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Critical Legal Theory in Central and Eastern Europe

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CRITICAL LEGAL THEORY IN CENTRAL AND EASTERN EUROPE: IN SEARCH OF METHOD

Abstract. Critical legal theory emerged in the United States in the 1970s, at a time when Central and Eastern Europe belonged to the Soviet bloc and was subject to the system of actually existing socialism. Therefore, the arrival of critical jurisprudence into the region was delayed. In Poland, the first texts on critical and postmodern legal theory began to appear at the end of the 1990s and the beginning of the 2000s. Lech Morawski's monograph, characteristically entitled *What Legal Scholarship Has to Gain from Postmodernism?*, published in 2001, officially inaugurated a broader interest in postmodern legal theory. Adam Sulikowski has been the main representative of critical legal theory in Poland, developing a postmodern theory of constitutionalism. Other sub-fields of postmodern and critical legal theory, gradually developing in Central European jurisprudence, include such areas as law and literature, law and ideology, law and neocolonial theory, as well as feminist jurisprudence. There is a noticeably growing influence of critical sociology and critical discourse analysis which seem to be a promising paradigm for invigorating critical legal theory from an empirical perspective. The concept of "the political", in the sense used by Chantal Mouffe, has been evoked to propose a "political theory of law" conceived as an analysis of the juridical phenomenon through the lens of the political. Recently, it has found its concrete applications in the political theory of judicial decision-making.

Keywords: critical legal theory, the political, law and ideology, Central and Eastern Europe.

Central and Eastern Europe has a specific history which differentiates it from Western Europe: in the 19th century most of the states of the region did not exist, but were dominated by neighbouring empires. Later on, in the 20th century all countries of the region went through the experience of actually existing socialism. These two factors alone have had a great impact upon our legal cultures. First of all, our legal cultures are young ones, as most of the states in the region emerged, in their modern form, in the 19th or 20th century, and others – such as Russia – were deeply transformed by the October Revolution (1917) and the dissolution of the Soviet Union (1991), which effectively broke any continuity with the pre-revolutionary legal culture. In contrast to the United Kingdom, France or

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Germany, we cannot boast a long tradition of legal culture, with subsequent generations of legal scholars emerging from within well established schools of jurisprudence. The story of glossators being succeded by commentators, commentators by the elegant jurisprudence, elegant jurisprudence by the pandctists and so forth – is not ours, for better or for worse.

However, what may seem *prima facie* as a disadvantage can also be turned into an advantage. The relative freshness of our legal communities, including our legal academia, means that especially the young generation of Central and Eastern European jurists is very open to new theoretical trends, even if they come to us 30 or 40 years later than in the West. This is exactly the case with critical legal theory. This strand of jurisprudence emerged in the United States in the mid 1970s and had its heyday in the 1980s. In the 1980s, it became popular in the United Kingdom (Douzinas 2014). But in our region everything came later. Just like the reception of postmodern legal thought into the humanities was delayed, so was – even more – the reception of critical legal theory. Effectively, the first Polish jurisprudential work on law and postmodernism was authored in 1999 by Bartosz Wojciechowski (Wojciechowski 1999), and the doors to postmodernism in legal theory were officially wide-opened only two years later by Lech Morawski in his programmatic monograph-manifesto entitled *What Legal Scholarship Has to Gain from Postmodernism?* (Morawski 2001). The early 2000s brought a whole plethora of writings on the subject, especially by Adam Sulikowski (2006a, 2006b, 2007a, 2007b, 2010a, 2010b), and Sławomir Oliwniak (2004, 2006, 2009, 2010, 2011). However, it was the first of them – Adam Sulikowski – to become the main representative of critical legal theory in Poland, with his ground-breaking works on postmodernism and constitutionalism (Sulikowski 2012a) and jurisprudence and posthumanism (Sulikowski 2013) which have set the trend not only in Polish, but more generally Central European critical legal studies. A symbolic recognition of this role was the organisation of the 30th Critical Legal Conference – the annual gathering of English-speaking crtitical legal scholars – at the University of Wrocław (Zomerski 2016), where Sulikowski is professor of legal theory.

Sub-fields of postmodern and critical legal theory, gradually developing in Central European jurisprudence, include such areas as law and literature (Škop 2011; Škop 2012; Sulikowski 2012b; Mirocha 2013; Klusoňová 2014; Škop 2015; Smejkalová, Škop 2017), law and ideology (Sulikowski 2015; Stambulski 2015; Mańko 2015; Zomerski 2015; Mańko 2016; Gałędek 2017), law and (neo)colonial theory/theories of peripherality (Dębska 2016; Mańko, Škop, Štěpáníková 2016), as well as feminist jurisprudence (Rodak 2014; Dębska 2014; Rodak 2016; Dębska, Warczok 2016; Jedlecka, Helios 2016; Sulikowski 2017). There is a noticeably growing influence of critical sociology (inspired by the legacy of Pierre Bourdieu) and critical discourse analysis (inspired by the works of Norman Fairclough) (Sulikowski 2014) which have been successfully employed especially by Hanna Dębska and Tomasz Warczok and seem to be a promising paradigm for

invigorating critical legal theory from an empirical perspective (Dębska, Warczok 2014; Dębska 2015). Critical discourse analysis has also been recently employed by Wojciech Zomerski (Zomerski 2017). The concept of "the political", in the sense used by Chantal Mouffe, has been evoked to propose a "political theory of law" (Paździora, Stambulski 2014; Sulikowski, Mańko, Łakomy 2018) conceived as an analysis of the juridical phenomenon through the lens of the political. Recently, it has found its concrete applications in the political theory of judicial decision-making (Mańko 2018a; Mańko 2018b). Finally, one should mention a special form of critical legal studies, based on an empirically grounded realist jurisprudence, advanced by Paweł Chmielnicki and a group of researchers following him (Chmielnicki 2015). Chmielnicki's method – situated at the interstices of legal theory and socio-legal studies – is based on analysing the empirically verifiable interests involved in legislative and judicial legal developments, which often leads to questioning the official narrative about the beneficiaries of legal innovations (for instance, a piece of legislation is presented as benefiting consumers, whereas in fact it benefits mainly the banking sector) (Chmielnicki 2014a; Chmielnicki 2014b).

In this context, the present special issue has the ambition of contributing to the further development of critical legal theory of a specific, Central and Eastern European strand, paying attention to the characteristic features of the legal life of our region. The nine papers in this volume can be divided into four distinct groups, addressing issues of our *current predicament* and its methodological implications (papers by Cercel, Tacik and Mercescu); questions of Central and Eastern European *legal identity* (paper by myself and by Nazmutdinov); *theoretical and philosophical issues* particularly in the contemporary Central and Eastern European context (papers by Fusco and Reid); and finally, questions of *law and ideology* in Central and Eastern Europe analysed through the lens of case studies from various areas of positive law (papers by Kuźmicka-Sulikowska and Rudt). The main question that we want to address is the methodology of critical legal theory as applied to the specific context of Central and Eastern Europe, although the focus of the papers is broader, and some of them already make a tentantive application of critical legal methods to the black-letter law of the region.

In the first paper, entitled 'The Destruction of Legal Reason: Lessons from the Past', Cosmin Cercel (University of Nottingham) addresses the analogies between our present predicament in Central and Eastern Europe to that of the 1930s, viewing the issue from the perspective of jurisprudence. In particular, Cercel argues that there are meaningful analogies between the emergence of post-WWI legal liberalism and the post-1989 legal neoliberalism. Furthermore, he thinks that the roots of the present crisis of legality lie in the liberal legality itself, which merged capitalism, 'rule of law' and parliamentary democracy into one complex, conceptually dependent on the 'markets'. Once the crisis of capitalism unveiled the Real of the markets, the Symbolic order of the juridical started cracking. In

this context, Cercel argues that the re-emegence of sovereignty and identitarian ideologies in Central and Eastern Europe is not necessarily a regression to a pre-modern form of legality, but simply a return to the core of liberal legality itself.

In the second paper, entitled 'A New Popular Front, or, on the Role of Critical Jurisprudence under Neo-Authoritarianism in Central-Eastern Europe', Kraków-based philosopher and jurist Przemysław Tacik (Jagiellonian University) addresses the vexed question of the approach of critical jurisprudence towards populism. He argues that critical jurisprudence 'must clearly draw the line between its approach and the manipulative, rightist and nationalist misuse of its heritage', admitting however that '[i]t is not easy to find the correct side of the antagonism'. Nonetheless, in his view 'the Crits must recognise that they belong to the camp of the Enlightenment, together with liberals' and therefore they 'should join the liberal side in defending fundamental values and post-Enlightenment legacy in a kind of tactical popular front'. Tacik's contribution is extremely topical, although I consider that one should not forget about the tensions between liberalism and democracy, highlighted by Mouffe and Laclau already in the 1980s (Laclau, Mouffe 1985). Critical legal theory's committment to authentic, agonistic democracy, means that within the phenomena referred to as instantiations of 'populism' one needs to make a distinction between form and content. In this context, the critique waged by populists against the unrepresentative character of ossified, proceduralised liberal democracy, coupled with the government of judges effectively filling what should be the 'empty place' carries some value. Therefore, as Mouffe rightly points out, the current wave of populism can also be seen as a chance (Mouffe 2018, 84–85).

In the third paper, entitled 'What Kind of Critique for Central and Eastern European Legal Studies? Comparative Law as One of the Answers' Romanian comparatist-at-law Alexandra Mercescu (West University of Timişoara) addresses fundamental questions of legal methodology, arguing that critical comparative law can be an interesting contribution in this respect. In my view, Mercescu's argument is particularly relevant in the context of social and economic antagonisms which are solved in so many different ways in different jurisdictions, to name but the examples of reproduction rights, access to marriage, tenant protection, or workers' participation in the managing of capitalist enterprises (*Mitbestimmung*). I fully agree that comparative analyses, both within the Central European region and outside of it could point to more progressive solutions, which could be a tangible basis for formulating a constructive critique of the positive law.

The second group of papers, comprising a paper written by myself and a second one by Bulat Nazmutdinov is concerned with the legal identity of Central and Eastern Europe. In my paper entitled 'Delimiting Central Europe as a Juridical Space: A Preliminary Exercise in Critical Legal Geography' I aim at contributing to the on-going discussion, both in legal theory and in comparative law, concerning the status of Central Europe and its delimitation from other legal

regions in Europe, notably Romano-Germanic Western Europe but also Eastern Europe and Eurasia. The paper adopts the methodological perspective of critical legal geography, understood as a strand of critical jurisprudence laying at the interstices of spatial justice studies, critical geography, comparative law, sociology of law and legal history. The paper proceeds by identifying the notion of Central Europe with reference to a specific list of countries, then proposes six criteria allowing to identify the region's unique legal identity. These include: 1) the dynamic of legal transfers; 2) institutional continuity; 3) legal continuity; 4) legal style; 5) legal ideology; 6) the social role of law. Following that, the paper applies those criteria to the region and enquires as to whether Central Europe should be deemed to be a 'legal family', a 'legal union' or simply a 'legal space' or 'space of legal culture'. In conclusion, I propose to take steps towards building a Central European legal identity which, in turn, could help to combat the region's juridical peripherality and redeploy the energy of the region's legal communities from adapting to the constant influx of foreign legal transfers towards the innovative elaboration of original legal institutions, suited to the needs of Central Europe.

Questions of legal geography are also raised in the fifth paper, authored by Bulat Nazmutdinov, a legal theorist from the Higher School of Economics in Moscow. In his contribution, entitled 'Critical Dimensions of the "Legal Culture" Approach: the Case of Classical Eurasianism and Eurasia's Legal Union', he refers to the writings of classical Eurasianists of the 1930s to address the legal identity of the region. He admits, however, that Eurasianism is a typically modernist narrative, based on essentialist assumptions. Nonetheless, he believes it could be usefully deployed towards the construction of a culturalist jurisprudence in our post-modern era.

The following two papers address topics of a general theoretical and philosophical interest which, however, are particularly relevant given Central Europe's present predicament. The paper written by Gian Giacomo Fusco, an Italian philosopher and jurist based at the University of Kent, is entitled 'Ademia: Agamben and the idea of people'. Fusco's intervention is topical in the context of the rise of populism in Central Europe and the reinvigoration of Schmittian friend/enemy distinctions. The concept of 'ademia', used in the title of the paper, is taken from Giorgio Agamben and means 'absence of a people' (from the Greek *a-* and *demos*, a negation of the 'demos'). As Fusco points out, ademia is a constitutive element of the modern state according to Agamben. In his paper, Fusco analyses the concept of ademia and its theoretical unfolding, as well as reconsiders it in the context of different interpretations of the idea of the demos, especially those of Rousseau and Schmitt. He argues that the notion of ademia can be of assistance in comprehending the paradoxical nature of the uses of the idea of the people in contemporary political discourse. Fusco concludes by stating that 'in light of what has been done in name of the people and the resurgence of fascio-populist sentiments, the challenge for contemporary political imagination, is not to question

the validity of the political category of the "people"; perhaps the time has come for thinking a politics completely detached from any idea of the people.' This finding seems to be very relevant in today's Central and Eastern European context, where populist discourse is reviving ethnonationalist forms of identity and reinvigorating Schmittian lines of division into friends (members of the ethnonationalist and sectarian community) and enemies (all those who are not in that community). The dangers of this discourse and its possibly tragic consequences are all too well known from legal and political history.

The paper by Julian Reid, a British political scientist based at the University of Lapland (Finland), addresses questions of ideological narratives concerning poverty with particular reference to the situation in Central and Eastern Europe. Reid's paper shows the different ways in which the poor are being put to work, in defence of a global neoliberal order by international economic institutions concerned with constructing them as so-called 'resilient' subjects. In his view, this predicament of the poor is particularly vexed in Eastern Europe where strategies of resilience are fast developing, and critical legal theory has so far offered little resistance to this trend. The article considers how one might reimagine poverty and conceive its politics beyond and against clichéd images of the poor as 'resilient' subjects.

The last two papers are case studies on law and ideology. The first one, written by private lawyer Joanna Kuźmicka-Sulikowska (University of Wrocław) focuses on 'The Politics of Limitation of Claims in Poland: Post-Communist Ideology, Neoliberalism and the Plight of Uninformed Debtors'. The object of Kuźmicka-Sulikowska's case study is a rather technical rule of the Polish Civil Code concerning the statute of limitations (prescription of claims) and, more specifically, whether courts may apply limitation on their own motion, or only upon request of one of the parties. Heeding to Duncan Kennedy's claim that there is always something political in the allegedly 'merely technical' rules of private law, Kuźmicka-Sulikowska tells the story of the ideological and social stakes behind the recent changes of the legislation concerning the statute of limitations. The Central European context of rejecting, after 1989, everything that is socialist, has played an important role in the developments, just as the populist tendencies of more recent pedigree.

The last paper in this special issue, written by Yulia Rudt from the Novosibirsk University of Technology, is concerned with 'Ideology in Modern Russian Constitutional Practice'. Rudt analyses the case-law of the Russian Constitutional Court from a law and ideology research perspective. In her view, the Court 'relies on ideologies of formalism and rationalism as adapted to the current economic, political and social development in Russia' as well as 'follows the idea around one truth in constitutional cases with the presumption that this truth is included in the axiomatically legitimate aim of legislators of Russia', i.e. follows the ideology of objectivism in legal interpretation (cf. Rodak, Żak 2015). Nonetheless, she also

notes a partial reception of Western constitutional doctrines, such as the principle of proportionality or the balancing of public and private interests.

* * *

I hope that the present special issue will constitute a further step in the development of critical legal theory in Central and Eastern Europe, following two special issues of journals (special issue of *Archiwum Filozofii Prawa i Filozofii Społecznej* volume 8 issue 1 of 2014, edited by Paweł Skuczyński, devoted to law and critical theory; special issue of the *Wroclaw Review of Law, Administration and Economics*, volume 5 issue 1 of 2015, edited by Michał Stambulski and myself, devoted to law and ideology), as well as two edited volumes (Mańko, Cercel, Sulikowski 2016; Bieś-Srokosz, Mańko, Srokosz 2019). As critical legal scholars, we need to take Central European specificities very seriously and, at the same time, we should be aware of the risks of applying and propagating critical legal tools, which are, as it is well known, sometimes abused by the populists (Zomerski 2018, 101). This does not mean that we should suspend or repress the development of critical legal theory in Central and Eastern Europe. To the contrary, we should take stock of the moment and work towards adapting the critical legal *instrumentarium* to the needs of the time and place. The current crisis of neoliberal legality creates a unique opportunity that we must definitely utilise to our advantage.

BIBLIOGRAPHY

Bieś-Srokosz, Paulina. Rafał Mańko. Jacek Srokosz. Eds. 2019. *Law, Space and the Political: An East-West Perspective*. Częstochowa: Podobiński Publishing House.

Chmielnicki, Paweł. 2014a. "Źródła i efektywność regulacji dotyczących nabycia lokalu lub domu od dewelopera. Ocena wstępna". *Przegląd Prawa Publicznego* 7/8: 141–156.

Chmielnicki, Paweł. 2014b. *Nabycie lokalu lub domu od dewelopera. Wykładnia przepisów i efekty ich stosowania*. Warszawa: Difin.

Chmielnicki, Paweł. 2015. "The Research Method of Association for the Research on Sources and Functions of Law". *Przegląd Prawa Publicznego* 3: 95–105.

Dębska, Hanna. 2014. "Płeć i władza. Kobiety w Trybunale Konstytucyjnym". *Studia Podlaskie* 22: 91–111.

Dębska, Hanna. 2015. *Władza, symbol, prawo. Społeczne tworzenie Trybunału Konstytucyjnego*. Warszawa: Wydawnictwo Sejmowe.

Dębska, Hanna. 2016a. "Prawo jako pole (ujęcie modelowe)". *Państwo i Prawo* 9: 36–53.

Dębska, Hanna. 2016b. "Strategia wielopozycyjności w półperyferyjnym polu prawnym. Homo academicus na rynku". In *Polska jako peryferie*. 221–240. Edited by Tomasz Zarycki. Warszawa: Scholar.

Dębska, Hanna. Tomasz Warczok. 2014. "Sacred Law and Profane Politics. The Symbolic Construction of the Constitutional Tribunal". *Polish Sociological Review* 4: 465–478.

Dębska, Hanna. Tomasz Warczok. 2016. "The Social Construction of Feminity in the Discourse of the Polish Constitutional Court". In *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*. 106–30. Edited by Rafał Mańko, Cosmin Cercel, Adam Sulikowski. Oxford: Counterpress.

Douzinas, Costas. 2014. "A Short History of the British Critical Legal Conference or, the Responsibility of the Critic". *Law and Critique* 25(2): 187–198.

Gałędek, Michał. 2017. "Juridification as an Ideology of Polizeiwissenschaft in 18th Century". *Journal on European History of Law* 8(1): 76–84.

Jedlecka, Wioletta. Joanna Helios. 2016. *Wpływ feminizmu na sytuację społeczno-prawną kobiet*. Wrocław: Prawnicza i Ekonomiczna Biblioteka Cyfrowa.

Kennedy, Duncan. 2001. "The Political Stakes in 'Merely Technical' Issues of Contract Law". *European Review of Private Law* 1: 7–28.

Klusoňová, Marketa. 2014. "Is Hamlet a Scandinavian Crime Fiction?" *Wroclaw Review of Law, Administration & Economics* 5(1): 104–118.

Laclau, Ernesto. Chantal Mouffe. 1985. *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*. London-New York: Verso.

Mańko, Rafał. 2015. "Reality is for Those who Cannot Sustain the Dream: Fantasies of Selfhood in Legal Texts". *Wroclaw Review of Law, Administration and Economics* 5(1): 24–47.

Mańko, Rafał. 2016. "Ideology and Legal Interpretation: Some Theoretical Considerations". In *Constitutional Values in Contemporary Legal Space*. Vol. 1. 121–123. Edited by Kalvis Torgans. Riga: University of Latvia Press.

Mańko, Rafał. 2018a. *W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego.

Mańko, Rafał. 2018b. "Orzekanie w polu polityczności". *Filozofia Publiczna i Edukacja Demokratyczna* 7(1): 65–95.

Mańko, Rafał. Cosmin Cercel. Adam Sulikowski. Eds. 2016. *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*. Oxford: Counterpress.

Mańko, Rafał. Martin Škop. Markéta Štěpáníková. 2016. "Carving out Central Europe as a Space of Legal Culture: A Way Out of Peripherality?" *Wroclaw Review of Law, Administration and Economics* 6(2): 3–28.

Mirocha, Łukasz. 2013. "Law and literature jako niedoceniony nurt jurysprudencji". *Societas et Ius* 1(2): 82–97.

Morawski, Lech. 2001. *Co może dać nauce prawa postmodernizm?* Toruń: TNOiK.

Mouffe, Chantal. 2018. *For a Left Populism*. London–New York: Verso.

Oliwniak, Sławomir. 2003a. "Transgresja, dyskurs, prawo w ujęciu Michela Foucaulta". In *Filozofia prawa wobec globalizmu*. 207–221. Edited by Jerzy Stelmach. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Oliwniak, Sławomir. 2003b. "Michel Foucault a potrzeba nauczania filozofii prawa". In *Filozofia prawa w życiu i nauczaniu*. 68–84. Edited by Maria Szyszkowska. Białystok: Temida2.

Oliwniak, Sławomir. 2006. "Etyka siebie. Dokończony projekt oświecenia Michela Foucaulta". In *Człowiek wobec systemów wartości*. 44–55. Edited by Tomasz Kozłowski, Karol Kuźmicz. Białystok: Temida2.

Oliwniak, Sławomir. 2009. "Biopolitics and the Rule of Law". *Studies in Logic, Grammar and Rhetoric* 32: 33–48.

Oliwniak, Sławomir. 2010. "Giorgio Agamben: biopolityka i 'pusta' forma prawa". In *Dyskrecjonalność w prawie*. 540–549. Edited by Wiesław Staśkiewicz, Tomasz Stawecki. Warszawa: LexisNexis.

Oliwniak, Sławomir. 2011. "Foucault and Agamben: Law As Inclusive/Exclusive Discourse". *Studies in Logic, Grammar and Rhetoric* 39: 49–62.

Paździora, Michał. Michał Stambulski. 2014. "Co może dać nauce prawa polityczność? Przyczynek do dalszych badań". *Archiwum Filozofii Prawa i Filozofii Społecznej* 8(1): 55–66.

Rodak, Lidia. 2014. "Are we all feminists now? Wyzwania ze strony Feministycznej Jurysprudencji wobec tradycyjnej teorii prawa". *Archiwum Filozofii Prawa i Filozofii Społecznej* 8(1): 67–76.

Rodak, Lidia. 2016. "Structural Violence and Its Gender Dimension in Polish Law". In *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*. 131–53. Edited by Rafał Mańko, Cosmin Cercel, Adam Sulikowski. Oxford: Counterpress.

Rodak, Lidia. Piotr Żak. 2015. "Justice and Objectivity as Balancing Principles". *Wroclaw Review of Law, Administration and Economics* 5(1): 79–94.

Škop, Martin. 2011. "Milan Kundera and Franz Kafka – How Not to Forget Everydayness". *Creative and Knowledge Society* 1(2): 110–119.

Škop, Martin. 2012. "Pluralism of Values in Contemporary Law and Possibility of Their Cognition". *Przegląd Prawa i Administracji* 90: 109–117.

Škop, Martin. 2015. "Law and Literature a Meaningful Connection". *Filozofia Publiczna i Edukacja Demokratyczna* 4(1): 6–20.

Smejkalová, Terezie. Martin Škop. 2017. "A Concept of a Reader in Legislation Drafting". In: *Argumentation 2017*. 51–69. Edited by Markéta Štěpáníková, Michal Malaník, Monika Hanych, Martin Škop. Brno: Masaryk University.

Stambulski, Michał. 2015. "The Critique of Ideological Legal Reason". *Wroclaw Review of Law, Administration and Economics* 5(1): 48–60.

Sulikowski, Adam. 2006a. "Nowoczesność i ponowoczesność w pojmowaniu prawa". *Zeszyty Naukowe Wałbrzyskiej Wyższej Szkoły Zarządzania i Przedsiębiorczości* 2: 119–127.

Sulikowski, Adam. 2006b. "O ponowoczesnej teorii prawa". In *W poszukiwaniu podstaw prawa*. 243–258. Edited by Adam Sulikowski. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Sulikowski, Adam. 2007a. "Poststrukturalistyczne pojmowanie prawa w myśli M. Foucaulta". *Zeszyty Naukowe Wałbrzyskiej Wyższej Szkoły Zarządzania i Przedsiębiorczości* 1: 174–182.

Sulikowski, Adam. 2007b. "Derridiańska koncepcja prawa". *Zeszyty Naukowe Wałbrzyskiej Wyższej Szkoły Zarządzania i Przedsiębiorczości* 1: 166–173.

Sulikowski, Adam. 2010a. "O możliwościach postmodernizacji nauki prawa konstytucyjnego". *Państwo i Prawo* 12: 3–16.

Sulikowski, Adam. 2010b. "Opresywność pozytywizmu prawnego i jego postmodernistyczna krytyka". In *Pozytywizm prawniczy i szkoła prawa natury – tradycje sporu i jego współczesne implikacje*. 28–35. Edited by Przemyław Kaczmarek, Łukasz Machaj. Wrocław: Prawnicza i Ekonomiczna Biblioteka Cyfrowa.

Sulikowski, Adam. 2012a. *Konstytucjonalizm a nowoczesność: dyskurs konstytucyjny wobec tryumfu i kryzysu moderny*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Sulikowski, Adam. 2012b. "Literary Fiction in Legal Dogmatics in Continental European Constitutional Law". *Acta Universitatis Brunensis. Iuridica* 432: 45–52.

Sulikowski, Adam. 2013. *Posthumanizm a prawoznawstwo*. Opole: Wydawnictwo Uniwersytetu Opolskiego.

Sulikowski, Adam. 2014. "Perspektywy zastosowań metod Krytycznej Analizy Dyskursu w badaniach nad prawem. Kilka uwag". *Studia Erasmiana Wratislawiensia* 8: 99–111.

Sulikowski, Adam. 2015. "Prawa a ideologia: prawa jednostki z perspektywy krytycznej myśli prawniczej i społecznej (wybrane zagadnienia)". *Roczniki Nauk Społecznych* 4: 17–32.

Sulikowski, Adam. 2017. "Prawo i płeć: kilka uwag o potencjale krytycznym feministycznej jurysprudencji". *Wrocławsko-Lwowskie Zeszyty Prawnicze* 8: 85–101.

Sulikowski, Adam. Rafał Mańko. Jakub Łakomy. 2018. "Polityczność prawa i ogólnej refleksji nad prawem: wprowadzenie". *Archiwum Filozofii Prawa i Filozofii Społecznej* 3: 5–9.

Wojciechowski, Bartosz. 2019. “Dekonstrukcja między prawem a sprawiedliwością”. In *Zmiany społeczne a zmiany w prawie*. 305–315. Edited by Leszek Leszczyński. Lublin: UMCS.

Zomerski, Wojciech. 2015. “Ideology in Modern Times: Three Ideological Lies Behind Universal Human Rights”. *Wroclaw Review of Law, Administration and Economics* 5(1): 119–127.

Zomerski, Wojciech. 2016. “Conference report: 1st International Conference of the Central European Network of Legal Scholars (CENELS) on ‘25 Years After the Transformation: Law and Legal Culture in Central and Eastern Europe. Between Continuity and Discontinuity’, Masaryk University, Brno, Czech Republic, 16–17 April 2015”. *Wroclaw Review of Law, Administration and Economics* 4(2): 103–108.

Zomerski, Wojciech. 2017. “Krytyczna analiza dyskursu sądowego dotyczącego prawnej sytuacji osób homoseksualnych w świetle art. 18 Konstytucji RP”. *Archiwum Filozofii Prawa i Filozofii Społecznej* 2: 80–97.

Zomerski, Wojciech. 2018. “Czy Europie Środkowej potrzebna jest krytyczna teoria prawa? (artykuł recenzyjny)”. *Państwo i Prawo* 9: 95–108.

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THE DESTRUCTION OF LEGAL REASON: LESSONS FROM THE PAST

Abstract. The legal predicament of today in Europe and beyond takes the form of a devaluation of the meaning of legality, constitutionality and, of the rule of law. What we are dealing with is yet another crisis of both the tradition of the *Rechtsstaat* in continental setting and, more broadly, of liberal legality. While this disruption within the sphere of the law seems to mirror the reshuffling in established politics that took place over the last twenty years, it traces back to central jurisprudential questions that have made the substance of crucial debates during the interwar and have fashioned both the field of constitutional theory of the continent and our jurisprudential apparatus for approaching the nexus between law and politics.

In this article I argue that the apparent uchronia that the current status of the law opens in relation to past theoretical questions that were seeking to ground legality, is neither a simple by-product of a *Zeigeist* oversaturated by appeals to procedural democracy or for returns to sovereign power, nor a mere regression to past juridico-political settings. It is a historical development that has been dormant for the past decades, yet has slowly undermined legal thought and praxis. Revisiting, as a matter of historical and jurisprudential inquiry, the context and the content of this original opposition between liberal legality and its enemy, is a way of understanding what constructs our own contemporary situation.

Keywords: authoritarianism, interwar, legal history, legal theory, liberal legality, rule of law.

1. LAW, THEORY AND THE RISE OF AUTHORITARIANISM

Eugène Ionesco's play *Rhinoceros* (Ionesco 1959) offers a convenient starting point for the reflection I intend to develop here. Wrote in 1959 and staged in the same year, the highly acclaimed play was often read – and this with the support of the author (Ionesco 1966, 277–278) – as an allegory of the rise of fascism. Set up in a small French village, it tells the story of a sudden contagion of *rhinoceritis* – a disease that strangely turns all the inhabitants save the main character into rhinoceros. Two recurring themes are of central importance for my argument: the transformation is doubled by an ominous thumping of marching rhinoceros, and all the characters – save from the main one – speak in clichés.

I argue that in many respects this is the position of the legal theoretical field today – that is, hesitating between giving way to the sound of rhinoceros and

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finding an apparent solace in the performance of rituals, clichés and platitudes. Let us unpack this metaphor further with the help of Lacanian psychoanalysis. Whereas the thumping of the rhinoceros stands for a signal of the Real (Lacan 1974, 93; Žižek 2002), that is of what cannot be symbolised as such and therefore disrupts the symbolic order, the recurrent production of clichés is a form of the *disque-ourcourant*,[1] the failure of the symbolic to ground itself (Lacan 1975, 35). These positions are supporting each other, and it is worth noting that in Ionesco's play it is those who are afflicted by *rhinoceritis* that use clichés, as if that would enable one to do away with the brutal presence of the animals. The legal theoretical field's reaction to the rise of authoritarianism seems somehow to follow the same line, being caught between a constant disavowal of the unbearable materiality of politics and an indistinct attempt at articulating a meaning of the current crisis. It is thus high time that we ask ourselves how are we in the field of law able to discern, let alone understand, the overtones of what lies outside of the law, at its borders and nonetheless structures it?

The question is how are we as critical lawyers in Central and Eastern Europe to address the present of looming catastrophes? While at the surface the situation appears to be desperate (Tacik 2019), the existing structures of the law are still there to offer some comfort by their seemingly timeless 'monumental' (Felman 2002, 203) existence. To be sure, there was during the last years a level of disruption forcing the venerable tenets of the law to disclose their structure and to ask fundamental questions related to the nature of our polities in the West and beyond. Even adepts of the doctrinal canon would be able to point to at least the technicalities of *Miller* cases,[2] the limitations and special measures entailed by the state of emergency in France,[3] President Trump's executive orders,[4] and agree that they are something out of the ordinary in the humdrum life of law. Yet, in a sense, the situation is not serious. With very few exceptions, the liberal constitutions of the good old times are still in force with both their ideological content as well as symbolic value. Even the Treaty of Lisbon is unscathed positive law! Save for the content of electoral politics everything seems to be in its place, and, in a continuation of the Apollonian dream of the "end of history", there are still voices preaching the resilience of democratic institutions and law and their capacity of containing disaster. As Gábor Halmai writes, "liberalism is … a constitutive precondition for democracy, which provides for the rule of law, checks and balances, and guaranteed fundamental rights" (Halmai 2019, 311).

Against this position I claim there should be little comfort in the very existence of the law as such with both its conceptual content and its intellectual

[1] For Lacan, the common discourse in which the subject is entangled, is turns in circle as a disk, in constant ignorance of the unconscious and the Real.

[2] *Miller 1*; *Miller 2*.

[3] Decree 1475/2015; Statute 1501/2015.

[4] Proclamation 9844/2019.

history. Looked at from this perspective the situation is both serious and desperate. The conceptual body of law continue to entertain – and, as a consequence, is able to re-enact – a historical link with the anti-democratic projects of the past century. Even if explored and documented on various instances (Joerges, Ghaleigh 2003; Fraser 2005; Skinner 2015; Cercel 2017; Skinner 2019a), this nexus is obscured both by an ideological apparatus nested within the field of legal theory and by the continuous devaluation of legal thought.

Let us be more specific about the salient features of the status of law and legal thought today in order to understand the destitution befalling the legal enterprise. On one hand, what we are facing is of a struggle between the various discourses and grammars of addressing the on-going movements in the realm of social reality – be they of economical or political nature, while on the other hand we are witnessing an inner crisis of the jurisprudential enterprise. Viewed from the outside, this can be understood as a form of radical irritation (Luhmann 2004, 366–367), in which the law recedes at the pressure of politics and economics to the point of losing its internal coherence. Yet, within the spheres of law's self-representation, the legal orthodoxy continues its squabbles over definitional strategies and conceptual clarifications seemingly divining the sphere of legality (Harel 2014, 107–129) and continuing to instil the faith in the law (Goodrich 1983, 255; Mańko 2013).

We are living thus at least two quite distinct dynamics, which both expose and found our legal present. The fact that legality, understood here as a both jurisprudential and philosophical category articulating what counts as lawful, is in crisis is not something entirely new. The neoliberal turn in the 1970s (Dardot, Laval 2013, 16–17) and the reconstruction of the state along the new lines in political theory and practice have left a visible trace on the ways of approaching law as a form of social regulation. The old paradigms of a pyramidal production of legislation with the state in its centre have left their place to multi-layered, horizontal (Ost, Van de Kerchove 2002), even rhizomatic (Philippopoulos-Mihalopoulos 2016) models of law in society. Legal pluralism, law-in-context, the rise of sociological, empirical-evidenced, or policy-oriented analysis of law have seemingly sapped even more the tenets of the jurisprudential enterprise and have significantly undermined its pretence at constructing an overarching theory of law. Despite these movements, or perhaps in strong connection to them, the legal canon survived and grew stronger. The position of the lawyer nowadays is thus that one of typical 'fetishist disavowal' (Žižek 1993, 88 ; Žižek 2001, 89). It takes a form that can easily be articulated along the following lines: "I know very well that the law is not grounded in its own self-reference, that the legal field is not easy to delineate, yet as a matter of legal practice I act as if it is".

