolutionary past are explored. This analysis is settled within the context of the debate on revolutionary constitutionalism that is gaining momentum in the constitutionalist discourse of the beginning of the twenty-first century. The analysis of constitutional memories and the constitutional past is framed by the broader theory of symbolic-imaginary constitutionalism developed by Martin Belov, which is preconditioned upon semiotic approaches to constitutionalism and constitutional law.

In Chapters 8 and 9 Emmanuel Cartier and Aleksandar Tsekov provide an insightful analysis of the role of transitional constitutions in times of constitutional crisis. They offer theoretically sound analysis verified on the basis of important case studies. Cartier explores in Chapter 8 an exception in French constitutional and revolutionary history, the use of a process of oblivion as a transitional legal solution after the fall of the Vichy regime in France (1940–1944). The chapter conceptualises the principle of ‘*damnatio memoriae*’ and its application to cancel all legal acts (enacted for four years by the Vichy regime) and to deny this government. Cartier follows by exposing some of the effects and consequences that the legal fiction and oblivion of the effects of the ‘Vichy syndrome’ still have today in the domestic system.

In Chapter 9 Aleksandar Tsekov analyses the concept of provisional constitution and the challenges that this temporary high norm causes to basic notions and principles of legal science. The chapter starts by distinguishing two different ways of supplanting a constitution by a new one; first, by a revolution, or secondly, by following the legal procedures and constitutional amendment rules provided for in the previous constitution. Tsekov then examines the processes of constitutional transitions towards democracy in Bulgaria and the Arab Spring from a comparative perspective and focuses on the similarities and challenges of these constitution-making processes.

Finally, Part IV of the book is devoted to the effects of revolutions on constitutional order and disorder with particular attention to constitutional making and the so-called theory of unconstitutional constitutional amendments. This part provides for a thorough analysis of critical problems of constitutional reform and transition, such as the accomplishment of unconstitutional constitutional amendments by informal amendments and unconstitutional constitutional interpretation. It highlights the existence of ‘hidden revolutions’ accomplished through either unconstitutional constitutional amendments or via recourse to revolutionary constitution-making promoting and fostering constitutional authoritarianism.

In Chapter 10, Zoltán Szente offers an analytical exercise and characterisation of the constitutional processes adopted in Europe since the end of the Second World War. Szente identifies several constitutionalising waves from 1945 to this day, classifying modern European constitutions based on specific formal and substantial criteria. The characterisation that is interesting in itself may serve to conduct further research in multiple topics, including the examination of the impact of historical past and traditions, political environment, or how the circumstances of the birth of constitutions affect their endurance.

Fruzsina Gárdos-Orosz examines in Chapter 11 the conceptualisation and effects of unconstitutional constitutional amendments in the case of informal amendments from the experience of the Hungarian constitutional experience. The starting point of the theoretical analysis is an explicit declaration of the Hungarian Constitutional Court asserting that the Constitution and the Fundamental Law of the country did not contain unamendable provisions. The logical consequence of this constitutional declaration was that all the provisions could be amended following the prescribed procedure to do so.

However, from 2013 to 2016, the jurisprudence of the Constitutional Court has assertively determined that there are fundamental principles of the Hungarian constitutional order that cannot be eliminated. Gárdos-Orosz maintains that this constitutional interpretation of implicit unamendability struggles to preserve the basic principles of the liberal Hungarian constitutional order. This controversy arose from the classic question of unconstitutionality in a different context that the chapter examines.

Chapter 12 is devoted to constitution-making, unconstitutional constitutional amendments and pro-authoritarian drifting of the constitutional order. Monika Florczak-Wątor follows the analysis of constitutional change through unconstitutional interpretation. The chapter profoundly explores two landmark judicial decisions, the US case on *Marbury v. Madison* of 1803 and the Israeli United Mizrahi Bank case of 1995. From this judicial *acquis*, Florczak-Wątor proves that the constitution law-making activity of courts is not absolute, but it is limited on the one hand by the acceptable method of interpretation used in the appropriate way, and on the other hand, by the specificity of the text. The

chapter ends by pointing out the nature and exercise of the derivative constituent power and its limits.