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**DISCUSSION ABOUT THE LEGAL IDENTITY OF CENTRAL  
AND EASTERN EUROPE. 3<sup>RD</sup> ANNUAL CEENELS CONFERENCE  
“LEGAL IDENTITIES AND LEGAL TRADITIONS IN CEE”**

**Abstract.** The paper describes the discussions during the 3rd Annual CEENELS Conference “Legal Identities and Legal Traditions in CEE”, which took place on January 11–13, 2018 at the University of Latvia in Riga. The main issue debated at the conference concerned the question whether the countries of Central and Eastern Europe have their own legal identity and whether there is a common legal identity of the entire region. The author is in favor of Mikhail Antonov’s view that labeling the Soviet legal theory and legal culture as characterized by rigid positivism or even by “hyperpositivism” is an oversimplification. Moreover, Antonov is right when emphasizing that there was no common “socialist legal culture” and this culture differed a bit from country to country.

**Keywords:** CEENELS, legal identity, legal culture, Central and Eastern Europe, legal theory.

Do the countries of Central and Eastern Europe have their own legal identity? Or is there only a reception of intellectual concepts created mainly in Western Europe? Are there only legal transfers and legal transplants in the legal systems of Central and Eastern European countries? What are the basic elements of the legal tradition of the countries of the region? Are these countries linked together only by the struggle with the remains of the legal system of the period of real socialism? These and similar questions were of interest to the participants of the 3<sup>rd</sup> Annual CEENELS Conference “Legal Identities and Legal Traditions in CEE”, which took place on January 11–13, 2018 at the University of Latvia in Riga.

CEENELS – the Central and Eastern European Network of Legal Scholars – is a natural forum to ask such questions. In the intention of the creators, it is an informal network of scholars in the field of legal sciences from the countries of Central and Eastern Europe, designed to counterbalance the domination of academic lawyers from Western Europe and North America over the intellectual life of the region. Although the history of this network is short – its beginning dates back to April 2015 (Zomerski 2015) – it operates very dynamically and under its patronage several international conferences are held annually (“About

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CEENELS”).<sup>1</sup> The strategic goals of CEENELS include strengthening the intellectual and organizational ties between legal scholars from the countries in the region, promoting joint research projects, and, perhaps more importantly, creating a unique – Central and Eastern European – methodology of law research and building critical legal knowledge about the region.<sup>2</sup> The last two goals are very ambitious, but they can also be criticized by those who question the possibility of building such a “regional” methodology of legal research. In any case, the third annual CEENELS conference undoubtedly served to get closer to achieving these goals.

The first plenary session was devoted to the current problems of Central European constitutionalism. Professor Adam Sulikowski representing the universities in Wrocław and Opole delivered the paper *Postmodern constitutionalism: Between liberal “gouvernement des juges” and authoritarian populism*. The starting point for the author was the postmodernist critique of the claims of positivist constitutionalism to the only truth about the constitution and thus to the only proper interpretation of its provisions. Meanwhile, the interpretation presented by the judges of the most important courts, especially constitutional courts, in fact originates from a specific ideology and is not apolitical, although it is presented as objective and free from the influence of current politics.<sup>3</sup> According to Prof. Sulikowski, the use of postmodern analyses of power and law makes it possible to reveal the ideological determinants of the narrative built by the constitutional judiciary. In the conference paper *Constitutionalism and statehood: from theoretical to spatial (Lithuanian) perspective*, Doc. Dr. Tomas Berkmanas (Vytautas Magnus University, Kaunas) used a broad understanding of the constitution, encompassing not only legal provisions but also the unity of institutions and practices identifying and maintaining a specific legal and political regime. According to Doc. Berkmanas, constitution is thus a varied territory on which the Hartian rule of recognition is hidden, indicating

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<sup>1</sup> Cf. (Zomerski 2017). In 2017, CEENELS co-organised the 9<sup>th</sup> CEE Forum in Wrocław on *Academia, Democracy and the Political* and the 4<sup>th</sup> International Workshop on Law and Ideology in Timișoara on *Adjudication and the Political*.

<sup>2</sup> See also the manifesto of CEENELS written by its founders (Mańko, Škop, Štěpáníková 2018).