At the antipodes, the rebellion of the CLS with its insistence on law-as-politics (Unger 1986) surrendered its critical thrust long time ago. The revolution was betrayed or simply quelled (Fraser 1987). For their part, the various attempts of

the critical field in displacing both hierarchies and the 'sublime object' (Žižek 2008, 12–14) of the law are constantly losing ground. The critical legal multitude seems to be caught up in a theoretical war of attrition against the established canon, one which lasts for more than three decades now and which witnessed very limited progress on any front. Its relentless opposition to the mainstream spheres of ideological production, has yet left unscathed 'that which is "rotten" in the law' (Derrida 1991, 95). Positing itself on the side of the non-knowledge and professing an uneasy attack on the knowledge of the Master (Lacan, 1991 [1970], 159) the critical field runs the serious risk to turn into a continuous celebration of transgression, which by its very structure keeps us closer to the established powers of the legal field. As Joan Copjec aptly noted, 'laws are made to be broken, prohibitions to be transgressed, but through its very violability the law binds us closer to it' (Copjec 1991, 29).

To put it simply, we have reached a point where not only the object of the legal enterprise had become obscure in a determinant manner, but it appears that the operation of the law itself attained a level of obscurity that makes it impenetrable to theorisation (Douzinas 2014, 190). In the light of the unfolding catastrophe, law simply *is*. If this theoretical *cul de sac* would be limited to the confines of the ivory towers of jurisprudence, perhaps the situation would not be serious. However under the strain of the present, we are compelled to rethink both the tenets of our theoretical standing as well as the nature of our engagement, be it simply because legal theory is still, rightly or wrongly, the site where our most basic tenets of articulating the meaning of law are forged.

Before moving forward on this path it would be useful to take further the measure of the changes that have befallen the existing body of law in our polities during the last decades in order to understand the structural imbalance at the core of legality. At a first glance, such changes seem to mirror the inconsistencies in legal thought, albeit in a rather cruder manner, that signals law's inscription in the contemporary capitalist flux (Hunt 1985, 15). As such, at the level of private law, we have been witnessing a shift from the imagined autonomous subject entering contracts out of his (most often than her) own volition, to a new and somewhat obscure stand, that of the *consumer* which is protected and enabled by the law in this economic position (Mańko 2015, 42–43). In criminal law there is an on-going shift from traditional categories of crime based on the both act and intent towards new forms broadening the scope of notions such as intent and bordering dangerously to status as to give way to the prevention of criminal conduct (Asp 2013; Dyzenhaus 2013). Fundamental rights and criminal legislation have always had an uneasy interaction, but the emergence of anti-terrorist legislation from the 1970s onwards had made it all the more ambiguous (Dyzenhaus 2013; Sajó, Uitz 2017, 440–444; Skinner 2019b; Skinner 2011).

For its part, public law principles are not only encroached by private/public mixed concepts (Hesselink 2002), but also the very position of the state

becomes obscured under these arrangements. Last, and certainly not least, the sphere of constitutional law emerged as both the most sensitive to the recent authoritarian onslaught and embarked on an unprecedented dialogue with political science in a seemingly failed attempt to make sense of the rise of populism. Yet, symptomatically, before lending itself to the wild goose chase of 'populism' (Müller 2016, 19–20) constitutional law was precisely the laboratory where classical concepts of sovereignty, citizenship and belonging were recast in a global and transnational mould (Weiler, Wind 2003; Rosenfeld 2010).

Furthermore, the traditional early modern systematisation of law through codes, has shifted to a myriad of legislations of various forms and forces which are both theoretically and practically hard to subsume to a set of principles and rules. In a Foucauldian turn, the decapitated sovereign body returned as manifold continual haunting, where the law seemingly dissolved in a sea of regulations, and norms have replaced juridical artefacts. As it has been noted at the zenith of this historical trajectory, 'law is no longer valid as an expression of a general will or common interest. Rather, it is valid by virtue of its normative quality' (Ewald 1990, 155). Reality is in flux, and a continual state of exception has insinuated itself as a new rule (Agamben 2005), laying down the new laws of a dystopian legal universe of texts without normative content and with norms without texts.

2. A GENEALOGY OF THE PRESENT

In Central and Eastern Europe, one would have expected lawyers to have a more sensitive ear to the sound of rhinoceros, if the protection of the normative liberal promise was indeed on their agenda. Yet, from the very beginning of the post-communist transformation, the intermingling between law and politics was worrying (Teitel 2002, 13–19) and startling in so many respects that it should have at least raised serious doubts about what the upholding of legality was able to mean in the forthcoming future (Cercel 2017, 2–5). For instance, the privileged frame of reading the communist legacy under the seal of lawlessness and a constant conflation of the communist experience with other authoritarianisms under a lax interpretation of totalitarianism (Arendt 1985 [1951]; Losurdo 2015 [1996], 26; Traverso 2019, 181–182), was at least indicative of the political roots of the emerging constitutionalism in Central and Eastern Europe. Under the waves of enthusiasm fuelled by the 'sacrificial violence' (Girard 1977) of the tyrannical past, both theoretical and memorial concerns over the process of dealing with the past were easily side-lined. Indeed, not only the legal theoretical antinomies highlighted by attempts of retrospective and restorative justice (Hart 1958; Fuller 1958; Fraser 2011) were left outside the scope of public and academic debates, but also the very post-war consensus over right-wing authoritarian past was put into question (Stone 2014). This process was celebrated as nothing short than a return

to normality (Krygier 1990, 635). As it has been written, in the wake of the fall of the Berlin wall: '[n]ormality has been absent from east central Europe for a very long time. One of its elements is the role played by law' (Krygier 1990, 638).

As it was unravelled by further developments in transitional constitutionalism, normality was nothing short than a particular arrangement between economic liberal values and rule of law, that is 'liberal democratic politics, capitalist economics, both undergirded by the rule of law' (Czarnota, Krygier, Sadurski 2005, 1). And yes, *normality* was what we called the neoliberal onslaught on both social rights and traditional forms of legality (Sadurski 2005, 9). One could thus easily speculate to each extent behind the pledges to uphold a particular version of legality, schmittian echoes were to be heard, insofar as 'for a legal order to make sense, a normal situation must exist and he is sovereign who decides whether this normal situation actually exists' (Schmitt 1985 [1922], 13).

Be it as it may, thrown into the world of freedom and capital accumulation, being on the frontline of the ideological offensive that conflated economical, moral and legal categories (Cercel 2017, 203–205), our polities have soon gave way to the latent ex-timate[5] (Lacan 1966, 524) of the (neo)liberal order. The law was there to comfort this change, be it by the very processes of transitional justice, constitutional reform, or by the reconstruction of its own social guarantees. It was also there all the way, even through its absence and through arbitrary application, by complacently effacing or suspending itself through the constant 'management of illegalisms' (Foucault 1975, 98–106) or by strategically inscribing itself as *force* in protecting the very economical basis of the new legal and constitutional arrangements. And so was legal theory, in its decrepit gowns of respectability moving between a mimicry of a *science of norms* and an apology of the established order. Law and legal thought continued their existence while a social catastrophe was unfolding.

In the case of a number of Central and Eastern European countries the writing was on the wall from the times of the secret torture sites[6] to those of the revisions of the labour law legislation limiting collective bargaining (Trif 2013, 231–234; Guga 2014, 152–155). More specifically, in Romania, the authoritarian slide became even more startling from the passing of austerity measures with disregard to the constitutional process[7] to the repression of anti-austerity protests (Cercel 2014, 142–143), marking the long decade of triumphant neoliberalism (Poenaru, Rogozanu, 2014; Damșa 2016) and heralding the entry of the region fully within the sphere of struggles that swept the world in the years of dreaming dangerously (Žižek 2012), from Madison to Athens (Cistelecan 2015).

[5] For Lacan an ex-timate, defines what is more real within the subject than the subject itself, and which necessarily captures to the subject's relation to its other.

[6] Al Nashiri v. Poland, ECtHR, 24 July 2014; Al Nashiri v Romania, ECtHR, 31 May 2018.

[7] Romanian Constitutional Court, *Advisory Opinon* No. 456, 12 July 2012.

Surprising as it might seem at a first glance, the turn towards an ideological position brandishing the flags of national identity and sovereignty, is yet part of the same historical trajectory that started with the so-called return to normality, and has insidiously taken place under the shadow of the same politico-legal arrangements that celebrated under the label of rule of law. Even more, let alone its national overtones, there is a clear transnational dimension to this affirmation of anti-liberalism, the otherwise obverse of the failed emancipatory potential diluted in the early 2010s.

The fact that the liberal paradigm gives way to new politico-legal arrangements cannot be easily dismissed as simply a passing scare or a some fleeting hick-up within the unstoppable progress towards a global democratic governance. At the core of this process there is a tension over the meaning of legality that goes beyond the mere posited ascriptions of this term within local constitutional contexts be they Poland, Hungary, or for that matter, the United Kingdom. Rather, we are witnessing a trend towards a reconstruction of the basic features of what law signifies in its relation to politics and has largely signified since the fall of fascism in the West and the putative return to liberal democracy in Eastern Europe. This turn still takes the form of a minute accumulation of social, political and technical legal pressure that reconstruct both the 'high' and the 'low' of our cultural existence. The authoritarian turn appears thus as a series of strategic and overtly symbolic changes within the body of the law or state practice (Scheppele 2018, 550–551; Sadurski 2019, 58–95), while at times is made up of silent and unnoticeable changes constructing the new normality (Varol 2015). This trend takes the form of laws of memory aiming to rewrite positively the past according to new protocols in imagining the history of the Nation (Belavusau, Gliszczyńska-Grabias 2017, 10–14) the call for an ideological purity through law (Könczöl 2017, 253–260), just as there is the constant movement of reframing subjectivities by the uses of criminal law geared towards protection of borders and the rise of the 'preventive state' (Sajó, Uitz, 440–444).

Yet, this crisis of legality, that is a critical reconstruction of the tenets of what is to count as legal, is something that escapes to a strictly legal theorisation and for that matter to a jurisprudential approach. Concepts such as 'populist constitutionalism' (Landau 2018) 'autocratic legalism' (Scheppele 2018) and 'stealth authoritarianism' (Varol 2015) have become the new symbolic veil that covers a present marked by conflict, tensions, struggle and repression. What was left unchallenged was, unsurprisingly, the place and function of legal normativity within this very dynamic of law's self-erasure. In order to be able to understand its deeper significance, one needs to move away from the "now" of the law and seek in both its conceptual structure and intellectual history that which renders it permeable to authoritarian uses and connivant to authoritarian projects.

Today the blind machinery of the law (Schütz 2000, 109) has found a no less sightless companion to guide its steps in the time of catastrophes. If we are

to examine this destitution of legality, there are indeed parallels to be drawn with other times of crisis. However, there is more than a formal similarity that can be inferred from the on-going capitalist crisis and the steps towards the breakdown of democracy specific to the interwar. That is because legal discourse has the peculiarity of both registering, archiving (Mawani 2012) and re-enacting its own history. Furthermore, at the core of this process of erosion of legality, what is at stake is the very undoing of the central tenet of the transnational postwar ideology – the "rule of law" – which was itself constructed at the intersection of crisis, revolutions and social strife.

3. A JURISPRUDENCE OF CRISIS: LESSONS FROM THE PAST

Understood in its own terms, law is timeless and at the same time historical. Through its unfolding, the ongoing crisis reactivates the formal and material patterns of law's destitution that have been latent during the past decades. That is because, as Anton Schütz noted following Agamben, the operation of the law is 'essentially exceptional, and under the rule of law as the rule of the delayed exception, as the rule of the ever saved, ever not yet performed (but yet threatening) performance or decision' (Schütz 2000, 117). It is thus necessary to resist to the temptation of opposing a lawful and law-full liberal tradition to a lawless, barbarian attack on legality. What we need is indeed to be able to articulate and revisit law's inner tensions turning it into 'a monument of its own destitution' (Schütz 2008, 127). Otherwise said, we should be able to map and document is law's inner cut that is constitutive of its own history within the liberal tradition.

What I propose as a possible answer to the current debasement of legality, is a radical revision the key opposition heralded in the 1930s by the Schmittian attack on Kelsenian pure theory of law. While indeed a remarkable literature documents the political, historical, and jurisprudential grounds of the debate (Arvidsson, Brännström, Minkkinen 2016; McCormick 1997; Scheuerman 1999) focusing on either the constitutional aspects (Vinx 2015), the socio-political dimensions (Simard 2009) or the lessons to be drawn from the breakdown of the Weimar republic (Jacobson, Schlink 2000) the focus is still too narrow. What we lack, is a broader framework of understanding the particular fracture between liberal legality and right-wing authoritarianism beyond the borders of the German legal science, and as a symptom of a political reshuffling in times of crises. In other words, we need to understand in their proper frames and grammars the reasoning that have shaped the fall of Europe in the shadow of authoritarianism during the interwar.

This is not purely a matter of historiography, but essentially a way of capturing the functioning of liberal legal thought in times of crisis. That is

because the intellectual weight of this debate is far from being exhausted, as it is emblematic for the tensions inherent to liberal legality from its advent to its zenith. Moreover, there is a formal historical parallelism between our authoritarian turn in Central and Eastern Europe and the troubled times of the interwar period that can be warranted beyond the mere contingent rhetorical appeals to the Nation, sovereignty and antisemitic innuendos that make the matter of our politico-legal present predicament.

To put it simply, the crisis of legality during the interwar took place in a constitutional and historical context that from the standpoint of legal history was not far removed from our experience in Central and Eastern Europe during the last decade, but entertained historical, if not causal, ties with our present. True, both the Weimar Republic and the First Austrian Republic emerged at the end of a catastrophic conflict that was unique in European history, which by its very existence has completely altered the politico-legal landscape as well as the very subjectivity of individuals. As an astute observer of the interwar such as Walter Benjamin noted, 'never has experience been contradicted more thoroughly than strategic experience by tactical warfare, economic experience by inflation, bodily experience by mechanical warfare, moral experience by those in power' (Benjamin 1969 [1936], 84).

For its part, the Central and Eastern European post-communist constitutionalism is the product of a different upheaval, that is the fall of state-steered projects of building communism. While the Weimar, and for that matter, Versailles and the numerous other states born or reshaped in its wake, rose on the ashes of the Empires, Central and Eastern European liberal legality was built on a failure of socialism. Granted, both regimes of legality appear at the end of a radical disruption, that is at the end of the Great War and Cold War era, but the term war can only function as a misnomer here, as in 1989 there was no peace settlement as such being sanctioned or recognised as a matter of law (Barbu 1998, 267–271), while at the same time there was no legal mechanism overseeing or guiding the conditions of peace. To be sure 1989 was not 1919. After the fall of the Berlin wall there was no peace treaty, and except for Romania and USSR, the regime change was mainly negotiated.

At the same time, the revolutionary turmoil was by and large that of a "velvet Revolution". Yet, this does not necessarily mean that there were no victors and winners (Barbu 1998, 268), or radical changes disturbing social structures and the lives of people. As it has been noted: 'no country that was affected by the Great Depression of 1933 suffered so many effects as the ex-communist countries at the beginning of the transition. Even if initially it seemed to be only a metaphor, it became manifest that these countries have lost, after all, a war' (Poenaru 2017, 8). Even more, not completely unrelated to the fall of communism, territorial changes ensued, giving rise to overt conflicts that still continue up to this day. Some of the emerging states were indeed simply re-casted within their old borders of

1918–1919 as in the case of the Baltic States and to some extent Ukraine, Georgia or Armenia, while frontlines have emerged along the old pre-World War I and World War II borders in former Yugoslavia. Of course, there is very little which could warrant a strict historical similarity, especially if we are approaching this context from the standpoint of the content of established politics. As a matter of fact, one of the main forces that was present at the end of World War 1 was completely missing both as a political party and as a theoretical movement, namely revolutionary socialism. One cannot overemphasize the extent to which this parallelism can be read only at a purely formal level, as a return of a legal configuration mirroring times of crisis.

However, what indeed can be regarded to be similar in the antecedents of this breakdown of democracy is the peculiar way of clinging to a particular version of liberal legality as a central feature of the polities that would be able to do away with what was often termed as the difficult transition from dictatorship to democracy. As it was thought, law was the discourse able to provide the neutral medium for grievances and conflict (Habermas 1993; Habermas, Rehg 2001, 770). In its apparent position of an 'absolute third' (Ricœur 1995, 11–13), it purportedly embodied the very symbolic frame of a society from which both class and political conflict were expunged. In the words of Kelsen, still echoing in today's politico-legal theory, "it is […] a procedure, a specific method of creating and applying the social order constituting the community, which is the criterion of that political system which is properly called democracy" (Kelsen 1955, 1). The proliferation of autonomous institutions, the continuous constitutional reforms and debates arising from a constant search of clarity and predictability that have marked our polities up to this day, as well as the ideological attachment to the belief in law as foundational for polities are reminiscent of an unavowed, and for that matter, an unarticulated version of legal formalism that ultimately turns around the conundrum of liberal legality in times of crisis. During the interwar years, this position was emphatically epitomised in both liberal and reactionary concepts. As such, one should recall the double meaning of the constitution revealed by Carl Schmitt. As he wrote,

> "constitution" can describe the state itself […] an individual concrete state as political unity […]. In this instance it means the *complete condition* of political *unity* and *order*. Yet, "constitution" can also mean a closed *system of norms* and […] designate a unity […] a reflective, ideal one (Schmitt 2008 [1928], 59).

For Kelsen, insofar as the state is 'a social structure' analysable as "a system of human behaviour" based on coercion, it can be properly understood in terms of law: "the state […] is a legal system" (Kelsen 1992 [1934], 100). Beyond the substantial oppositions of these positions, that is between a concrete legal order and the state's foundation on abstract normativity, we can seize the specific primacy of the question of legality during the interwar years. Whereas, the affirmation of

formal legality as a ground for the state had at least two opposing meanings, it aimed at doing away with the materiality of struggles and politics. Indeed, there is an amphiboly in this position, insofar the state and constitutionalism are one hand construed as essentially forms of political compromise (Schmitt 2008 [1928], 82–88) aimed at keeping at bay social strife and on the other hand, they are conceived as an embodiment of reason that can be reduced as a set of rules related through validity (Kelsen 1992 [1934], 99).

Yet, both positions do aim to give grounding to the state by excluding either the absolute enmity of civil war or the arbitrariness of irrational power struggles. In this sense, the state was either saved as an embodiment of rationality, or as a force beyond individual significance. This ambiguity goes beyond the singular case of Weimar Germany. In whole Europe, dealing with either the threat of revolutionary communism, class struggle and later with the rise of fascism, law would be split between a formal subsistence of substantive political, civil and individual rights and a series of exceptional measures effectively limiting the emancipatory potential of rights. This would take either the radical forms of martial law, state of siege – or state of exception, that is on the formal and effective suspension of the constitutional process, or more diffuse forms of criminal and administrative repression minutely sapping the scope and meaning of constitutional provisions. In these sense, liberal legality, in the context of the 'sense-making crisis' (Platt 1998, 208) emerges as nothing else that a system at war with itself, in which the ultimate goal was a struggle over the meaning of legality.

If we are to approach the present crisis in Central and Eastern Europe, we need then to be able to return to the original meaning of the liberal belief in legality that constituted the legal matter of the post-communist transformation. This dispositive of legality was indeed not only the prevailing language of transitional constitutionalism and transitional justice, but also that of the prevalent constitutional theory, spilling later into the ideology of institutional and political actors and even going beyond the formal borders of the polities. In short, it was the politico-legal theory of the lawyers and officials in Central and Eastern Europe determined to break with the past and to pave the way to a new form of constitutional patriotism (Sulikowski 2016, 24–27).

Within this project, democracy, the rule of law and market economy are conflated under one and the same theoretical framework that, rightly or wrongly, still bears the name of liberalism. This confusion should not be taken only as a fleeting error, rather it is part of the very apparatus of neoliberal transformation that linked together the markets as producers and bearers of social truth, under the ideology of monetarism (Eyal, Szelenyi, Townsley 2001, 87–91) and the "civil society", with its seemingly generous promises of a stable legality able to endorse social change with its specific legitimacy.

It is indeed this unholy alliance between the intellectual elite and the markets that is perhaps at the core of the vagaries of the post-communist transformation

(Eyal, Szelenyi, Townsley 2001, 91–96). With the consensus that markets are the depositary of an ultimate social meaning and the position of the free individuals responsible for their actions, constitutional theory and what was left of the jurisprudential enterprise, were bound to turn into a search for ways of limiting state discretion as to offer a constant predictability and freedom of action for the economic actors. The arbitrary inherent in the functioning of the traditional administrative machinery was to be externalised to the economic sphere where they were deemed to disappear as it was unquestionable that real rational mechanisms of the economy ultimately drive markets.

4. CONCLUSION

Following this thread, what we are witnessing at this very moment is the last series of events signalling a decoupling of the ideological connection between free markets and the so-called liberal freedoms in the sense that the former could easily operate without the latter. Indeed, this connection was anything but necessary and it should be understood in its proper historical context that is of a coalescence linking the interests of the capital to the liberal form of democracy. This is the reason for which a particular view of law and democracy has been revived as a mechanism instrumental to the operation of the transformation, while at the same time being elevated to the central ideological position: the ultimate truth about law and state.

It should not be a surprise then that when the presumed rationality inherent in the markets failed, the ideological justification supporting an already fragile arrangement started to show its cracks and reactivate the very coordinates that founded modern legality. The present breakdown of democracy in Central and Eastern Europe is thus the drama of a law left to its own devices that can no longer sustain the ideological pledge of the rationality of the markets and seeks to find its grounding. In this sense, the re-emergence of sovereign, identarian and nationalist tropes is not necessarily a regression to a pre-juridical or pre-modern state, a lawless barbarian onslaught, but a reconstruction of law within the boundaries of what was already present in the structure of liberal legality itself.

If indeed it is the specific legal form of fetishist disavowal that is at the core of the present destruction of legal reason by keeping lawyers' and legal theorists' eyes closed to what supports legality, the task that lies before us is not a simple one. It is not to merely refocus the legal mind as to grasp the disruptions within the symbolic order, rather, it is to point out to which extent the symbolic coordinates of liberal legality were and still are fluid, and they offer very little, if any, comfort in front of the authoritarian assertion of power. To put it simply, the task is to show the contingency of the legal form, its historical inscription in a history, that is as any history one of class struggle. In this sense, engaging in critical socio-legal histories

of the law within our polities, bearing the very marks of this struggle is crucial in order to expose law's connivance with authority and its mythical foundations. The historical trajectory of law in Central and Eastern Europe is itself a living embodiment of this conundrum. Yet, while this task is important and necessary, we should also be able to move beyond the frames of the legal form itself and map the nexus that ties legality and the structures of economy and politics.

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BIBLIOGRAPHY

References

Agamben, Giorgio. 2005. *State of Exception*. Chicago: University of Chicago Press.

Arendt, Hannah. 1985 [1951]. *Origins of Totalitarianism*. New York: Harvest Books & Harcourt.

Arvidsson, Matilda. Leila Brännström. Panu Minkkinen. 2016. *The Contemporary Relevance of Carl Schmitt: Law, Politics, Theology*. London: Routledge.

Asp, Petter. 2013. "Preventionism and Criminalization of Nonconsummate Offences". In *Prevention and the Limits of Criminal Law*. 23–46. Edited by Andrew Ashworth, Lucia Zedner, Patrick Tomlin. Oxford: Oxford University Press.

Barbu, Daniel. 1998. *Republica absentă*. Bucharest: Nemira.

Belavusau, Uladzislau. Aleksandra Gliszczyńska-Grabias. 2017. "Introduction: Memory Laws: Mapping a New Subject in Comparative Law and Transitional Justice". In *Law and Memory: Towards Legal Governance of History*. 1–26. Edited by Uladzislau Belavusau, Aleksandra Gliszczyńska-Grabias. Cambridge: Cambridge University Press.

Benjamin, Walter. 1969 [1936]. "The Storyteller". In *Illuminations.* 83–110. Edited by Hannah Arendt. New York: Schocken Books.

Cercel, Cosmin. 2017. *Towards a Jurisprudence of State Communism.* London: Routledge.

Cistelecan, Alex. 2015. "From Region to Culture, from Culture to Class". *Journal of Contemporary Central and Eastern Europe* 25: 45–60.

Copjec, Joan. 1991. "Vampires, Breast-Feeding, and Anxiety". *October* 58: 22–45.

Czarnota, Adam. Martin Krygier. Wojciech Sadurski. 2005. "Introduction". In *Rethinking the Rule of Law after Communism*. 1–8. Edited by Adam Czarnota, Martin Krygier, Wojciech Sadurski. Budapest: Central European University Press.

Damșa, Liviu. 2016. *The Transformation of Property Regimes and Transitional Justice in Central Eastern Europe.* Heidelberg: Springer.

Dardot, Pierre. Christian Laval. 2013. *The New Way of the World: On Neoliberal Society*. London: Verso.

Derrida, Jacques. 1994. *Force de loi*. Paris: Galilée.

Douzinas, Costas. 2014. "A Short History of the British Critical Legal Conference or, the Responsibility of the Critic". *Law and Critique* 25: 187–198.

Dyzenhaus, David. 2013. "Preventive Justice and the Rule of Law Project". In *Prevention and the Limits of Criminal Law*. 91–114. Edited by Andrew Ashworth, Lucia Zedner, Patrick Tomlin. Oxford: Oxford University Press.

Ewald, François. 1990. “Norms, Discipline and the Law”. *Representations* 30: 138–161.
Eyal, Gill. Ivan Szelenyi. Eleanor Townsley. 2001. *Making Capitalism Without Capitalists. The New Ruling Elites in Eastern Europe*. London: Verso.
Felman, Shoshana. 2002. *The Juridical Unconscious. Trials and Traumas in the Twentieth Century*. Cambridge, MA: Harvard University Press.
Foucault, Michel. 1975. *Surveiller et punir*. Paris: Gallimard.
Fraser, David. 1987. “The Day The Music Died. The Civil Law Tradition from a Critical Legal Studies Perspective”. *Loyola Law Review* 32: 861–880.
Fraser, David. 2005. *Law after Auschwitz: Towards a Jurisprudence of the Holocaust*. Durham, NC: Carolina Academic Press.
Fraser, David. 2011. “Shadows of Law, Shadows of Shoah: Towards a Legal Theory of the Nazi Killing Machine”. *Oxford Journal of Legal Studies* 32: 401–419.
Fuller, Lon Luvois. 1958. “Positivism and Fidelity to Law – A Reply to Professor Hart”. *Harvard Law Review* 71: 630–672.
Girard, René. 1977. “Violence and Representation in the Mythical Text”. *Comparative Literature* 92: 922–944.
Goodrich, Peter. 1983. “The Rise of Legal Formalism; or the Defenses of Legal Faith”. *Legal Studies* 3: 248–266.
Guga, Ștefan. 2014. “Criza ca oportunitate: schimbarea legislației muncii și înfrângerea mișcării sindicale”. In *Epoca Traian* Băsescu: *România* între *2004* și *2014*. 103–116. Edited by Florin Poenaru, Costi Rogozanu. Bucharest: Tact.
Habermas, Jürgen. 1993. *Moral Consciousness and Communicative Action*, Cambridge, MA: MIT University Press.
Habermas, Jürgen. William Rehg. 2001. “Constitutional Democracy: A Paradoxical Union of Contradictory Principles”. *Political Philosophy* 29: 766–781.
Halmai, Gábor. 2019. “Populism, Authoritarianism and Constitutionalism”. *German Law Journal* 20: 296–313.
Harel, Alon. 2014. *Why Law Matters*. Oxford: Oxford University Press.
Hart, Herbert L. A. 1958. “Positivism and the Separation of Law and Morals”. *Harvard Law Review* 71: 593–629.
Hesselink, Martijn W. 2002. “The New European Legal Culture”. In *The New European Private Law*. 11–75. The Hague: Kluwer Law International.
Hunt, Alan. 1985. “The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law”. *Law and Society Review* 19: 11–37.
Ionesco, Eugène. 1959. *Rhinocéros: pièce en trois actes et quatre tableaux*. Paris: Gallimard.
Ionesco, Eugène. 1966. *Notes et contre-notes*. Paris: Gallimard.
Jacobson, Arthur J. Bernard Schlink. Eds. 2000. *Weimar – a Jurisprudence of Crisis*. Berkeley: University of California Press.
Joerges, Christian. Navraj Singh Ghaleigh. Eds. 2003. *Darker Legacies of Law in Europe*. Oxford: Hart Publishing.
Kelsen, Hans. 1955. “Foundations of Democracy”. *Ethics* 66: 1–101.
Kelsen, Hans. 1992 [1934]. *Introduction to the Problems of Legal Theory*. Oxford: Oxford University Press.
Könczöl, Miklós. 2017. “Dealing with the Past in and around the Fundamental Law of Hungary”. In *Law and Memory: Towards Legal Governance of History*. 246–262. Edited by Uladzislau Belavusau, Aleksandra Gliszczyńska-Grabias. Cambridge: Cambridge University Press.
Krygier, Martin. 1990. “Marxism and the Rule of Law: Reflections After the Collapse of Communism”. *Law and Social Inquiry* 15: 633–663.

Lacan, Jacques. 1966. “L’instance de la lettre dans l’inconscient ou la raison depuis Freud”. In *Écrits.* Vol. 1. 493–528. Paris: Le Seuil.
Lacan, Jacques. 1974. “Le séminaire. Livre XXII. RSI. La scéance du 17 décembre 1974”. *Ornicar?* 2: 87–97.
Lacan, Jacques. 1975. *Le séminaire: livre XX: Encore.* Paris: Le Seuil.
Lacan, Jacques. 1991 [1970]. *Le séminaire: livre XVII: L’envers de la psychanalyse*. Paris: Le Seuil.
Landau, David. 2018. “Populist Constitutionalism”. *Chicago Law Review* 85: 521–544.
Losurdo, Domenico. 2015 [1996]. *War and Revolution: Rethinking the Twentieth Century*. London: Verso.
Luhmann, Niklas. 2004. *Law as a Social System*. Oxford: Oxford University Press.
Mangabeira Unger, Roberto. 1986. *The Critical Legal Studies Movement*. Cambridge, MA: Harvard University Press.
Mańko, Rafał. 2013. “Weeds in the Garden of Justice. The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome”. *Polemos: Journal of Law, Literature and Culture* 7(2): 207–233.
Mańko, Rafał. 2015. “Reality Is For Those Who Cannot Sustain the Dream: Fantasies of Selfhood in Legal Texts”. *Wroclaw Review of Law, Administration and Economics* 5(1): 24–47.
McCormick, John P. 1997. *Carl Schmitt’s Critique of Liberalism.* Cambridge: Cambridge University Press.
Müller, Jan-Werner. 2016. *What Is Populism?* Philadelphia: University of Pennsylvania Press.
Ost, François. Michel Van de Kerchove. 2002. *De la pyramide au réseau?* Bruxelles: Publications des Facultés Universitaires Saint-Louis.
Philippopoulos-Mihalopoulos, Andreas. 2016. “Flesh of the Law: Material Metaphors”. *Journal of Law and Society* 43: 45–65.
Platt, Gerald M. 1998. “An Alternative Theory”. In *International Fascism*. 204–215. Edited by Roger Griffin. London: Arnold.
Poenaru, Florin. 2017. *Locuri Comune: clasă, anticomunism, stânga*. Bucharest: Tact.
Poenaru, Florin. Costi Rogozanu. 2014. *Epoca Traian* Băsescu: *România* între *2004* și *2014*. Bucharest: Tact.
Ricœur, Paul. 1995. *Le juste*. Paris: Esprit.
Rosenfeld, Michel. 2010. *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community*. London: Routledge.
Sadurski, Wojciech. 2005. “Transitional Constitutionalism: Simplistic and Fancy Theories”. In *Rethinking the Rule of Law after Communism*. 9–27. Edited by Adam Czarnota, Martin Krygier, Wojciech Sadurski. Budapest: Central European University Press.
Sadurski, Wojciech. 2019. *Poland’s Constitutional Breakdown.* Oxford: Oxford University Press.
Sajó, András. Renáta Uitz. 2017. *The Constitution of Freedom: An Introduction to Legal Constitutionalism*. Oxford: Oxford University Press.
Scheppele, Kim Lane. 2018. “Autocratic Legalism”. *University of Chicago Law Review* 85: 545–583.
Scheuerman, William E. 1999. *Carl Schmitt: The End of Law*. New York: Rowmann and Littlefield.
Schmitt, Carl. 1985 [1922]. *Political Theology*. Cambridge, MA: MIT Press.
Schmitt, Carl. 2008 [1928]. *Constitutional Theory.* Durham: Duke University Press.
Schütz, Anton. 2000. “Thinking the Law With and Against Luhmann, Legendre, Agamben”. *Law and Critique* 11: 107–136.
Schütz, Anton. 2008. “The Fading Memory of Homo non Sacer”. In *The Work of Giorgio Agamben. Law, Literature, Life*. 114–131. Edited by Justin Clemens, Nicholas Heron, Alex Murray. Edinburgh: Edinburgh University Press.

