

ROUTLEDGE FRONTIERS OF CRIMINAL JUSTICE

# Building Justice in Post-Transition Europe?

Processes of criminalisation within Central  
and Eastern European societies

Edited by  
Kay Goodall, Margaret Malloch and  
Bill Munro

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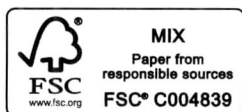
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# Building Justice in Post-Transition Europe?

After the collapse of the Berlin Wall in 1989 and the disintegration of the Soviet Union, scholars focused on the problems of legal transitions within the newly emerging democracies. Two decades on, these states are in 'post-transition' conditions, having undergone and continuing to experience political, economic and constitutional upheavals to varying degrees. This book provides an interdisciplinary perspective on this largely unexamined topic.

Part I of the book sets the scene with a socio-historical overview and a theoretical chapter, both of which contextualise the book within current debates and provide the theoretical direction of the book as a whole. The later chapters set out contrasting perspectives and consist of themed essays on individual legal systems, investigating these through approaches ranging from socio-legal study to political economy. The book aims to refine important directions for the comparative conceptual study of criminal law policy and processes of criminalisation in emerging democratic states. The result is a significant contribution to the understanding of this subject in the fields of criminology, law, philosophy and political science.

The book will appeal to academics, policy-makers and practitioners who are attempting to grapple with the area of 'transitions' in the fields of criminology, law, philosophy and political science. As a distinctively interdisciplinary text, it brings together analysis of both the social processes of creating (and abandoning) criminal law and a philosophical reflection. The book provides a comprehensive and critical analysis that points to future directions in criminalisation in the emerging democratic states of Eastern Europe.

**Kay Goodall** is a Senior Lecturer in Law in the School of Law at the University of Stirling, Scotland. Her research interests lie in conceptualising racism, religion and sectarianism in domestic and transnational criminal law.

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In the transition from symposium to book, we would also like to acknowledge the support of Thomas Sutton at Routledge and the three anonymous reviewers who assisted us in sharpening our focus.

This book has been the work of a team. Furthermore, it has been a process in which each of our authors has not only contributed excellent chapters, for which we are very grateful, but has also generously given their time throughout, with dedication and enthusiasm. Thank you to everyone.

The editors

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# Preface

This book emerged from a symposium held in 2009 at the University of Stirling. The focus of that symposium was to provide a forum to take further the existing research on justice in transition and processes of criminalisation. It had several objectives. It was designed to encourage international collaboration. It sought to share ideas and experiences in a post-Soviet socio-political territory where the institutional structures of the emerging states are relatively new and where little has been written or studied around these legal transitions. It furthermore provided an opportunity to engage with international work that has been developing at the levels of theory, policy and practice. The outcome we aimed for was to make a significant contribution to knowledge across the fields of criminology, law, philosophy, political science and Eastern European and post-Soviet studies.

The book expands on the debate initiated at that event. In particular, it examines the shift to post-transitions in the former Soviet and satellite states and the consequences this has had in terms of processes of criminalisation within states generally, and criminal justice systems specifically. Some chapters here are revised papers from the symposium; others are wholly new.

Sometimes, edited collections suffer from the disparate orientations of authors who have not met and debated as a group: we have aimed in this project to overcome that. The project does not just synthesise what our authors have contributed; our aim was to effect a syncretic debate, drawing in new researchers with contrasting outlooks. It is our hope that we have provided a stronger and more comprehensive forum for examining and analysing the key issues in this area.

What emerges is that the crucial role of criminalisation is not a new feature of transition or of these post-Soviet states. It was, for instance, central in maintaining the ideological grip of communism through the regulation of dissent by the policing of 'political' crimes. Modern states, in the post-Soviet states as in the old 'West', cling to criminal law and policy as matters for domestic governance and sovereignty, only with great reluctance to be relinquished to others. Yet decriminalisation, less often considered in the post-Soviet context, was not necessarily pressed on these states from outside (as we see, for instance, in Ben Noble's chapter on legal concepts governing same-sex

relationships). Emerging conceptions of criminalisation and decriminalisation are not only the results of changing concepts of justice during transition and post-transition: they change social understandings of justice itself.

*Building Justice in Post-Transition Europe?* examines the pursuit of democratisation, shifts towards economic change and the impact this has on criminal law, resulting in new forms of both regulation and mechanisms of decriminalisation that emerge alongside moves towards political and economic change. Changes in the law and their application are often related to the extent of real democratisation in a state (notably the shift of power from the state). However, transitional shifts to new forms of economic organisation can result in other challenges to the development and operation of the law, influenced as it is (in both form and application) by domestic and global organisations, and particularly by economic precedents.