<sup>3</sup> Professor Sulikowski already presented his position on this issue, including in the paper published in the middle of the Polish dispute regarding the Constitutional Tribunal (Sulikowski 2016). The indication of the political dimension of the functioning of the constitutional judiciary does not mean its rejection or depreciation. As the author emphasized, its current activity constituted a barrier before totalitarian (or, perhaps more precisely, authoritarian) practices. According to Prof. Sulikowski, the end of the apolitical myth of the constitutional court, boiling down to the inclusion of this institution in the Schmittian dialectic of a friend and enemy, may also have at least potentially dangerous consequences. It can contribute to the transformation of the discourse around the Constitutional Tribunal and to a change in the functioning of this body, if not to the reduction of its role only to the function of a façade body. The author argued that the Constitutional Tribunal can regain social confidence when it is aware of its political nature and shows that it represents the interests of various social groups.

what should be considered the law. Doc. Dr. Martin Škop (Masaryk University, Brno), in turn, presented the topic *Cultural identity in statutory drafting*. Dr. Cosmin Sebastian Cercel (Nottingham University) in his work uses the genealogical approach of Giorgio Agamben and Michel Foucault to discover links between legal discourse and ideology in Central Europe, especially in Romania.<sup>4</sup> He did so in his paper entitled *Beyond constitutional identity: law, history and traditions of struggle in Central and Eastern Europe*. Presented in the second plenary session, the paper by Doc. Dr. Zdeněk Kühn (Charles University; Justice at the Supreme Administrative Court of the Czech Republic), entitled *The rise and decline of Central European constitutional judiciary*, undertook the same subject differently than it had been developed by Prof. Sulikowski. Doc. Kühn, in the spirit of liberal political theory, sees the constitutional courts above all as the guarantors of the rule of law in Central Europe.

Two papers of the second plenary session concerned the issue of the existence of specific features of the legal culture of the countries of Central and Eastern Europe, as well as the existence (or non-existence) of the legal identity of particular countries in the region. This very issue was often discussed during the conference. The justice of the Constitutional Court of the Republic of Latvia, Prof. Dr. Sanita Osipova (University of Latvia) presented the paper *Baltic states as the legal cultural space in the discourse of the process of the legal history (Searching for the legal identity of Baltic states)*. The author posed the question concerning the extent to which it is plausible to talk about one legal tradition of the Baltic countries. Prof. Dr. Manuel Guțan (Lucian Blaga University, Sibiu), in turn, attempted to identify the features of the legal system of post-communist Romania, as well as answering the question whether it had legal identity. Professor Guțan pointed out that in the 1990s, the legal heritage of the communist period was rejected, and the adoption of a new constitution in 1991 was an important moment in this process. At that time, two trends in the Romanian legal discourse marked their presence, i.e. one supporting full Europeanization and another one advocating the return to the Romanian legal tradition. Interestingly, the latter referred to the Romanian Civil Code of 1864, which finally ceased to be in force in 2011, although this code was the result of the reception of foreign solutions.<sup>5</sup> However, after Romania's accession to the European Union, the debate on the Romanian legal identity completely disappeared. The next plenary session of that day of the conference was different from the others because it was focused on a single issue, although presented in a comparative way. Dr. habil. Piotr Fiedorczyk (University of Białystok) analyzed the matrimonial property regimes in Central and Eastern Europe.

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<sup>4</sup> Cf. (Cercel 2015; Cercel 2018).

<sup>5</sup> The fact quoted by Professor Guțan draws our attention to an important issue, namely to what extent the phenomenon which is called the legal identity of the countries of Central and Eastern Europe consists of foreign elements, but transplanted earlier, before 1945.

The plenary sessions of the second day of the conference included further papers on legal identity. Doc. Vladislav Starzenieckij (Higher School of Economics, Moscow) analyzed problems with the application of the European Convention on Human Rights in the context of Russian legal identity. The author pointed out the existence of tension between this identity, emphasizing the importance of collective rights, and the individualistic concept of human rights which underlies the jurisprudence of the European Court of Human Rights. Prof. Dr. Marko Novak (Evropska Pravna Fakulteta) addressed the issue of Slovenian legal identity and named it “Central European with a post-socialist limp”. Professor Novak stressed that the legal culture of Slovenia is deeply rooted in the civil law of the Central European (or Austrian) type. However, this culture was undermined after the collapse of the Habsburg monarchy, when Slovenia – in order to build a stronger national identity – turned to the East, and later during the period of Real Socialism. Dr. habil. Tomasz Bekrycht (University of Łódź), in turn, raised the question of legitimacy in the context of the renaissance of interest in republicanism and the republican concept of freedom.<sup>6</sup> As is known, this concept recognizes the central element of freedom in the participation of an individual in lawmaking. It emphasizes that an individual is free when she is a subject only to the law that was established with her participation. The acceptance of such an understanding of freedom resumes the question about the legitimacy of the law imposed from outside, for example certain European Union regulations. Professor Piotr Niczyporuk (University of Białystok, Faculty of Law, and Branch in Vilnius) raised the issue of the role of Roman law in the Central and Eastern European legal culture. This issue aroused heated disputes in the nineteenth century, when many scholars investigated the extent to which Roman law had been adopted in this part of Europe.<sup>7</sup> Professor Niczyporuk focused on the example of *Academia Vilmensis* and stated that Roman law had been taught there from the mid-seventeenth century and played a large role in the academic training of lawyers, and the lecture program was the same as at other universities at that time.<sup>8</sup>

Other papers were presented under seven parallel sections, namely: “Legal Identity”, “Constitutionalism”, “Public Law”, “Private Law”, “Comparative Law & Legal Culture”, “Legal History”, “Legal Reasoning and Legal Interpretation”. The

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<sup>6</sup> This renaissance is primarily associated with the works of Quentin Skinner and Philipp Pettit. Cf. (Skinner 1998; Pettit 1997).