Skinner, Stephen. 2011. "The Right to Life, Democracy and State Responsibility in 'Urban Guerilla' Conflict: the European Court of Human Rights Grand Chamber Judgment in *Giuliani and Gaggio v. Italy*". *Human Rights Law Review* 11: 567–577.
Skinner, Stephen. Ed. 2015. *Fascism and Criminal Law: History, Theory, Continuity*. Oxford: Hart Publishing.
Skinner, Stephen. Ed. 2019a. *Ideology and Criminal Law: Fascist, National Socialist and Authoritarian Regimes*. Oxford: Hart Publishing.
Skinner, Stephen. 2019b. *Lethal Force, the Right to Life and the ECHR: Narratives of Death and Democracy*. Oxford: Hart Publishing.
Stone, Dan. 2014. *Goodbye to All That: A History of Europe since 1945*. Oxford: Oxford University Press.
Sulikowski, Adam. 2016. "Government of Judges and Neoliberal Ideology: The Polish Case". In *Law and Critique in Central and Eastern Europe*. 16–31. Edited by Rafał Mańko, Cosmin Cercel, Adam Sulikowski. Oxford: Counterpress.
Tacik, Przemysław. 2019. "A New Popular Front, or, on the Role of Critical Jurisprudence under Neo-Authoritarianism in Central-Eastern Europe". *Acta Universitatis Lodziensis. Folia Iuridica* 89.
Teitel, Ruti. 2002. *Transitional Justice*. Oxford: Oxford University Press.
Traverso, Enzo. 2019. *The New Faces of Fascism*. London: Verso.
Trif, Aurora. 2013. "Romania: collective bargaining institutions under attack". *Transfer: European Review of Labour Research* 19(2): 227–237.
Varol, Ozan O. 2015. "Stealth Authoritarianism". *Iowa Law Review* 100: 1673–1742.
Vinx, Lars. 2015. *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*. Cambridge: Cambridge University Press.
Weiler, Joseph H. H., Marlene Wind. 2003. *European Constitutionalism Beyond the State*. Cambridge: Cambridge University Press.
Žižek, Slavoj. 1993. *Tarrying with the Negative: Kant, Hegel and the Critique of Ideology*. Durham: Duke University Press.
Žižek, Slavoj. 2001. *Did Somebody Say Totalitarianism?* London: Verso.
Žižek, Slavoj. 2002. *Welcome to the Desert of the Real*. London: Verso.
Žižek, Slavoj. 2008 [1989]. *The Sublime Object of Ideology*. London: Verso.
Žižek, Slavoj. 2012. *The Year of Dreaming Dangerously*. London: Verso.

Legislative and administrative acts

Decree 1475/2015. Decree No. 1475 of 14 November 2015 concerning the application of Statute 55–883 of 3 April 1955. *Journal officiel de la République française* No. 264, 14 November 2015, p. 21297.
Statute 1501/2015. Statute No. 1501 of 20 November 2015 extending the application of the Statute 55–883 of 3 April 1955 on the state of emergency and reinforcing the efficacy of its provisions. *Journal officiel de la République française* No. 271, 21 November 2015, p. 21665.
Proclamation 9844/2019. Proclamation 9844 of 15 February 2019 Declaring a a National Emergency Concerning the Southern Border of the United States. 84 *Federal Register* No. 34, 20 February 2019.

Case-law

Miller 1. *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.
Miller 2. *R (Miller) v Prime Minister* [2019] UKSC 41.

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A NEW POPULAR FRONT, OR, ON THE ROLE OF CRITICAL JURISPRUDENCE UNDER NEO-AUTHORITARIANISM IN CENTRAL-EASTERN EUROPE

Abstract. The current decade brought a neo-authoritarian wave to the countries in CEE. This process, which in certain respects runs parallel to the populist upsurge in Western countries, has its own specificity. Firstly, by focusing on the clash between "elites" and "the people", it rekindles – in a displaced, right-wing form – the class conflict which before 1989 was an ideological staple in CEE countries. Secondly, insofar as neo-authoritarianism in CEE has often a distinctly neo-liberal agenda shadowed by declarative anti-globalism and national chauvinism, it warps the field of political struggle. Thirdly, in the neo-authoritarian turn law becomes the crucial field of ideological fight, principally in those countries where populists came to power. In this respect, new governments in CEE resort to a blend of old Fascist tools (such as dismantling of constitutional control and denying the primacy of international law) and new inventions (such as the effective state of exception in some areas of law in Poland introduced in 2015–18). The role of critical jurisprudence in CEE is therefore particularly significant and difficult. The paper argues that liberal jurisprudence, although actively engaged in analysing neo-authoritarianism, does not possess adequate conceptual tools for full success. Therefore critical jurisprudence should urgently take part in explaining neo-authoritarianism in the legal field.

Keywords: neo-authoritarianism, constitutional crisis, rule of law, critical jurisprudence, populism.

Critical jurisprudence usually portrays the legal universum in dark colours, and quite rightly so. Nevertheless, there are times when a yet darker hue of black begins to dominate and the cause of freedom begins to lose. For all critical thinking – at least the current which harks back to Marx and inherits from the Frankfurt School – such historical moments present an uncanny challenge. The eye which is well adapted to black might be less inclined to notice that the twilight is moving forward surprisingly fast. It is rather liberal jurisprudence that seems to take account of slowly progressing tectonic rifts that, once completed, will separate us for good (and bad) from the world in which critical jurisprudence flourished. Suddenly, what the Crits denounce as a bare play of interests and power under the hegemonic and neutralised edifice of positive law is brought to light. The liberal disguise begins to lose its mystifying force and the critical discourse is confronted with movements or governments that machiavellianly abuse legal

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instruments. Given that these historical periods are times of great confusion, they require – especially from the critical jurisprudence (and, generally speaking, all critical approach) a careful calculus of one's own positions. It is only in this manner that divisions between the critique and the criticised may be re-drawn.

This paper is meant to argue that processes of degradation of the rule of law, the rise of nationalism and authoritarianism – variously defined and having multiple forms – should be viewed as signs of an epochal challenge not only for liberal, but also for critical jurisprudence. In Central-Eastern Europe, with its own complex legal history, legacy of real socialism, relations of post-colonial dependence from the West and impact of turbo-capitalist transition – and, most importantly, with most crystal examples of turning to new forms of semi-authoritarian regimes that might be found within the EU – critical jurisprudence must promptly reconsider its own strategies.

This change comes in a somewhat unfortunate moment, given that critical legal studies in this part of Europe only recently began to gain its own voice and perspective (Mańko, Cercel, Sulikowski 2016, 1–11). Critical jurisprudence has so far focused more on the legacy of real socialism and the (neo-)liberal hegemony in post-socialist countries of CEE, simultaneously struggling for recognition in the Western academia. Therefore the confrontation with the ongoing authoritarian turn might require speedy adaptation processes and developing new intellectual tools. Nevertheless, deliberate myopia for the recent events, or even a kind of *Schadenfreude* on the part of the CEE Crits in times of populism would not augur well for self-criticism and self-orientation of critical jurisprudence. That the liberal opponent has been weakened is obviously an opportunity for better dismantling of previously hegemonic ideological veil, but it runs the risk of contributing to the right-wing authoritarian assault on values that the critical movement should not dispense with, such as personal and civic freedoms, gender and LGBTQ+ equality, rights of minorities as well as egalitarianism abstracting from nationality or ethnicity. In other words, critical jurisprudence is in dire need of outlining a third way – not in the compromised sense connoting the debacle of the left in the 90s, but understood as a position from which liberal ideological hegemony might be criticised on a par with anti-emancipatory populist movements which openly rekindle spectres of thick nationalism.

The paper consists of four parts. Firstly, it attempts to outline what the neo-authoritarian transformation is, especially in the context of CEE on the example of Poland and Hungary. Then it proceeds to investigating the strained relationship between CEE neo-authoritarianisms and the law. The third part provides a brief overview of liberal jurisprudence in its attempts to grasp and criticise neo-authoritarianism as a practice openly challenging the rule of law. Finally, it aims to provide a few orientation points concerning the desired position and tasks of the CLS in the context of CEE neo-authoritarianism.

1. THE NEO-AUTHORITARIAN TURN IN THE CENTRAL-EUROPEAN CONTEXT

The predicament with naming the processes which we are currently witnessing is well known and habitually deplored: terms such as "populism", "authoritarianism", "neo-authoritarianism" or "illiberal democracy" are usually used as conventional references (Pech, Scheppele 2017, 4). Given that the designates remain more or less the same, the process is not fully intelligible (especially in its long-term consequences) and all the names seem somewhat trite or worn out, they should be used more as provisional stickers rather than ossified naming conventions. Instead of musing on whether "populism" is an operationalisable tool or whether "illiberal democracy" is still a democracy, I would opt for choosing one of the terms as (at least transiently) more pertinent than others: neo-authoritarianism.

I borrow it from Polish sociologist Maciej Gdula who in his otherwise debatable enquiry into the rise of Poland's far-right government meant to highlight that it is supported not (chiefly) because of its pro-social agenda and unblocking the previous neo-liberal consensus on a class-biased austerity, but due to the component of public revenge on the elites, broadly perceived by some strata of Polish society as corrupt, hegemonic and unjust (Gdula 2018). As Gdula argues, Poland's ruling majority produces a spectacle of vengeance and humiliation on institutions, authorities and individuals who were anyhow prominent under the previous government. Adherents of the far-right coalition may thus identify their own perception of injustice or underprivileged status with the Debordian spectacle in the public sphere. In this sense, "neo-authoritarianism" grasps well the mechanism of mobilising the general disenchantment with globalisation and liberal democracy which is channelled into a movement against an enemy constructed with far-right imagery.

Apart from this explanatory power, "neo-authoritarianism" might be linked to a few further connotations which can make it a handy conceptual tool for analysing the recent developments in CEE: (1) it retains the component of authoritarian rule, even if variously squared with elements of Western liberal democracy, (2) it underlines a certain continuity of pre-War and post-War right/far-right politics as centred on coerced unanimity of opinions, normalisation of support for the ruling power, arbitrariness, anti-minority rhetoric and policies, rekindling nationalism and the foe-friend division, (3) it points to a transformation of socio-political context in which this new form of authoritarianism functions, (4) it catches the elusive presence of past forms of far-right governments, the one which Neil Levi and Michael Rothberg called "the mnemonic flash of fascism" (Levi, Rothberg 2018, 356) and, finally, (5) it is undetermined enough to provide a working tool for referring to the still unfinished processes.

Applying this concept to the context of Central-Eastern Europe in order to orientate critical jurisprudence requires finding some basic coordinates of this region's specificity. Naturally, CEE neo-authoritarianism, if we settle for this term, bears similarities to processes which happen throughout the contemporary world with most crystal examples in "trumpism" or Rodrigo Duterte's rule in the Philippines. Western Europe has equally produced analogous movements, led by Marine Le Pen in France, Geert Wilders in the Netherlands or Matteo Salvini in Italy. In the field of political studies, there are already some valuable preliminary analyses of the new kinds of populism (Müller 2016, Moffitt 2016, Saward 2010). All these phenomena can be understood only with reference to some elementary socio-political conditions such as: (1) transformations of the public sphere by the Internet and the subsequent democratisation and fragmentation of knowledge (which, on the one hand, allow of consolidation of movements on the basis of beliefs excluded or non-represented in the official channels of communication, and, on the other hand, prevent systematic verification of news, thus contributing to spread of conspiracy theories as well as incoherent and ideologically biased opinions), (2) post-neoliberal intellectual desert, in which in-depth analysis of the current conditions is hampered by most mystifying ideological misrepresentations; in a supremely Baudrillardean way, the ideological seems nowadays greatly displaced in comparison with actual social relations, making politics be reigned by drifting simulacra, (3) the unprecedented historical collapse of the left on many levels: intellectual (lack of general theory of world/state justice and absence of proper political agenda stemming from it), political (the left is now divided between waning social-democratic parties of the old establishment – still too strong to disappear, but too weak to hold power and bring about a significant change – and new movements, still struggling for self-definition and broader recognition) and organisational. Nonetheless, there are some significant factors that differentiate neo-authoritarianism in CEE from its Western or global counterparts.

First of all, the most notable difference consists in the fact that unlike Western Europe CEE has witnessed the rise of far-right populist movements gaining power and establishing governments which in the last few years have undertaken vast transformations of the previous liberal regimes. Naturally, the rise of Austrian (far-)right-wing majority (comprising the infamous FPÖ party) or the recent actions of the Italian Lega are also reminiscent of "illiberal democracies" (and might lead to building them in the future), yet it is only in CEE that these neo-authoritarian regimes are actually constructed (cf. Bugaric, Kuhelj 2018, 22). The difference is most visible at the legal level. Both Hungary and Poland, which are the basic examples, underwent a significant change in the relation between power and law: law is treated at best instrumentally, with permanent attacking the bulwarks of the rule of law standards and sometimes, especially in the case of Poland, the very applicability of law is dismantled.

Secondly, CEE democracies even before the neo-authoritarian turn were – in liberal terms – classified as "flawed" democracies (The Economist Intelligence Unit's 2018). The accumulated historical burden of long-term peripherality, real socialism and brutal transition to market economy determined the adaptation of liberal democracy. Moreover, these countries are marked by relatively high levels of nationalism (cf. Bugaric, Kuhelj 2018, 23, 26–27) – with still unworked-through legacy of nationalism cultivated by popular democracies. This entanglement at least partially accounts for the particular blend of socialist measures and chauvinistic rhetoric that marks neo-authoritarian governments in this region. The legacy of real socialism and swift transition to neoliberalism also contributed to increasing the "post-ideological" desert in these countries. With low levels of intellectual culture and lack of competent organic intellectuals (in the Gramscian sense), CEE states are particularly prone to ideological misrepresentations with conspiracy theories elevated to the rank of officially endorsed beliefs (like George Soros' alleged influences on Hungarian institutions and opposition or Polish myth of "communist deposits" who paralyse the country's development).

Finally, neo-authoritarianism in CEE must be read in postcolonial context. These countries, historically suspended in almost perpetual dependence and, worse enough, having some cultural propensities to dependence-centred perception of the world, are now once again in the peripheries, this time of the EU. In economic terms, they are dependent on the Western core of the Union, which is particularly manifest in the relationship between Poland and Germany. Dependence reproduces itself on many levels; on the personal plane, many citizens of CEE countries (especially of Poland and Romania) have experienced economic migration to the West and relative deprivation.

Taking into account this specific context of CEE countries, neo-authoritarianism might be seen as a conceptual tool which is much more explanatory in relation to them than to states of Western Europe or non-European ones. The term accentuates a peculiar blend of continuity and novelty which accounts for their current far-right deviations. Unlike Western Europe, neo-authoritarianism has two legacies that it draws from (although with only implicit references): the experience of socialist autocracy and the practice of non-negotiable neoliberal governing as a condition of possibility of politics, beyond actual representations of the political agon. Critical jurisprudence is usually well acquainted with legal weaponry of the latter, whereas long legal and political shadow of the former – especially inasmuch as it contributed to producing a properly nationalistic imagery of homogenous nations, protected by states against external threats – is less recognised.

If, however, critical jurisprudence is to provide a pertinent and original answer to CEE neo-authoritarianism, it needs to undertake a systematic review of its origins, practices and ideology in relation to both previous types of authoritarianism. As far as the legacy of "technical" authoritarianism of liberal

capitalism is concerned, it seems that to all intents and purposes the current neo-authoritarian governments in CEE not only have not ruptured with it, but continue to use its paradoxical strategy of building "democracy without a choice". Their purportedly socialist measures, especially in Poland (such as the "500+ programme", consisting in benefits for families or introducing a minimum wage for workers employed on civil contracts) do not form part of a well-constructed, comprehensive and just socialist agenda. They are, moreover, accompanied by purely neoliberal practice in pro-capitalist politics. As a result, the class conflict is exploited in an extremely misrepresented manner.

In this regard, the current developments also need to be seen in the light of the wane of the language of class struggle under late real socialism and its almost absolute evaporation in CEE after the fall of the Iron Curtain. In a displacement which bears many affinities with classic manoeuvres of fascism, the class struggle has been diverted to construct a chain of equivalence between imaginary class enemies (essentially, all the "elites" which do not support the far-right governments, especially judicial and cultural ones) and usual scapegoats (Jews – although referred to via crypto-anti-Semitic language of understatements and suggestions – Muslims, refugees and ethnic minorities). Therefore the CEE neo-authoritarianism must be seen in the light of a massive social misrepresentation of the class struggle, centred on authoritarian tendencies and ideology of pure power. In this regard, all tools offered by previous dysfunctional liberal democracies are used to pursue quite a universal neoliberal agenda under the official guise of anti-globalism and anti-Europeanism. It is for this reason that the clash between Hungary and Poland and the EU is hardly concentrated on economic matters, but on standards of democracy (space for opposition, rule of law, independent judiciary etc.) and human rights protection, even though neo-authoritarian governments sap energy from class conflict displaced by globalisation.

2. LAW AS A FIELD OF FIGHT

Not unexpectedly, law becomes a crucial field of expansion of neo-authoritarianism and it is in this area that its clash with broadly conceived liberal democracy comes to the fore. Both CEE examples of neo-authoritarian governments, the Hungarian and the Polish one, brought about a profound transformation of legal systems in both countries, although in each case they resorted to different strategies. The Orbán government seized the opportunity of gaining constitutional majority (as a result of low demands that the previous constitution stipulated for its amendment and a pro-majority electoral rules) and openly undertook a systematic overhaul of Hungarian legislation, beginning with adopting the new constitution in 2011. The far-right government in Poland did not share its ally's luck and, without constitutional majority, must have taken an even

more unsettling path. The combination of gaining sway over key institutions (the public prosecution, the Constitutional Court, the National Council of Radio and TV, the National Council of the Judiciary and, work still in progress, the Supreme Court and common courts) and amending the constitution with sub-constitutional laws made it possible to gain direct control over a huge part of state apparatus and legal norms.

The two strategies are manifestly different, but mainly in two points. Firstly, they differ in their ideological effects. The new Hungarian constitution was adopted as a blatant contestation of liberal ideals of democracy; it is based on strong nationalistic rhetoric and a vision of the nation as *ethnos*, not *demos*. Poland, however, is still formally ruled by its 1997 liberal constitution, although it became practically inapplicable to a high degree. As a result, the Polish far-right transformation could not be satisfied with finding its "ultimate expression" in an appropriate basic law. The overall direction of this transformation has not been sanctified in any legal manifesto, which increases the rift between audacious anti-European chauvinist rhetoric of the ruling majority and its down-to-earth instrumental approach to the law and the state. Secondly, Hungary preserved to a much higher extent the form of legality and the very applicability of the opposition "legal/illegal", whereas Polish legal system in some of its parts becomes inoperable, because state institutions may – according to their current political affiliation – apply either non-constitutional laws or the Constitution itself. If there is no institution which can declare illegality in a legitimate manner (as the Constitutional Court in its current formation is unconstitutional itself), the opposition legal/illegal loses its positive objectivity. For this reason the current legal system in Poland constitutes a real challenge for jurisprudence which needs to find better conceptual tools than just sticking to explaining why and in which respect the majority's manoeuvres violate the constitutional legal order.

Despite these crucial differences between the two CEE neo-authoritarian governments, practical effects of their actions are often quite convergent. They concentrate on gaining pure, possibly unbridled power, whereas law is at best just an instrument to exercise it (cf. Scheppele 2015, 124). Nevertheless, given that both countries still formally pledge allegiance to the Western world and the EU (even if mingled with anti-European and anti-liberal rhetoric), they seem to feel still obliged to maintain the mask of liberal democracies. In this manner, they evolve into what Gábor Halmai called "hybrid regimes" (Halmai 2014, 512). Formally, they retain the recognisable institutional framework of liberal regimes, yet the executive (having dominated the legislative and effectively depoliticising it – cf. Ágh 2017, 20) either gained full control over the institutions that ought to be independent – thereby making their existence senseless – or marginalised them to such a degree that they cannot be of any hamper. The handover of the Polish Constitutional Court is a good example of the first strategy, whereas the Fourth Amendment to the Hungarian 2011 Constitution – inasmuch as it

effectively deprived the Hungarian CC of its institutional memory and continuity of interpretation (Halmai 2014, 500–501; Sólyom 2015, 27–30) – proves efficiency of the latter.

All in all, the CEE neo-authoritarianism demonstrates a complex approach to law, which might be viewed in its short- and long-term consequences, as well as depth of interference with the legal system. As far as short-term consequences are concerned, both Hungary's and Poland's legal systems are field of struggle between the liberal and the neo-authoritarian sides. The latter aim to demonstrate violations of the Constitution or of international and EU law or their standards, as well as to retain as much as possible from the framework of liberal democracy (cf. the role of the Polish ombudsman). The former approach the legal system as a field that needs to be conquered with intra-legal, extra-legal and preater-legal methods.

Long-term consequences, however, are more difficult to assess, especially in case of Poland. The institutions whose members were appointed illegally already act and their decisions will shape legal relationships. Each day the legal chaos is increasing, as non-constitutional laws which cannot be declared as such by the paralysed CC envisage non-constitutional regulations of institutions (especially of courts) which, on their part, adjudicate. Numerous tricks undertaken in Poland and Hungary defy the elementary division between legality and illegality: power is exercised by non-recognition of valid acts of legal institutions by other institutions controlled by the ruling majorities. In this respect the very coherence of the legal system is undermined. Moreover, as in past historical examples (it is enough to remind oneself of Hitler's obsessive attacks on lawyers and jurisprudence – Broszat 1969, 130ff), the law in itself is presented as an obstacle than prevents the almost total imaginary overlap between the will of the people, as represented by populist governments, and the state machinery. This rhetoric profoundly affects the social perception and ideology of the legal field. It seems clear now that even in the case of quite improbable return of liberal forces the legacy of neo-authoritarian manoeuvres will last long.

As far as short-term consequences are concerned, liberal jurisprudence has done a lot of good work in raising awareness about the ongoing changes. Nevertheless, it seems quite unprepared to grasp their deep effects on legal systems, legal culture and the interface between the political and the legal in neo-authoritarian CEE countries.

3. LIBERAL JURISPRUDENCE AGAINST NEO-AUTHORITARIAN ILLEGALITY

Even if with somewhat lingering at the beginning, liberal jurisprudence – not only from CEE, but from Western Europe and the US as well – is now in full swing in denouncing the transformations in Hungary and Poland. The literature on the topic is already quite vast. Given that this article does not aim to describe

the ongoing debate in full detail, it must be enough to observe a few major trends in how CEE neo-authoritarianism is analysed.

First of all, perhaps since the establishment of the liberal consensus after the fall of the Iron Curtain liberal jurisprudence has not known such an irruption of the political into the legal as it witnesses now (cf. Palombella 2018, 8). *Nolens volens* the analysis of neo-authoritarianism in the legal field calls into question the uneasy relationship between the legal and the political, so even if the latter is sometimes filtered through a rather unsophisticated conceptual grid (with a notable overuse of the concept of populism), it is seen as an unobvious underlining of law which no longer can be contained by constitutional rules.

Unsurprisingly, the notion which guides a vast majority of analyses is the concept of the rule of law. Applied against the background of the challenge that CEE neo-authoritarianism presents to it, it seems to best capture the surface of the liberal/anti-liberal rift. The upsurge of anti-liberal rhetoric and measures gave an impulse for re-considering what the rule of law means today. Some commentators are aware of the paradox that liberal nation-state necessarily produces: radical democratic demand might lead to "democraduras" if not curbed by the rule of law (Palombella 2018, 9–10). In this line, the rule of law should be viewed rather as "the way legality is organised by also allowing a side of positive law capable of a contrasting and resisting autonomy vis-à-vis the laws issued by those in power" (Palombella 2018, 10). Usual ideals of non-arbitrariness and Fullerian demand of predictability are also invoked, which seems of high pertinence in times when the Polish and Hungarian governments might almost overnight change each law against any standard of continuity and envisageability.

Nevertheless, the rule of law is seldom investigated at its conceptual roots (Pech, Scheppele 2017, 9–10). Only Gianluigi Palombella overcomes the simplistic view of the EU's defence of the rule of law, demonstrating that the EU's account in this regard is not that favourable, whereas the crisis it faces calls into question the very relationship between the will of the people and law generation (Palombella 2018, 15–17). Commentators notice how the rule of law – enmeshed in a thick web of international and EU law and cooperation between different levels of governance – is being openly contested in the name of national sovereignty (Ágh 2017, 25; Halmai 2014, 510). In this respect, liberal commentators abstract from a notoriously paradoxical nexus between national sovereignty and international law, settling for noticing that neo-authoritarian regimes blatantly contest the former in the name of the latter.

The notion of populism is a usual key to explaining relationship between the political and the legal. The two decades between 1990 and 2010, in themselves uneasy for standards of liberal democracy in CEE, are now deplored as times of "mild populism" (Ágh 2017, 8, 17) which did not undermine the very ideological framework of what is politically desirable. Even if some sins were committed, the Big Other was never challenged. Now, however, populism seems to attack the

very roots of modern liberal states. As to the causes of the current predicament, the socio-economic ground is usually acknowledged, often without much further enquiry, with scarce notable exceptions (Ágh 2017, 8ff). Rise of nationalism and identity politics is also observed (Ágh 2017, 9). Quite often commentators refer to the transformation of the public sphere under the influence of new forms of communication (Ágh 2017, 9).

As far as CEE countries are concerned, commentators often notice superficial adoption of Western standards in the aftermath of 1989. The cultural and civilisational aspect of flawed democratisation (or Europeanisation) seems to come to the fore (Halmai 2014, 513). Attila Ágh presents the pre-neo-authoritarian era in CEE as times of reciprocal mimicry between CEE countries and the EU: the former dressed up their "historical deficits" in garb of successful progress with only tiny glitches, whereas the latter took their declarations at face value without offering an adequate response to their civilisational backwardness (Ágh 2017, 13–14, 16–17). As a result, the marriage between the EU and CEE countries seems a rather unmatched one, with both sides culturally unprepared for each other. CEE countries are perceived as lacking "democratic resilience" (Ágh 2017, 18). Such a state might be even contributed to by the EU as long as local autocrats are allies of political parties at the EU level (Kelemen 2017, 231). Mass support for the Hungarian Fidesz or the Polish Law and Justice – unabating despite international criticism – are a major source of concern, presented sometimes as an inexplicable misery that might augur a permanent decline of liberal democracy in CEE (cf. Oliver, Stefanelli 2016, 1080; Palombella 2018, 6).

Weaknesses of the EU are a subject in itself. Its legitimacy is now perceived as heavily burdened by inadequate responses to the economic crisis, bureaucratic isolation, lack of direct democratic control over its institutions (especially in comparison with the populist short circuit between imaginary people's will and its exercise over state apparatus) as well as a clear pro-market bias (Ágh 2017, 10–12; Pinelli 2011, 15). According to some voices, integration through law – a naked emperor whose symbolic clothes were for long venerated as a peaceful and "apolitical" method of building the Union – has now been revealed in the form of populist backlash it sparked off by its elitist and undemocratic character (Scharpf 2015). On the other hand, lack of advancements in integration is also criticised for contributing to neo-authoritarianism. As R. Daniel Kelemen put it, the EU constitutes now "an «authoritarian equilibrium», with just enough partisan politics at the EU level to coddle local autocrats, but not enough to topple them" (Kelemen 2017, 214). Some commentators engage in unmasking the effective state of exception which in the crisis years was practiced in the EU governance and can no longer be tacitly accepted under the guise of normalcy of integration (Joerges, Kreuder-Sonnen 2017, 121, 127).

Liberal commentators often severely criticise the EU for its paralysis before the Medusa gaze of neo-authoritarianism. They point to its indecision,

counter-productive measures, lingering and lack of adequate legal tools against anti-liberal populism (Pech and Scheppele 2017, 13–24, 28–34; Ágh 2017, 21–25). Reluctance to re-adapt available legal devices and inefficiency in the EC's actions are also noted (Oliver and Stefanelli 2016, 1076–1080; Kelemen 2017, 225). Some commentators point to the fact that violating the rule of law coupled with the principle of mutual trust in the EU might entail problems also for countries not affected by neo-authoritarianism (Bonelli 2018, 49–53; Pech and Scheppele 2017, 7, 11).

As far as answers to the current predicament are concerned, the opinions are divergent and rather pessimistic. Some authors engage in conceiving effective legal devices of EU law that could curb neo-authoritarian governments – from the famous Heidelberg "reverse Solange" proposal, through budget pressure (Pech, Scheppele 2017, 45) up to Scheppele's "systemic infringement procedure" (Bonelli 2018, 57–63; Pech, Scheppele 2017, 35–38). Others perceive them as hardly feasible and suggest modest focusing on the already functioning institutions, mainly on Art. 7 TEU (Pech, Scheppele 2017, 7; Bonelli 2018, 63–65), or call for actions of liberal Member States (Pech, Scheppele 2017, 26).

All in all, since a long time, if ever, liberal jurisprudence – especially in the field of European studies – has not been confronted with such a challenge. The liberal compromise has been clearly shattered: the debris of its fall keep spreading and cannot be ignored by the doctrine of EU law. Its entanglement in all-too-easy eulogy for integration regardless of the means used has already drawn substantiated criticism (Joerges, Kreuder-Sonnen 2017, 120–138). Nevertheless, liberal analyses of neo-authoritarianism – despite the sophistication of some of them – often have a few lacunas which need to be confronted by critical jurisprudence.

4. NEO-AUTHORITARIANISM AND CRITICAL JURISPRUDENCE

Critical jurisprudence in Europe and especially in CEE is now confronted with a challenge of probably epochal character. On the one hand, it is itself put in an uneasy position: in a sense, it sees it dream coming true in a perversely warped way. Neo-authoritarian governments bring back the dimension of the political and very often use the rhetoric that harks back to critical approaches to liberal ideology of apolitical rule of law. It was well visible in the case of the Polish CC, which was attacked quite along the lines of previous critical analyses (cf. Sulikowski 2012), although to instrumental reasons. Yet just as fascism might be read as a perverted emancipatory struggle, so does this critique has no goals that the Crits aspire to. Nevertheless, the CLS must clearly draw the line between its approach and the manipulative, rightist and nationalist misuse of its heritage. It is not easy to find the correct side of the antagonism, but in

my opinion no alliance with neo-authoritarianism is a boundary condition for all sensible critique. I would argue that in this struggle the Crits must recognise that they belong to the camp of the Enlightenment, together with liberals. At the same time, all kinds of collusion between neo-authoritarianisms and the liberal side should be vigorously denounced. We can see it clearly in the case of the EU: the unholy alliance between neo-authoritarian governments and EU establishment (the EPP–Fidesz cooperation, ritual "dialogue" carried out by the EC, tacit sympathy of some governments, i.e. Austrian and Italian ones, for CEE neo-authoritarianisms) is a cause of worry even for liberal doctrine; all the more vehemently should it be decried by the CLS. From the part of academia, liberal normalisation of neo-authoritarianism or even granting to its inventions a place in the European legal area requires polemical response.

In the field of jurisprudence the ossified liberal consensus seems to crumble and debate has been opened. As the two sides are now well entrenched in their camps, the voice of the left – always the uneasy third party – is hardly hearable. The CLS in CEE is relatively new, still occupied with ensconcing itself in the academic milieu and re-appropriating conclusions of earlier Western debates. Nonetheless, direct intervention in the current struggles within the field of jurisprudence is nowadays acutely needed. Neo-authoritarianism will not be conquered by eulogising the rule of law and denouncing its dismantlement. Critical jurisprudence needs to bring in its own apparatus, supplementing those areas in which liberal doctrine remains mute.

What are they? The above-mentioned review of literature demonstrated that mainstream jurisprudence is already able to open the debate of the relationship between the legal and the political or to reconsider – at least to a certain extent – the pernicious effects of previously hegemonic uncritical approach to liberal dogmas. It is, however, much worse at seven main intellectual and practical challenges: (1) re-evaluating the causes of neo-authoritarianism beyond the scheme of assault on liberal democracy by demagogues exploiting uneducated masses, (2) understanding continuity between neo-authoritarianism and earlier forms of monopolised power, such as nationalist stages of real socialism regimes and early liberal technocratic governments, (3) analysing in-depth long-term effects of neo-authoritarian changes, (4) reassessing the fundamental values of the legal system, such as predictability, reasonability and certainty in order to save them from the crumbling liberal dogma, (5) reinventing ways out of the crisis, (6) redesigning the new legal foundations of democracy, which would be both non-exclusive and resilient to far-right handover and finally (7) reinventing the very construction of EU law – and new models of integration – which would be able both to adequately address the challenge of right-wing populism and take responsibility for social costs engendered by capitalism (see Azmanova 2013, 33–34).

The most crystal example of conceptual framework that the CLS could bring into the current debate is the post-Agambenian notion of the state of exception. It is

more than ever adaptable to explaining hybrid regimes which construct autocracy in the garb of allegedly democratic forms. In the case of Poland, which is more conceptually challenging, it might be the principal conceptual tool to describe how the hitherto coherent legal system composed of acts and institutions that recognised themselves mutually was disrupted by refusals to recognise the validity of norms or acts by executive-controlled institutions. The relationship between the legal system and its outside, re-absorbed into play by neo-authoritarianism, needs to be portrayed adequately with the concept of the state of exception.

5. CONCLUSIONS: THE URGENT NEED FOR CLS

In analysing the current wave of neo-authoritarianism liberal jurisprudence cannot reach the necessary depth: the conceptual framework that the CLS might elaborate is acutely needed. Contrary to what might appear at first glance, the CEE neo-authoritarianisms do not tend towards suspending the law in order to exercise pure power (which is how Nicos Poulatzas interpreted fascism – cf. Poulantzas 1979, 322), but rather produce complex hybrid regimes which intermingle norms of different origin (supranational and national) with a grid of exceptions clouding the power of the executive. In this sense, they are a direct continuation of technocratic liberal democracies, developing their façade techniques of governance. That neo-authoritarian countries might still be functioning members of the EU points to a critical short circuit between the liberal blank point and the new far-right governmentality.

On the conceptual level, I argue, the CLS should therefore directly and urgently engage in analysing the ongoing change in CEE jurisprudence. On the political level, however, it should join the liberal side in defending fundamental values and post-Enlightenment legacy in a kind of tactical popular front. Nonetheless, it can never lose from its sight the opportunities created by the irruption of the political into the field of mainstream jurisprudence.

BIBLIOGRAPHY

Ágh, Attila. 2017. "The EU Polycrisis and Hard Populism in East-Central Europe: From the Copenhagen Dilemma to the Juncker Paradox". *Politics in Central Europe* 13(2/3): 7–32.

Azmanova, Albena. 2013. "The Crisis of Europe: Democratic Deficit and Eroding Sovereignty – Not Guilty". *Law and Critique* 24: 23–38.

Bonelli, Matteo. 2018. "A Federal Turn? The European Union's Response to Constitutional Crises in the Member States". *Perspectives on Liberalism* 10(1): 41–70.

Broszat, Martin. 1969. *Der Staat Hitlers: Grundlegung und Entwicklung seiner inneren Verfassung*. München: Deutscher Taschenbuch Verlag.

Bugaric, Bojan. Alenka Kuhelj. 2018. "Varieties of Populism in Europe: Is the Rule of Law in Danger?" *Hague Journal of the Rule of Law* 10: 21–33.

The Economist Intelligence Unit's. 2018. "Democracy Index". https://infographics.economist.com/2018/DemocracyIndex/ [Accessed: 11 August 2018].

