

Publicity and Law in Bulgarian Context

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1. The Invention of “Publicity”.

“Territorial conquest and industrial technique were the most obvious features of Europe’s novel assertiveness over the rest of Eurasia. But there was a third dimension to the new disequilibrium. It was in this period that Europeans first advanced the claim that their civilisation and culture were superior to all others – not theologically (that was old hat) but intellectually and materially. Whether this claim was true need not detain us. Much more important was the Europeans’ willingness to act as if it were. This was shown in their eagerness to collect and categorise the knowledge they gleaned from other parts of the world. It was revealed in the confidence with themselves at the centre. The intellectual annexation of non-European Eurasia preceded the imposition of physical dominance.”²

The clarification of the category “publicity” or “public sphere”³ is not needed because of terminological purism. On the contrary: at least because of scientific idealism the theoretical categories have to define and reflect the social phenomena and not to produce them. The reason why we deal with the category “publicity” is in the first place its wide and unrestrained usage for definition of different phenomena which have emerged and become possible in rather different social and civilization contexts. This, apart from being misleading in itself has another long-fetched aim – to replace one social reality with another, one condition with another – desirable but non-existent. This is what happens to “publicity” lately.

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²John Darwin “After Tamerlane. The Rise and Fall of Global Empires 1400 – 2000” Bloomsbury Press New York 2009, p. 198.

³ The text uses the categories “publicity” and “public sphere” as synonyms.

Two explanations of this process are possible:

The first one is that there is no understanding of the different social and civilization context and because of that lack an attempt for its “clarification” is made by implementation of the well-known categories and interpretation schemes of Euro-centrism. Indeed knowledge comes with comparison but it is comparison that is bound to show the principal incomparability of the different social forms. And when we witness the external “epidermal” similarity we have to ask ourselves whether this similarity does not conceal a totally different social “geometry”. In this line of thinking social forms which exist outside of the Euro-centric historical context but which resemble “publicity” are also categorized as such. As a consequence the expectation comes that social realities which are characterized as “public” would have the same characteristics and essential specifics which are typical for the archetype. This is how one world is seen as another and this “world” is in fact being replaced by the other i.e. the desirable becomes real.

The problem is in fact not terminological or interpretational but essential and political. As we shall see the “public sphere” is a typical product of modernity and it can be understood only and solely in the context and logic of this social world. Indeed there is public sphere in the Ancient times but then it is a social interaction of an entirely different nature which has nothing in common with the modern forms of social life.

There is a second hypothesis – that the different civilization contexts are very well understood and it is known that they are incomparable qualitatively especially through the categories of publicity and the public sphere but the replacement is done consciously and as a part of a scientific (and not only scientific) strategy for leveling of essential differences and universalizing of the Western social model as the only legitimate one. This is carried out both openly and slyly – through different hidden social programs.

Ergo this approach is not as innocent as it may seem. To put it clearly – we are not confronting an incorrect scientific and methodological strategy but a deliberate approach which replaces one social reality with another.

This is exactly what happens to “publicity” in all its possible and conceivable dimensions in the latest decades.

The category “publicity” has a long-lasting application but a different meaning is attributed to it. In the following text I clearly differentiate the theoretical category “publicity” and the social reality that it pretends to reflect. It receives its theoretical shine with Juergen Habermas’ book “Structural changes of publicity” where it reflects a certain specifics of the European social and historical context, associated with the so-called New age. Publicity is a historically produced plastic social form in which and through which a given community – the public of the “private people” makes its interests, controversies and crises meet. Of course these are dressed up in the respective cultural, institutional and ideological forms typical for the given period. Therefore “publicity” is not a socially indifferent category – it designates a system of social practices, connected with the genesis of capitalism in Europe and whose product in the end it is. The sphere of “publicity” is impossible without the establishment of a functioning capitalist market and economization of the social life. The lack of this basic prerequisite makes the use of this category least to say a speculative exercise. Publicity equalizes and stabilizes the contradictory and often conflicting capitalist transactions. As far as these transactions take place in a more or less competitive environment, the environment itself requires stabilization by the invention of a system of common rules, adopted and implemented by the players themselves. The public sphere is where these rules are formulated and the respective institutional, organizational and cultural “moulds” for these rules are invented. Gradually this sphere adopts its own social density, blended with historical volatility. Historism is an inherent characteristic of publicity because it is genetically and functionally connected to the dynamics of the West – European social life and it also possesses its own dynamics.