<sup>7</sup> In the Polish territory, the dispute began at the beginning of the 19<sup>th</sup> century, when Tadeusz Czacki (1765–1813) pointed out that the former Slavonic law, including Polish law, was influenced by Scandinavian law. Cf. (Czacki 1809, 84–121). Nowadays, Sławomir Godek claims that in old Poland Roman law influenced both the practice of justice and the legislation. Cf. (Godek 2002, 133–140).

<sup>8</sup> Another thing is that, in the Polish-Lithuanian Commonwealth, only a small group of lawyers had an academic education.

small student section was a significant addition to the program, enabling candidates for future academic work to present their contributions to a wider audience.<sup>9</sup>

The “Legal Identity” panel consisted of nine papers. Doc. Anna Alexandrova (Penza State University, Russia) presented a contribution entitled *The question of determining the legal identity of the states of Central and Eastern Europe*, prepared jointly with Doc. Andrei Sieriegin (Southern Federal University, Rostov-on-Don). According to the authors, the legal systems of the countries of this region have similar features that make it possible to recognize them as having a common legal culture. This culture is dominated by elements of the Romano-Germanic legal tradition, though distorted in a certain way during the communist period. Against this background, the Russian legal culture is characterized by peculiarities that may lead to a situation in which it would be plausible to talk about the “Eurasian” legal culture. Among features of the contemporary Russian legal system, the instability of statutory law, the often low quality of the legal technique and so-called legal nihilism as a peculiar attitude towards the law were mentioned. Dr. Jacek Srokosz (Opole University) in his paper proposed the occurrence of the “Americanization” of Central and Eastern European legal cultures, which could affect their identities. In the discussion, doubts about the very concept of “Americanization” were underlined. Mgr. Tomasz Guzik (Jagiellonian University), in turn, tried to show the distinctive features of the Polish legal identity against the background of the legal identity of the region. Doc. Dr. Dmitrij Poldnikov (Higher School of Economics, Moscow) presented an interesting contribution entitled *Piercing the Soviet veil of the Russian national identity with comparative studies in the truly European legal history*. He rightly stressed that the history of law had served to create national legal identities in the 19<sup>th</sup> century. It legitimized the positive law and provided the basis for the legal ideal of a given nation. At present, such a nineteenth-century manner of practicing legal history is questioned by scholars from the circle of “comparative legal history”. However, as emphasized by Doc. Poldnikov, in Russia, the traditionally understood history of law still dominates, and “the national romance narrative” is still present in the research. At the same time, serious comparative research on the history of law is blocked by the Soviet heritage, which is characterized by three features: adaptation of a sociological interpretation of legal phenomena from the past (legacy of the Marxist theory), dominance of general historians in research on foreign history of law, and isolation from international research.

No less interesting was the next paper *Western legal tradition as part of the legal identity in the “East” of Europe: The Transnational Impact of the Historical*

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<sup>9</sup> The following students took part in this session: Xenia Eggert (Higher School of Economics, Moscow), Aleksandra Niczyporuk (University of Białystok), and Mirosław M. Sadowski (University of Wrocław).

*School of Law*, presented by Dr. Christoph-Eric Mecke (Leibniz University Hannover). The author strongly emphasized that the narrative of a common family of legal cultures of Central and Eastern Europe is not only dangerous from a political point of view, in the era of attempts to undermine the common European values, but also historically untrue. Dr. Mecke showed that the German and Polish private law culture had common roots for a long time before 1989. The assumptions of research on Roman law presented after 1814 in Germany by the Historical Law School were discussed by Warsaw legal scholars in the 1820s. Thus, at that time, Polish legal science were part of the all-European discourse.<sup>10</sup> Dr. Mecke's paper provokes an important question of whether Central and Eastern Europe was a place where original legal ideas appeared or mainly a place of reception and possible development of concepts emerging elsewhere, mainly in France and German-speaking countries. Then Mgr. Marcin Wróbel (Jagiellonian University) presented an interesting, though controversial, paper (*II*) *legal Tradition – informality as a legal identity of Central and Eastern Europe: a hypothesis*. The author, using a few examples mainly concerning pastoral communities in the Tatra Mountains, argued that formalism could not be considered a universal feature of the legal culture of Central and Eastern Europe, as members of traditional rural communities usually had chosen an informal way of regulating property relations between them. The author himself pointed out that the examples used by him were still insufficient to generalize, but they were enough to put forward a hypothesis.<sup>11</sup> Then, Doc. Dr. Tatiana Borisova (Higher School of Economics, St. Petersburg) spoke about the Russian national legal tradition. Dr. Laura Gheorghiu (Graz University) delivered a paper concerning the difference between the legal cultures of Romania and Transylvania in respect to the issue of self-determination. According to Dr. Gheorghiu, the cultural differences have a historical background. The Principality of Transylvania enjoyed a large autonomy even under the Ottoman Empire, and during the period of the Habsburgs' rule, memory about the values of the confident Protestant population survived, while the Romanian principalities were continuously dependent on the Ottomans. During the interwar period, the state was not completely unified, and the bureaucratic and paternalist communist legal culture was much stronger in Bucharest than in Transylvania. Taking into consideration these differences, Dr. Gheorghiu put forward the idea of decentralization and regionalization of the Romanian state. In his paper, entitled *The political concept of Central Europe before and after the Autumn of Nations*, Mgr. Piotr Eckhardt (Jagiellonian University) analyzed three different approaches