Gdula, Maciej. 2018. *Nowy autorytaryzm*. Warszawa: Wydawnictwo Krytyki Politycznej.

Halmai, Gábor. 2014. "An Illiberal Constitutional System in the Middle of Europe". *European Yearbook on Human Rights* 14: 497–514.

Joerges, Christian. Christian Kreuder-Sonnen. 2017. "European Studies and the European Crisis: Legal and Political Science between Critique and Complacency". *European Law Journal* 23(1–2): 118–139.

Kelemen, R. Daniel. 2017. "Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union". *Government and Opposition* 52(2): 211–238.

Levi, Niel. Michael Rothberg, 2018. "Memory Studies in a Moment of Danger: Fascism, Postfascism, and the Contemporary Political Imaginary". *Memory Studies* 11(3): 355–367.

Mańko, Rafał. Cosmin Cercel. Adam Sulikowski. 2016. "Introduction. Law and Critique in Central Europe: Laying the Cornerstone". In *Law and Critique in Central Europe. Questioning the Past, Resisting the Present*. 1–15. Edited by Rafał Mańko, Cosmin Cercel, Adam Sulikowski. Oxford: Counterpress.

Müller, Jan-Werner. 2016. *What Is Populism?* Princeton: Princeton University Press.

Oliver, Peter. Justine Stefanelli. 2016. "Strengthening the Rule of Law in the EU: The Council's Inaction". *Journal of Common Market Studies* 54(5): 1075–1084.

Palombella, Gianluigi. 2018. "Illiberal, Democratic and Non-Arbitrary? Epicentre and Circumstances of a Rule of Law Crisis". *Hague Journal of the Rule of Law* 10: 5–19.

Pech, Laurent. Kim Lane Scheppele. 2017. "Illiberalism Within: Rule of Law Backsliding in the EU". *Cambridge Yearbook of European Legal Studies* 19: 3–47.

Pinelli, Cesare. 2011. "The Populist Challenge to Constitutional Democracy". *European Constitutional Law Review* 7: 5–16.

Poulantzas, Nicos. 1979. *Fascism and Dictatorship. The Third International and the Problem of Fascism*. London: Verso.

Saward, Michael. 2010. *The Representative Claim.* Oxford: Oxford University Press.

Scharpf, Fritz. 2015. "After the Crash: A perspective on Multilevel European Democracy". *European Law Journal* 21(3): 384–403.

Scheppele, Kim Lane. 2015. "Understanding Hungary's Constitutional Revolution". In *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*. 111–124. Edited by Armin von Bogdandy, Pal Sonervend. München: Beck, Hart & Nomos.

Sólyom, László. 2015. "The Rise and Decline of Constitutional Culture in Hungary". In *Constitutional Crisis in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania*. 5–31. Edited by Armin von Bogdandy, Pal Sonerven. München: Beck, Hart & Nomos.

Sulikowski, Adam. 2012. *Konstytucjonalizm a nowoczesność. Dyskurs konstytucyjny wobec tryumfu i kryzysu moderny*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

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WHAT KIND OF CRITIQUE FOR CENTRAL AND EASTERN EUROPEAN LEGAL STUDIES? COMPARISON AS ONE OF THE ANSWERS

Abstract. This paper seeks to emphasize the merits of comparative law as a critical legal enterprise. For this purpose, it first provides a brief overview of the various forms of critique that have been advocated in the field of comparative law. Second, it discusses four epistemological concerns as regards legal comparison that are meant to orient comparatists towards a critical mode of comparative reasoning. While most of the remarks comprised in this contribution apply to legal comparisons in general, a few observations shall be made with specific reference to the stakes and limits of legal comparisons in Central and Eastern Europe.

Keywords: comparative law, critique, cultural resources, critical interdisciplinarity.

1. INTRODUCTION

Critique, as Foucault famously stated in his lecture 'What is Critique', is certainly not one thing but "seems to be condemned to dispersion, dependency and pure heteronomy" for "[i]t only exists in relation to something other than itself" (1978, 21). In relation to law, one can already notice the gap that exists between the general public's perception of law (and lawyers) as being critical and a well-established tradition of scholarly understandings of law as scarcely self-reflective, mired in thinking taking its cue from authority, not unlike religion. When lay people think of lawyerly activities as critical they usually have in mind lawyers' abilities of close reading and hair-splitting. It is quite common that first-year law students tell their professors that they joined law school because they want to learn to think critically. When scholars denounce law's overconfident and self-congratulatory language, they usually refer to its excessive formalism, its self-centeredness and its lack of preoccupation with people's real experiences in law. It is nothing less than fascinating that one of the least critical disciplines from an epistemological point of view asserts itself publicly as properly belonging to the realm of critique, a fact that stands, to my mind, as a proof that academic critique in relation to law is much needed. The goal lies not in shaking the public's trust

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in law but in refining some of the preconceptions when it comes to what law does and does not, can and cannot achieve.

From an internal perspective, lawyers commonly engage in normative analyses. They seek to answer what the law on a specific issue is and, for this purpose, they establish how the various pieces of legislation, caselaw and doctrinal insights relate to each other. Correlatively, their critique generally resides in fault-finding: the judge was mistaken on the law when rendering this or that decision, this author got the law wrong or the lawmaker was incoherent.

As the title of a book by Günter Frankenberg reads, *Comparative Law as Critique* (2016), comparative law itself can be the critique we want in relation to law, for, from the very outset, it suspends this idea of normativity as the main pillar of thinking about the law. Comparisons force a reconnection of law to its material conditions, to life, and thus unveil how law relates to society, ultimately offering answers about law's "whereabouts". It points to the fact that law does not own a transcendental condition. It also highlights that some general questions that we ask about law, oftentimes *ad nauseam*, cannot even be answered, at least not in abstract. With comparative law, suddenly, both the questions and the critique focusing on the usual suspects charged with infringing law's integrity and systematicity are radically called into question. When dealing with two distinct legal orders, it no longer makes sense, from an intellectual point of view, to address the same typical normative questions raised within the confines of national scholarship. As opposed to traditional dogmatic writings, whose utility has been defended for a long time and is taken for granted by most jurists, the act of putting together, in the same mental configuration, two or more legal systems represents an unnecessary intervention. It is the researcher who generates this theoretical encounter and, therefore, he or she bears a greater responsibility for why and how they are doing this.

Insofar as it unmasks legal structures as contingent and dependent on cultural context, comparative law lays the ground for apprehending law's ways of domination. In this sense, comparative legal research could service an explanatory goal as understood in Max Horkheimer's *Critical Theory* (1993). However, for it to remain a useful critique of law, comparative law's critique needs not overlap with the other goals (practical and normative) of the Frankfurt School of Critical Theory. Thus, while exposing domination could be a legitimate outcome of comparative legal studies, comparatists should, for instance, refrain from proposing change based on the simplistic assumption that what works abroad shall necessarily work (in the same way) locally. This is not to say that comparative can or should be ideologically-free for it cannot. As David Kennedy rightly points out, even the no-politics attitude of post-World War II comparatists represents a politics. In fact, Kennedy denounces contemporary comparatists' political numbness contrasting it with their pre-war peers' political engagement: "[a]ll [comparatists before WW II] felt comfortable participating in public life,

making choices and advocating positions on issues facing government on the basis of their comparative knowledge" (2003, 373). By contrast, in the contemporary landscape, "[t]he discipline encourages its practitioners not to take positions on issues facing government and to think of their professional work as the exercise of academic good judgement rather than political choice. Comparative law today is about knowing, not doing" (Kennedy 2003, 346). Departing from the prevailing vocabulary imbued with agnosticism, this author pleads for much more visible political commitments from the part of those working in comparative law, a claim he makes upon the "intuition that the profession does more to sustain than remedy the world's *status quo* injustice" (Kennedy 2003, 433). While I admit that no comparative act is politically innocent and that it is always better to be honest about one's ideological commitments and social interests, I also think comparative lawyers can contribute something interesting to legal knowledge without overtly assuming a political mission. Kennedy states as follows: "[i[magine each comparative-law project coming with an ideological and interest 'impact statement', articulating the effects of knowing this, rather than something else, might have on the distribution of ideas and things in the world. Become a habit, this heuristic might heighten the comparatist's experience of himself as a ruler" (Kennedy 2003, 432). Indeed, while I am prepared to accept the first part of his statement, I am much more reluctant to share Kennedy's view according to which a successful comparatist should transform himself or herself into a ruler, whose choices are "to be part of the fabric of global governance" (2003, 432). To allude again to Horkheimer's criteria, in being explanatory a comparative endeavor is always already a normative endeavor. The question of knowing whether on top of its already inherent normative character comparatists should add another layer of more explicit normativism is something over which they should enjoy a large margin of discretion. Thus, critique does not mean politics (for there is an implicit politics, at least in the sense in which choices are involved, even in the least critical projects) and it needs not be equated with assumed political goals (comparative studies can retain a scholastic reach without loosing their critical stance).

Comparative law comes in many packages, some less critical than others. My intention in what follows is, first, to provide a brief overview of the various forms of critique that have been advocated in the field of comparative law (II). Second, I would like to discuss four epistemological concerns as regards comparison. Most of the remarks apply to legal comparisons in general but a few observations shall be made with specific reference to the Central and Eastern European region (hereafter referred as CEE) and its problematic geopolitical situation as a "*peripheria duplex*", "a unique amalgamation of postcolonialism (vis-à-vis the former Soviet power) and neocolonialism (vis-à-vis the West)" (Mańko, Cercel, Sulikowski 2016, 3).

2. COMPARISONS AND THEIR CRITICAL ITINERARIES

It is fair to acknowledge that "[c]omparative law has not made its mark as a discipline boosting doubt and introspection, even though a comparative attitude, more than a non-comparative approach, one would assume, would lend itself to practicing (or arguably presupposes) a modicum of self-reflection and critical thought" (Frankenberg 2016, 17). In fact, as I argued elsewhere, the idea of bringing comparison to the field of law exacerbated legal scholars' attachment to positivism and its scientific ethos (Mercescu 2018, 135). In viewing comparison as a tool of objective measurement, in line with its conceptualization in the social sciences, legal scholars rest assured that their endeavors were thus legitimized and, therefore, felt no need to extend their research beyond law's conventional boundaries. Through comparison, law came to be closer to science in the imagination of many jurists who envied the universal status of other disciplines. To use the words of two prominent figures of mainstream comparative legal theory, Konrad Zweigert and Hein Kötz: "comparative law offers the only way by which law can become international and consequently a science. In the natural and medical sciences, and in sociology and economics as well, discoveries and opinions are exchanged internationally. […] There is no such thing as 'German' physics or 'British' microbiology or 'Canadian' geology" (1998, 15). Paradoxically as this might seem, such conclusions ensued as the existence of similarities even as to details between various legal systems and, at the same time, the superiority of some national systems in relation to the others. Arguably, Alan Watson's seminal study on legal transplants (1993) encouraged scholars of comparative law to think in terms of similarities and to therefore regard "minor" systems as replicas of "major" ones.

Clearly informed by a universalistic post World War II vision, this approach did not come under serious attack until the end of the 1980s and the beginning of the 1990s. Significantly, in 1985, Günter Frankenberg published an article entitled 'Critical Comparisons: Rethinking Comparative Law' in which he criticized mainstream comparisons especially for their formalism and ethnocentrism. Frankenberg's critique entered the Critical Legal Scholars Network in the United States whose members appreciated its potential for taking Critical Legal Studies (CLS) insights beyond the American Legal System (Mattei 2006). In 1996, the conference 'New Approaches to Comparative Law' was organized at the University of Utah where critically-inclined comparatists gathered to discuss comparative law's renewal in light of the CLS' agenda. As Ugo Mattei notes in his review of the encounter between comparative law and CLS, what followed were a series of meetings that helped the formation of a rather loosely connected network of scholars whose interest lied in denouncing "law as a hegemonic system legitimating direct forms of domination" (2006, 876). Thus, critical scholarship covering the

Arab world, Asia, Latin America or Africa, questioning the way in which the legality of these spaces has been perceived by the Western gaze, were soon to be produced. For instance, Teemu Ruskola's *Legal Orientalism* challenges traditional depictions by Western scholars of Chinese law (Ruskola 2013) or, in the words of one of his reviewers, leading comparatist Pierre Legrand, "emphasizes how the United States features China as an especially important other-in-the-law – or, more accurately, as a significant other-out-of-the-law or as a compelling out-law" (Legrand 2014, 449). Inspired by Edward Saïd's pathbreaking study, *Orientalism*, Ruskola uses case studies to propose a departure from the opposition between an idealized American law and a caricatured Chinese lawlessness. Thus, he claims that there is indeed a strong cultural tendency to associate the United States with law (even if excessively so at times), and a corresponding historic tendency to associate China with an absence of law (whether that absence be considered a vice or a virtue). The distinction is crucial because the emergence of law, in the sense of rule-of-law, is one of the signal markers of modernity. This rough cultural mapping of the triangulated relationship among China, the United States, and law generates a number of assumptions that provide the framework for scores of comparative studies of China. These include, most notably, the notion that China is traditional – or worse, primitive – while the United States is modern, as is the law that embodies its essential values. From these fundamental oppositions much else ensues, historically and conceptually (Ruskola 2013, 5).

Or, to take another example, comparative law was employed to question the alleged Europeanness of Latin American law and denounce this qualification as factitious and only meant to serve the Latin American elites and their neo-liberal projects in national governance (Esquirol 1997, 2003). The examples could go on. Thus, Mattei credits comparative law with the merit of having moved the Crits agenda to a global level (2006, 877).

Besides its CLS strand, comparative law developed other paradigms of critical thinking manifested in what one could call its "cultural awareness". Comparative lawyers started to understand that contrasting legal systems *in abstracto* amounts to a void intellectual enterprise: not only uninteresting but also utterly flawed inasmuch as these exercises in black-letterism invariably ends up presenting legal systems as similar, when, in fact, detailed analyses attuned to the law in practice or to law as a social phenomenon would tell us a rather different story. For a long time, "comparative lawyers have neglected to scrutinize the foundations of their discipline or to think with sufficient rigor about the essentially philosophical question: How can we best come to understand law in cultures other than our own?" (Ewald 1995, 1891). Starting with the 1990s, a number of comparatists took this question seriously and began working on the notion of "culture" for the purpose of refining the discipline's epistemology.

Thus, the notion spans almost all the writings of Pierre Legrand, the most prominent figure of the field's heterodoxy, who insists that we should view law

as culture and cultural explanations as having a better explanatory potential than positivist renditions of law, which confine themselves, somewhat tautologically, to what is legally binding. Importantly tough, Legrand cautions that

> [s]peaking of 'legal culture' certainly does not automatically privilege coherence, imply reification, entail essentialism, exaggerate distinctness, preclude temporal change, efface individual variations or contestations that can take the form of participation or non-participation in a range of sub-cultures, fetishize identity so that it would lay beyond critique, trivialize agency or individual reasoning, and cast its advocates as blinkered conservatives (Legrand 2011, 111).

Legrand's sophisticated use of culture in relation to the comparisons of laws paved the way for other critical insights, ranging from a critique of method (Glanert 2012) to refined investigations of law's translatability (Glanert 2011). Various authors proposed other terminologies such as legal consciousness, legal discourse, legal ideology, regulatory styles, legal styles, legal epistemes, legal traditions to ultimately suggest that there is more to law than its textualism and that comparatists should be eager to excavate its multiple cultural ramifications. In any case, culturalism then, with its emphasis on differences, has gained terrain as a serious competitor to functionalism – comparative law's traditional approach. Indeed, the topic of the Annual Meeting of the American Society of Comparative Law in 2007 was 'Comparative Law and Culture'. More recently, in 2017, the *American Journal of Comparative Law*, one of the leading journals in the field, dedicated a special number to Pierre Legrand's critique of mainstream comparative legal scholarship.

The "cultural awareness", in turn, brought about a series of critical investigations in response to the legal transplant literature asserting the relative easiness with which law travels from one jurisdiction to another. In the 1990s, unsurprisingly given the celebratory "end of history" atmosphere, it was not uncommon to come across statements such as the following: "[o]ften when we speak of globalization we mean that certain American legal practices are being diffused throughout the world (for instance, the legal device of franchising) […] [f]or whatever reasons, it is now possible to argue that American business law has become a kind of global *jus commune* incorporated explicitly or implicitly into transnational contracts and beginning to be incorporated into the case law and even the statutes of many other nations" (Shapiro 1993, 39). Or, in the words of another author: "the reception of American law is an irreversible process"; "remarkable parallels exist between the process by which Roman law took root at the Italian universities in the Middle Ages and developed into the European *ius commune* on the one hand, and the dissemination of American law, on the other" (Wiegand 1991, 230). Looking at the case of product liability, Mathias Reimann goes as far as suggesting that the ubiquity of legal transplants challenges the very idea of legal traditions:

> The basic concept of strict liability regardless of contract spread from the United States as a common law jurisdiction to the civilian world of continental Europe, from there to the

> common law regimes of England and Ireland as well as to the Asian legal systems of Japan, Taiwan, and Korea, not to mention mixed jurisdictions like Israel and the Philippines. It crossed and re-crossed the boundaries between legal traditions with an ease that suggests their irrelevance (Reimann 2003, 837).

Nowadays, it is much more common to encounter less hegemonic and more nuanced positions in scholarship.[1] For instance, in comparing American universal service to French and Italian public service, Tony Prosser concludes that "[l]egal transplants and adaptation are quite a lot easier than Legrand suggests; However, legal culture plays an important role in explaining differences; each approach has something to learn from the other" (2001, 239). In showing that legal knowledge is always local knowledge, comparative law helps one withstand global convergence claims and uncover their underlying hegemonic ideology (Bönnemann, Jung 2017, [9]).

To sum up, critique in comparative law means

> to re-think the methods, theories, and masters of the discipline; to re-view the genealogy of the privileged Western tradition; to confront its colonialist legacy and hegemonic services; to re-evaluate the proclaimed ideological agnosticism; to re-consider the ethnocentric and nationalist framework of the discipline and meet the challenges of globalization; to submit to 'close reading' the operations of the legal consciousness in foreign systems, the styles and mentality they shape; to revise the exaggerated concern with private law; to reject the assimilation between law and rules, law and state, law and the West; to reassess the preoccupation with and privileging of similarity; to re-orient comparative studies to the analysis of legal transfer, its contexts, risks and side-effects; to analyze the relationship between comparative and international law; to produce not only 'reliable information' but critical-comparative insights into projects of governance and legal harmonization (Frankenberg 2016, 18–19).

What do these critical itineraries of comparative lawyers tell us about their discipline's possibilities of critique in relation to Central and Eastern Europe? In what follows, I will try to provide an answer to this question and launch some tentative guidelines for how to conduct critical comparisons involving Central and Eastern European countries.

3. A CRITICAL GUIDELINE FOR COMPARISONS IN CEE

From the point of view of Central and Eastern European scholars, Central Europe has been described "legally speaking" as "an extraordinary place (in the sense used by Örücü), that is a place where things 'out of the ordinary' are happening and where lawyers are questioning once again the tenets of the order"

[1] This should not be taken to mean that comparative law is now "cured" of its ethnocentrism. For instance, Upendra Baxi rightly denounces its "colonialist heritage" that makes itself felt in important scholarship quarters: "[t]he revival of comparative constitutionalism studies almost always ignores the remarkable achievements of decolonized public-law theory" (Baxi 2003, 53).

(Mańko, Cercel, Sulikowski 2016, 4). However, not unlike Latin America which has been characterized by the West as "a European appendix lacking a distinct legal culture that could serve as the basis of a genuine and exotic contribution to jurisprudence" (Mattei 2006, 820), CEE's "out of the ordinary" is generally either negated or, when affirmed, it is rather affirmed in negative terms (the "out of the ordinary" all too readily becomes the "out of order"). If I were to subsume the various instances of critique stemming from comparative law under a unique label I would point to its ability of unveiling "how thought [is] related to place" (Chakrabarty 2000, xiii). For this to happen, we need as many critical-cultural comparisons as possible: between Central and Eastern European countries themselves but also between CEE countries and the traditionally privileged Western legal systems. This would allow us to reconstrue legal spaces in CEE anew by inscribing them twice in the logic of *distinctiveness*: first, Central and Eastern European legal systems are to be shown distinct from its Western counterparts and not mere imitations thereof; second, they are to be contrasted to each other so as to counter the narrative according to which they are trapped in the same past of actually existing socialism or in the same present configured, for example, by their relationship with the European Union.

The appeal to culture as a heuristic tool forces us to admit the influence of the past. As Legrand emphasizes, citing Giorgio Agamben's definition, "[e]very culture is essentially a process of transmission and of *Nachleben*" where "*Nachleben* […] harbours a posthumous dimension, such that it allows for 'a derivation of ought from was'" (Legrand 2011, 110). But it does not foreclose us from evaluating how a common past translates into different presents. By "generat[ing] a sense of our historical contingency" (Fletcher 1998, 700), legal comparisons rebut determinisms of all sorts and therefore, in a sense, free the entities under review, which can come to appreciate the fact that because things could have been different, they can be different.

Thus, alongside its usual benefits (de-naturalization of one's system of thought, better knowledge of the self, the accrual of legal imagination), comparative law's utility in relation to the CEE space also lies in its anti-hegemonic power. Damjan Kukovec decries the center-periphery dynamics inscribed in the existing configuration of rights and obligations in the European Union (2015). Interestingly, this author reconceptualizes the EU as a space where the dichotomy center-periphery cuts across the distinction left (social concerns) – right (free market/movements), which solicits, to my mind, all the more so the intervention of comparative law broadly conceived. In fact, while neo-liberalism within the EU can be usefully criticized from various non-comparative standpoints, comparisons seem to be favorably suited to address the more complicated picture involving these four conflicting sets of interests: those of the right, those of the left, those of the center and those of the periphery, where center and periphery can, although they must not, be circumscribed by national borders. Indeed, an analysis of how the

EU's relation to the member states belonging to the center stands as opposed to the EU's approach towards the periphery can reclaim for itself a comparative character.

However, not all comparisons are conducive to critical insights. To the contrary, comparative law can be used in an uncritical way to advance hegemonic projects that do violence to the legal systems involved. I introduce here a critical analytical toolbox that could guide comparatists of laws in their academic paths. Nevertheless, this theoretical discussion is meant, at the same time, to point to some inherent limits of comparative law.

3.1. Critical Interdisciplinarity

Serious comparative work, relying on the law as culture paradigm, cannot circumvent an interdisciplinary path. In general, interdisciplinary thinking is associated with critique. "Romantic", "rebellious", "the expression of a self-sacrifice against stupid authority" (Balkin 1996, 957), interdisciplinarity often poses – in a self-congratulatory rhetoric – as knowledge unconstrained by disciplinary shackles. While it is fair to acknowledge that all interdisciplinarities fight against limits in a necessarily limited framework, some do fight better than others.

Students of interdisciplinarity can find at least three recurrent justifications in favor of the cross-fertilization of knowledge: ontological, pragmatic and epistemological.

According to the ontological rhetoric, it is possible to document the integrality of a complex phenomenon deemed to have multiple layers (Repko 2012, 126). Interdisciplinarity's task would then consist in bringing together the various pieces in an all-encompassing matrix meant to allegedly reflect "reality". Inspired by continental philosophy and its propensity for totalizing thought, this vision lost however momentum although it tried to reinvent itself by giving up on the single reality discourse to replace it with the language of multiple levels of reality (Nicolescu 1996, 10).

In contradistinction with the previous approach, the pragmatic justification frames the call to interdisciplinarity as being triggered by the necessity to solve social issues and other unresolved problems. It does not concern itself with the "nature" of things but in a typically pragmatist fashion only with the impact of our knowledge. Unsurprisingly, this approach, developed especially in the socio-historical context of the Cold War (Fuller 2010, 24), enjoys today considerable respect in the context of the marketisation of knowledge. Whereas the ontological approach surprises in that it represents "a regain of a quite classical scientism" (Stengers 1987, 331) in its "nostalgic search for a whole" (Resweber 1998, 21), the pragmatic paradigm is excessive in the way in which it only looks for solutions. While possibly useful in more pragmatic domains, the relevance of this approach for comparative law is questionable, for comparative law should have above all a critical, hermeneutic vocation and resist instrumentalization. Therefore, because,

as Peter Goodrich says, "[i]t is the beauty of theory that it does not require decision but, rather, and only, argument, knowledge, and insight brought to bear as invention and intervention" (2009, 490), I favor in relation to comparative law a type of interdisciplinarity that challenges one discipline through another rather than one purporting to solve problems.

The epistemological approach to interdisciplinarity focuses on the plurality of discourses. Since discursive practices join other forces in the creation of "reality" what matters is how the researcher manages to make these interact. As long as more than one discipline talks about a given object of study it is commendable to generate an encounter between the various perspectives. It is then not reality itself that is being recomposed and thus better explained. It is the languages that are being reimagined: ultimately, then, what counts is the intertextuality put forth by the researcher. Unlike the ontological approach, the epistemological one does not conceive of interdisciplinarity as an *adequatio rei et intellectus*. Thus, in light of these different motivations for an interdisciplinary work, the specialized literature provides us with the following dichotomy: between an integrative or Apollonian interdisciplinarity and a critical, Dionysian interdisciplinarity (Newell 2003). Whereas the first one seeks to build bridges between disciplines with a view to obtaining a holistic explanation without critically interrogating the disciplinary *status quo*, the second type aims at reconstructing disciplinary frontiers by highlighting each discipline's tensions, uncertainties and inconsistencies. Such an interdisciplinarity puts to the test each discipline's premises and predispositions and usually involves two stages: first, the denunciation of an act of exclusion and second, the reconstruction of the discourse by including the path(s) not taken.

Comparative law risks to propose flawed conclusions if it lets itself guided by an integrative interdisciplinarity. While it winded up non-interdisciplinary, functionalism aspired, at least in the beginning, to coalesce the various laws under the umbrella of a common social function. In other – epistemic – words, sociology was meant to play an integrative role. More recently, the "Legal Origins" theory proceeds in a similarly integrative vein when it pits the various laws against economic standards and declares some to fare better than others (see, for instance, La Porta *et al.* 1998). Here it is through economics that the different laws are integrated into a common theoretical structure. In the context of the CEE, it might be tempting to resort to such a "methodology" if, as a result of its use, CEE countries could shift from the periphery to the center. For example, in the World Bank Doing Business Reports of 2018, elaborated on the basis of the "Legal Origins" theory, five CEE countries, that is Estonia, Latvia, Lithuania, Poland and the Czech Republic, rank in the first 50 countries and, at the same time, higher than France (which is the 31st).[2] However, critical comparative law should resist the idea of superiority – the impossibility of objective measurement does

[2] http://www.doingbusiness.org/en/rankings [Accessed: 15 September 2018].

not preclude the possibility of a foreign eye criticizing, inevitably from his or her cultural categories, a different legal system (Legrand 2011, 147). Or, integrative interdisciplinarity usually leads to asserting the superiority of one legal system over the other, the "foreign" discipline acting as the final arbiter. I claim that this mode of interdisciplinarity should be resisted.

By contrast, a study such as the one of Hila Shamir, for example, entitled 'The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States' (2010), puts forth a fruitful *critical* interdisciplinarity. In comparing specific legal aspects of the welfare regimes in Israel and the United States, Shamir calls into question, on the one hand, the various economic and sociological theories that converge to uphold the view according to which the welfare state represents a leveling force in society. The comparatist shows that while seeking to promote equality the welfare regimes end up by "producing stratifying effects" (Shamir 2010, 957). On the other hand, law does not remain unscathed at the end of Shamir's comparative research. She reconstructs the notion of "family law" to include not only "peripheral legal orders" (Halley, Rittich 2010, 772) but also extra-juridical elements.

3.2. Collective research

Team work is the norm in the sciences, less so in the humanities and other soft disciplines (Cummings, Kiesler 2005). However, according to Michael Gibbons *et al*., under the new Mode 2 regime of knowledge production, which finds itself on the rise, "creativity is mainly manifest as a group phenomenon, with the individual's contribution seemingly subsumed as part of the process" (1994, 9). Indeed, collaborative work has been appreciated as having important merits when applied to the field of comparative law (Girard 2009). Thus, a team can be as culturally diverse as the coordinator wishes and, as such, it has been highlighted that one member can "correct" another's excesses and vice-versa. In fact, comparative law has a rich, tough not unproblematic, history of collective undertakings starting from Rudolf Schlesinger's Cornell project to von Bar's Study Group on a European Civil Code.

Moreover, whereas collaboration is not coterminous with interdisciplinarity (Klein 2010, 19), they can reinforce each other. Collaboration allows from the outset for a wide representation of disciplines. Or, if CEE legal scholarship is to be taken seriously it has to exhibit the strength to let itself debated and critiqued inside eclectic networks of scholars.[3]

However, if collective work is to remain relevant and go beyond a mere juxtaposition of the participants' legal (or disciplinary) systems facilitated by their representatives' physical presence, I suggest that each participant work

[3] Existing networks such as CEENELS (http://ceenels.org/), CEE Forum (http://www.cee-forum.org/) or CLEST (clest.pl) are models to be followed.

on a foreign legal system (or other discipline) so that the research preserve its deterritorialization goal. Comparisons take place in the mind of the comparatist and are then articulated in writing. They do not take place *in der Luft*, in a room where lawyers gather to speak, in turn, of their own systems. Such an enterprise would amount to nothing else than an inventory of legal systems having little analytical value.

3.3. Cultural resources

Critical comparatists understand law as culture and therefore are ready "to embrace interpretation as emphasis on heterogeneity, mobilization of difference, activization of the singular" (Legrand 2011, 128). Or, difference can easily be converted into negativity in a context marked by a "centre-periphery" dynamics. Indeed, if one compares CEE to Western countries and difference is asserted, there is a risk of CEE legal systems mistakenly being perceived as incapable to do away with their dark past. Moreover, a theory focused on difference might legitimize an exacerbated national identity rhetoric, which can give rise to populist and illiberal politics, as we have recently witnessed. In practice, then, comparatists should seek to articulate difference without the implication of an objective hierarchy between the two or more objects of the *differend*. For this end, a slightly revisited theory of comparison replacing *difference* with *distance* might be useful. I propose in what follows a tentative scheme to be further developed.

In 2016, François Jullien, a French philosopher and well-renown sinologist, published a small book entitled *There is no such a thing as cultural identity* where he asks the following question: "should we account for the different cultures in differential terms or according to specific traits, held to be characteristic, from which it would follow that there is an identity of each culture thus distinguished?" (Jullien 2016, 34). The author first draws a distinction between the concept of distance (*écart*) (between cultures) and difference and argues that we should embrace the former. Both entail the idea of separation, according to Jullien. However, he argues that *difference* is too closely linked to the fallacious concept of identity. When we say *difference*, we either imply that there is some sort of a common, original identity from where the process of differentialization started or we defend the idea of fixed identities that exist in isolation from each other. On the other hand, when one says *distance* one does not seek to range the object of study in any way, one simply suggests that there is a space between two or more entities that calls upon us to reflect on it, to fulfill it conceptually as one thinks fit. Difference hints to classification, distance, by contrast, to confrontation.

There is no such a thing as identity then but only a set of resources (or fecundities) made available by each culture by virtue of the distance existing between the participants to that culture. Distance allows the conversation to go on and, thus, a culture to be built precisely in the interstices, between (*entre*) the

various resources. Indeed, Jullien reminds us that transformation is what makes the cultural cultural when he asks: "How could we characterize French culture, how could we fix its identity? Under La Fontaine or under Rimbaud? Under the figure of René Descartes or André Breton? French culture is no more one than another, but it is, obviously, in the distance between the two: in the tension between the two or in the betweenness that opens up between them" (Jullien 2016, 48). Or, similarly, at the time when we wanted to draw a Constitution for Europe we asked ourselves whether Europe was Christian or secular. A proper answer would have been: Europe is "at the same time Christian and secular (and other). It developed itself in the distance between the two" (Jullien 2016, 49). What is common then in a culture is the sum total of those cultural resources: "what is common is not what is similar" (Jullien 2016, 74). What is common encompasses "the common of the language as well as that of history, of cultural references, of intelligence modes transmitted through education, of arts and of lifeforms" (Jullien 2016, 74).

While Central and Eastern Europe remains too heterogenous for one to be able to speak of a common culture, I do think it is possible to work with *Central and Eastern European cultural resources* ranging from collective memories of actually existing communism to post-transition experiences, whose expression can be found not only in law and politics but also in literature, sociology, psychology and the arts. Talking about CEE cultural resources then must be recognized as a political gesture directed, before anything else, at making the region more intellectually relevant.

3.4. Language

Law is inextricably connected to language (see, for instance, Glanert 2011). Therefore, a sensible comparative approach would require looking at a different law in that law's particular language. As it has already been remarked: "[n]ot working in the other's language would mean imprisoning the other in a system which is mine ('I'). It would simultaneously mean a force (violence) in the form of a translation by means of which the uniqueness of the case in hand is covered and by which the uniqueness of the other is interrupted" (Škop 2016, 42). Or, we have to admit that when it comes to the comparisons I praised here (between the various CEE countries) very few scholars would have the necessary linguistic competences to engage in this kind of ethical comparison. Imagine a Romanian scholar working on Czech and Polish law without reading neither Czech nor Polish. For instance, this is what a reviewer writes of a comparatist who addressed Romanian constitutional law: "[a]s the author acknowledges, not being able to read in the original language, he was at the mercy of primary source translations, the relatively scant constitutional law and political science academic publications in English, and German, and the foreign language press (*i.e.*, a couple of local and relatively marginal newspapers published in German and English)" (Iancu 2013, 99).

As in the case of critical interdisciplinarity, one language provokes the other and, as a consequence, one law confronts the other. If English is solicited, as it will often be, in order to mediate this negotiation between Central and Eastern European legal languages, we can be sure that some resources will be lost (in translation). Indeed, all cultural resources live in a given language and no cultural resource lives in no or above language. Hence, should they be forced to pass through another semiotic matrix, their message will be filtered all the more so that English, a hegemonic language at least to a certain extent, cultivates "preferred readings" (Škop 2016, 40). Indeed, it has been pointed out that "in the process of interpretation, some meanings that correspond with everyday experience, everyday knowledge, or a dominant ideology prevail against ones that are new, novel, deemed dangerous or unusual" (Škop 2016). While interdisciplinarity, and especially critical interdisciplinarity, might be very hard to do, as Stanley Fish tried to demonstrate (1989), the linguistic problem raised here must be recognized as an inherent limit of legal comparative analyses that becomes especially problematic in the context of the linguistic periphery of CEE countries.