This dynamics causes two misleading effects. The first one is connected with the illusion that the so-called “publicity” is an independent social phenomenon. The already developed contemporary publicity is hiding the causes that had given life to it and the grounds that make it possible and socially valid. This fact causes the subjective illusion – on the level of theoretical reflection – which the public sphere is fully independent and this produces the temptation for theoretical stylization of “publicity”, understood as an aggregation of practices that are socially indifferent to the specific social context.

The second effect is a consequence of what was said above; “publicity” starts to “wander”, it is understood as universal and therefore inherent to almost every type of social community.

It is clear that “publicity” and “representativeness” are two different things. The developed social publicity starts to be seen as a social reality for itself and by itself. That fundamental quality of her leads to the respective theoretical implications. The theoretical “break – up” from the historical specifics is a consequence from the specifics of the capitalist social system and from modernity as a whole that leads to the logical result that publicity is understood in socially, civilizationally and historically neutral terms. But the definition of publicity as a sphere, place, field, social space for all sorts of social interactions is rather misleading. Such definition is deprived of concrete historical social contents. Indeed modern publicity possesses such characteristics (at a first glance). But they are not accidental. The ostensible social mediativeness and neutrality so typical of modern publicity requires the identification of the causes that have fashioned its current social shape. However, the dominance of presentism as a leading style in contemporary social sciences leads to the wrong conclusion that social publicity was always and everywhere and that publicity has ever had – more or less- the same characteristics. This is how a momentary historical status of the subject is presented as its “everlasting” quality. The result is the transformation of this cognitive construction into an instrument of questionable heuristic value. We find it important therefore to seek for an answer as to how “publicity” was possible, why it was possible and what caused it.

In the first place what we call “publicity” in the context of the emergence and expansion of capitalism is not possible without the introduction of an economically autonomous individual, deriving his individuality from his economic independence. In the second place this means that the economically autonomous individual is capable of participating into different social institutions and organizations as a subject of his own life. Consequently the sphere of publicity cannot be treated as a completely detached, freely floating aggregate of historically varying practices that conceal the grounds for their own existence. In fact these grounds determine its social and historical contents. The “sudden” appearance of absolutely novel forms for circulation of information (the newspapers, the epistolary practices, education as a public activity), the emergence of clubs. Cultural institutions and such like can be explained by themselves.

On the other hand the detachment of religion and the religious institutions as an independent sphere and the “invention” of politics and the political institutions (and mainly the political parties and the political ideologies) are also closely linked to the market foundations of capitalism and the social stratifications that capitalism produces. The economic coercion of the market exchange presupposes and produces the necessity for creation of the respective social structures through which the so-called “economic” people mean to express and defend their own interests. Whether this is done in already existing institutional forms like the estate parliaments or through the gradual formation of novel organizations is beyond the purposes of this paper. What is important to note is that publicity is not a socially indifferent “field” but a dramatic social construction that has become possible only when certain social and historical conditions combined.

The second big illusion evolves directly from the above and is connected with the fact that specific, even local social practices which are European by origin are presented as universal and general. The expansion of Europe from the XVth century onwards – a process successfully named by F. Braudel “the engulfment of the world by Europe” leads to imposing of the respective ways of mental organization of knowledge. In fact historical and social realities typical for the given Western European context are torn from the concrete period of time and place and are introduced as universal. This operation gives the following results: those forms of social life that differ from the European “paragon” are arranged according to the following co-ordinates: developed – underdeveloped, where the centre of this system is of course the respective European model which is accepted as universal. Secondly, the fact that the “non-European” communities function and exist in a way that is rather different from the European ones, is explained as a deviation from the model or is interiorized as “stages”, “phases” of the development which, however, are all ultimately aiming at reaching the superior paragons of the European social practices. The European uniqueness is presented as universal, the specific forms of knowledge that are used to analyze this uniqueness are also introduced as the only true instruments for scientific approach towards the subject.

In fact the problem with “publicity” is neither lexical, nor terminological or philological. It is a conceptual problem. There is a replacement both of the subject matter and of the means for its research and analysis.