<sup>10</sup> It should be added that not only the scholarly analysis of private law in Poland was developed under the influence of discussions taking place in Europe in the 1820s. At the same time, Romuald Hube (1803–1890), mainly based on the achievements of German scholars, created the foundations of the Polish academic reflection on criminal law.

<sup>11</sup> I do believe that distinguishing the legal culture of professionals and the legal culture of various social groups would be enough to avoid the trap of groundless generalization.

to Central Europe. One treats the region as a part of the West kidnapped by the Soviet Union (as Milan Kundera famously pointed out), while the another one, developed especially before the integration with the EU, emphasizes the peripheral character of the region as well as the need to take the position of Western Europe's apprentice. The third approach, however, sees Central Europe in a negative light, calling it "the sick man of Europe", who violates the rule of law and is well-known for populism and xenophobia. It must be pointed out that all three approaches – burdened with one-sidedness – tend to distance us from understanding the specificity of the region rather than allowing us to capture it.

In the panel on constitutionalism, the opening paper on current constitutional changes in Poland was delivered by Prof. Andrzej Szmyt and Dr. Anna Rytel-Warzocha (University of Gdańsk). The authors compared the current situation to that which existed in inter-war Poland, when the regime introduced after the May coup of 1926 was based on the authority of Marshal Józef Piłsudski, who was officially outside the constitutional apparatus of the state. Dr. Berke Özenç (Turkish German University, Istanbul) analyzed the legal state of emergency, which was introduced in Turkey after the coup attempt on July 16, 2016. In the paper, the importance of the decision of the Turkish Constitutional Court regarding the impossibility of reviewing the constitutionality of decrees introduced during the state of emergency was emphasized. This decision raises the question about the protection of human rights during this state. The problem of diagnosing the current state of democracy in Central Europe, frequently addressed during the conference, returned in the paper prepared by Mgr. Łukasz Kołtuniak (Jagiellonian University), entitled *Illiberal democracy and the future of the democratic state of law: end of checks and balances, end of democracy*. The author reminded those present that, already in the mid-1990s, Fareed Zakaria had – against the optimism of such thinkers as Francis Fukuyama – analyzed the illiberal democracy phenomenon and argued that in the future it would be the dominant system in the world. Zakaria, however, believed that Central Europe would remain in the orbit of Western liberal democracy. However, according to the author, the current problems of constitutionalism in the region provoke the question of whether democracy can survive without the checks and balances mechanism existing in the liberal model. In his contribution, Dr. János Fazekas (Eötvös Loránd University) presented the issue of the centralization of government in Hungary. Doc. Dr. Kamil Baraník and Mgr. Klaudia Bederková (Komensky University Bratislava) analyzed the issue of the constitutional identity of the former Czechoslovakia. They asked the question whether the short period of existence of Czechoslovakia after 1989 was sufficient to build an independent concept of basic constitutional values, or if the aim was simply to implement the model of Western democracy. Mgr. Lu Da (University of Szeged) presented the comparative research concerning provisions aimed at the protection of the constitution in China and Hungary. The contribution of Doc. Marija Kapustina (St. Petersburg State University) was devoted to the role

of the legislator in the Russian legal system. According to the author, this very role is influenced by state's political system, legal tradition and peculiarities of the legal culture. The paper of Doc. Arnis Buka (University of Latvia) was aimed at evaluating the efficiency of the application of the EU law by Latvian courts. In his contribution, Mgr. Bartłomiej Ślemp (University of Warsaw) presented the issue of parliamentary associations in Poland against the background of regulations in effect in other European countries, e.g. Germany, Slovakia, and Lithuania.