4. CONCLUSION

Critique can mean many things: critical legal studies, feminist jurisprudence, postcolonial studies, law and psychoanalysis, queer studies or socio-legal studies. All of these have been shown to be useful in the context of CEE scholarship as well (see generally Mańko, Cercel & Sulikowski 2016). Additionally, I tried to show in this contribution that comparative law can also play its part in a critique of law. Though the various branches of critique mentioned above can inform legal comparisons, they should not be confounded. Comparisons are not methods but intellectual postures. Thus, they have an intellectual standing of their own requiring careful consideration of both their promises and limits. I emphasized, in particular, how comparative law can contribute to map the complex dynamics between the various European states in a context crisscrossed by multiple dichotomies.

Thus, not every kind of comparative law is worthwhile. I suggested that for a comparative enterprise to display its fully-fledged critical potential it first needs to be founded on interdisciplinary premises. Importantly, I cautioned that interdisciplinarity, to whom, significantly enough, many comparative legal scholars still resist, does not guarantee the success of one's endeavor. Indeed, there are many possible interdisciplinary designs not all of which are suitable for comparative purposes. I therefore argued in favor of a critical – not integrative and not instrumental – interdisciplinarity.

I also briefly discussed collaborative work as an important research tool in CEE academic world. However, as in the case of interdisciplinarity, my point

was not so much to advocate it indistinctively but to contest conventional ways of collective comparative research and to correlatively plead for what I view as a critical mode of collaboration, one which maximizes the deterritorializing effect of the comparative act.

In order to counter narratives of CEE's (legal) backwardness while defending its specificity, I proposed to slightly amend the theories of culture as currently understood in comparative law. Resorting to French sinologist François Jullien's terminology in understanding cultural phenomena, I explained how the concept of distance, as opposed to the concept of difference, can help account for CEE legal spaces in a non-hegemonic manner. I also suggested that it might be theoretically more interesting to imagine CEE in terms of a panoply of cultural resources rather than a culture. An important limit of my proposal resides however in its exclusively theoretical stance. Further studies pointing to the practical ways in which comparatists can draw on the concepts of distance and cultural resources with a view to putting forth critical legal comparisons are undoubtedly needed.

Last, given the endless list of publications in the field of comparative law circumventing the question of language, my guide to a critical comparison included the reminder that comparatists should stay attuned to the intricacies/limits of language and translation, especially in a context of linguistic periphery such as the one of CEE countries.

To sum up, this contribution was meant to present comparative law, more precisely a specific way of doing comparative law, as a good candidate for a critique of law in Central and Eastern Europe, of whose possibility one should be reminded regularly.

BIBLIOGRAPHY

Balkin, Jack. 1996. "Interdisciplinarity as Colonization". *Washington and Lee Law Review* 53: 949–970.

Baxi, Upendra. 2003. "The Colonialist Heritage". In *Comparative Legal Studies: Traditions and Transitions*. 46–75. Edited by Pierre Legrand, Roderick Munday. Cambridge: Cambridge University Press.

Bönnemann, Maxim. Laura Jung. 2017. "Critical Legal Studies and Comparative Constitutional Law". *Max Planck Encyclopedia of Comparative Constitutional Law*. http://dann.rewi.huberlin.de/doc/oxcon_critical_legal_studies_and_comparative_constitutional_law.pdf [Accessed: 15 September 2018].

Chakrabarty, Dipesh. 2000. *Provincializing Europe*. Princeton: Princeton University Press.

Cummings, Jonathon. Sara Kiesler. 2005. "Collaborative Research Across Disciplinary and Organizational Boundaries". *Social Studies of Science* 35: 703–722.

Esquirol, Jorge. 1997. "The Fictions of Latin American Law (Part I)". *Utah Law Review* 2: 425–470.

Esquirol, Jorge. 2003. "The Fictions of Latin American Law (Part II)". *Florida Law Review* 55: 41–114.

Fish, Stanley. 1989. "Being Interdisciplinary Is So Very Hard to Do". *Profession* 239–249.

Fletcher, George. 1998. “Comparative Law as a Subversive Discipline”. *The American Journal of Comparative Law* 46: 683–700.

Foucault, Michel. 1990. “Qu’est-ce que la critique?” *Bulletin de la Société française de la philosophie* 84: 35–63.

Frankenberg, Günter. 2016. *Comparative Law as Critique*. Cheltenham: Edward Elgar.

Fuller, Steve. 2010. *The Sociology of Intellectual Life*. London: Sage.

Gibbons, Michael. Camille Limoges. Helga Nowotny. Eds. 1994. *The New Production of Knowledge*. *The Dynamics of Science and Research in Contemporary Societies*. London: Sage.

Girard, Charlotte. 2009. “L’énigme du lieu commun”. In *Comparer les droits, résolument.* 313–346. Edited by Pierre Legrand. Paris: P.U.F.

Glanert, Simone. 2011. *De la traductibilité du droit*. Paris: Dalloz.

Glanert, Simone. 2012. *“Method?”. In Methods of Comparative Law*. Edited by Pier Giuseppe Monateri, 61–81. Cheltenham: Edward Elgar.

Goodrich, Peter. 2009. “Intellection and Indiscipline”. *Journal of Law and Society* 36: 460–490.

Halley, Janet. Kerry Rittich. 2010. “Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism”. *American Journal of Comparative Law* 58: 753.

Horkheimer, Max. 1993. *Between Philosophy and Social Science*. Translated by G. Frederick Hunter, Matthew S. Kramer, John Torpey. Cambridge: MIT Press.

Iancu, Bogdan. 2013. “Book Reviews”. *Romanian Journal of Comparative Law* 1: 92–101.

Jullien, François. 2016. *Il n’y a pas d’identité culturelle*. Paris: L’Herne.

Kennedy, David. 2003. “The Methods and The Politics”. In *Comparative Legal Studies: Traditions and Transitions*. 345–434. Edited by Pierre Legrand, Roderick Munday. Cambridge: Cambridge University Press.

Klein, Julie Thompson. 2010. “A Taxonomy of Interdisciplinarity”. In *The Oxford Handbook of Interdisciplinarity*. Edited by Robert Frodeman, Julie Thompson Klein, Carl Mitcham. Oxford: Oxford University Press.

Kukovec, Damjan. 2015. “Law and the Periphery”. *European Journal of Law* 21: 406–428.

La Porta, Rafael. Florencio Lopez-de-Silanes. Andrei Shleifer. Robert W. Vishny. 1998. “Law and Finance”. *Journal of Political Economy* 106: 1113–1155.

Legrand, Pierre. 2011. “Foreign Law: Understanding Understanding”. *Journal of Comparative Law* 6: 67–177.

Legrand, Pierre. 2014. “Noted Publications”. *Journal of Comparative Law* 8: 444–459.

Mańko, Rafał. Cosmin Cercel. Adam Sulikowski. Eds. 2016. *Law and Critique in Central Europe*. Oxford: Counterpress.

Mattei, Ugo. 2006. “Comparative Law and Critical Legal Studies”. In *The Oxford Handbook of Comaprative Law*. Edited by Mathias Reimann, Reinhard Zimmermann. Oxford: Oxford University Press.

Mercescu, Alexandra. 2018. *Pour une comparaison des droits indisciplinée*. Basel: Helbing Lichtenhahn.

Newell, William. 2003. “Apollo Meets Dionysius: Interdisciplinarity in Long-Standing Interdisciplinary Programs”. *Issues in Integrative Studies* 21: 9–42.

Nicolescu, Basarab. 1996. *La Transdisciplinarité: Manifeste*. Monaco: Éditions du Rocher.

Prosser, Tony. 2001. “Marketisation, Public Service and Universal Service”. In *Adapting Legal Cultures*. 223–240. Edited by David Nelken, Johannes Feest. Oxford: Hart Publishing.

Reimann, Mathias. 2003. “Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?” *The American Journal of Comparative Law* 51: 751–838.

Repko, Allen. 2012. *Interdisciplinary Research. Process and Theory*. Los Angeles: Sage.

Resweber, Jean-Paul. 1998. “Disciplinarité, transdisciplinarité et postures du sujet”. In *Du dialogue des disciplines*. 19–36. Edited by Christine Maillard, Arlette Bothorel-Witz. Strasbourg: Presses Universitaires de Strasbourg.

Ruskola, Teemu. 2013. *Legal Orientalism*. Cambridge, MA: Harvard University.

Shamir, Hila. 2010. “The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States”. *American Journal of Comparative Law* 58: 953–987.

Shapiro, Martin. 1993. “The Globalization of Law”. *Indiana Journal of Global Legal Studies* 1: 37–64.

Škop, Martin. 2016. “The Importance of Being a Linguist: Critical Legal Thought in Central Europe”. In *Law and Critique in Central Europe*. Edited by Rafał Mańko, Cosmin Cercel, Adam Sulikowski. Oxford: Counterpress.

Stengers, Isabelle. 1987. “Complexité: effet de mode ou problème?” In *D’une science à l’autre. Des concepts nomades*. 331–351. Edited by Isabelle Stengers. Paris: Éditions du Seuil.

Watson, Alan. 1993. *Legal Transplants*. Athens, GA: University of Georgia Press.

Wiegand, Wolfgang. 1991. “The Reception of American Law in Europe”. *American Journal of Comparative Law* 30: 229–248.

Zweigert, Konrad. Hein Kötz. 1998. *Introduction to Comparative Law*. Translated by Tony Weir. Oxford: Oxford University Press.

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DELIMITING CENTRAL EUROPE AS A JURIDICAL SPACE: A PRELIMINARY EXERCISE IN CRITICAL LEGAL GEOGRAPHY

Abstract. The aim of the present paper is to contribute to the on-going discussion, both in legal theory and in comparative law, concerning the status of Central Europe and its delimitation from other legal regions in Europe, notably Romano-Germanic Western Europe but also Eastern Europe and Eurasia. The paper adopts the methodological perspective of critical legal geography, understood as a strand of critical jurisprudence laying at the interstices of spatial justice studies, critical geography, comparative law, sociology of law and legal history. The paper proceeds by identifying the notion of Central Europe with reference to a specific list of countries, then proposes a number of objective criteria for delimitng Central Europe and applies them in order to highlight the difference between Central Europe and other adjacent legal regions. Following that, the paper enquires as to whether Central Europe should be deemed to be a 'legal family', a 'legal union' or simply a 'legal space' or 'space of legal culture'.

Keywords: critical jurisprudence, critical legal geography, legal theory, comparative law, legal families, legal taxonomy, Central Europe.

1. INTRODUCTION

Central Europe as a legal notion emerged in the 1990s, when the former East-West divide in Europe disappeared with the dismantlement of the Soviet bloc.

The present intervention is subtitled as a 'preliminary exercise in critical legal geography'. It is preliminary in the sense of providing an outline towards further, in-depth research based on a broad range of legal materials. Critical legal geography, in turn, is understood here as a strand of critical jurisprudence (critical legal theory) placed at the insterstices of critical geography (Best 2009; Berg 2010), spatial justice studies (Pirie 1983; Philippopoulos-Mihalopoulos 2013), as well as (comparative) legal history and comparative law. Its aim is to reflect critically upon geographical categories used in legal discourse.[1] As such, it encompasses the field of legal taxonomy (the discourse of comparative law concerning legal families) but

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[1] I am using the notion of critical legal geography not in the sense of linking geographical features (e.g. islands, mountains, rivers, forests, deserts etc.) with legal culture (in some causal manner), but rather in the sense of the study of the spatial (geographical) dimensions of legal culture. In other words, 'geography' denotes here the socially constructed *legal geography*, and not the physically existing 'natural' geography (in the sense of the shape of the terrain).

is broader. Critical legal geography enquires about legal transfers historically and today, about the spatial dimension of law (e.g. the coexistence of different legal systems within one state[2] or the extension of legal systems beyond one state[3]), including the relation between specific features of spatiality and the legal system (e.g. as argued by Eurasian legal theorists).

As part of critical theory, and in line with its links to critical geography and spatial justice studies, critical legal geography, as proposed here, is predominantly concerned with unmasking violence and domination (of any form) and promoting emancipation (i.e. resistance to violence and domination, leading to the liberation of the opressed). *In casu*, the focus will be on a specific region: Central Europe (as defined in section 2), which – on account of its peripheral status – has been subject to domination (*in casu* – legal). I contend that this domination is spatially determined: for various reasons of historical development (political, economic, military etc.) and contemporary predicament, the countries situated in this region have been exposed to forms of external domination which, in the legal realm, takes the form of being a recipient of legal transfers, rather than an originator of them (Mańko 2017a). It is a structural feature of legal geography.

The present paper develops ideas raised in earlier publications (Mańko, Cercel, Sulikowski 2016; Mańko, Škop, Štěpáníková 2018) aiming at the elaboration of more precise criteria for identifying Central Europe as a specific legal space, capable of articulating its interests and making an actual move towards its emancipation. Most importantly, the paper proposes a catalogue of six criteria (in section 4.2) which can be used as criteria of delimitation of Central Europe from adjacent legal spaces. A tentative application of those criteria is undertaken in section 4.4. Furthermore, the paper develops the ideas present in the earlier publications by considering more closely the relation between the concepts of Central Europe (section 2) and Central and Eastern Europe (section 3), and refers back to this possible alternative when summarising the results of the application of the criteria of distinguishing. Finally, in contrast to an earlier seminal paper (Mańko, Škop, Štěpáníková 2018), the present one does not unequivocally argue in favour of a Central European Legal Family but instead raises two alternative concepts: that of a 'legal union' and 'legal space' (section 5).

In methodological terms, the paper belongs to the metadiscourse of critical legal geography, as defined above. It seeks, above all, to set the framework for

[2] A prime example from Central Europe is the coexistence, between 1918 and 1946, of five distinct legal systems in the Republic of Poland (French-Polish, Russian, German, Austrian and Hungarian law). Examples from outside the region include the continued existence of a distinct Scottish legal system in the UK or the specificities of Lousiana law within the US (as a Civil Law jurisdiction within a predominantly Common Law country).

[3] As in the case of wholesale receptions, such as that of French law during the period of Napoleonic wars which – notably – survived the fall of Napoleon and continued in force, in western Germany (the Rhine Provice), until 1900 and in central Poland – until 1946.

discussion on the legal identity of Central Europe by putting forward and testing workable criteria allowing to outdifferentiate this legal space from others, as well as to open a space for discussion on the nature of this legal region (legal family, legal union, legal space). Hence, the object of the paper is to put forward a rational ramification for further research, and in particular to encourage a broadly conceived empirical analysis of the legal cultures of Central European countries in the hope of positively verifying the hypotheses put forward in this and earlier papers.

2. DEFINING CENTRAL EUROPE

If Central Europe is conceived of as a juridical space, two questions must be answered: firstly, what areas should be treated as falling within the category of Central Europe and secondly, from what areas should Central Europe be distinguished from. The first question is more difficult and will therefore be addressed beforehand. Among critical legal theorists from Central Europe the prevailing conception of Central Europe is that of former socialist states (including former USSR republics) which have joined the European Union (Mańko, Cercel, Sulikowski 2016; Mańko, Škop, Štěpáníková 2018). Admittedly, this is a somewhat arbitrary category, but on the other hand it is highly functional with regard to contemporary legal culture. There is no doubt that the two delimiting factors – former socialist legal system and current membership in the EU – play an enormous role in the legal culture of each country. The former socialist legacy creates numerous challenges, from transitional justice to socialist survivals in legal culture, especially judicial mentality, which have been comprehensively described by Zdeněk Kühn (2004, 2011) and Alan Uzelac (2010). EU membership, on the other hand, means a duty to receive massive legal transfers and to subject oneself to the jurisdiction of the Eureopean Court of Justice, an arguably activist court which, through its case-law, seeks to influence the legal culture of the EU Member States with view to their uniformisation. Thus defined, the category of 'Central Europe' would encompass (in alphabetical order): Bulgaria, Croatia, Czechia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. It would be a dynamic category, i.e. the accession of new Member States (e.g. Albania or Northern Macedonia) or leaving the EU by some country from the region would affect the category. Undoubtedly, joining or leaving the EU has a tremendous impact upon legal culture and cannot be ignored by legal geography as an important factor. Nonetheless, defining Central Europe along these lines means that former socialist countries which are not EU members are not included (specifically: Albania, Belarus, Bosnia and Herzegovina, Moldova, Northern Macedonia, Russia, Ukraine). If we treat the concept of 'Europe' more broadly, i.e. extending also to Transcaucasia, the list of exluded countries encompasses also the commonly

recognised: Armenia, Azerbaijan and Georgia.[4] A common denominator of the region is the communist past. As Cosmin Cercel (2018, 199–200) rightly underlines,

> Either as a matter of transitional justice, constitutional reform or simply political debate, the communist legacy is a recurrent trope through which the countries of the region are identified. […] Of course, such a process is laden with traces of cultural representations that reflect not only the East-West divide in geographical imaginaries, but also reenactments of Balkanism, or the center-periphery dialectics. Indeed, behind the signifier »communism« attached to Central and Eastern Europe, one can easily find and filter residues – if not of a colonial gaze, at least those of a specific discourse positing the West as the centre and norm.

Importantly, this approach to the notion of Central Europe means excluding countries which formerly would have been regarded as 'Central Europe' or *Mitteleuropa*, notably today's Austria and Germany, which cannot be described as post-communist states. However, the change of Germany's borders after 1945 meant that it lost its Central European territories (Pomerania, Silesia, West and East Prussia) to Poland and Russia. Whilst the former German Democratic Republic (GDR) was, during the period of its existence (1949–1990) regarded as part of Eastern Europe (the Soviet bloc), its integration into the Federal Republic of Germany, and notably the extension not only of the West German legal system, but also the West German legal apparatus (judiciary, academia) onto the former East German territory (removal of judges, prosecutors, law professors, etc.) meant that – even if geographically the eastern part of Germany could be regarded as Central Europe, in terms of legal culture it became (more or less forcibly) Westernized, and reunited Germany as a single state cannot be described as 'post-communist'.

Concerning the second problematic case, namely Austria, it should be stated that although in strictly geographical and historical terms Austria and especially its predecessor, Austro-Hungary, was a Central European country, since 1945 the Republic of Austria has clearly drifted away in the direction of Western Europe. Nonetheless, as all categories used by critical legal geography need to be dynamic, the situation and its evolution need to be closely observed as the state of affairs may change.

On the eastern flank the category of Central Europe in the aforementioned sense excludes Russia, Belarus and Ukraine – former Soviet republics. Whilst Russia's status as part of Eurasia and Eastern Europe is rather undisputable in historic and geographical terms, the status of Belarus and Ukraine is open to discussion. However, given the current orientation of the Republic of Belarus, remaining closely linked to the Socialist Legal Tradition, and its membership in the Eurasian Economic Union rather argue in favour of its inclusion with Eastern Europe and Eurasia, than Central Europe. As regards Ukraine, it should be emphasised that its legal culture is, at the moment, in a state of dynamic

[4] For reasons of brevity, I am not discussing here self-proclaimed states whose status is disputed and which are recognised only by some other countries, but are not UN members.

transformations the outcome of which can be decisive with regard to its classification as part of Central Europe or Eastern Europe/Eurasia. Clearly, prior to 2014, when Ukraine was a member of the Eurasian integration structures, it was, alongside Russia and Belarus, a post-Soviet, Eastern Europen/Eurasian legal culture. Currently, in terms of legal culture, Ukraine is a liminal region between Central and Eastern Europe. *Mutatis mutandis*, these remarks can be applied to the Republic of Moldova.

Finally, some remarks must be made concerning the Baltic States – Lithuania, Latvia and Estonia. They do share with Central Europe a socialist past (and specifically, the fact of being Soviet Republics between 1940 and 1990) and have juridico-cultural links with Poland (e.g. the Polish-Lithuanian Commonwealth, and specifically the fact that the region of Livonia (Inflanty) was part of that Commonwealth). However, especially with regard to Estonia, its links to the Nordical legal family cannot be overlooked. Therefore, it can be regarded as a liminal region within Central Europe and the situation needs to be more closely observed over time.

On the southern flank, the Balkan states of Albania, Bosnia and Herzegovina, Serbia and Northern Macedonia can be regarded as liminally belonging to Central Europe, although due to their non-integration with the EU, their legal cultures are not exposed to the same stimuli as those of Poland, Czechia or Bulgaria.

In economic terms, Central Europe is definitely a periphery. As Damjan Kukovec explains:

> The centre countries or regions are those with a much higher gross domestic product (GDP) per capita than the regions of the periphery; they invest more money in research and development and have the best universities; they have more capital and more ingoing and outgoing foreign direct investment (FDI). Their actors, products and services have more prestige. […] Generally, companies of the centre find themselves higher in European and global production chains. The centre exports final products and is the seat of powerful corporations and law firms. Countries of the centre are, for example, Germany, France, the Netherlands, Austria, Sweden, Finland and the United Kingdom. The periphery has much weaker industry and a less efficient agricultural sector. It has no (or very few) brands known beyond its borders. Non-branded companies typically earn lower margins and are constantly at risk of being undercut by cheaper rivals. […] Regions of the periphery have a lower GDP per capita, and the actors, products and services from the periphery have much less prestige. They often produce semi-final products or final products for a brand of the centre. Generally, companies of the periphery find themselves lower in European and global production chains. The wages are lower than in the centre, and often (with the exception of the European south) the life expectancy is lower. Countries of the periphery are, for example, Hungary, Portugal, Greece, Bulgaria, Cyprus, Latvia, Poland, Slovenia and Estonia (Kukovec 2015, 408–409).

This peripheral status – as an economic notion – is closely linked to peripherality in other terms, especially political, social and juridical. Without aiming at explaining the causal links between various forms of peripherality, assuming that the juridical enjoys a relative autonomy from the economic (Collins

1982), it seems feasible that juridical peripherality can be, at least partly, remedied within juridical discourse itself (Mańko, Škop, Štěpáníková 2018, 23–24).

3. CENTRAL AND EASTERN EUROPE (CEE) AS AN ALTERNATIVE CATEGORY?

Given the geographical and juridico-cultural issues entailed by the category of Central Europe as presented above, an alternative spatial category which could be taken into account is that of 'Central and Eastern Europe'. This broader category would, essentially, encompass the entirety of Central Europe and those countries which are located within geographical Europe *sensu largissimo* but do not belong to Central Europe. Central and Eastern Europe would, therefore, comprise also Russia, Belarus, Ukraine, Moldova, Georgia, Azerbaijan, Armenia, Serbia, Northern Macedonia, Albania, Bosnia and Herzegovina.

For some purposes, such a category may be useful, but for others it can seem more problematic. Specifically, Russia is leading the legal integration of the former Soviet space in the form of the Eurasiatic Economic Union. On the other hand, Russia remains a member of the European Convention on Human Rights and remains subject to the jurisdiction of the Strasbourg Court, which leads to interactions between its legal system and the Western European tradition of human rights law, developed in the post-World War II period (Mälksoo, Benedek 2017). Countries such as a Serbia, Bosnia and Herzegovina, Albania, Northern Macedonia, Montenegro and Moldova share with Central Europe a socialist past and a capitalist present, hence many of the legal problems encountered there are similar (e.g. property transformation, transitional justice), despite the lack of EU membership. Also historically these regions were closely linked to Central Europe (e.g. today's Republic of Moldova was part of the Kingdom of Romania, Bosnia and Herzegovia as well as the the northern part of today's Republic of Serbia was part of Austro-Hungary, not to mention the seven decades of existence of the Yugoslav state, extending from Slovenia to Macedonia, whose legacy in the field of legal culture cannot be overlooked.

4. DELIMITING CENTRAL EUROPE *VIS-À-VIS* ADJACENT LEGAL SPACES

4.1. Central Europe and former empires

In order to delimit Central Europe vis-à-vis neighbouring legal spaces, two elements must be specified beforehand: firstly, the legal spaces with regard to which such a delimitation is to take place and secondly, the criteria for delimitation. For the present purposes, a hybrid notion of Central Europe will be

applied, encompassing Central Europe as defined above and Central and Eastern European states with the exclusion of Russia which, for the present purposes will be treated as Eurasia. Historical factors also support this hybrid approach – if Central Europe is conceived of as a space subject to the domination of empires (German, Austrian, Russian and Ottoman), the former empires themselves cannot be treated as part of notion of Central Europe. This is particularly justified by the phenomenon of legal transfers, a key notion for critical legal geography. As it will be explained further on, such transfers usually move from the metropolis towards the territories subject to the Empire's rule, and not vice versa. On the other hand, the four empires which have, in the past, dominated Central Europe, can be themselves classified in terms of centre-peripheries as belonging to the Centre (German Empire), the Semi-Periphery (Austrian Empire) and Periphery (Russian and Ottoman Empires). As it will become clear later on, the semi-peripheral and peripheral status of empires dominating Central Europe had an impact upon the dynamic of legal transfers, with empires such as Russia and later the Soviet Union acting both as a recipient and as a donor of legal transfers.

4.2. Criteria of delimitation

A second question which needs to be addressed as a preliminary issue is the catalogue of criteria for delimitation. The following seem to be particularly helpful: 1) the dynamic of legal transfers; 2) institutional continuity; 3) legal continuity; 4) legal style; 5) legal ideology; 6) the social role of law. Each criterion will be explained in more detail.

Ad 1. The concept of the *dynamic of legal transfers* refers to the fact whether a given state (jurisdiction, territory) has been the originator or recipient of legal transfers, in the past and today (Watson 1993; Krzynówek 2003; Ajani 2006; Husa 2015). Furthermore, apart from the aspect of *direction* (incoming or outgoing legal transfers) one should take into account their *modality* and differentiate between voluntary legal transfers (*receptio voluntaria*) and forced legal transfers (*receptio necessaria*). The latter are of particular concern for critical legal theory, as they imply an act of violence. This violence can be military, political or economic (reception of foreign law as a conditionality).

It should be added here that critical legal theory is concerned with various forms of violence. For instance, Lidia Rodak (2015, 133) identifies five forms of violence: psychological, symbolic, structural, hermeneutic and aesthetic. Martin Škop (2015) adds to this also linguistic violence. In turn, Wioletta Jedlecka and Joanna Helios (2017, 15–30) identify physical, psychological, sexual, economic, latent, structural, instrumental and symbolic violence. The links between legal transfers and violence certainly require further theoretical and empirical research, nonetheless it can be *prima facie* pointed out that such transfers may involve especially symbolic violence (degradation of the local legal community), linguistic

(a foreign legal transfer arrives in a foreign language, and the local implementation is only a translation, referring back to the original); aesthetic (if the legal transfer follows a different aesthetic than local law, for instance a codification *vs* customary law, or technocratic law *vs* traditional civil law); economic (if a legal transfer is imposed as a conditionality); structural (if the legal community of the donor becomes epistemologically privileged); possibly also heremeutic (if the legal transfer distorts interpretive processes in the recipient legal community). Furthermore, if legal transfers lead to legislative inflation (Chmielnicki 2012) and instrumentalisation of law (Sitek 2008, 66–78) in a technocratic fashion (Ziętek 2012; Mańko 2017c), this can also have negative impacts upon the recipient legal culture.

On the other hand, critical legal theory cannot overlook the fact that a legal transfer, even if it is the effect of violence (military and economic) and exerts violence (especially vis-à-vis the recipient legal community and its legal culture), can nonetheless be emancipatory towards certain social groups, removing opression and violence, especially if it introduces more progressive rules than those found originally in the given recipient legal system (cf. Mańko 2008). A critical study of legal transfers in Central Europe, particularly in the 19th and 20th century, cannot overlook this aspect.

Ad 2. The concept of *institutional continuity* refers to the institutional framework of the juridical, such as the courts, the prosecution service, the legal professions (attorneys, notaries), both in terms of their personal substratum and in terms of legal arrangements (rules in force). Continuity encompasses especially an on-going tradition, transmitted by education and professional apprenticeship, whilst discontinuity implies creating a new profession from scratch. Institutional continuity in this sense should be distinguished from the continuity of legal institutions (*Rechtsinstitute*), i.e. functionally interlinked, relatively coherent sets of legal norms (Renner 1976, 75; Ziembiński 1980, 34; Sulikowski 2007, 35, 61; Mańko 2016a, 13–14).

Ad 3. The concept of *legal continuity* refers here to the on-goingness of the positive law, including its structure, fundamental principles, conceptual framework, and individual institutions and rules (Mańko 2018a). The notion of legal continuity, understood in this way, should be differentiated from the social function of legal institutions (Mańko 2018a, 118), which is treated for our present purposes as a different criterion.

Ad 4. The concept of *legal style* is understood here with reference to Zweigert and Kötz (1996, 68–72) but in a somewhat more narrow meaning,[5] focusing especially on the the predominant and characteristic mode of legal thought,

[5] I would like to thank the anonymous reviewer for drawing my attention to the difference between the scope of the notion of legal style used in my paper and the broader understanding by Zweigert and Kötz (1996).

acknowledged sources of law and prevailing modes of legal reasoning (Mańko, Škop, Štěpáníková 2018, 15). Therefore, such elements as historical development of the legal system or legal ideology are singled out as separate criteria.

Ad 5. The concept of *legal ideology,* mentioned already above, encompasses the prevailing views of lawyers on the role of law and their own role within the legal community and society at large. As such it is strictly connected both to legal style and to the final category of the social role of law.

Ad 6. The concept of the *social role of law* relies on sociological categories according to which the entirety of social life is differentiated into certain systems (Luhmann) or institutional worlds (Berger and Luckmann), one of which is law (or 'the juridical'). This criterion refers, firstly, to the outdifferentiation of the juridical from politics and the economy (or other systems, such as custom or religion) and secondly, in the case of its outdifferentiation, to the relation between the juridical and such systems (e.g. whether the economy is subject to the rule of law, or the subject to the rule of economy or to political decisions).

4.3. Neighbouring legal spaces

In the following analyses, I will apply these six criteria to the legal spaces from which Central Europe needs to be delimited in order to be constituted as a distinct legal space. These legal spaces can be conceived in various ways. On the one hand, it is possible to refer to the concept of legal families and speak here of the following: 1) Common Law Family; 2) Nordic/Scandinavian Legal Family; 3) Romanic Legal Family; 4) Germanic Legal Family; 5) Eurasian Legal Family. The Romanic and Germanic can also be merged as the Romano-Germanic Legal Family. However, within that region – comprising continental Europe – one could also outdifferentiate Southern European (Mediterranean) legal systems, and treat them as a distinct category (i.e. Italy, Spain, Portugal, Greece). Such detailed comparisons would undoubtedly be useful, however for our present purposes of a merely preliminary enquiry into the issue, it seems more useful to refer jointly to the Romano-Germanic legal family.

4.4. Application of the distinctive criteria (a preliminary tentative)

A complete and comprehensive application of the six distinctive criteria developed above (dynamic of legal transfers, institutional continuity, legal continuity, legal style, legal ideology and social role of law) would definitely require a large-scale comparative research project, involving researchers from various jurisdictions and representing various specializations (private lawyers, administrative lawyers, constitutionalists, criminal lawyers, to name but the most important ones). Therefore, what follows below is a merely preliminary tentative sketch, which – hopefully – will eventually inspire a fully-fledged research endeavour by a team of competent and dedicated scholars.

Starting from the first criterion, namely the *dynamic of legal transfers*, it should be emphasised that at least since the 19th century, i.e. for over 200 years now, Central Europe has been exclusively a recipient of legal transfers. There is no meaningful example of a Central European legal system acting as a donor of legal institutions towards other countries. This specific feature contrasts Central Europe not only with Western Europe, both Romano-Germanic and Common Law, which have a long track record of being donor legal systems,[6] but also with Eastern Europe – Russian and later Soviet law, although relying to a large extent on legal transfers from Germany, were themselves an object of transfers to Central Europe. To name but a few examples, one can mention the institution of supervisory instance or the broad powers of the prosecutor which, originating in Russian/Soviet law, were transferred to Central European legal systems. There seem to be no examples of reverse transfers, i.e. of a Polish, Czech or Romanian legal institution which was transferred to Soviet law. In general, there also seems to have been little internal transfers *within* Central Europe, although there are notable examples of cooperation, such as attempts at unifying Central European (*in casu* Slavic) legal systems, commenced in the 1930s, stopped by World War II (Jędrejek 2001, 66), and the well-known Polish-Czechoslovak cooperation on elaborating a joint Family Code (Fiedorczyk 2009; Fiedorczyk 2011; Fiedorczyk 2012; Fiedorczyk 2013). These examples suggest a different approach to the transfer of legal models, more collaborative, balanced and respectful than the West-to-East flow of legal transfers, known in the 19th century and on-going also today, in an only slightly modified form (Mańko 2017a). One could only express the desire for such efforts to be restarted once again within our region, especially after the mainly Western European efforts for elaborating a European Civil Code have been aborted.

Turning to the second aspect of the dynamic of legal transfers, namely their *modality*, one should emphasise that in Central Europe there have been both periods of voluntary transfers and periods of forced transfers, and sometimes both coincided at the same time. For instance, when in the 19th century Bulgaria received Italian contract law, it was definitely not imposed by force (Bulgaria was not occupied by Italy, the Bulgarian king was German, not Italian). Hence the choice of Italian law can *prima facie* be treated as voluntary. The same can be said of the reception of French and Austrian law in Moldavia in the early 19th century (Bocşan 2006: 36).

However, when French law was introduced in 1808 in the Duchy of Warsaw, this was a *receptio necessaria* – the Polish legal and political elites in the Duchy were not given any choice. Likewise, the reception of French legal models in 19th century Romania (Diamant, Luncean 1986, 100) can be treated as voluntary, whilst the introduction of the ABGB in the Kingdom of Croatia – involuntary, imposed by

[6] Apart from the well-known reception of German, French and Austrian law, one should mention *inter alia* the reception of Italian law of obligations in Bulgaria in 1893 (Jędrejek 2001, 66).

the Austrians (Čepulo 2006, 58). There is no necessary link between the fact that a given Central European country was an idependent state at the time of reception and the modality of reception, although having an independent country certainly is conducive towards voluntary legal transfers. However, this need to always be the case. For instance, if we compare the transfer of the Franco-German institution of unfair contract terms, we will note that it was a *receptio voluntaria* for the then 12 EU Member States (who adopted the Unfair Terms Directive in Council), but a conditionality of membership – and hence *receptio necessaria* – for Poland, Hungary or later Romania and Croatia (cf. Micklitz 2015, 5). Such forced legal transfers may, not unexpectedly, lead to a resistance from the legal community, as was, for instance, initially the case with the Unfair Terms Directive in Poland (Mańko 2012).