First of all, by taking the phenomenon “publicity” away from its specific social and historical context and secondly by its projection and its imposing over principally different social realities. By “identifying” publicities in the world of Islam or in India or China this approach – consciously or not – organizes the social space in these communities in the moulds and forms of the European archetype. The first descriptions given by Portuguese and Spanish voyagers of the local tribal heads as “kings” or “barons” have become anecdotic. The local social institutions which were not familiar to the Europeans were quickly adjusted “to fit” certain European etalons. And if this is to a certain extent admissible in the era of “discoveries”, sticking to such practices nowadays is a total anachronism. Indeed we see also the opposite trend especially in those non-European societies that are presently undergoing “modernization”. In this line of thinking the constitutionalism in the era of Tanzimat in the Ottoman Empire or Persia under the dynasty of the Kajars is seen as “re-discovery” of the shariat principle for consulting the believers and the constitutional and ideological figure of the “people – sovereign” produced by the French constitutionalism will be transported and interpreted as the Muslim “umma” **1**.

2. Law in the Bulgarian Context

Similar are the problems when analyzing the legal systems of the “late” societies - late because they are supposed to catch up with the already existing modern examples mostly in Europe and North America. At a first glance we find out that they possess all formal institutional attributes of the modern societies as well as the outside requisites of a contemporary legal system – a fact that is stressed in a number of books and lectures on History of the State and the Law.

But what is to be understood as “legal system”?

Most often this term is used to define the existing system of legal acts i.e. of different combinations of legal rules along with the respective law-making and law-implementing institutional infrastructure. But the existence of visible elements of a “modern” legal system conceals the more important question – why and how it emerged, what is making it possible and most important – *is it a true basic regulator of social life*. Because existence does not always mean functioning. Here, however, we confront a research problem that we can metaphorically call “the effect of the distorting mirror”. The belated development of the “peripheral” societies has, at first glance, certain benefits – there are social models long ago invented and used by the “developed” societies that can be imitated, implemented and followed relatively easy.

Whether this is empirically possible is another question. What concerns the legal regulator this task is achieved through different forms and processes of reception of mostly European legal etalons.

The reception of legal regulations is a procedure that is typically researched from the angle of the technical transfer and adaptation, institutional back-up, formal interpretation, the cultural dichotomies and the lexical transplantation. That is – there is everything in such approach let alone the most important – the socio – historical analysis of the social dimensions of the reception process. In fact the legal reception nowadays (referred mostly to the reception of the EU legislation by the countries that join the Union) but also in the XIXth and the first half of the XXth centuries is a one-way transfer of principally different social models, codified in the language of the formal legislative dispositions. Saying it shortly – this is a transfer of different social realities. But conventional science rarely asks itself the question what is hidden behind the transfer of the various legal regulations which in fact are only a piece (and maybe not the most significant one) of an entire system of social regulation of the modern societies. The effect of the “distorting mirror” is that such reception transports to a different social tissue only part of an entire social regulation and this part is presented as being the whole thing. This is so because it is easy to transpose a document but it is not so easy to transpose the social prerequisites and practices that have made this document possible.

This is especially true for the years called “transition” (because of the lack of a better name) i.e. the period starting with the early 90s of the 20th century and lasting still in the first decade of the 21st century. Indeed even the immediate occasion can be subjected to criticism, since not many representatives of the political, scientific and legal circles find a reason for anxiety. However, for reasons of internal but mostly of international political nature⁴, the (il) legal character of the Bulgarian society was noticed. This led to the reluctant confessions that the problem exists but the interpretations as to its essence driving forces and demonstrations are more than various. Thus, according to some, no word could be said that we were facing a general problem – it was explained as incidental deviations from the otherwise flawless administration of justice, which was attributed to single irresponsible individuals.

⁴ Especially after accession to EU in 2007.

And when the escalation of such “harmless” deviations became too visible and substantial, the tactics for overcoming it through the years passed through a number of successive stages.

In the beginning, the main reason for the not-so-impressive status of the Bulgarian administration of justice was said to be the lack of adequate material, technical and financial back-up of the system.

When the back-up was given through the years (**especially after EU entering**) but the problem continued to persist, reasons were looked for (and found) in the political conducting of the judiciary, in its institutional infrastructure, in its human resources, in the constitutional foundations and last – in the quality of the laws with which the magistrates had to work.⁵

The problems with legal institutions and of the legislation is further strengthened by the fact that a considerable part of it (above 50 %) is a result of a direct reception of the common law of the EU. This secondary mass process of imposing of an external legal model confronts a multi-sided opposition. One is from the side of the state administration that is bound to implement it but neither has the knowledge, nor the tradition to do so. Secondly – the opposition is coming from social groups for whom the legal regulations of the EU are contradictory to their interest.