The "Public Law" section was started with the paper by Dr. Paulina Bieś-Srokosz (Jan Długosz University in Częstochowa), concerning the impact of Western legal institutions on Polish administrative law. Doc. Jernej Letnar Črnič (Graduate School of Government and European Studies, Brdo u Kranja, Slovenia), in turn, analyzed the impact of the European Court of Human Rights on the rule of law in the former Yugoslavia. As Doc. Črnič pointed out, all former Yugoslavia states faced the same problems with implementing the rule of law and protecting human rights, caused *inter alia* by interference of populist groups of interest. Mgr. Aleksandrs Potaičuks (University of Latvia) presented the issue of the Europeanization of national administrative procedural regulations in Central Europe. Prof. Agnieszka Skóra (University of Warmia and Mazury in Olsztyn) and Dr. Agata Cebera (Jagiellonian University) gave an interesting outline of the problem of the principle of equality in Polish administrative law. The authors stressed the different ways of understanding the notion of equality on the basis of the philosophy of law, especially the division into horizontal and vertical equality, and the attempts of the EU to lay down a common framework of the equality principle in administrative procedure (European Parliament resolution of 15 January 2013 and the European Code of Good Administrative Behaviour). Moreover, the permissible exceptions from the principle of equality were also analyzed. In the concluding part of their speech, Prof. Skóra and Dr. Cebera attempted to answer two fundamental questions, namely whether the principle of equality was one of the pillars of the democratic state ruled by law and what would be the future development of this principle. Doc. Dr. Inese Druviete (Riga Graduate School of Law) delivered a paper concerning the issue of discretion in opting out from data protection and presented situations when such discretion leads to discrimination. Mgr. Jūlija Jerņeva (Vilgerts Law Firm), in turn, presented a contribution concerning the possible future development of competition law. The author identified the reasons for differences between competition law regulations in the USA, the EU, and EU Member States (the example of Latvia was particularly considered). In her view, American competition law, largely shaped by court decision, is characterized by a greater degree of flexibility and, therefore, more freedom of action is given to market participants, while the European model of competition law, guarded by the Court of Justice of European Union, is focused on economic integration and thus is more restrictive. The post-Soviet thinking, which is not in favor of true



liberal market economy, was also taken into consideration as a possible reason for a more restrictive approach to competition law implemented in Central and Eastern Europe. Prof. Gaabriel Tavits (University of Tartu) analyzed the impact of the socialist legal tradition on social security law. The author pointed out that this influence still occurs in Estonian regulations on pension insurance as well as work accidents and occupation diseases, despite the fact that these regulations were adopted in 1992. The contribution of Mgr. Angéla Gábri (Géza Marton Doctoral School of Legal Studies) concerned the important issue of legal solutions implemented in the cases of informal payments for public healthcare in Central and Eastern Europe. This issue is on the borderline of administrative law, labor law, and criminal law. The report of Doc. Olga Pietrova (Belarusian State University), in turn, should be treated separately, because it was devoted to criminal law and criminal procedure. Doc. Pietrova presented the issue of the child's right to be heard in the context of criminal justice in Belarus.

The "Private Law" section offered a wide range of topics concerning the development of different institutions after the collapse of the Soviet bloc. The main issue emphasized by several speakers was the process of getting rid of the burden of regulations from the communist period and the "modernization" or "Europeanization" of legal solutions. Dr. habil. Magdalena Habdas and Dr. habil. Anna Stawarska-Rippel (University of Silesia) presented a contribution entitled *When love says goodbye*, analyzing the development of divorce regulations in Poland. The authors emphasized three models of matrimonial law in force on the Polish territory at the beginning of the 20<sup>th</sup> century, i.e. a religious model (introduced by the Decree on Marriage of March 16, 1836 by the Emperor of Russia Nicholas I),<sup>12</sup> a secular model (German *Bürgerliches Gesetzbuch* of 1896 and the Hungarian Act of 1894), and a mixed one (*Allgemeines Bürgerliches Gesetzbuch* of 1811). Because of conservative tendencies, a progressive unified matrimonial law project of 1929 was rejected. Matrimonial law was unified and secularized after World War II, when the role of the public prosecutor in the divorce procedure simultaneously became noticeable due to the enhancement of inquisitorial elements in the civil procedure. As it was pointed out, the premises for applying for divorce had not changed much since 1964, and a permanent disintegration of the marriage must be proven to obtain a divorce. Moreover, there are situations in which a divorce cannot be declared (the best interest of minor children, so-called rules of socio-economic coexistence, and the lack of consent of the innocent spouse). However, it should be asked what the reasons are to maintain such strict and narrowly cut provisions. Dr. Lucian Bojin (Universitatea de Vest, Timișoara) presented the legal debates over private law in Romania between 1990 and 2009. The paper by Dr. Bojin concerned the same topic that was also discussed by Prof. Manuel

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<sup>12</sup> On the shaping of matrimonial law in the Polish Kingdom ruled by the tsar, cf. (Szymaniec 2016).