On the other hand, the legal elites of the Polish People's Republic – despite the limitation of Poland's sovereignty by the USSR – enjoyed quite a large margin of discretion when chosing certain legal models, and did not always rely on direct legal transfers from Soviet law. In fact, the situation changed over time, and whilst in 1950 such transfers were introduced almost directly, especially in civil procedure (Mańko 2007), after 1956 many solutions were either original Polish ones (as the cooperative member's *in rem* right to an apartment – Mańko 2015) or highly modified ones, only loosely inspired by Soviet law (as the perpetual usufruct – Mańko 2017b).

Discussing the dynamic of legal transfers, one should also take into account not only private law (which traditionally has been the prime object of interest of comparative lawyers), but also public law. It should be emphasised that, for instance, constitutional justice has been, in Central Europe, an object of reception, mainly from Germany, as has also been the case with various institutions of administrative law, such as agencies (Bieś-Srokosz 2017).

Turning to the second criterion, namely *institutional continuity*, one cannot but emphasise a striking institutional discontinuity, which seems to have been a feature of Central Europe for the past two centuries. This was linked with the supression of earlier forms of statehood and creation of new ones, with abrupt cutoffs. One could mention here the fall of the Polish-Lithuanian Commonwealth in 1795 and the introduction of Prussian, Russian, Austrian and subsequently also Polish-French administrations, including justice systems, in the 19th centuries, followed by the creation of the Republic of Poland in 1918, its fall in 1939 and the subsequent re-creation, largely from scratch, of People's Poland starting from 1944, and so forth. This is in sharp contrast to the West, where insitutional continuity has been generally strong, at least since the beginnings of the 19th century.

The third criterion, namely *legal continuity* is also an example of abrupt changes ocurring over the past 200 years almost continuously. This contrasts the region especially with Western Europe where continuity and evolutionary reforms either ocurred since the Middle Ages (Common Law Family) or at least since the era of the Grand Codifications (Civil Law Family). But even the Codes did not

always bring about abrupt changes, and for instance the German Civil Code of 1896 is commonly deemed to be a restatement of the Pandectist School, rather than a revolutionary change in private law (cf. Zimmermann 2006).

5. CENTRAL EUROPE: LEGAL FAMILY, LEGAL UNION OR LEGAL SPACE?

In light of the foregoing it is justified to pose the question as to how can Central Europe be addressed within the discourse of critical legal geography and, more broadly, space-oriented jurisprudence (such as the discourse of legal taxonomy proper to comparative law). The first category which comes to our mind is that of a 'legal family' (in German referred to as '*Rechtskreis*', literally – 'legal circle'). This category was elaborated in 20th century comparative law, in particular by Zweigert and Kötz, (Zweigert, Kötz, 1987), as well as René David (David, Brierly 1968), and can be said to be an established category of comparative law. The category of legal tradition, elaborated by John Henry Merryman (Merryman 1969) and later by H. Patrick Glenn (Glenn 2010), although termed differently, is in fact identical to that of legal family which can be easily discovered by comparing the *criteria divisionis* put forward by Merryman and Glenn on the one hand, and those put forward by Zweigert, Kötz and David, on the other. What is common to all these notions, despite certain differences, is the emphasis put on the genetic aspect – legal families/traditions essentially share the same historical roots which shape their legal culture in contemporary legal life.

Looking upon Central Europe in this perspective we immediately notice the problematic character of the genetic approach: the historical roots of Central Europe are actually quite diverse. Czech law flows from Austrian law, Romanian law from French law, and Polish law is a mix of elements flowing from German, French, Swiss and partly Austrian law. The genetic criterion is, therefore, somewhat problematic in Central Europe. It can also be criticised for being a formalist criterion, oriented towards the historical roots of legal institutions, and overlooking the current legal life, and the actual features of 'law-in-action', i.e. the *living law*, rather than its historical roots. The popularity of the genetic criterion can be easily explained: in the West, the main difference has been between the countries which received Roman law (the Civil Law tradition) and those which did not (the Common Law tradition). Comparative law in the West was mainly focused on the Civil Law vs. Common Law divide, and the criteria elaborated by Western comparative lawyers naturally looked for the main *criterium divisionis* between the UK and 'the Continent' (France, Germany). That *criterium* was the reception or non-reception of Roman law.

However, in Central and Eastern Europe things look differently, also from a historical perspective. The region never received Roman law, although it had a certain influence due to the fact of being taught, for instance at the Jagiellonian University. On the other hand, in the Eastern European countries subject to the

Byzantine tradition and later to non-European domination (Mongolian, Ottoman), if Roman law had any influence, it was, firstly, in the form of Byzantine law, and secondly, there was no influence of Western Canon Law (of the Latin rite), which – as it is well known – had a very strong impact upon the development of Western European laws, including not only the famous Roman-Canon procedure, but also various elements of private and public law.

All in all, the impact upon the genetic aspect can be deemed as not as significant in Central and Eastern Europe as it is in Western Europe, where the Civil Law vs. Common Law division is strongly rooted in rather distant (i.e. medieval) legal history. Therefore, the notion of legal family/legal tradition, if it is to be understood along the lines of David, Zweigert, Kötz, Merryman and Glenn, could be less workable with regard to Central Europe than it is with regard to Western Europe. It is at this point that the concept of a 'legal union' – fashioned along the lines of 'linguistic union' – could come in handy. As Bulat Nazmutdinov (2019) writes in the present issue of *Folia Iuridica*, the concept of a legal union was developed in the Eurasian legal theory of the 1920s and 1930s as an attempt to explain the legal similarity of Eurasian legal systems which, despite different roots, have become assimilated to each other on account of long-term coexistence within one space (the Eurasian one). I think that this concept, first developed with regard to Eurasia, can also be applied, *mutatis mutandis*, to Central Europe. In essence, using the concept of a legal union instead of a legal family/tradition moves the emphasis from the roots of legal systems (i.e. their more distant history) towards their long-term coexistence within a given, common space. Thus, applying the notion of a legal union to Central Europe, one could argue that despite their different origins (Romanic, Germanic, Scandinavian, etc.) the legal systems of Central Europe have been coexisting together within one legal space, initially within the socialist bloc, and currently within the European Union, which has led to their progressive assimilation.

Finally, the concept of a 'legal space' could be used with regard to Central Europe, intended as a neutral yet capacious term, leaving aside the question of legal families, legal traditions or legal unions, and emphasising the currently present similarities and interactions. The notion is frequently used in Italian legal literature (*spazio giuridico*), especially in connotation to European and global processes of legal integration (hence concepts of '*spazio giuridico europeo*' and '*spazio giuridico globale*'). Importantly, these notions abstract from legal families or legal traditions and focus on the on-going interactions between legal orders. The adoption of the concept of legal space with regard to Central Europe must, however, be undertaken *cum grano salis*. The legal space of Central Europe is predominantly a space of a common legal culture and a common legal mentality, and not so much a space of actual juridical interactions as opposed to the legal space of the EU or the global legal space (for want of regional forms of integration in Central Europe). Therefore, it would be more justified to speak of Central Europe as a 'space of legal culture' (Mańko,

Škop, Štěpáníková 2018), rather than a juridical space (*spazio giuridico*) in the strict sense. As such, Central Europe is, objectively speaking, a legal-cultural space *in itself* (not conscious of its idenity), and the task of critically oriented jurisprudence in the region is to transform it into a legal space *for itself*, i.e. self-conscious of its distinct legal identity. Various academic networks, which have emerged in the region in the last years, can be instrumental to this end, especially the Central and Eastern European Network of Legal Scholars – CEENELS (Zomerski 2015, 2018; Szymaniec 2018) as well as, to a certain extent, the Central and Eastern European Network of Jurisprudence – CEENJ (Mańko 2018c) and the International Workshops on Law and Ideology which have had a strong Central and Eastern European dimension (Mańko, Kauczor, Zomerski 2015; Rakoczy 2015; Mańko 2018b), as well as, to a certain degree, also the annual CEE Fora (Gárdos-Orosz, Fekete 2017).

6. CONCLUSIONS

Central Europe is a space ridden by violence: symbolic, military, economic, political and, finally, juridical. Its various parts, extending from Northern Macedonia and Bulgaria in the south, to Estonia and Latvia in the north, have been subjected to the more or less 'enlightened' rule or at least domination of various empires, ranging from the Ottoman, through the Habsburg, intermittently French, Prussian/German and finally Russian and Soviet. Degrees of political and economic dependence varied, but the region's peripheral status, established already in the 15th-16th century, was only emphasised by its political subjection to foreign masters. This could not have remained without influence upon legal culture. One of the most striking features of Central Europe is that it has been, at least for the last 200 years, an arena of *incoming legal transfers*, many of which were forced and involuntary, but at the same time was not an originator of legal transfers. Legal transfers always represent an intake of foreign law, and if they are forced, they also represent an act of violence upon the local legal community and society at large. Furthermore, the region is characterised by a very high level of legal discontinuity: the laws in Central Europe had been modified much more often and much more profoundly than has been the case in the West. Legal insitutions – the professional juridical apparatus – have also changed rather frequently, although after 1989 a larger degree of continuity was generally maintained. The prevailing legal style and legal ideology in the region have been described as hyperpositivist or ultraformalist, but at the same time the place of law in society has generally been different than in the West. The current phenomenon described as 'retraditionalisation' of constitutional law (Medushevsky, 2018), observed both in Central and in Eastern Europe, can be seen as a rejection of a legal transfer which, although formally voluntary, was in fact involuntary (as it was a conditionality of joining 'the West').

What is important from the perspective of critical legal theory – *in casu* critical legal geography – is, first of all, to draw attention to the violence, including symbolic, which has been inflicted upon Central Europe, in a sense, constituting it as a legal space. What is important is to go beyond the mere statement about 'modernisation through transfer', but show how the massive intake of foreign legal models, voluntary or not, impacted upon the prestige of the local legal community (as inferior to the West) and on the perception of law by society (as something foreign). This could be a key factor explaining the current phenomenon of 'Rule of Law backlash' – if the entire 'Rule of Law' setup is a foreign legal transfer, experienced by society and even by many lawyers as foreign and imposed, this could explain a relatively low degree of acceptance by the legal community and society. A second element from the above considerations which could have an explanatory potential with regard to the said 'backlash' is the place of law in society (both actual and perceived).

A second aspect crucial from the perspective of critical legal geography conceived as a unity of theory and praxis is the self-constitution of the region as a legal space distinct both from the West and East. Constructing such an identity may not be easy, but the efforts have begun. The stakes are high. As Kukovec (2015, 427–428) forcefully argues:

> A grid of legal thinking on the centre–periphery axis is thus needed. Only then does the space for thicker politics, which entails higher political engagement, open up. […] The legal discourse, the currency in which interests are discussed, excludes people on the periphery. […] The outlook, the mindset of the European legal profession, is one of the centre. The wrong suffered by the actors in the periphery is often not signified in the idiom. Workers and companies from the periphery can participate in the discourse and somehow become plaintiffs and defendants, but this does not mean that they cease to be victims. Their aspirations are weak and their harms are often not actionable […]

A juridical articulation of Central Europe's interests, not only in the short term (which Kukovec seens to focus his attention on), but also in the long term (for instance, concerning the development of adequate legal institutions, principles, suited for the region), can be possible only if the region's legal identity is asserted. In this paper I tried to show that, on the basis of a set of objective criteria, Central Europe can be persuasively differentiated both from Western and from Eastern Europe. This approach can be a first step towards building a Central European legal identity which, in turn, could help to combat the region's juridical peripherality and redeploy the energy of the region's legal communities from adapting to the constant influx of foreign legal transfers towards the innovative elaboration of original legal institutions, suited to the needs of Central Europe. Instead of waiting for the West to come up with a solution that can later be copy-pasted into Central European laws, our jurists should rather try to find solutions themselves, returing to the good traditions of legal cooperation within the region.

BIBLIOGRAPHY

Ajani, Gianmaria. 2006. *Sistemi giuridici comparati*. Torino: Giappichelli.

Berg, Lawrence. 2010. "Critical Human Geography". In *Encyclopedia of Geography*. Edited by Barney Wharf. SAGE Publications. https://www.academia.edu/2044691/Critical_Human_Geography [Accessed: 23 August 2018].

Best, Ulrich. 2009. "Critical Geography". In *International Encyclopedia of Human Geography*. Vol. 2. 345–357. Edited by Rob Kitchin, Nigel Thrift. Oxord: Elsevier. https://www.academia.edu/3620477/Critical_Geography._In_Kitchin_R_Thrift_N_eds_The_International_Encyclopedia_of_Human_Geography_volume_2_pp._345–357._Oxford_Elsevier [Accessed: 23 August 2018].

Bieś-Srokosz, Paulina. 2018. "Legal Transplants in Administrative Law: Polish Experiences". In *Law, Space and the Political: An East-West Perspective*. 85–93. Edited by Paulina Bieś-Srokosz, Rafał Mańko, Jacek Srokosz. Częstochowa: Podobiński Publishing House.

Bocşan, Mircea-Dan. 2006. "L'oeuvre de codification – enjeu de la modernisation du droit roumain". In *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*. 33–46. Edited by Tomasz Giaro. Frankfurt am Main: Vittorio Klostermann.

Cercel, Cosmin. 2018. *Towards a Jurisprudence of State Communism: Law and the Failure of Revolution*. London: Routledge.

Čepulo, Dalibor. 2006. "Building of the Modern Legal System in Croatia 1848–1918 in the Centre--periphery Perspective". In *Modernisieuring durch Transfer im 19. und frühen 20. Jahrhundert*. 47–91. Edited by Tomasz Giaro. Frankfurt am Main: Vittorio Klostermann.

Chmielnicki, Paweł. 2012. "Podejmowanie decyzji w warunkach prawnego i prawniczego potopu informacyjnego". *Roczniki Administracji i Prawa. Teoria i Praktyka* 12: 17–24.

Collins, Hugh. 1982. *Marxism and Law.* Oxford: Oxford University Press.

David, René. Brierley, John. 1968. *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*. London: Stevens and Sons.

Diamant, Betinion. Vasile Luncean. 1986. "Note on the History of Romanian Law". *Journal of Legal History* 7(1): 98–101.

Fiedorczyk, Piotr. 2009. "Czechosłowacka droga do kodyfikacji prawa rodzinnego 1919–1949. Z dziejów współpracy z Polską". In *Państwo, prawo, społeczeństwo w dziejach Europy Środkowej. Księga jubileuszowa dedykowana Profesorowi Józefowi Ciągwie w siedemdziesięciolecie urodzin*. 184–196. Edited by Adam Lityński. Katowice–Kraków: Wydawnictwo i Drukarnia Towarzystwo Słowaków w Polsce.

Fiedorczyk, Piotr. 2011. "Polski kodeks rodzinny z 1950 r. Czy przełom?" *Zeszyty Prawnicze UKSW* 11(2): 129–151.

Fiedorczyk, Piotr. 2012. "Počátky socialistického rodinného práva". In *Vývoj soukromého práva na území českých zemí* (*I díl).* 549–600. Edited by Ladislav Vojáček, Jaromír Tauchen, Karel Schelle. Brno: Masarykova Universita.

Fiedorczyk, Piotr. 2013. "Debata nad uchwaleniem polsko-czechosłowackiego prawa rodzinnego w czechosłowackim Zgromadzeniu Narodowym w 1949 r." *Studia Iuridica Lublinensia* 19: 131–141.

Gárdos-Orosz, Fruzsina. Bálasz Fekete. Eds. 2017. *Central and Eastern European Socio-Political and Legal Transition Revisited*. Frankfurt am Main: Peter Lang.

Helios, Joanna. Wioletta Jedlecka. *Współczesne oblicza przemocy. Zagadnienia wybrane*. Wrocław: Prawnicza i Ekonomiczna Biblioteka Cyfrowa.

Husa, Jakko. 2015. *A New Introduction to Comparative Law*. Oxford: Hart.

Jędrejek, Grzegorz. 2001. "Polski kodeks zobowiązań z 1933 roku. Powstanie, źródła, znaczenie dla europejskiego prawa obligacyjnego". *Roczniki Nauk Prawnych* 11(1): 47–68.

Krzynówek, Jerzy. 2003. "Tradycje prawne Europy". In *Prawo polskie a prawo Unii Europejskiej*. 23–34. Edited by Eugeniusz Piontek. Warszawa: Liber.

Kühn, Zdeněk. 2004. "Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement". *American Journal of Comparative Law* 52(3): 531–567

Kühn, Zdeněk. 2011. *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* Leiden-Boston: Martinus Nijhoff.

Mälksoo, Lauri. Wolfgang Benedek. Eds. 2017. *Russia and the European Court of Human Rights: The Strasbourg Effect*. Cambridge: Cambridge University Press.

Mańko, Rafał. 2007. "Is the Socialist Legal Tradition 'Dead and Buried'? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure". In *Private Law and the Many Cultures of Europe*. 83–103. Edited by Thomas Wilhelmsson. Alphen aan den Rijn: Kluwer Law International.

Mańko, Rafał. 2008. "Unifikacja europejskiego prawa prywatnego z perspektywy społeczeństwa polskiego: przyczynek do dyskusji". *Nowa Europa* 2: 35–84.

Mańko, Rafał. 2012. "Resistance towards the Unfair Terms Directive in Poland: The Interaction between the Consumer Acquis and a Post-Socialist Legal Culture". In *European Consumer Protection: Theory and Practice*. 412–434. Edited by James Devenney, Mel Kenny. Cambridge: Cambridge University Press.

Mańko, Rafał. 2015. "The Cooperative Member's Proprietary Right to an Apartment: A Legal Survival of the Period of Actually Existing Socialism in Polish Private Law". *Zeszyty Prawnicze* 15(4): 147–176.

Mańko, Rafał. 2016a. "Transformacja ustrojowa a ciągłość instytucji prawnych – uwagi teoretyczne". *Zeszyty Prawnicze* 16(2): 5–35.

Mańko, Rafał. 2017a. "Legal Transfers in Europe Today: Still 'Modernisation Through Transfer'?" In *Mutual Interaction Between Contemporary Systems and Branches of Law in European Countries*. 139–155. Edited by Paulina Bieś-Srokosz, Jacek Srokosz, Ewelina Żelasko-Makowska. Częstochowa: Podobiński Publishing House.

Mańko, Rafał. 2017b. "Prawo użytkowania wieczystego jako pozostałość po epoce realnego socjalizmu – ujęcie socjologicznoprawne". *Zeszyty Prawnicze* 17(1): 35–63.

Mańko, Rafał. 2017c. "Symbolic Violence in Technocratic Law and Attempts at Its Overcoming: Politicisation Through Humanization?" *Studia Erasmiana Wratislaviensia* 11: 31–64.

Mańko, Rafał. 2018a. "Towards a Typology of Dimensions of the Continuity and Discontinuity of Law: The Perspective of Polish Private Law after the 1989 Transformation". *Wroclaw Review of Law, Administration and Economics* 6(2): 108–120.

Mańko, Rafał. 2018b. "Conference Report: 3rd International Workshop on Law and Ideology on the 'Rule of Law and the Politics of Conflict', Javakhishvili Tbilisi State University, Tbilisi, Georgia, 23–24 May 2016". *Wroclaw Review of Law, Administration and Economics* 6(2): 184–186.

Mańko, Rafał. 2018c. "XII Konferencja Central and Eastern European Network of Jurisprudence (CEENJ), Ryga, Łotwa, 14–16 września 2017 r." *Archiwum Filozofii Prawa i Filozofii Społecznej* 18(3): 97–101.

Mańko, Rafał. Martin Škop. Marketa Štěpáníková. 2018. "Carving Out Central Europe as a Space of Legal Culture: A Way Out of Peripherality?" *Wroclaw Review of Law, Administration and Economics* 6(1): 4–28.

Mańko, Rafał. Wojciech Kauczor. Wojciech Zomerski. 2015. "Conference Report: 1st International Workshop on Law and Ideology (Wrocław, 29–30 May 2014)". *Wrocław Review of Law, Administration and Economics* 3(2): 84–88.

Medushevsky, Andrei. 2018. "Konstitutsionnaya retraditsionalizatsiya v vostochnoy Yevrope i Rossii". *Sravnitel'noye Konstitutsionoye Obozreniye* 122(1): 13–22.

Merryman, John Henry. 1969. *The Civil Law Tradition*. Stanford: Stanford University Press.

Micklitz, Hans-Wolfgang. 2015. "Prologue: The Westernisation of the East and the Easternisation of the West". In *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited*. 1–12. Edited by Michal Bobek. Oxford: Hart Publishing/Bloomsbury.

Nazmutdinov, Bulat. 2019. "Critical Dimensions of the 'Legal Culture' Approach: the Case of Classical Eurasianism and Eurasia's Legal Union". *Folia Iuridica* 89: 81–93.

Philippopoulos-Mihalopoulos, Andreas. 2013. "Spatial Justice in the Lawscape". In *Urban Interstices: The Aesthetics and Politics of the In-Between*. 87–102. Edited by Andrea Brighenti. Surrey: Ashgate.

Pirie, Gordon H. 1983. "On Spatial Justice". *Environment and Planning* 15: 465–473.

Rakoczy, Filip. 2015. "2nd International Workshop on Law And Ideology 'Memories of Struggles, Struggles of Memories', Sarajevo, 28–29 maja 2015". *Archiwum Filozofii Prawa i Filozofii Społecznej* 11: 157–160.

Renner, Karl. 1975. *The Institutions of Private Law and their Social Functions*. London: Kegan & Paul.

Rodak, Lidia. 2016. "Structural Violence and Its Gender Dimension in Polish Law". In *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*. 131–153. Edited by Rafał Mańko, Cosmin Cercel, Adam Sulikowski. Oxford: Counterpress.

Sitek, Bronisław. 2008. "Od antropocentryzmu prawniczego do ekonomizacji prawa". In *Człowiek pomiędzy prawem a ekonomią w procesie integracji europejskiej*. 515–523. Edited by Gaetano Dammacco, Bronisław Sitek, Oksana Cabaj. Olsztyn–Bari: Wydawnictwo Uniwersytetu Warmińsko-Mazurskiego.

Škop, Martin. 2016. "The Importance of Being a Linguist. Critical Legal Thought in Central Europe". In *Law and Critique in Central Europe: Questioning the Past, Resisting the Present*. 32–43. Edited by Rafał Mańko, Cosmin Cercel, Adam Sulikowski. Oxford: Counterpress.

Sulikowski, Adam. 2007. *Wstęp do prawoznawstwa. Krótki kurs*. Wałbrzych: Wałbrzyska Wyższa Szkoła Zarządzania i Przedsiębiorczości.

Szymaniec, Piotr. 2018. "Discussion About the Legal Identity of Central and Eastern Europe. 3rd Annual CEENELS Conference 'Legal Identities and Legal Traditions in CEE'". *Acta Universitatis Lodziensis. Folia Iuridica* 85: 139–153.

Uzelac, Alan. 2010. "Survival of the Third Legal Tradition?" *Supreme Court Law Review* 49: 377–396.

Watson, Alan. 1993. *Legal Transplants: An Approach to Comparative Law*. Athens–London: University of Georgia Press.

Ziembiński, Zygmunt. 1980. *Problemy podstawowe prawoznawstwa*. Warszawa: PWN.

Ziętek, Magdalena. 2012. "Europejskie prawo konsumenckie jako wyraz technokratycznej koncepcji prawa umów". In *Kierunki rozwoju europejskiego prawa prywatnego*. 275–291. Edited by Monika Jagielska, Ewa Rott-Pietrzyk, Aneta Wiewiórowska-Domagalska. Warszawa: C.H. Beck.

Zimmermann, Reinhard. 2006. "The German Civil Code and the Development of Private Law in Germany". *Oxford University Comparative Law Forum 1*, available at: https://ouclf.iuscomp.org/the-german-civil-code-and-the-development-of-private-law-in-germany [Accessed: 6 November 2019].

Zomerski, Wojciech. 2016. "Conference report: 1st International Conference of the Central European Network of Legal Scholars (CENELS) on 25 Years After the Transformation: Law and Legal Culture in Central and Eastern Europe. Between Continuity and Discontinuity', Masaryk University, Brno, Czech Republic, 16–17 April 2015". *Wroclaw Review of Law, Administration and Economics* 4(2): 103–108.

Zomerski, Wojciech. 2018. "Conference Report: 2nd Annual Conference of the Central and Eastern European Network of Legal Scholars (CEENELS): 'An Uneasy Legacy: Remnants of Socialist Legal and Political Thinking in Central and Eastern Europe', Jagiellonian University, Faculty of Law and Administration, 7–8 January 2017". *Wroclaw Review of Law, Administration and Economics* 7(2): 83–85.

Zweigert, Konrad. Hein Kötz. 1996. *Introduction to Comparative Law*. Oxford: Clarendon Press.

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CRITICAL DIMENSIONS OF THE 'LEGAL CULTURE' APPROACH: THE CASE OF CLASSICAL EURASIANISM AND EURASIA'S LEGAL UNION

Abstract. This paper refers to the accurate usage of the word "Eurasian", which is tightly connected with Russian Eurasianism, an intellectual movement that existed in the Interwar period, in the years 1921–1939.

Nowadays, the concept of "Legal Culture" is rendered banal by comparative legal thinkers, who reduce it to legal tradition or even the legal system as a social system. In contrast to these theories, the Eurasianist jural project was mostly culture-oriented. For instance, the Eurasianist idea of Language Union, provided by Nikolai Trubetzkoy and the famous linguist Roman Jakobson, could be useful for developing a new concept of Legal Union instead of the idea of legal family. Piotr Savitzky's notion of "Mestorazvitie", Jakobson's "method of linking", and Nickolai Alekseev's idea of "Right-Duty" could be very fruitful concepts for establishing cultural jurisprudence.

Keywords: Legal Culture, Critical Legal Theory, Classical Eurasianism, Cultural Turn, Legal Union, Legal Family, Mestorazvitie.

INTRODUCTION

Eurasia, Eurasian, Eurasianist? What do these terms really mean? Contemporary writings are often dedicated to so-called "Eurasian" legal systems or "Eurasian" legal cultures. But is this term instrumental or purely critical? Does the word "Eurasian" mean the same, as, for example, "Post-Soviet"? After the 1990s, "Eurasian" legal culture usually designates a particular area of the former USSR legal systems. Instead of focusing on geopolitics and Alexander Dugin's views, this paper refers to the accurate usage of the word "Eurasian", which is tightly connected with Russian Eurasianism, an intellectual movement that existed in the Interwar period, in the years 1921–1939.

According to classical Eurasianism, at the beginning of 1920s Eurasia consisted of "Russia-Eurasia" within the borders of Soviet Union. Contrary to the ideas of the Austrian geologist Edward Suess, who associated Eurasia with the northern part of the "Old World", Europe and Asia (Suess 1882, 768), Eurasianists asserted that only Russia was the true Eurasia. Who created these "Eurasianist"

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points of view? And what does term "Eurasia" mean for them? Are there possible any Eurasianist legal explications, any critical arguments against the contemporary mainstream in legal theory or comparative law? This paper is particularly focused on answering these questions.

Classical Eurasianism was initiated by Russian émigrés in the 1921, in Sofia, Bulgaria, as an intellectual reaction to the results of the Russian Revolution of 1917, and to the First World War.

The philologist Nikolai Trubetzkoy (1890–1938)[1], the geo-economist Piotr Savitzky (1895–1968), the historian Georges Florovsky (1893–1979), and the musicologist Piotr Suvchinsky (1892–1985) became the founding fathers of Eurasianism. They declared that Russia was neither Europe, nor Asia, but a unique entity with its own boundaries and specific historical path.[2] In their opinion, the fateful point of Eurasia was rooted in the times of Mongolian invasion of Kievan Rus' and the creation of the Golden Horde. According to Trubetzkoy, the Russian political system was of Mongol origin, not European. Imperial Russia was mostly Pro-European and Anti-Eurasian, and its collapse in 1917 was to be expected. In contrast, Bolshevik Russia was an ambiguous phenomenon, which combined European Marxism with an anti-colonialist and anti-Western paradigm. It is important to mention that, according to Trubetzkoy, Russia should have become a unique Eurasian Ideocracy, instead of being a decadent heir to the European Marxist paradigm.

In the 1920s, Savitzky, as an economist and geographer, stated that the western border of Russia-Eurasia was near the Pulkovo meridian line (30°19′34″ east of Greenwich), running through Murmansk-Saint-Petersburg-Minsk-Odessa. This line divided the 4-element geographical space of Eurasia (tundra-taiga-steppe-desert) from steppe-less Europe. The western borders of Eurasia, according to Savitzky, were located to the east of Poland, Galicia and the Baltic countries. The southern limits were demarcated by the Caucasus, the Pamir mountains and the Amur river, while the eastern border is delineated by the Pacific Ocean. Iran, India and China were not included in Eurasia.

Being charmed or terrified by this perspective, many scholars in the 1980s–2000s dedicated their writings to the geopolitical and cultural dimensions of Classical Eurasianism. Jurists and historians have rarely devoted attention to its jural aspects. There have been several attempts to describe Eurasianist jural philosophy as a coherent system, but they were not fully relevant to the source

[1] Afterwards, Trubetzkoy, like Roman Jakobson, became a member of the famous Prague Linguistic circle and a founder of the Phonologie theory, which influenced later structuralist writings. See: Toman 1995.

[2] Piotr Savitzky was the first to describe Russia as unique "Eurasia", this description appeared in his review of Nikolai Trubetzkoy's writing "Europe and Mankind" (1920). See: Savitzky 1921.

material.[3] Our task is to make it better. We will also focus on the possible impact of culture-oriented Eurasianist jural views on contemporary jurisprudence.

So, can we find some foundations of so-called Eurasian legal culture in the history of ideas or legal history? In contrast to many recent theories of so-called legal culture, the Eurasianist jural project was mostly culture-oriented.

1. BANALIZATION OF "LEGAL CULTURE"

Some legal scholars insisted that "use of legal culture presupposes homogeneity, de facto reproducing hegemony, which also explains its success as an argument to support particular legal-political projects" (Comparato 2014, 5). However, the opposite is the problem. Nowadays, the concept of "legal culture" is banalized by comparative legal thinkers, who reduce it to legal tradition or even the legal system as a social system. The famous American legal scholar, Lawrence Friedman, suggested "legal culture" as an umbrella concept, which could cover meta-jural phenomena in legal life (Friedman 1975). In his opinion, law was a product of social forces: so-called "external legal culture" was the social environment of Law. This approach was mostly connected with the Sociological Turn in jurisprudence and the theory of social systems, but not with cultural turns, e.g. the spatial, postcolonial or translational turns (See: Bachman-Medick 2016). Such a conception of "legal culture" became a stigma of social functionalism. However, some contemporary legal scholars accepted Friedman's concept of legal culture and his distinction between external and internal legal culture (Hoecke 2002, 57–58).

Even Pierre Legrand's sharp critique of the notion of legal transplants was not truly culture-oriented. He took the common schemes of the Swiss linguist Ferdinand de Saussure (1857–1913) for granted, for instance, the interconnection between the 'signifier' and the 'signified' (Legrand 1997, 118).[4] Moreover, in some comparative cases Legrand uses legal terms in the meanings assigned by traditional legal dogma (Legrand 1996, 65–67). As a result, there are not so many paths of cultural turn here. Legal scholars often advocated the concept of culture[5],

[3] There were several attempts to describe Eurasianist jural philosophy as a coherent system. See, for instance: Böss 1961, 85–94; Isaev 1991, 203–233.

[4] According to Legrand, interpretation of legal rules is "cultural product". "The meaning of the rule is, accordingly, a function of the interpreter's epistemological assumptions which are themselves historically and culturally conditioned. An interpretation, then, is always a subjective product and that subjective product is necessarily, in part at least, a cultural product […] A rule does not have any empirical existence that can be significantly detached from the world of meanings that characterizes a legal culture; the part is an expression and a synthesis of the whole: it resonates […]" (Legrand 1997, 114–115). However, I mostly agree with David Nelken's opinion, namely that legal transplant could reform not only the text, but its foundation, the culture.

[5] "Legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behavior and attitudes. The identifying elements of legal culture range from

but did not really use the culture-oriented approach in the sphere of jurisprudence. For example, the dialogical doctrine of law which was advocated by the Russian Legal Scholar, Ilya Chestnov, who developed Mikhail Bakhtin's concept of dialogue (Chestnov 2012). It incorporated some culture-oriented points, but was not coherent.

Specialists from other academic spheres tried to solve this problem. The semiotic approach of Yury Lotman's and Victor Zhivov's writings should be emphasized. By developing Lotman's idea of Russian Culture's duality, Zhivov describes the history of Russian law through the prism of dualism between Religious and Pagan customary law, which was based on the linguistic dualism between Church-Slavic languages and Ancient Russian languages. In Zhivov's view, in contrast to the European situation, efforts were made to enforce official Russian Christian law, but it remained high-cultured and powerless, while everyday unwritten, "Pagan" rules were in force (Zhivov 1988).

These views on Russian legal culture were rather structuralist and quite orientalist in nature. So, in these circumstances, it will be fruitful to emphasize the Eurasianist impact on the cultural turn in jurisprudence. My aim is to focus on the cultural dimensions of holistic Eurasianist jurisprudence during the 1920s and 1930s, especially on its potential influence on the problem of legal culture, especially the spatial issues of contemporary legal theories in terms of cultural turns.

2. AN INTRODUCTION TO THE EURASIANIST VIEWS ON CULTURAL CONCEPTS

The mood of Eurasianism was inspired by the Russian Revolution and the post-war atmosphere caused by the crisis in European culture. This attitude affected the Eurasianist approach to "law", which was portrayed as a peculiarly European concept and phenomenon.

The historian and theologian, Georges Florovsky, was the first to address the problem of law in the Eurasianist context, in his paper "The Cunning of Ratio" ["Hitrost' Razyma"], published in the First Eurasianist Edition "Exodus to the East" ["Iskhod k Vostoku"] in 1921. Florovsky opposed the Idea of *ratio* (reason) with faith (intuition, etc.). The law referred to the realm of *ratio* and was disqualified for its European – in particular Judaic and Catholic – background. The only merit of European jural thought admitted by Florovsky was the existence

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facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behavior such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are not just what we do" (Nelken 2004, 1).

of the German historical school of jurisprudence, with its "modest intuitionism" (Florovsky 2008, 80).