Making the long story short, the problems of the law and the regulation by law in Bulgaria were explained and confined to problems of the judicial system and the quality of the legal corpus and were interpreted mainly as technical by essence. Hence, the social problem was reduced to technology. And from there came the misleadingly easy solutions to the problem. Assuming that the problem was institutional and normative, it meant that the institutions were to be reformed (whatever the meaning of “reform” was), and the legislation was to be adapted to correspond to the most efficient European examples. But the adapts of such easy solutions needed to remember that this exercise had already been made.

⁵About this topic and it's very different interpretations by experts from legal e non legal societies see: “The Constitutional Debate in Bulgaria”, “Open Society” Institute, Sofia, 2005.

And made almost 100 years ago when the young Bulgarian state - founded in 1878 – directly adopted from abroad the “latest achievements” of the then leading European jurisprudence and when not one or two Bulgarian judges had graduated law from leading European universities whose Law Faculties date back to the 12th century. However, neither the Bulgarian constitutional order had something in common with the Belgian, nor the Bulgarian administration of justice had come closer to the European one – neither then, nor now.

Understanding the genesis of these prevailing interpretations of the problem does not mean sharing them. The fact that they exist and dominate is grounded onto two main prerequisites. The first is the dominating status of positivism in the jurisprudence and in the so called “legal theory” in Bulgaria.

Being a peripheral European state and suffering from the awareness that it is an underdeveloped state which always needs to “catch up” because of the fact that it lacks the historical and social experience of the “progressive” European nucleus (if we can paraphrase Im. Wallerstein and Fernand Braudel), the country has retreated to the “provincial” behavior of accepting and adopting without criticism external institutional and normative models without realizing that these are not self-acting instruments but are a legitimate socio-historical product of a long and sometimes contradictory modernization process. This approach is typical not only for the Bulgarian social scientists but also for many Western researchers for whom the efficiency of the institutional and regulatory mechanisms typical for the Western society is an “inherent”, “self-understood” even “natural” phenomenon. In my opinion such approach deforms the research from the very beginning. In fact the biggest problem of positivism lies in the fact that its supporters do not give account for its heuristic limitations and for the fact that it lies in a strictly historical context. And secondly, by confining the scientific discourse to the pure theory of law (as per H. Kelzen and the Vienna neonomativism) its Bulgarian adepts – consciously or not – distract the researcher from looking into the actual status and reasons for the (il)legal character of the Bulgarian society today.

The second group of circumstances is due to the so called “defect of reflection”. Both the court and the law are visible. And this means that almost anyone who has ever been in touch with either of them can judge about their merits and shortcomings.

This “visibility” often deceives not only the amateur in this game but also specialists in the field of law-making and implementation. But neither law-implementation is equal to administration of justice, nor is law identical to legislation. Both the court and the “corpus juris” are nothing more but means for the solving of social problems. Historically the judicial system has come into being and has developed as an institutional mechanism for solving of conflicts emerging during or as a result of the (mis)implementation and/or (un)observation of the established normative order. So, it becomes active only when and after the order has been broken, the balance – tilted, the interest – infringed, the right – affected. And when the number of legal disputes and law infringements is growing exponentially it is clear that behind the problem of the jurisprudence hides yet another deeper and larger social problem – **the problem of the actual applicability, efficiency and respectability of the law in the society.** To measure this problem, in turn, requires outlining the genesis of the real social props, which make the law necessary. And then it becomes clear that the visible social problem covers a more fundamental sociological problem, which requires determining when, where and in what socio-historical context do some societies transform into legal ones and in others the law serves in the best of cases for decoration, which has nothing to do with the real means of social reproduction.

3. Basic Hypotheses

Unlike the dominant theoretical discourses I adhere to another type of explanation of the social problem described above. This explanation is not to be confined to the means of solving the problem – the judiciary and the legislative infrastructure, nor is it limited to the mentality and emotions of the addressees of this infrastructure. Not that these are considered unimportant. But both of them are a result and a reproductive element of the far more complex socio-historical transformations through which the Bulgarian society has passed. This means that the problems of today cannot be understood and explained by the simple “overview” of their daily appearances. The analysis has to be shifted sharply away from these appearances in the direction of looking for the respective historical layers and processes in which the object of the research has its relative genesis and its further transformation. Thus the main problem of the current research will not be the law or the court – the main problem will be how needed and socially effective regulator is the law in our society not only in contemporary times but also in a historical perspective.