Guțan. As the author emphasized, the year 2009, when a new Romanian civil code was adopted, should be considered the real end of the transition period in the development of Romanian private law. Doc. Dr. Vadim Matrov (University of Latvia) in his paper talked about the influence of the EU law on the harmonization of consumer protection law in Latvia. The contribution of Dr. Jakub J. Szczerbowski (SWPS University, Warsaw) regarded to blockchain smart contracts, which are seen by the author as a challenge to the traditional civil law concepts because in the case of these contracts the transfer of assets occurs without any intervention on the part of the judicial system. Mgr. Wojciech Bańczyk (Jagiellonian University) analyzed the institution of payment from a bank savings account in the case of death, which was introduced to the Soviet legal system in 1922, just to encourage people to establish bank accounts, and then transferred to Polish law in 1964. The final paper in the panel was delivered by Mgr. Ewa Radomska (Jagiellonian University), who pointed out the “socialist” features of Polish copyright law.

The next panel, “Comparative Law & Legal Culture”, was of particular importance, mainly because it contained a fruitful discussion on comparative law, the notion of culture, and taxonomy of legal cultures. It was started with my own contribution concerning the reception of Leon Petrażycki’s work in Poland, which was selective before World War II. It is also difficult to talk about its occurrence in the Stalinist period. However, after 1956, the conviction dominated that Petrażycki was an original thinker worth attention, and his thought directly influenced the representatives of the Polish school of sociology of law created by Adam Podgórecki. However, Petrażycki’s theories had no great impact on the “mainstream” legal theory. In my opinion, this fact was caused by the domination of a type of normativism, developed by such scholars as Jerzy Wróblewski, in the Polish legal theory from the late 1950s. The approach offered by normativism was seen by lawyers themselves as a safe harbor, because the formalism associated with it was considered to protect the legal environment from greater political pressure. Dr. Alexandra Mercescu (Universitatea de Vest, Timișoara), in turn, presented her contribution on the notion of culture as seen by comparative law theorists. In her view, any discussion on the existence of a Central and Eastern European legal identity could benefit from the approach provided by these theorists. Dr. Mercescu considered the perspective of the French philosopher François Jullien, as particularly appealing for lawyers interpreting the phenomena of legal cultures. Dr. Rafał Mańko (University of Amsterdam) delivered a paper entitled *Comparative legal taxonomy and the political: A view from Central Europe*. Dr. Mańko provided a critical assessment of legal taxonomy in the comparative law discourse, pointing out two main aspects: firstly, that legal taxonomy is an act of social construction of reality; secondly, that it always contains an element of symbolic violence; thirdly, that it is a disciplining and normalizing device. In the context of Central and Eastern Europe, Dr. Mańko, using a postmodern theoretical apparatus, criticized

the taxonomic approaches according to which our countries should be placed within one of the Western legal families (e.g. Romanic or Germanic), precisely because it disempowers our legal cultures and forces us uncritically to accept legal transfers. In the discussion that followed, Mgr. Marko Bratković raised the issue of “positive legal transfers”. Dr. Mańko explained that he was not against legal transfers as such, but that they should be voluntary and well reflected upon, rather than mechanically adopted, as it often happened. Prof. Manuel Guţan agreed in principle with Dr. Mańko’s approach but argued for a deeper grounding of the paper’s arguments within a broader theoretical framework. Dr. Mercescu, in turn, stressed the need for empowering the region and giving it an equal footing in the international circulation of legal ideas.

The panel “Comparative law & Legal Culture” contained three other contributions. The analysis of the preambles of the constitutions of the Baltic states was presented by Prof. Peeter Järvelaid (University of Tallinn). The paper by Dr. Markéta Štěpáníková and Dr. Terezie Smejkalová (Masaryk University Brno) was entitled *Writing commas in legislative texts, textual interpretation and socialist legal tradition*. The authors showed the manner of comma use in legislative texts can influence their interpretation by courts. They chose the example of the new Czech civil code and the example of a comma before “or” in this particular legal act to demonstrate the ambiguities which can arise and how they are solved by courts. Moreover, the authors tried to explain how the socialist legal tradition influenced the way of interpreting legal texts in the Czech Republic. The contribution of Mgr. Wojciech Zomerski (Centre for Legal Education and Social Theory, University of Wrocław) was devoted to the issue of legal education in Central and Eastern Europe, which is immersed in legal dogmatics.