According to the statement of another Eurasianist scholar, Vladimir Ilyin, the "Western-European" idea of Natural Law had been traditionally criticized by Russian Orthodox anthropology for its formalism and individualism (Ilyin 1928, 86). However, the Eurasianist scholars Trubetzkoy and Nikolai Alexeev advocated law in order to establish a Eurasianist type of rule: they sincerely wanted to come to power in Post-Imperial Russia. The Eurasianists insisted that "Ideocracy" (The Power of Ruling Idea)[6] was the ideal type of polity in Eurasia. From their point of view, law should be an organic part of the Ideocracy. Therefore, the power of State should also be analyzed in terms of law. Further, Nikolai Alekseev emphasized that the monarch, or other sovereign, is neither absolutely entitled, nor obliged, but has a "right-duty" ("pravoobyazannost") to rule in the Eurasianist State. Like such sovereigns, the proprietors of land are also entitled-obliged to operate with their property (Alekseev 1998, 166).

On the other hand, Eurasianists struggled for law, which had been grounded in other spheres of Eurasia's culture, inside the "Symphonic [Collective] Personality" of Big Eurasia. The latter was the main intention of Nikolai Trubetzkoy. Eurasianist jurisprudence should be included in the Eurasianist macroscience project which covered such areas as Eurasianist history (Trubetzkoy's and George Vernadsky's vision), Eurasianist economical geography (Savitzky), Eurasianist philology (Trubetzkoy and Roman Jakobson), etc. This macroscience project resembled the "Naturphilosophie" project, the organistic system of non-Positivist disciplines, which were linked with each other (Schelling 1987, 188–189).

It is very important to describe the vision of "culture" in Trubetzkoy's writings, especially in his pamphlet "Europe and Mankind" (1920), and in the paper entitled "The tops and the bottoms of Russian Culture" (1921). There we can find the description of the culture's structure, which consisted of "cultural values" (or "the inventory of the culture"); tradition as a transitional mechanism of values between generations; and "heredity" as an addition to the mechanism of tradition (Trubetzkoy 1991, 38–39).

For Eurasianists, cultures (literate or non-literate, European or non-European) are equal in their uniqueness. And there is no procedural and material possibility for implanting real cultural institutes and norms (including legal) into non-European culture and westernizing it without assimilation with Roman-German people, because the recipient culture has a unique cultural basis and mechanism of value transition (Trubetzkoy 1991, 62). To Eurasianists, pro-European westernization only produces chimeras (e.g. Imperial Russia after Peter the Great); Florovsky characterized these results (for example, the "Latinization of Russian

[6] After WWII Waldemar Gurian insisted that he had borrowed the term "Ideocracy" for analysis of totalitarian regimes from the "Russian Eurasianist School" (Gurian 1964, 123).

Orthodox religion") as "pseudomorphes" (Florovsky 1975, 165–166). According to Trubetzkoy, and anticipating Pierre Legrand's famous thesis, if there is no real transition of cultural values and traditions, "there are no "higher" or "lower" cultures, only cultures and peoples that resemble one another to a greater or less degree" (Trubetzkoy 1991, 61).

In the Eurasianist text "On the problem of Russian self-cognition" (1927), and even earlier, Trubetzkoy focused on the problem of personality, which was emphasized as a central point in Eurasianist philosophy (Trubetzkoy 2000, 93–99). Nikolai Arapov questioned this approach in the heated debate that took place in the Eurasianist correspondence. He insisted that the central question of Eurasianism should be the problem of culture, not a concept of personality: "Nation is an environment which is defined by the unity of cultural potencies". (Pis'ma Savitzkomu 1925, 65). Using Aristotelian terms, Arapov characterized the Nation as matter, State as form, culture as *entelecheia*, inner power, which contains goals and results from the development of the thing (e.g. to Aristotle, a soul is the *entelecheia* of an organism).

According to Arapov, the problem of Culture is revealed in the problems of form, social constructivism and nation-building. For instance, he rejected Trubetzkoy's idea of the non-violent coexistence of equal cultures inside Eurasia: "The development of national cultures should be strictly framed by the basic principles of Pan-Eurasian culture" (Arapov 1925b, 74). The nationalism of each Nation should be balanced with pan-cultural goals. Therefore, the State is an "organization, which unites people on behalf of common (conscious or unconscious) perception of cultural goals, which are regulated (in the first case) by independent power of thought leaders; this organization takes all measures for contributing to creativity, development and dissemination of this culture" (Arapov 1925a, 1).

According to Arapov's vision, culture symbolizes systematicity; individual personality appears inside culture as a system, and culture is prior to personality. Arapov's sociopolitical views were culture-oriented in this special meaning: culture is a sphere where values appear. The goal of the State was to shape the life of the Nation within cultural targets. Arapov denied Trubetzkoy's "nationalism" (the priority of the Nation over the State), because Nation was only the epiphenomenon of the State's activity. In this perspective, law should be interpreted more in is it is in legal positivism, as a system of the State's command, based on some cultural platform. It is interesting to compare Arapov's views with Józef Piłsudski statement (1918): "It is the State which makes the Nation and not the Nation the State" (Hobsbawm 1987, 148). Arapov, similar to Pilsudski, was an aristocrat and a military officer, and this approach could be typical for that social class.

Karsavin interpreted the concept of culture, which was prior to all social phenomena, in a rather Spenglerian way. Culture as an expression of the

metaphysical, religious sphere, is not a number or system of values, but an organic unity. It is a very complex-structured, hierarchical order of symphonic (collective-spiritual) personalities, which in some respects is similar to the Russian doll or "matryoshka". Nation as a symphonic personality is a first individuation of culture. The ruling elite, as a second individuation, reveals the potentiality of culture in the most proper way. Law is a lower sphere, the border of culture. It is a defensive mechanism, which protects the higher spheres of spiritual life from offences and wrongdoings. Karsavin's approach to legal ideas resembles Georg Jellinek's and Vladimir Soloviev's vision of law as the "ethical minimum" (Pribytkova 2009).

Similar to Arapov and Trubetzkoy, Karsavin stressed the role of the intellectual elite in the Nation's development, which is based on cultural roots. They rejected the idea of individualistic democracy. However, Karsavin's romanticist approach to law was also culture-oriented. He emphasized the mission of "politics": it should be defined as a discipline, being focused on the culture as a coherent whole (Karsavin 1927, 174–176), whereas jurisprudence was expected to be inside "politics". Karsavin rejected the idea of sociology for its individualistic and mechanistic attitude to culture. This vision of culture has some similarities with the cultural sociology of Jeffrey C. Alexander: "This is the task of a cultural sociology. It is to bring the unconscious cultural structures that regulate society into the light of the mind" (Alexander 2003, 3–4). However, Alexander could characterize this attitude as "idealistic" and even "spiritualistic".

3. EURASIANIST VIEWS ON THE CONCEPT OF LAW

The legal views of so-called Classical Eurasianism were quite contradictory. There were several jural approaches in Eurasianism:

– Natural law views (Mstislav Shakhmatov and Vladimir Ilyin),
– Phenomenological approach (Nikolai Alexeev),
– Legal positivist views (Nikolai Dunaev),
– The "Alleinheit" theory (Lev Karsavin).

While Florovsky disagreed with the rationality represented in modern concepts of natural law, Vladimir Ilyin stated that "the Eurasianists were not enemies of the doctrine of natural law, however they tried to base it [natural law] on the religious, concrete-ametaphysical grounds of Orthodox anthropology and opposed the "enlightening" form… of natural law" (Ilyin 1928, 86).

In this work, I particularly emphasize the approach of Nikolai Alekseev, since he was the main legal scholar among the Eurasianists. Similar to the phenomenologist Adolf Reinach, Alekseev tried to establish the core of the law and the Jural System outside the system of positive law, law in acts, old customs and judicial precedents. He tried to describe this essence in the concept of "jural structure". This structure, according to Alekseev, consists of following:

1) a jural actor ("pravovoi sub'ekt"; "nositel' soznaniya");

2) values ("tsennosti");

3) basic jural connections ("osnovnye pravovye opredeleniya") between the actor and values, i.e., juridical rights and duties (Alekseev 1998, 73).

Thus, for Alekseev, law is the intellectual activity of the jural actor, which is performed in accordance with values (e.g. cultural values, which are ultimately based on religious foundations). The results of this activity manifest themselves in jural rights and duties. For example, if you recognize the value of human dignity, you will accept and respect someone's dignity, therefore you have a duty to recognize his right. And you recognize this value in yourself, I realize your right, realize that you are entitled to it. These views of Alexeev resemble Hegelian argumentation. The interactive moment of law, stressed by Alekseev, is was also advocated by Evgeni Pashukanis. This prominent Soviet scholar even cited Alekseev's "Introduction to the Study of Law", 1918 (Pashukanis 1980, 91).

I should draw attention to several similarities between the "proto-structural" Eurasianist methodology and Alekseev's idea of "jural structure". The concept of "jural structure" is not Eurasianist *sensu stricto*. Meanwhile, for Alekseev the "jural structure" is a "place of an encounter" between the jural actor and values. The spatiality of this "structure" is reminiscent of the views on the uniqueness of Eurasian "mestorazvitie" ("place-development"). Eurasianists also favoured Alekseev's refusal to reduce law to other elements. In the same way that Eurasianists rejected attempts to reduce "Eurasia" to Europe or Asia, Alekseev denied that the law could be reduced to other elements: he refused to reduce law to "the sovereign's command", "a form of freedom" or "social experience". These similarities could be explained by the proximity of Eurasianist proto-structuralism and Alekseev's phenomenological method, in both of which discovering the structure of a phenomenon, and not its causes or effects, is of paramount importance. This proximity influenced the development of Alekseev's views within the frame of the Eurasianist movement, but his ideas did not become an applied platform for Eurasianist jurisprudence.

The limited jural individualism advocated by Alekseev was the basic cause of the contradictions in Eurasianist jural views. And there were a number of jural approaches in the Eurasianist context, which do not together form a coherent jural theory. The contradictions between the several Eurasianist jural programs suggest that it was impossible to create a uniquely "Eurasianist" jural theory. Eurasianist ideology in the field of law was not a single phenomenon, having different institutional and especially conceptual dimensions.

Nikolai Dunaev was Alekseev's student at the Russian Juridical Faculty in Prague during the 1920s. However, he argued for some basic legal positivist axioms, for instance, a strict distinction between subjective and objective law. Dunaev criticized Petrazhitzky's negation of private/public law dualism and, contrary to Alekseev, insisted on the independent reality of objective law (Dunaev 1931, 278–280).

However, we are still able to establish some common characteristics of Eurasianist legal philosophy. Eurasianists grounded law in the essence of religious and social-natural space (e.g. the space of Eurasia), and justified law spiritually and geopolitically. The law as a jural system reveals the principles of the higher system. They use the terms "subordinate law" and "subordinate economy" to highlight the dependence of the social systems on Christianity (Alekseev 1931, 251) and "place-development" ("mestorazvitie") as a specific natural-social space corresponding to a particular geographical region. As a result, the following common features were identified:

1. The Geopolitical Roots of the Eurasianist Jural Doctrine. Eurasianism shares similarities with other theories: Carl Schmitt consequently stated in *"Der Nomos der Erde"* (1950) that "Nomos", contrary to abstract "Law" (Gezetz), is strictly determined by a concrete space e.g., a certain area of land or sea. He called it the *radical title*, the title of *radius* – root (Schmitt 1974, 17). Eurasianists did not argue for geographical determinism, but they explained the dependence of basic rules on the particular space of development ("mestorazvitie") which included social, as well as natural, space (Savitzky 1927, 28–29). We could also interpret the concept of "Mestorazvitie" ("place-development" or 'topos-development') in cultural terms, inside the "spatial turn". "Mestorazvitie" is a particular socio-geographic and cultural sphere. And we should put legal norms not only inside a symbolic system of the signified and the signifier, but inside the unique day-by-day communication in a certain socio-geographical space. In the next section, I will describe the role of "Mestorazvitie" for comparative law.

2. The Orthodox Christian Roots of Eurasianist Jurisprudence. According to the Eurasianists, the law and the State have their foundations the higher spheres, not in their own existence. In contrast to Hegel and the Roman jurists, the Eurasianists did not call the State *divine*, and rejected any sort of étatistic cult: in their view the law and State are not unique, but exist only in relation to religion (Karsavin 2005, 79). The Eurasianists followed the Russian theological tradition and adopted St. Hilarion's distinction between the law and divine grace, and Khomyakov's line of critique of Europe for the legalization of ethical life. They insisted on the limitation of the status of State and law by Orthodox spirituality. Therefore, the Eurasianists neglected legal positivism and Kelsen's "Pure Theory of Law".

3. The Rejection of the Idea of the Individualistic Jural System and Individualistic rights: Khomyakov's idea of "Sobornost" (a 'Spiritual community of many jointly living people') influenced Eurasianist views, especially those of Karsavin.[7] Eurasianists turned to collectivist law and sought to refute mechanistic and individualistic thought in jurisprudence and other social sciences: these scholars tried to operate with ultra-individualistic subjects of the law, such as

[7] "Sobornyi" as a translation of the word "Catholic", which means, in the Slavophile's vision, "unity in plurality". See: Homjakov 1926, 59.

a "real collective person" (Karsavin), or a "constructed collective person" (Alekseev).

But in this framework, there could be different jural programs, which occurred in the Eurasianist Movement. This plurality was based on different meta-jural premises, including phenomenological ideas in the work of Nikolai Alekseev, who argued for legal individualism; the "Alleinheit" theory found in the writings of Karsavin; and a legal positivist theory in a paper by Nikolai Dunaev.

We argue that members of the Eurasianist movement held jural views which were fundamentally contradictory. Some of the views were grounded in the tradition of Russian social philosophy. The Slavophile idea of "Sobornost" ('Spiritual community of many jointly living people') influenced Eurasianist views, especially, those of Lev Karsavin. A number of authors have emphasized the unity of Eurasianist jural views and avoided the problem of the plurality of those views. We even could combine these bizarre views inside the cultural approach of law. Law is a part and an expression of cultural life, law is dependent on cultural grounds. This was a central Eurasianist thesis.

4. EURASIANIST "MESTORAZVITIE": LEGAL UNIONS INSTEAD OF LEGAL FAMILIES

We should particularly emphasize one of the fruitful ideas of Eurasianism. It's a well-known statement that construction of language families was very productive for establishing the differentiation between so-called legal families. The Eurasianist idea of Language Union, provided by Nikolai Trubetzkoy and his colleague, another famous linguist, Roman Jakobson, proved to be very useful for developing a new concept of Legal Union, instead of idea of legal family, because in terms of the legal-family-approach the legal systems in the family should have had one shared ancestor (judge-made English common law in the Anglo-American legal family, or the religious basis of the Islamic legal family).

In the Eurasianist perspective, a Linguistic Union is a system of languages which is localized in the single "Mestorazvitie" because of convergence. The latter is based on everyday co-existence and interaction. I should characterize the grounds of the Language Union as extralinguistic, because they are spatial and quite geopolitical: Jakobson's idea of Eurasianism was affected by the geopolitical idea of Piotr Savitzky and his "United Eurasia" concept, according to which unity ought to be analyzed systematically – from historical, cultural, juridical, and, obviously, philological academic perspectives. Jakobson named this systematic approach "a method of linking" (Jakobson 1931, 5). This method could discover the similarities and parallels in many spheres of social life.

Nikolai Trubetzkoy introduced the Russian term "Language Union" (*yazykovoy soyuz*) in his Eurasianist paper "The Tower of Babel and the Confusion

of Tongues" (1923) and defined it as "group formed on a nongenetic basis" (Trubetzkoy 1991, 154). Afterwards, he used the German term *Sprachbund* at the first International Congress of Linguists in 1928, defining it as "a group of languages with similarities in syntax, morphological structure, cultural vocabulary and sound systems, but without systematic sound correspondences, shared basic morphology or shared basic vocabulary" (Trubetzkoy 1930, 17–18).

In 1931, Trubetzkoy's colleague Roman Jakobson developed his approach in order to construct the model of the Eurasianist Language Union. According to Jakobson, this Union was linked by two particular characteristics: the correlation of mild sounds ("myagkostnaya korrelaciya"), which is absent in European Roman-German languages, and non-politony (politony is widespread in the Far East). All "Eurasianist" languages (Eastern Slavic, Turkic, Finno-Ugoric, etc.), according to Jakobson, have these characteristics. Therefore, the borders of the Language Union looked like similar to the political borders of Eurasia.

The Eurasianists also asserted the existence of a Balkan language union, which could include not only Slavic, but also Albanian, Greek and Romanian languages, which in everyday communication and co-existence were creating a new language entity (Trubetzkoy 1991, 154). Using the principle of an analogy, the idea of Legal Union could cover the legal systems of Central and Eastern Europe – Poland, Czechia, Hungary, and several parts of former Yugoslavia and Romania, who due to their coexistence and cooperation, their shared experience under imperial (under Russian or Austrian ruling) and soviet past, non-reception of Roman Law (Giaro 2011, 4) could establish, according to the Eurasianists, a new legal union. However, in this context, we cannot agree with the opinion that the Eurasian legal area is at the same time Eastern European, as it is in the vision of Rafał Mańko or Gianmaria Ajani (Mańko, Škop, Štěpáníková 2018, 9). For Trubetzkoy and Savitzky, "Eurasia", in contrast to Central or Eastern Europe, was a unique cultural, sociopolitical, legal and even linguistic entity.

CONCLUSION

In this context, the Eurasianist culture-oriented approach could be characterized as much more culture-oriented, with new culture-oriented vocabulary, than other well-known approaches. Savitzky's "Mestorazvitie", Jakobson's "method of linking", Trubetzkoy's "Language Union", and Alekseev's "Right-Duty" could be very fruitful concepts for establishing cultural jurisprudence. Obviously, they have proto-structuralist and essentialist roots, partly due to geographical determinism; they did not cooperate with legal culture as a sphere of contradictory and non-resistible meanings. The Eurasianist narrative is a narrative of the Modern but much less repressive than others, it is much more relevant to the key-terms of the cultural turn, like "border", "third space", "transit" and "thick description".

BIBLIOGRAPHY

Alekseev, Nikolai. 1930. *Religiya, pravo i nravstvennost'*. Parizh: YMCA Press.

Alekseev, Nikolai. 1931. "K ucheniyu ob 'obyektivnom prave': o normativizme v prave". In *Tridtsatye gody. Utverzhdenie evraziytsev.* Kn. 7. 221–254. Parizh: Evraziiskoye knigoizdatelstvo.

Alekseev, Nikolai. 1998. "Obyazannost' i pravo". In *Russkii narod i gosudarstvo*. 155–169. Moskva: AGRAF.

Alekseev, Nikolai. 1998. *Osnovy filosofii prava.* Sankt-Peterburg: Yuridicheskiy institute.

Alexander, Jeffrey. 2003. *The Meanings of Social Life. A Cultural Sociology.* New York: Oxford University Press.

Bachman-Medick, Doris. 2016. *Cultural Turns. New Orientations in the Study of Culture*. Berlin–Boston: De Gruyter.

Böss, Otto. 1961. *Die Lehre der Eurasier. Ein Beitrag zur russischen Ideengeshichte des 20. Jahrhunderts*. Wiesbaden: Otto Harrassowitz.

Chestnov, Ilya. 2012. *Postklassicheskaya teoriya prava*. Sankt-Peterburg: Alef-Press.

Comparato, Guido. 2014. "Challenging Legal Culture". *European Journal of Legal Studies* 7(2): 5–17.

Dunaev, Nikolai. 1931. "Pravomochie i ègo vidy". In *Tridtsatye gody. Utverzhdenie evraziytsev.* Kn. 7. 255–284. Parizh*:* Evraziiskoye knigoizdatelstvo*.*

Florovsky, Georges. 1975. "Western Influences in Russian Theology". In: *Aspects of Church History. Vol. IV in the Collected Works of Georges Florovsky.* 157–182. Belmont, MA: Harvard University.

Florovsky, Georges. 2008. "Khitrost Razuma". In *Ishod k Vostoku*. 71–85. Moskva: Ladomir.

Friedman, Lawrence. 1975. *The Legal System: A Social Science Perspective.* New York: Russell Sage Foundation.

Giaro, Tomasz. 2011. "Legal Tradition of East Europe. Its Rise and Demise". *Comparative Law Review* 2(1): 1–23.

Gurian, Waldemar. 1964. "Totalitarianism as a Political Religion". In *Totalitarianism*. 119–137. Edited by Carl J. Friedrich. New York: Grosset & Dunlap.

Hegel, George.V.F. 1978. *Filosofiya dukha.* Moskva: Nauka.

Hobsbawm, Eric. 1987. *Age of Empire, 1875–1914*. New York: Vintage Books.

Hoecke, Marc van. 2002. *Law as Communication*. Oxford: Hart Publishing.

Homjakov, Alexei. 1926. "Pis'mo k redaktory «L'Union Chretiénne» o znachenii slov 'kafolicheskiy' i 'sobornyy' po povodu rechi ottsa Gagarina, iezuita". In *O cerkvi.* 57–59. Berlin.

Ilyin, Vladimir. 1925. "K vzaimootnosheniyu pravy i nravstvennosti". *Evraziysky vremennik* 4: 305–317.

Ilyin, Vladimir. 1928. "Magnitsky M. L. (Iz istorii evraziyskikh idey)". *Evraziyskaya Khronika* 10: 86.

Isaev, Igor. 1991. *Politiko-pravovaya utopiya v Rossii: Konets XIX – nach. XX v.* Moscow: Nauka.

Jakobson, Roman. 1931. *K kharakteristike evraziyskogo yazykovogo soyuza.* Parizh: Imprimerie de Navarre.

Karsavin, Lev. 1927. "Osnovy politiki". *Evraziysky vremennik* 5: 174–239.

Karsavin, Lev. 2005. "Tserkov', lichnost' i gosudarstvo". *Chelovek* 2: 70–82.

Legrand, Pierre. 1996. "European Legal Systems Are Not Converging". *The International and Comparative Law Quarterly* 45(1): 52–81.

Legrand, Pierre. 1997. "The Impossibility of Legal Transplants". *Maastricht Journal of European and Comparative Law* 4: 111–124.

Mańko, Rafał. Martin Škop. Markéta Štěpáníková. 2018. "Carving Out Central Europe as a Space of Legal Culture: A Way Out of Peripherality?" *Wroclav Review of Law, Administration and Economics* 6(2): 4–28.

Nelken, David. 2004. "Using the Concept of Legal Culture". *Australian Journal of Legal Philosophy* 29(1): 1–28.

Pashukanis, Evgeni. 1980. *Izbrannye trudy posle teorii prava i gosudarstva.* Moskva: Nauka.

Petrazhitskii, Lev. 2000. *Teoriya prava i gosudarstva v svyazi s teoriey nravstvennosti.* Sankt-Peterburg: Lan'.

Pribytkova, Elena. 2009. "V poiskakh èticheskogo minimuma: G. Ellinek, È. Fon Gartman, Vl. Solovyev". *Issledovaniya po istorii russkoy mysli. Ezhegodnik za 2006–2007* 8: 307–345.

Savitzky, Piotr. 1921. "Evropa i Evraziya (po povodu broshury N.S. Trubetskogo 'Evropa i chelovechestvo')". *Russkaya mysl'* 1–2: 119–138.

Savitzky, Piotr. 1927. "Geograficheskiy obzor Rossii-Evrazii". In *Rossiya – otdel'ny geograficheskiy mir.* Praga: Evraziiskoye knigoizdatelstvo.

Schelling, Friedrich. W. J. 1987. *Sochineniya v 2 toma.* T. 1. Moskva: Nauka.

Schmitt, Carl. 1974. *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*. Berlin: Duncker & Humblot.

Serio, Patrik. 2001. *Ctruktura i tselostnost': ob intellektual'nykh istokakh strukturalizma v Tsentral'noy i Vostochnoy Evrope*. Moscow: Yazyki slavyanskoj kul'tury.

Shakhmatov, Mstislav. 1923. "Podvig vlasti". *Evraziysky vremennik* 3: 55–80.

Strauss, Leo. 2007. *Estestvennoe pravo i istoriya.* Moskva: Vodolej.

Suess, Edward. 1885. *Das Antlitz der Erde*. Bd. I. Prag–Leipzig: F. Tempsky.

Toman, Jindřich. 1995. *The Magic of a Common Language: Jakobson, Mathesius, Trubetzkoy, and the Prague Linguistic Circle.* Cambridge, MA: The MIT Press.

Trubetzkoy, Nikolai. 1930. "Proposition 16. Über den Sprachbund". In *Actes du premier congrès international des linguistes à la Haye, du 10–15 avril 1928*. 17–18. Leiden: A. W. Sijthoff.

Trubetzkoy, Nikolai. 1991. *The Legacy of Genghis Khan and Other Essays on Russia's Identity.* Ann Arbor: Michigan Slavic Publications.

Trubetzkoy, Nikolai. 2000. *Nasledie Chengiskhana*. Moskva: AGRAF.

Trubetzkoy, Nikolai. 2008. *Pis'ma k P.P.Suvchinskomu: 1921–1928.* Moskva: Russkii Put'.

Zhivov, Victor. 1988. "Istoriya prava kak lingvosemioticheskaya problema". In *Semiotics and the History of Culture: In Honor of Jurij Lotman.* 46–128. Columbus, OH: Slavica Publishers.

Archives

State Archive of the Russian Federation (GARF):

Arapov 1925a (F. R 5783. Op. 1. D. 193. Zametki Arapova 'o natsionalizme' [Arapov's notes 'on Nationalism']. 17 Sentyabria 1925).

Arapov 1925b (F. R 5783. Op. 1. D. 193. Zametki Arapova 'o natsionalizme' [Arapov's notes 'on Nationalism']. 5 Oktyabria 1925).

Pis'ma Savitzkomu 1925 (F. R. 5783. Op. 1. D. 410. Pis'ma P.N. Savitskomu ot predstaviteley evraziyskogo techeniya po vnutri-partiynym i literaturno-izdatel'skim voprosom [Letters to P.N. Savitzky from representatives of Eurasian movement on internal-party and literature-publishing issues]. 4 Oktyabria 1925).

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ADEMIA: AGAMBEN AND THE IDEA OF THE PEOPLE

> It is in the retrospective effect of the nonexistence of a state that the "people" can be part of the naming of a political process and thus become a political category. As soon as the state in question is formed, regulated, and enrolled in the "international community", the people it claims as its authority ceases to be a political subject. It becomes a passive mass that the state configures, universally, no matter what the form of the state.
>
> Alain Badiou[1]

Abstract. In the volume *Stasis. Civil War as a Political Paradigm*, the Italian philosopher Giorgio Agamben advances the thesis that *ademia* – the absence of a people (a-*demos*) – is a constitutive element of the modern state. When confronted with the fact that modern political and juridical thought elevated the *people* to the role of the sole chief constituent agent and the ultimate source of the legitimacy of constituted orders, this thesis turns out to be rather problematic. In this work, I will explore Agamben's notion of *ademia*, retracing the main lines of its theoretical development and reconsidering it in relation to different interpretations of the idea of the people. Most notably, I will demonstrate how Jean-Jacques Rousseau and Carl Schmitt in challenging the conundrums that the idea of the people inevitably entails ended up in revealing the ultimate absence of the people in the political space of the constituted order of the state. In doing so, I will try to show how Agamben's notion of *ademia* is helpful is grasping some of the main paradoxes and conundrums underpinning the meaning and the uses of the idea of the people in legal and political thought.

Keywords: Agamben, Ademia, People, Multitude, Rousseau, Schmitt.

INTRODUCTION

In the volume *Stasis. Civil War as a Political Paradigm*, the Italian philosopher Giorgio Agamben advances the thesis that *ademia* – the absence of a people (a-*demos*) – is a constitutive element of the modern state (Agamben 2015). When confronted with the fact that modern political and juridical thought elevated the *people* to the role of the sole chief constituent agent and the ultimate source of the legitimacy of constituted orders, this thesis turns out to be rather problematic. For modern thought the people has become a linchpin in the composition of

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[1] Badiou 2016, 25–26.

state's organisation. One paradigmatic example of this view is the renowned Georg Jellinek's "three elements doctrine" [*drei elemente lehre*], according to which the people [*Staatsvolk*], alongside with a defined territory [*Staatsgebiet*] and the monopoly of state's power (and of the legitimate exercise of violence) [*Staatgewalt*], is a fundamental element of the state (Jellinek 1914). The essential bond that ties the state with the "people" is even more prominent in democratic constitutionalism, which declaims the unitary subject of the people as the unique, original source of every legitimate constituted power.

Although it might seem counterintuitive, Agamben's hypothesis points to a crucial problem seldom considered by political rhetoric (especially in its more populist version) and by the accepted idea of popular sovereignty, namely the fact that in its very meaning and in its actual existence, the *people* lacks of an unambiguous stable substance-identity. 'Every interpretation of the political meaning of the term people', Agamben claims, 'must begin with the singular fact that in modern European languages, "people" also always indicates the poor, the disinherited, and the excluded' (Agamben 1998, 176). The people is alternatively 'the constitutive political subject and the class that is, *de facto* if not *de jure*, excluded from politics' (Agamben 1998, 176), becoming in this way, the signifier for both the political actor *par excellence* (the people as the author of the constitution) and the impolitical mass of individuals with their private lives and biological needs.

This semantic ambiguity goes along with a further complication inherent to the doctrine of constituent power. In jurisprudence, constituent power represents the ultimate source of constitutional norms and institutional arrangements. It is configured as 'an all-powerful and expansive power', whose absolute and formless creative potential must be 'reduced to the norm of the production of law' (Negri 1999, 2–3). To function properly as foundational element of legal orders, constituent power has to be put-in-a-form, restrained into an established order, and therefore perverted in its nature. Constituent power, though, exists as long as it is negated; and the people – being the holder of such formless power – after the decisional act of constituting itself in a politically organized community, falls outside the realm of the constituted order. In this sense, the appearance of a constitution corresponds to the oblivion of its author. For these reasons, Agamben maintains that the people 'to the extent that it is the bearer of constituent power must find itself outside all juridical-constitutional normativity' (Agamben 2015, 50). And the state, in electing the people as the source of its own organisation, lives in a constant condition of *ademia*, while paradoxically being the most proper "realisation" of the people.

This paradox raises inevitably the question of the place and role of the people in relation to its own creation. In Western modern political tradition, the people embody the substance of the community and the object of state's government (Possenti 1988); but, if the subject "people" is systematically excluded from

the constituted order, the state finds itself de-substantialised. The state in this perspective would be the "pure" form of an absent substance. What is, thus, the subject (and the object) of modern state power, if the people cannot be present inside the boundaries of the constituted order? In *Stasis,* Agamben (through a reading of Hobbes's distinction between the concepts of "people" and "multitude), provides an answer to this question. The main subject of political power and governmental practices is not "the people", but the impolitical body of a multitude. In the event of the exercise of its faculty of self-constitution, the people loses its political potential, leaving the stage to a "confused" – impolitical – multitude.[2] Akin to the modern idea of "population", the multitude has not a proper political significance; rather, it represents the sum of passive and docile bodies of the people.[3]

In line with what one could expect from a text of this length, the following pages do not seek to enquiry exhaustively the questions surrounding the ideas of the people. Rather this article is committed to a more modest, but engaging task. I will explore Agamben's notion of *ademia*, retracing the main lines of its theoretical development and reconsidering it in relation to different interpretations of the idea of the people. Indeed, the peculiar aporia that Agamben poses at the core of the definition of *ademia* – namely the impossibility for the people of finding a coherent place in its own constituted order – could be encountered in different moments of the evolution of Western political thought and jurisprudence. Most notably, I will demonstrate how Jean-Jacques Rousseau and Carl Schmitt in challenging the conundrums that the idea of the people inevitably entails ended up in revealing the ultimate absence of the people in the political space of the constituted order of the state.[4]

While admittedly quite abstract, Agamben's notion of *ademia* is indeed helpful to grasp effectively some of the main paradoxes underpinning the meaning and the uses of the idea of the people, which we should not refrain from questioning – especially in a time like the one we are living in. The concept of *Ademia* conveys openly the impossibility of thinking the people as having an authentic political existence inside the constitutional boundaries of the state. The people *is* never a natural given that pre-exists the state; rather it is a signature that, on the one hand functions as an element in the dialectic of the foundation upon

[2] For a detailed reconstruction of Hobbes' distinction see: Piasentier, Tarizzo 2016.

[3] It must be acknowledged that Agamben's idea of multitude represents an alternative to the "revolutionary" conception of multitude made popular by Negri, Hardt and Virno (See: Negri, Hardt 2004; Virno 2004).

[4] I must specify that this work does not want to be a history of the concepts of *ademia* and of "people", and for this reason it does claim to adhere to the specific methods of the different strands of the history of ideas. Rather, I aim to test the validity of Agamben's theory, by confronting it with the thought of authors such as Rousseau and Schmitt; and certainly, the list of thinkers who have incurred in the questions raised by the theory of *ademia* could be longer. The comparative approach, I have chosen, thus, points to find a confirmation of Agamben's theory, rather than establishing a genetic lineage.

which the West thought the legitimacy of its institutions, and on the other hand represents the image (or matrix) orienting – the often tragic – political decision on the limits and forms of political communities.

1. DIVIDED PEOPLE

Speculations over the meaning of the word "people" are recurrent in Agamben's oeuvre since, at least, the volume *Homo Sacer. Sovereign Power and Bare Life*, where he firstly engaged with the ambivalent polysemy of such term. The term "People", Agamben maintains, indicates two substantially opposed entities: "the People" as a political agent and "the people" as the class of individuals whose social, juridical and economic status do not permit them to take part, fully, to the life of a community. Therefore, the semantic sphere of the word people embraces two opposed senses: the People as the source of the legitimacy of legal and political orders represent the counterpart of the people, as those who cannot be part of the political community. What we usually call "people", Agamben points out, is not 'a unitary subject but rather a dialectical oscillation between two opposite poles': the People as a 'whole and as an integral body politic' and the people as a 'subset and as a fragmentary multiplicity of needy and excluded bodies' (Agamben 1998, 176). Therefore, the people are never 'present as a whole' (Agamben 2015, 50) but implicates, logically, a fundamental division, between the whole of the included and the excluded.