Making the long story short, the main hypotheses of the current state of Bulgarian legal system after Bulgarian assessment to EU in 2007 are based on the assumption that under the conditions of “transition” after 1989 a political and economic structure was introduced which was a natural continuation of the “real” socialism and which was characterized by:

- 1) dominant hierarchically constituted political-economic symbioses (the so called “oligarchic “ model) under which the major mechanism for generation, distribution and re-distribution of resources was not the market and the free competition but the organic adhesion between the state, understood as a specific clientelist “network of social networks” and different groups – different in structure, scale and personnel –but all of them originating from the economic, administrative or repressive structures of the former regime and all of which have mutated and acquired independence in a pseudo-market media. This fact has unilaterally determined that corruption, nepotism, the massive social criminalization and the actual non-functioning of the powers are not some sort of “external” deformations of the system but its organic manifestation. And their presence is not to be considered surprising - on the contrary – were they to be absent from the Bulgarian social context would have been unexpected. It is necessary to state here that the economic and social processes of emancipation of the communist nomenclature have commenced long before the “sacred” 1989. At the same time there were not other significant players on the social terrain of the late socialism which could have been its effective competitor and which could have given a different typology of the transition.
- 2) The political-economic symbiosis by essence (and not because of the ill will of a certain social subject) *excludes the use and the enforcement of modern law as a central normative channel for formulation, assertion and defence of interests – a process exactly opposing the genesis of the “long” European modernization.*⁶ The law – at least the one that has become known as “law” from the end of the 18th and in the 19th and 20th centuries is a formal normative system, which is a result of the law-making functions of different legislatures whose work is based on the impulses of the already existing modern and still modernizing society (at least in the European historical context).

⁶ About this historical process: Berman, H.J. “Law and Revolution. The Formation of the Western Legal Tradition”. Harvard University Press. Cambridge, 1983.

The legal system is constructed in correlation to the autonomous social spheres and is centred around autonomous social subjects who – in the modern legal interpretation are called legal subjects and whose status and legitimacy is derived from the perimeter of legal rights and obligations. From there the whole dynamics of law-making and law-enforcement is based on the notion of the free will of these subjects who realise their legally recognized and legally regulated interests through a series of legal acts and by entering into a variety of legal relationships;

- 3) Therefore the genesis and the mechanisms for functioning of the modern legal systems are by essence not possible if there are no autonomous legal subjects whose activities are motivated by a social reality, grounded on capitalistic economic forms and political publicity. If these subjects are non-existent or are only in their foetal “stage”, then the given state will boast itself only with a formally European legislation, which in fact will not demonstrate the “supremacy of law” essential for the European legal system.
- 4) In this context the constitutional political and legal system introduced after 1989 is serving only as a formal “cloak” of the actual power - and economic mechanisms governing the society and which mechanisms have nothing to do with the constitutional dispositions proclaiming division of powers and representative parliamentary government.
- 5) The introduced multi-party system, in turn, is an artificial social construction which does not fulfil the main purpose of the modern political parties - to be a mediator, protector and political representative of autonomous group interests; the political parties that exist in Bulgaria are in fact someone's private cliquish project and the difference between them is only the formal political label. This fact leads to the complete inadequacy of the left – right political division inherent to the European modernity on the Bulgarian arena. The artificial character of the party-political system in Bulgaria has condemned the Parliament and its subordinate institutions to political and institutional emptiness and has converted them into meaningless institutional decoration.
- 6) The formal constitutional separation and independence of the judiciary cannot hide the fact that major economic and financial fluxes as well as the arbitration of eventual conflicts in fact circumvent the judiciary and are solved in forms and mechanisms that have nothing in common with modern jurisdiction. And the main reason for this is to be found into the social symbiosis described above. Hence, the main reason of the any civil activist is not to be resentful from this fact but to explain “how and why this fact is possible”

- 7) If everything outlined above is true, an analysis and real political actions are needed to determine whether there exist certain social factors and “players” who have acquired enough potential for growth and who identify their own interest with the establishment of a modern legal order. The identification of such factors will be a key topic of the research, since only in that way an answer can be given what and how big are the chances for the establishment of a legal society in Bulgaria.

As a conclusion, it has to be said that the author shares the thesis (which may look naïve in the eyes of post-modernists) that the first step for effective social action has to be based on an adequate analysis and interpretation of the social problem. In this sense, at times of dramatic social cataclysms, seeing the social science as a closed autopoietic system is rather an escape from the actual social commitment of the social researcher.