A highly interesting panel “Legal Reasoning and Legal Interpretation” took place during the last day of the conference. In his paper entitled *Teaching and applying the law in the ex-USSR countries: subsumption vs discretion*, Doc. Dr. Mikhail Antonov (Higher School of Economics, St. Petersburg) challenged the idea that the Soviet legal theory had been characterized by rigid positivism or even by “hyperpositivism”.<sup>13</sup> Doc. Antonov plausibly showed that the Soviet legal theory had in fact been a mixture of positivist and realist elements. The latter made it possible to apply extraordinary measures whenever “interests of the class struggle” or “interests of the construction of communism” required so. Thus, according to this realist viewpoint, effective social regulation could be accomplished through administrative commanding. Moreover, such a dualist legal ideology, composed of formalist and realist features, has endured in Russia until today. Doc. Antonov pointed out that a distinctive feature of the Russian legal culture is perceiving legal rights as binding due to the will of the state. Dr. Paulina Świącicka and

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<sup>13</sup> “Hyperpositivism” is seen by some authors as a feature of the legal culture of the entire Soviet bloc. Cf. (Mańko 2013).

Dr. Marek Stus (Jagiellonian University) presented a paper trying to answer the question whether judicial formalism may be recognized as *differentia specifica* of the Polish post-socialist legal culture. The authors raised legitimate questions about the possible determinants of the prevailing formalist attitude of Polish lawyers and about the features of such an attitude which make it so attractive for the judiciary. Moreover, they looked at the legal education in Poland, aimed at equipping the law students with the knowledge of how to use arguments based on formal rules and standards, as one of the possible sources of such an approach. The same issue was tackled by Dr. Sorina Doroga (Universitatea de Vest, Timișoara) in her contribution entitled *The dynamics of judicial formalism: looking out of the window or walking a two-way street?* Dr. Doroga pointed out that the formalist approach means that judges restrict themselves to the mechanical application of the law rather than using more creative techniques and modes of reasoning. Moreover, the possible dynamics of that approach, caused by the interactions between the national courts and the CJEU or the ECtHR, was also a subject of reflection. Adv. Māris Vainovskis (Eversheds Sutherland Bitans law firm), in turn, presented a contribution concerning the influence of the Latvian Senate case-law on the legal system of this state. The role of supreme courts in Central Europe was the subject of the paper by Mgr. Marko Bratković (University of Zagreb). He pointed out that the pressure from the overcrowded supreme courts caused the limitation of the possibilities of submitting appeals to the supreme courts only to cases which raised issues of general significance. As was emphasized, this tendency has been met with criticism because according to the legal tradition of the region, the function of the supreme courts also consisted of fixing the mistakes of the courts of appeal. Finally, a contribution entitled *Role of the judge in Soviet legal society and in the contemporary judicial system: the shift of the paradigm* was presented by Mgr. Lauris Liepa (COBALT law firm). The author firmly asserted that strict positivism which reduced the role of the judge just to “an automated rule-machine” was a characteristic feature of the socialist legal tradition. According to Mgr. Liepa, after the collapse of the Soviet bloc and the accession to the European Convention on Human Rights by countries in the region, the role of the direct application of legal principles has distinctively increased.

The last panel was devoted mainly to legal history; however, it started with a contribution that was more about the heritage of the ancient legal and political thought and its importance for our time. That was the content of the paper presented by Prof. Dr. Siergiej Koroliiov (Russian Academy of Sciences). Its long title speaks for itself: *Do Plato and Aristotle still have a say in the modern constitutional theory? (a brief analysis of Plato’s “Politeia” and its Aristotelian counterpart at the juncture of legal theory and sociology of law)*. The paper by Doc. Dr. Elīna Grigore-Bāra (University of Latvia), in turn, provided a comparative analysis of the constitutional order of the short-lived Latvian Socialist Soviet Republic (December 1918–January 1920) and the Republic

of Latvia. The author tried to defend the claim that the fall of Peter Stuchka's government was not accidental, but it resulted from the fact that the legal order it tried to establish did not reflect the legal consciousness of the Latvian people. Doc. Grigore-Băra argued that this consciousness was shaped by such historical events as Reformation and the abolition of serfdom in the Baltic provinces in 1816, 1817, and 1819. Polish legal history was the subject of the last two papers during the conference. Mgr. Paweł Dziwiński (Jagiellonian University) analyzed the importance of the Warsaw Confederation Act (*Confoederatio generalis Varsoviae a.d. 1573*) for the Polish and Lithuanian national identities and for the development of religious tolerance in Europe. As was emphasized, the origins of the religious peace confirmed by the Warsaw Confederation could be found in mediaeval privileges for the Jews, the Armenians, and the Ruthenians (e.g. the Statute of Kalisz issued by Bolesław the Pious in 1264) and in the works of the theologians Stanisław of Skarbimierz and Paweł Włodkowic. The contribution by Mgr. Krzysztof Bokwa (Jagiellonian University), entitled "*We stand with You, Your Majesty...*", was devoted to the influence of the Austrian legal tradition on the Polish legal culture. The impact of the Austrian legislation on Polish law after 1918, as well as the influence of Polish lawyers and legal institutions (e.g. *pactum advitalitium*) on the law of the Habsburg monarchy were important subjects of the analysis. The re-assessment of the links between the Austrian and Polish legal cultures leads to the question whether the phenomenon of the "Central European legal identity" is in fact a specific amalgamate of different elements, taken from various legal traditions, of many transfers and transplants which were adopted at various stages of the development of this identity.