Our work develops a multi-disciplinary, transnational contribution to the understanding of this subject, which we hope will be an original forum for international collaboration around legal transition and processes of criminalisation. The debate is much needed at a time of (often poorly understood) rapid and distinctive developments in the post-Soviet and the new European Union states. As Kimmo Nuotio's chapter on Finland demonstrates, however, not all that seems distinctive is to be found on one side of the 'old' and 'new' European divide. The book develops scholarly and academic work on legal transitions and attunes this to emphasise processes of criminalisation that are omitted from existing transitional studies, yet are of fundamental importance to the experiences of both citizens and states.

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## **Part I**

# **A socio-historical overview**



# 1 Social and legal transitions and criminalisation

*Kay Goodall, Margaret Malloch  
and Bill Munro*

One of the purposes of multi-disciplinary study has been to broaden understandings of the relationships between the accepted concepts within a particular discipline by aligning them with a broader disciplinary constellation (Klein 1996). However, the works that make up any intellectual discipline exist within inherited institutional traditions and are apprehended only through the accumulated layers of previous interpretations and methodological habits developed by these traditions (Said 1995). A key problem, therefore, raised by the inevitable crossing of disciplinary boundaries is the question of disciplinary integrity; in other words, the problem of weakening the theoretical rigour of a particular discipline and its historical context by aligning it in part with different disciplinary approaches and frameworks.<sup>1</sup> Therefore, to map multi-disciplinary boundaries is a difficult task complicated by what Klein (1996: 4) refers to as a 'jungle of phenomena'. Multi-disciplinary activities encompass a 'complex and contradictory set of practices located along shifting coordinates' and touch on questions of epistemology, history, divisions of geographical space and cultural politics. Damaška (1986) highlights this complexity when grappling with the scale and diversity of institutions and processes through which justice is administered in modern states. It is not always possible to meet such a range of institutions and processes of administration in terms of a common vocabulary, and our initial points of reference are often inadequate to our task. If superficial similarities in the forms of justice often mask profound differences in institutional settings when comparing Western systems,<sup>2</sup> then matters become more complex when the administration of justice in the former Soviet Union and its East and Central European spheres of influence is considered. Whether the divisions and contradictions of history, culture and place can be made intelligible is a theoretical as well as an empirical problem, and it is doubtful whether a single framework can be developed for us to fully trace the diversity of European transitions. As Offe (1996) notes, many fundamental concepts used to interpret complex social phenomena such as political and economic transition have a dual political status, one analytic and the other normative. It is important, therefore, in a collection such as this to balance the relationship of the historical to the structural as well as attempting to resolve the antagonism



between the empirical and the normative. This chapter considers just some of the theoretical and socio-historical contexts that may work towards such a framework for understanding the concepts of justice, their role in transition and criminalisation in East Central European states.<sup>3</sup>

An important area of transition research, which has been well theorised elsewhere and is not dealt with in this volume, other than in the discussion in Peršak's chapter, is that of *transitional justice*, which is concerned with how new regimes deal with the crimes and human rights violations of the old. How new regimes carry out this complex and conflicting process is essential for the development of legal and political cultures and for identity formation in post-communist society (Stan 2008; Skapska 2010). As Roht-Arriaza and Mariezcurrena (2006: 2) have outlined, the contemporary landscape of transitional justice is situated firmly within the legal context of human rights centred on principles of truth and justice. This work, focusing on 'prosecutions and criminal investigations, truth commissions, vetting or cleansing of security forces, and ... formal reparations programs', has moved beyond Eastern Europe with a geographical range including Ireland, South Africa, Sierra Leone, Peru, Columbia, East Timor, Rwanda, Iraq and Afghanistan (McEvoy and McGregor 2008). Our focus here is on 'post-transition', explained below.

### Societies in transition

Following the collapse of the Berlin Wall in 1989, transition literature focused on legal transitions in the former Soviet satellites of East Central Europe (Příbáň and Young 1999; Příbáň et al 2003).<sup>4</sup> The aim of such work was to examine how liberal democratic institutions and systems of justice were developing and how they were adapting to post-communist conditions. Twenty years on, the complexities of transitions have been widely reflected upon in the academic literature, and much of the focus now is on the contexts and semantics of what has been termed 'post-transition' conditions (Febbrajo and Sadurski 2010) and the constitutional developments and limitations regarding the new democratic states and European Union (EU) integration (Příbáň 2009a, 2009b, 2010). Echoing Damaška's (1986) concerns, outlined above, relating to the diversity of arrangements and institutions through which justice is administered; when examining processes of criminalisation, there exist severe limitations in adopting a strictly legal definition that ignores the contradictions between the new procedural and institutional practices, the cultural life of a country and the emergence of new property relations.<sup>5</sup> These contradictions not only operate at different legal levels, both supranational and intergovernmental, but also across geographical space, and in turn highlight different levels of transition: democratic, market and, on the level that criminal law is most concerned with, social integration (see Offe 1997).<sup>6</sup> It is to this relationship between geography, politics and social integration that we now turn.