The conference showed that discussing the problem of the identities and legal traditions of the countries of Central and Eastern Europe is still very important. However, one can get the impression that the current issues related to constitutional disputes in such countries of the region as Poland and Hungary dominated the conference a bit. I think that the issue of the region's legal culture and identity is worth discussing regardless of current political disputes. This issue should be discussed in a way that avoids stereotypes and clichés. Thus, in my personal view, while analyzing formalism in the "socialist legal culture", we should avoid some oversimplifications. Therefore, Mikhail Antonov is right when he emphasizes that there were differences in this culture from country to country. Moreover, the Soviet legal theory of the 1930s or 1940s was different than that of the 1960s or 1970s. The same seems to be true regarding other countries of the Soviet bloc. A hypothesis could be plausibly made that until the "thaw" in 1956, the concept of the "will of the working class" was a factor weakening the formalism and the positivist character of the prevailing legal theory. At the same time, it was a factor enabling pressure from the Communist party to the system of justice, as well as the legitimization of terror and political trials. It was natural, then, that, after 1956, legal circles fled into formalism which seemed to protect the legal environment against political pressure.

This would explain why, for example, in the Polish legal theory after 1956, hidden or explicit references to normativism were so popular. When this is taken into account, it is easier to understand, for example, the position of the leading Polish specialist in the field of state law, Stefan Rozmaryn, who in 1961, on the one hand, rejected the view that some fundamental constitutional provisions derived their special legal power from non-constitutional sources (no matter if it was e.g. natural law or the will of the ruling class) and, on the other hand, emphasized that all constitutional norms must be comprehensively implemented in ordinary legislation because of their legal nature. According to Rozmaryn, there was no reason to distinguish between the provisions of the constitution which were of legal nature, and those that were only a kind of political “guidelines” for the legislator.<sup>14</sup> It is true that Rozmaryn questioned the idea of the constitutional judiciary,<sup>15</sup> but at the same time he strongly opted for the direct (autonomous) validity and application of constitutional norms, and the independent determination of exceptions to constitutional rights and freedoms by the state, without a constitutional foundation, was unacceptable to him.<sup>16</sup> Thus, the views of this lawyer were undoubtedly formalistic, but at the same time they paved the way to making the constitution a real safeguard of individual rights. Perhaps, then, formalism should be considered a way of defending the legal environment against pressure from the communist authorities, and at the same time a way of preserving professional identity.

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<sup>14</sup> Cf. (Rozmaryn 1961, 146–151). It is worth to add that Rozmaryn (1908–1969) was a leading Marxist lawyer in late 1940s and early 1950s.

<sup>15</sup> Cf. (Rozmaryn 1961, 184).

<sup>16</sup> Cf. (Rozmaryn 1961, 269–278). Rozmaryn was also of opinion that international agreements had legal effects *proprio vigore* in the legal order of the Polish People’s Republic. Cf. (Rozmaryn 1964, 319–332). Needless to say, this view was unusual in the conditions of the Soviet bloc of the 1960s.

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## TOŻSAMOŚĆ PRAWNA EUROPY ŚRODKOWEJ I CENTRALNEJ DOROCZNA KONFERENCJA CEENELS "LEGAL IDENTITIES AND LEGAL TRADITIONS IN CEE"

**Streszczenie.** Artykuł opisuje dyskusje toczące się podczas III konferencji CEENELS zatytułowanej: „Legal Identities and Legal Traditions in CEE”. Otrzymała się ona w dniach 11–13 stycznia 2018 r. na Uniwersytecie Łotwy w Rydze. Główny zagadnienie, które było przedmiotem debat, dotyczyło tego, czy można w ogóle mówić o tożsamości prawnej Europy Środkowej i Wschodniej i czy ewentualnie istnieje jedna, wspólna tożsamość prawna regionu. Autor uważa za trafny pogląd Michaiła Antonowa, że określanie sowieckiej teorii prawa i kultury prawnej jako charakteryzującej się twardego pozytywizmem czy nawet „hiperpozytywizmem” jest uproszczeniem. Ponadto Michaił Antonow słusznie twierdzi, że nie było jednej „socjalistycznej kultury prawnej”, a kultura ta różniła się nieco w poszczególnych państwach dawnego bloku radzieckiego.

**Słowa kluczowe:** CEENELS, tożsamość prawna, kultura prawna, Europa Środkowa i Wschodnia, teoria prawa.