In the book *The Time That Remains. A Commentary on the Letter to the Romans*, Agamben returns over the idea of a "divided people", through a reading of the biblical image of "Israel". In the Jewish biblical tradition, he claims, the 'principle of the law' is 'division' (Agamben 2005, 47). The grounding of Jewish law is made possible only through a clear-cut separation between Jews and non-Jews, between *Ioudaioi* and *ethnē*. In 'the Bible, the concept of 'people' is in fact always already divided between *am* and *goy'*; where *'Am* is Israel, the elected people, with whom Yahweh formed a *berit*, a pact', and the goyim are the other peoples. What marks the establishment of Israel is not the identity of a people with itself, but the fracture, generated by the adhesion to the law, which divides the People and the "peoples" – the Jews and the gentiles. As Leland de la Durantaye maintains, the divided people of Israel, for Agamben, 'becomes a paradigm for the notion that the idea of a people cannot and should not be thought of as pure, whole, or without remainder' (de la Durantaye 2005, 300). The unitary subject of the people, is always the outcome of a division, the remnant of a separation; and the attempt to establish a community through the delimitation of an identity encapsulating the individualities of its member, is made possible through the division itself. The whole of the people, thus, is thinkable only as the reminder of

a separation; and the concrete determination of the people – established through the adhesion to a law (or a pact) – entails a substantial degree of separation.

The image of a "divided people", in this regard, becomes the cypher of the impossibility of thinking the people as a coherent and homogenous unity, in which every element can be subsumed under a single presupposed identity. The people can never coincide in every single particle with its supposed idea. In its existential dimension, the people, is entrapped in a space marked, on the one side, by the tension between the unity of its political representation and the disunited singularities of its members, on the other side by the opposition to the other, excluded and separated "people".

What is more, the fault line informing the semantic structure of the people, for Agamben reflects the original biopolitical fracture that separate *bìos* and *zoē*; the politically qualified life of the "citizens" and all those subjects that are prevented from having a proper position in the polis. In this regard Agamben writes:

> there exists no single and compact referent for the term people anywhere: like many fundamental political concepts […], people is a polar concept that indicates a double movement and a complex relation between two extremes. This also means, however, that the constitution of the human species into a body politic comes into being through a fundamental split and that in the concept of people we can easily recognize the conceptual pair identified […] as the defining category of the original political structure: naked life (people) and political existence (People), exclusion and inclusion, *zoē* and *bios*. The concept of people always already contains within itself the fundamental biopolitical fracture (Agamben 2000, 31–32).

Once again, Agamben portrays the people as oscillating between the two existential forms of a "politically qualified life" (*bios* – the People) and the impolitical-excluded biological life (zoē). And the unity of a political community becomes possible through this separation. Consequently, a constituted order is the ultimate outcome not of the "will" of founding agent, but of the relation established by the original division of "the people" from its minor counterpart. In this way, Agamben deconstructs one of the symbolic pillars of modern constitutionalism. He puts in question the "people" as a unitary subject, as unique author of the constitutional order; replacing the solid ground of the popular will, with the instability of a relation between two (opposite) terms. If the people are always a reminder of a separation, a constituted order presupposes and, in a way, sustains that very separation – with all the unpredictable, conflicted and "tragic" consequences every separation entail.

But along with the ambivalence between masses positively or negatively valued, the term "people" entails a further semantic ambiguity: the one that separates and distinguishes the people as political creation and as natural or historical datum (Crépon, Cassin, Moatti 2014, 751). And given the role the people play in legal thought, this ambiguity had inevitably a repercussion on the very definition of constitution. From the perspective of constitutional law, Agamben claims, 'on the one hand, the people must already in itself be defined

by a conscious homogeneity, regardless of what kind (whether ethnic, religious, economic and so on), and hence is always already present to itself; on the other hand, as a political unity it can be present only through those who represent it' (Agamben 2005, 50).

As the author of its own constitution, the people should be present, in the form of a self-conscious unity of subjects – sharing certain a common culture and history – prior to the constitutional act. However, the people become properly "the People", only in the moment of giving itself a constitution; only when represented into a sovereign institution. Thus, Agamben concludes that the people are 'the absolutely present which, as such, can never be present and thus can only be represented' (Agamben 2005, 50). Only when manifested into a mechanism of representation, the people can be thought as a unity. But this logically implies that the people become a decisive political subject only through its institutionalisation and at the cost to disappear.

2. PEOPLE AND MULTITUDE

Who is the subject of state's power, if the "people" cannot find an accommodation inside the border of constituted orders? What is the substance-object of state's sovereign institutions? Agamben offers an answer to these questions through an interpretation of the frontispiece of Hobbes's Leviathan. His exegesis begins by noting that the Leviathan, the 'artificial Man called Commonwealth or State does not dwell within the city', but is placed outside of it. The Leviathan rests beyond the limits of the city and over the territory of his domain; and the body political, consequently, 'does not coincide with the physical body of the city' (Agamben 2015, 34–37). A possible explanation of this paradoxical aspect, Agamben claims, is that 'the population has been fully transferred to the body of the Leviathan', and therefore, 'not only the sovereign' but also the "people" has no place in the city (Agamben 2015, 37).

In the representation of the "physical" and symbolic space of the Hobbesian state, though, the people seem, paradoxically, absent. Agamben finds a solution to this riddle in Hobbes' *De Cive*, when the English philosopher advanced the fundamental distinction between "people" and "multitude". The people, Hobbes claims

> is something single [*unum quid*], which has one will and to whom one action can be attributed. None of these can be said of the multitude. The people reigns in every city [*Populus in omni civitate regnat*]; even in a monarchy the people commands, for the people wills by the will of one man. The citizens, that is, the subjects, are the multitude. In a democracy and an aristocracy, the citizens are the multitude; but the council is the people [*curia est populus*]. And in a monarchy, the subjects are the multitude, and (although this is a paradox [*quamquam paradoxum sit*]), the king is the people [*rex est populus*] (Hobbes 1983).

While supposedly composed of the same substance – the individual existence of the subjects of the "commonwealth" – the people (as rex or as council) differ from the number of single "citizens" composing the multitude. The people acquire a political subjectivity only when represented in the figure of the sovereign (or of the council). Hence, as Agamben put it, the people can be thought as sovereign only 'on the condition of dividing itself, of splitting itself into a multitude and a people' (Agamben 2015, 43). It is as if in the moment of being represented in a sovereign-institutionalised organ (the *rex-sovereign* or a council) the people leave the stage of politics open to the emergence of the multitude as a primary actor.

Indeed, as Agamben notes, for Hobbes in the act of choosing a sovereign, in the very moment of uniting themselves into the same body-politics, the people *dissolves* itself 'into a confused multitude' (Agamben 2015, 46). Under the command of the Sovereign, the people 'is no longer one person, but a dissolved multitude [*populus non amplius est persona una, sed dissoluta multitudo*]' (Agamben 2015, 46). Hobbes's description of the process of constitution of the political body of the state, turns out to be a cycle that connect a "disunited multitude" that pre-exists the covenant and the creation of the community, and the "dissolved multitude" that follows it. The constitution of the *populus-rex* appears in the exact moment of the decision for the entrance into the covenant, in the point of passage between the disunited and the dissolved multitude. In the Hobbesian interpretation of the emergence of a political body the people are a "People" only in the "event" of constituting itself as 'one Man, or an assembly of men, to beare their Person'; but this very moment represents also the point of oblivion of the people as a political subjectivity. Therefore, the body political, Agamben claims, 'is an impossible concept, which lives only in the tension between the multitude and the populus-rex' (Agamben 2015, 45).

What is more, in Agamben's account, Hobbes's theory of the constitution of the Leviathan represents an early symptom of the modern biopolitical turn of sovereign power. By dividing the people from the multitude, and in defining the latter as the proper subject dwelling the polis, Hobbes shows the awareness of the difference between the political agency of the people and the unpolitical essence of the population; difference that, as Foucault argued, will be fundamental in the emergence of modern biopolitics.[5] The multitude, in fact, has no political function; the multitude 'is the unpolitical element upon whose exclusion the city is founded' (Agamben 2015, 47), and upon which it is possible to exercise something like a bio-political power.

According to Agamben, the biopolitical significance of Hobbes's multitude, is witnessed also by the symbolism of the Leviathan's frontispiece.[6] The presence of the 'plague doctors' wearing the 'beaked mask' reminds 'the selection and

[5] On this point see: Foucault 2007.

[6] See: Falk 2011.

the exclusion, and the connection between epidemic, health and sovereignty' (Agamben 2015, 48). The multitude, 'like the mass o plague victims' could be 'represented only through the guards who monitor its obedience and the doctors who treat it'; it 'dwells in the city, but only as the object of the duties and concerns of those who exercise the sovereignty' (Agamben 2015, 48).

The impolitical multitude of the disunited individual existences represents the sole actual substance of the state. The constitution of the Leviathan, thus, presupposes a radical form of de-politicisation: the evanescence of the political potential of the people, which is passed in the absolute power of the sovereign. What remains of this process is a multitude: an assemblage of individuals with a strictly biological essence, under the care of sovereign institutions. The multitude, thus, is the un-political side of the people-sovereign; it is what remains when the people has instituted itself.

Here, the care of the multitude has the decisive function of assuring the stability and the continuity of the community. The multitude is always exposed to the risk of dissolution, since it is the *locus* of the creation of new covenants. It is in fact the "multitude" of men, in the act of constituting itself as a people, the author of the commonwealth. The governmental care of the citizens, which is the supreme aim of sovereign power, is a practice apt to limit the dissolutive forces embodied in the multitude. To govern, though, means to block the cycle of the constitution of the city, to keep at bay the political potential of the "people" as decisive unity.

The endurance of a political community and of the State is conditioned by the necessary removal of its author. It seems, thus, as if once the creational force of the people has been absorbed and instituted, it has to be kept at bay in order to ensure the endurance of the constituted order. With the concept of *ademia* Agamben exposes this specific removal that stands at the core of the modern conception of the state's form. In this perspective, governmental practices (and more generally institutions) are ultimately operating a limitation of the creational potential of the people.

3. ROUSSEAU, THE SOCIAL CONTRACT AND THE PEOPLE

Central to Agamben's concept of *ademia* is the peculiar fact that the People as the author of state's constitution, does not coincide with the people as the sum of the members of the body-political of the state. He seems to suggest that the legal and political order of the state cannot sustain the presence of its own founding agent. And, in a sense, this is nothing other than a re-formulation of the paradoxical definition of representative government. According to the principle of representation, the political agency of the people becomes manifest only when represented in state's institutions. This logically implies, however that the people are ultimately absent

from the people's administration. As Bernard Manin argued, in representative democracies the people 'acquire political agency and capability of self-expression only through the person of the representative' and once authorized, representative bodies replace the represented. The idea of representative government presupposes the presence of a "gap" between who governs and the governed. In representative political systems, Manin points out, who governs 'can never say with complete confidence and certainty "We the people"' (Manin 1997, 174–175).

An author who has struggled to overcome the conundrums of representation was certainly Rousseau, whose political imagination strived for making the "sovereign people" present in the stage of the political life of the state (Canovan 2005, 115). For Rousseau, popular sovereignty cannot be expressed and exercised by representative institutions; and the whole apparatus of government is put in motion according to the dictates of the sovereign general will. However, his attempt not to make the people disappear, to some degree failed. In Rousseau's theory of state's organisation, the position and the function of the people seems to incur in contradictions similar to those Agamben has recorded under the definition of *ademia*.

In the Social Contract Rousseau begins the construction of his theory of the state with the examination of the act 'by which a people become a people' that represents the ultimate event of 'foundation of the society' (Rousseau 2002, 162). Antecedent to the institution of a kingdom, a Republic or a political body more in general, there should be an act of constitution of the "people", in the form of a pact. Rousseau summarises this process as follows: 'each of us puts in common his person and all his power under the supreme direction of the general will, and in return each member becomes an indivisible part of the whole' (Rousseau 2002, 162). The *volonté générale* is supposed to reconcile the necessity of the individuals to perceive the protection of their interest and the need for the preservation of the whole; it is 'directed to the common good and is ideally just', since its 'willed by the people (both as individuals and as a body assembled)' (Canovan 2005, 115).

However, Rousseau seemed conscious of the difficulties entailed in the process of unifying a multitude of different interests towards a general common good (qualitatively different from the sum of the individual interests). The figure of the lawgiver, thus, is 'conjured up', to 'form individual citizens into a cohesive people' (Canovan 2005, 115). 'In order to discover the rules of association that are most suitable to nations', Rousseau writes 'a superior intelligence would be necessary, who could see all the passions of men without experiencing any of them' (Rousseau 2002, 180). The legislator should be an 'extraordinary man' capable 'of changing human nature; of transforming every individual, who in himself is a complete and independent whole, into part of a greater whole' (Rousseau 2002, 180). Rousseau condenses the functions of the legislator in the expression *instituer un peuple* – to institute a people that is making the people expressing a unitary will.

In Rousseau's social contract, the entity "people" – as a political category – is entangled in a continuous process of self- constitution: it represents the foundational agent of the state and, at the same time, it is established by the same institution it creates. A people is a 'community of citizens united by a social contract'; it is, therefore, the unity of a plurality capable of expressing a general will. Yet, the legislator is the agent who has the task to establish the general will. The people, in this way, creates its proper institutions to be such; and the original moment of emergence of the general will is brought into the very institutional structure. The people can exercise its deliberative power only as "People"; however, to be the people, the individuals, need to be able to legislate over themselves, that is to say, needs to be (or to have) a legislator capable of cementing the singular into the universal of the general will.

Rather than a given political entity, Rousseau's people can be described, as a "process" of self-constitution in which the creation of legitimate "governmental" and legislative institutions are functional the constitution of the people as such. In this regard, the people become the product of what it is supposed to be its product. Therefore, if the people become such through the establishment of its own institution, that is through the legislator, what is the place of the "people" in Rousseau's theory of the state? Rousseau offer an answer to this question while discussing the general idea of government, in book III of his *Social Contract*. Every free act, he claims, has

> two causes which together produce it; one is moral that is, the will that determines the act; the other is physical, that is, the power that executes it. When I walk toward an object, first I must want to go toward it; in the second place, my feet must take me to it. […] The body politic has the same driving forces; in it, we discern force and will, the latter under the name of legislative power, the former under the name of executive power. Nothing is, or ought to be, done in it without them (Rousseau 2002, 193).

In this schema the people are present as a "legislative will" and therefore is reduced to the 'moral' source of the 'physical' act of administering the Nation. For Rousseau, thus, the people are the "moral" source of state's institutions and governmental actions. It represents the source of the force animating the life of the body-politics of the state; but concretely, it remains absent in the moving machine for the administration of the res publica.

Rousseau's idea of the state turns out to be a composition of three elements: a sovereign (legislator), a government (magistrate) and the subjects that obey to the law. These three entities have different functions, and their equilibrium is vital for the self-standing of the state: 'if the sovereign wishes to govern, or if the magistrate wishes to legislate, or if the subjects refuse to obey, disorder prevails over order, force and will no longer act in concert, and the State being dissolved falls into despotism or anarchy' (Rousseau 2002, 194). In this partition the people are ultimately absent. The people *is* indeed the sovereign, but only through the

legislator. Sovereignty, in fact, is 'the exercise of the general will', which is the outcome of the encounter of the unity of the singular interests with a lawgiver. In this schema the people are present only as "the subjects", which is the term Rousseau uses to define the members of the body-political inasmuch 'they are subjected to the laws of the State' (Rousseau 2002, 164), that is when they are passively ruled.

In Rousseau's theory of the state the people (as a political agent) does not have a determined place, other that being the "moral source" of the action of government. And even though he stressed tenaciously the pre-eminence of the general will in the architecture of state's powers, his theory failed in accommodating the political agency of the "people" inside the state. The general will is always mediated by the extraordinary capacity of the legislator; and the people acquire the status of political subject only through its institution. *Ademia*, consequently, is an element of Rousseau's image of the state.

4. PEOPLE *ANTERIOR TO* AND *WITHIN* THE CONSTITUTION

In chapter 18 of his *Constitutional Theory*, Carl Schmitt sums up the meanings of the term people in relation to modern constitutionalism, by distinguish between "unformed" and "formed" people. The "unformed" people (composed by those who are not officials or holder of public functions) stands above the constitutional framework, as the bearer of the constitution-making power and of the public opinion. The "formed" people, instead, is the "people" within the constituted order, implementing its decisional power thorough regulated procedures, such us elections and referendums. With this (qualitative) distinction, Schmitt designates the two main existential dimensions that the people hold in democratic regimes (Schmitt 2008, 279).

In Schmitt's account, Democratic orders are – by definition – the product of an 'act of the constitution making power', which through an autonomous original decision 'determines the entirety of the political unity in regard to its peculiar form of existence'. Therefore, the "people" as the holder of such power pre-exists the decision towards the creation of the constitutional order; and the constitution represents the political form that an already existing people decides to give to itself. 'It is not the case that the political unity first arises during the "establishment of a constitution"', Schmitt claims, rather 'such constitution is a conscious decision, which the political unity reaches for itself' (Schmitt 2008, 75–76). The constitution is, in this perspective, the "form" of the political union that a determinate people – with a given identity and established customs and institutions – decide to assume. As long as the people *is* what is presupposed by any political and constitutional form, it must be necessarily unformed and "above" the constitutional order.

The existential dimension of the people as the bearer of the constitution-making power is the one that pertain to a formless entity whose self-decisional power is unrestrained and potentially limitless. The people, for Schmitt, much like the sovereign of *Political Theology*, has the faculty to decide in autonomy the form of its own existence as political community. It is prerogative of the people, to decide which kind of political orders would be most suited in relation to what it is deemed the "normal" framework of its life (Schmitt 2005). For Schmitt constituent power is by definition unlimited and can do whatever it wills: the people in its decisional act is free to give itself an arbitrary constitution.

However, the emergence of a constituted order absorbs and perverts the political potential of the people, channelling it into specific procedural forms, for mediated and to a certain extent, predictable decisions. Inside the boundaries of a constituted legal order, Schmitt claims, the people can execute its decisional function only through "election", "vote" and more generally systems of validation; but this is tantamount to transform the people to the point of making it disappear: in democratic constitutional orders, Schmitt claims, 'the people elect and vote no longer as the people' (Schmitt 2008, 273). In the act of taking part to a popular election or a referendum, the citizen is isolated, and the decisional instance of the people is fragmented in many separated individual preferences. For the secret ballot, there is no people, but only citizens with their lives, needs and private interests.

But for Schmitt, it is proper of a democracy to keep the decisional potential of the people intact; it is implicit in the idea of democracy the attempt to make the people present. Following the lesson of (Sieyès 2003), Schmitt sustains that democratic orders are perpetually exposed to the possibility of the actualisation of the people's deciding power. Therefore, Schmitt claims, even though in constitutional regimes the people can legally implement its decisional instances through regulated procedures (elections and voting), its 'potential for political action and significance in a democracy is in no way exhausted or settled' (Schmitt 2008, 271). In a democratic order, he writes,

> the people continue to exist as an entity that is directly and genuinely present, not mediated by previously defined normative systems, validations, and fictions […] the fact that individual constitutional powers are assigned to the voters and state citizens entitled to vote still does not transform the people into an administrative organ. It is precisely in a democracy that the people cannot become the administrative apparatus and a mere state "organ." […] The people in its essence persists as an entity that is unorganized and unformed. (Schmitt 2008)

How could the people remain present within the constituted structure of the democratic state? In which way can the people perpetuate in the exercise of its unformed and decisive power? For Schmitt 'the natural form of the direct expression of a people's will is the assembled multitude's declaration of their consent or their disapproval, the acclamation' (Schmitt 2008, 131). The people can formulate and express its own decisional power only when assembled

and sustaining or rejecting "publicly" the decisions of sovereign institutions. The popular assemblage in Greek democracies; the Roman Forum; the local government in a Swiss land: these are all examples of popular assembly. However, Schmitt is well aware that acclamations and assemblies are unknown to contemporary-liberal-constitutional regimes.

Quite surprisingly, especially in in light of his explicit aversion for democratic liberalism, Schmitt sustains that in modern democracy the public opinion is the form acclamations have taken. The possibility for the people to express and influence the decisional instances of given political state's institution, is channelled in the whole set of "parties" and "groups" – but also the press and the cinema industries – through which the popular sentiment can be channelled. What makes the public opinion suitable to be a form of acclamation is the fact that it is usually an 'unorganized form': as much as acclamations, Schmitt sustains that the public opinion 'can never be recognized legally and made official, and, in some sense, it remains uncontrolled' (Schmitt 2008, 275). The people, through the non-institutional *medium* of the public opinion can express its endorsement or disapproval. The public opinion represents, therefore, the timebomb of the formless constitution-making power of the people.

Carl Schmitt's speculation over the meaning of the role of the people as political author of its own institutional and constitutional life is probably one of the clearest attempts to keep the creational formless potential of the people present inside the border of the constituted order. It could be argued that Schmitt's critique of liberalism and his peculiar idea of plebiscitary-direct democracy makes of the necessary presence of the people in the stage of state's politics its main hallmark. However, despite the sharpness of his strategy, Schmitt's attempt to find a place for a non-mediated expression of the people's will is ultimately delusional (Rash 2014). The people, in fact, can absolve its political function of the constitutional order, only by dividing itself in formed and unformed people, and through its reduction to "public opinion". But this is tantamount to making the people disappears; since it is only through the mediation of specific entities – like parties, groups of interests, the press, etc. – that the people can exercise its decisional power.

Even if quite carefully crafted, Schmitt's theorisation of the unformed people as an always-present entity capable of having a decisive influence in political decisions in the form of public opinion, ultimately fails in his purpose. It is not clear, in fact, how something like a formless potential could express itself through the mediation of specific cultural, social and political agencies, without being in a way or another, affected by them. Indeed, if the history of the last century teaches us, the public opinion – and all the *media* through which it finds a channel of expression – is not spontaneous, let alone something unformed; rather it is a field of conquest and manipulation in which different political agendas and economic powers compete in giving it a favourable form. Consequently, also in Schmitt's concept of the state the people find *itself* ultimately excluded.

5. THE IDEA OF THE PEOPLE

Within the dynamic of secularisation, which has characterised Western temporal powers in the last four centuries, the people replaced the image of the almighty God as the source of every legitimate power. Indeed, the distinction between constituent and constituted power, replicates the foundational dialectic between God's *absolute* and *ordained* power; where the first corresponds to the divine transcendent absolute power to create, re-create and change the mundane order, while the latter represents the perfect and immanent creation of God, with its self-standing natural laws. The people's creational potential – as much as God's absolute power – stands out as the transcendent mythical legitimation of constituted order. But in doing so, the people as the holder of constituent power remain relegated to the sphere of the transcendental; it represents the mythical-image according to which mundane political powers are considered as legitimate.[7]

But, when the "people" entered the political lexicon of modernity conveyed in the conceptual apparatus of the theory of the state and constitution, its ambiguous polysemy. In the idea of people singularity and plurality, the self and the other, nature and culture, *nomos* and *physis*, are separated, opposed and re-articulated in the same conceptual framework. For what we have seen so far, through the engagement with the thought of Agamben, Rousseau and Schmitt, it is possible to discern three semantic levels in which the concept of "people" could be displaced: i) the people as an historical and social entity, with common identity, language and traditions; ii) the people as a political agent, as the holder of the constituent power and as the source of the legitimacy of state's institutions; iii) the people as the mass of the excluded subjects, the marginalised classes of those who cannot take fully part to the political community.

When observed from the angle of the first two levels, the idea of people assumes a specific normative value. The political body of the people, in its concrete socio-historical reality asks for its realisation as a community according to the coordinates of its presupposed image-identity. The people must institute itself, and to do so, it needs to have the consciousness of its own identity as a political agent. The people are in motion towards the constitution of its own idea. But this brings about a peculiar contradiction, which Agamben delineates in this way: the people 'is what always already is and yet must, nevertheless, be realized; it is the pure source of every identity but must, however, continually be redefined and purified' (Agamben 1998, 178). A people *is* subject to a continuous mechanism of constitution and re-definition, since its real referent never coincides with its own idea.

[7] Carl Schmitt recognises that the idea of the relationship between *pouvoir constituant* [constituent/constituting power] and *pouvoir constitué* [constituted power] finds its complete analogy, systematic and methodological, in the idea of a relation between *natura naturans* [nature nurturing/creating] and *natura naturata* [nature natured/created]. See: Schmitt 2014, 123.

But the problem with the "constitution of a people" (Laclau 2005) is that it can never be operated positively. As soon as the category of the people is invoked, it begins to function as an exclusionary device, always in need of being defined both internally and externally. As we have seen above, the political logic of "the people" is the one of division. Therefore, by choosing the people as a privileged term for articulating the very idea of politics and community, modern thought internalised the necessity of the other – of the enemy (to use a term dear to Schmitt).

In light of what has been done in name of the people and the resurgence of post-fascist populist sentiments, the challenge for a critical political and legal imagination, is not to question the validity of the category of the "people", or to re-frame it in more progressive terms; perhaps the time has come for thinking a community completely detached from whatever idea of the people.

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BIBLIOGRAPHY

Agamben, Giorgio. 1998. *Homo Sacer: Sovereign Power and Bare Life*. Translated by Daniel Heller-Roazen. Stanford, CA: Stanford University Press.

Agamben, Giorgio. 2000. *Means without End: Notes on Politics*. Translated by Cesare Casarino, Vincenzo Binetti. Minneapolis–London: University of Minnesota Press.

Agamben, Giorgio. 2005. *The Time That Remains: A Commentary on the Letter to the Romans*. Translated by Patricia Dailey. Stanford, CA: Stanford University Press, 2005.

Agamben, Giorgio. 2015. *Stasis*. *Civil War as a Political Paradigm*. Translated by Nicolas Heron. Edinburgh: Edinburgh University Press.

Althusser, Louis. 2007. "Rousseau: The Social Contract". In *Politics and History.* 128–129. Translated by Ben Brewster. London: Verso.

Badiou, Alain. 2016. "Twenty-Four Notes on the Uses of the Word 'People'". In *What Is a People?* 21–31. Edited by Alain Badiou, Pierre Bourdieu, Judith Butler, Georges Didi-Huberman, Sadri Khiari, Jacques Rancière. New York: Columbia University Press.

Canivez, Patrice. 2004. "Jean-Jacques Rousseau's Concept of People". *Philosophy & Social Criticism* 30(4): 393–412.

Cassin, Barbara. 2014. *Dictionary of Untranslatables. A Philosophical Lexicon*. Princeton: Princeton University Press.

Durantaye de la, Leland. 2009. *Giorgio Agamben: A Critical Introduction*. Stanford, CA: Stanford University Press.

Falk, Francesca. 2011. *Eine gestische Geschichte der Grenzen: wie der Liberalismus an der Grenze an seine Grenze kommt*. Munich: Fink.

Foucault, Michel. 2007. *Security, Territory, Population. Lectures at the Collège de France 1997–1978*. New York: Palgrave Macmillan.

Hardt, Michael. Antonio Negri. 2004. *Multitude: War and Democracy in the Age of Empire.* New York: Penguin.

Hobbes, Thomas. 1983. *De Cive. Latin Version.* Edited by Howard Warrender. Oxford: Clarendon Press.

Jellinek, Georg. 1914. *Allgemeine Staatslehre*. Berlin: Häring

Laclau, Ernesto. 2005. *On Populist Reason*. London: Verso.

Manin, Bernard. 1997. *The Principles of Representative Democracy*. Cambridge: Cambridge University Press.

Mouffe, Chantal. Ernesto Laclau. 1986. *Hegemony and Socialist Strategy*. London: Verso.

Negri, Antonio. 1999. *Insurgencies. Constituent Power and the Modern State*. Translated by Maurizia Boscagli. Minneapolis: University of Minnesota Press.

Piasentier, Marco. Davide Tarizzo. 2016. "'The Government of a Multitude': Hobbes on Political Subjectification". In *The Routledge Handbook to Biopolitics. Prozorov*. 36–49. Edited by Simona Rentea, Sergei Prozorov. London: Routledge.

Possenti, Vittorio. 1988. "Sul concetto di popolo: momenti della filosofia pubblica antica e moderna". *Rivista di Filosofia Neo-Scolastica* 80(3): 395–423.

Rash, William. 2014. "Carl Schmitt's Defence of Democracy". In *The Oxford Handbook of Carl Schmitt*. Edited by Jens Meierhenrich, Oliver Simons. Oxford: Oxford University Press.

Rousseau, Jean-Jacques. 2002. *The Social Contract and the First and Second Discourses*. Edited by Susan Dunn. New Heaven: Yale University Press.

Schmitt, Carl. 2005. *Political Theology. Four Chapter on the Concept of Sovereignty*. Translated by George Schwab. Chicago: The University of Chicago Press.

Schmitt, Carl. 2008. *Constitutional Theory*. Translation by Jeffery Seitzer. Durham: Duke University Press.

Schmitt, Carl. 2014. *Dictatorship*. Cambridge: Polity Press.

Sieyès, Emmanuel Joseph. 2003. *Political Writings: Including the Debate Between Sieyès and Tom Paine in 1791*. Indianapolis: Hackett Classics.

Virno, Paolo. 2004. *A Grammar of the Multitude: For an Analysis of Contemporary Forms of Life*. New York: Semiotext(e).

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PEDAGOGIES OF THE POOR: RESISTING RESILIENCE IN EASTERN EUROPE AND BEYOND

Abstract. This article illustrates the different ways in which the poor are being put to work, in defence of a global neoliberal order by global economic institutions concerned with constructing them as resilient subjects, as well as by opponents of neoliberalism concerned with galvanizing the revolutionary potentials of poor people. In spite of the apparent gulf between neoliberalism and its revolutionary opponents, the poor find themselves subject to remarkably similar strategies of construction by both proponents and opponents of neoliberalism today. This predicament of the poor is particularly vexed in Eastern Europe where strategies of resilience are fast developing, and critical legal theory has so far offered little resistance to this trend. Turning against this tide, this article considers how we might reimagine poverty and conceive its politics beyond and against clichéd images of the poor as resilient subjects. Through an analysis of the work of the Hungarian filmmaker Bela Tarr, it argues for the necessity of images capable of conveying the intolerability of the conditions in which the poor continue to live, as well as the contingency of those conditions; images that serve as interventions on narratives which would reduce the poor to a life of mere resilience.

Keywords: resilience, poverty, cinema, neoliberalism, commons, Roma, Eastern Europe, Béla Tarr.

INTRODUCTION

This article illustrates the different ways in which the poor are being put to work, in defence of a global neoliberal order, by global economic institutions concerned with constructing them as resilient subjects of that order, as well as by opponents of neoliberalism, in theories of social and political transformation concerned with galvanizing the revolutionary potentials of poor people. In spite of the apparent gulf between neoliberalism and its revolutionary opponents, the poor find themselves subject to remarkably similar strategies of construction, when we compare the ways in which they are imagined and conceived by both proponents and opponents of neoliberalism. On both left and right we encounter an assumption as to the unbreakability and endless resourcefulness of poor people. Whichever way they turn the poor find themselves vulnerable to this strategy of subjectification, which seeks to convince them of their resilience, and which invests in it, as a source for political and social transformation.

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It is a fact, of course, that in Europe poverty is much higher in the East than in the West (Menchaca 2018). Rural poverty is particularly high in Eastern Europe, leading to mass migration, especially of the young, westward and into cities. The Roma are said to be especially poor and prone to migrate, and since 1989 have become target subjects for European development programs in the West, which today are aimed at making them 'resilient' (Fisher, Buckner 2018; Morell *et al* 2018; Van Baar 2018). At the same time resilience as a concept is said to be under-developed in the Eastern European context, 'missing from post-socialist discourses' and lagging in its application to rural communities in Eastern Europe (Lendvay 2016, 255). It is inevitable that the concept and discourse of resilience, and its application to Eastern European poor is going to grow over the coming years, with at best dubious implications for their lives (Chandler, Reid 2016; Evans, Reid 2014; Reid 2013; Reid 2012).

1. RESILIENCE IN LAW; WHERE IS THE CRITIQUE?

In legal theory resilience has powerful proponents, as legal scholars argue that 'existing law is too inflexible to accommodate resilience thinking' (Allen *et al* 2014, 4). Environmental law, in particular is under considerable pressure to import resilience theory and develop frameworks that are seen to be 'adaptive' in their capacities to govern ecosystems that are said to be instable and dynamic, yet also resilient to change and pressure, and capable ultimately of absorbing the shocks of disasters (Arnold, Gunderson 2013). Arguments for the development of resilience in the field of environmental law arise from concerns that existing legal regimes are based on outdated understandings of nature as relatively stable, linear in their development, and predictable in their patterns of change. However the importation of resilience into law is also impacting on social systems, and scholars argue that there is insufficient attention paid to the ways in which this shift in law impacts on society (Cosens 2013). The demands now made on the poor to be resilient reflects the fallacious assumption that ecosystems and social systems follow the same laws and can thus be governed on the same principles. The legal theorist, J.B. Ruhl, has argued precisely this, that poverty is a 'complex adaptive system', and that its governance depends on the same principles as every other complex adaptive system, including the law itself, which also is said by Ruhl to be itself yet another complex adaptive system of which we need to develop the resilience thereof (Ruhl 2012).

In other words, law and legal theory is increasingly a part of what has been named 'the resilience machine' (Bohland, Davoudi, Lawrence 2019). When will critical legal theory wake up to the dangers of this shift? For years now, Costas Douzinas and his collaborators in the project of introducing criticality into legal thought have been arguing for the necessity of examining the functions of law in ideological and imaginary constructions of human subjectivity (Douzinas, Gearey

2005). Yet the legal critique of the incorporation of law into the resilience machine remains hitherto non-existent. Indeed, even within critical legal theory itself we can find the resilience machine at work. Anna Grear, writing for the influential journal, *Law and Critique*, itself edited by Douzinas, has argued that critical legal scholarship needs to get busy with delivering resilience in today's world of climate crisis and what, as we will see later, is now called the Anthropocene (Grear 2015, 246). If legal critique is to meet the challenges which it has posed for itself, as expressed clearly by Rafał Mańko, of exposing the function of law in maintaining hegemonic ideology, as well as the function of hegemonic ideology within law itself, then it needs to address, also, the ways in which 'critique' itself too often serves to mask ideology (Mańko 2018). Legal critique is no exception to this danger of 'critique' turning toxic. Central and Eastern European scholars of law need to be made particularly aware of the dangers inherent in resilience ideology, and of getting caught up in the resilience machine, if they are to meaningfully 'resist the present' as has been urged necessary (Mańko, Cercel, Sulikowski 2016. The raising of such awareness is especially pressing given the ways in which the European Union and other agencies of western colonialism now have Eastern and Central Europe in their sights.

2. REIMAGINING POVERTY

Attempting to turn against the tide of these trends, this article will consider how we might reimagine poverty and conceive its politics beyond and against clichéd images of the poor as resilient subjects. It addresses in particular the politics that emerges when we ground social relations in a project of both breakability and unfixability – the method guiding Lauren Berlant's pedagogy of poverty; a pedagogy aiming to teach and train the poor to live with what is broken. While opposed to the neoliberal agenda of resilience, Berlant's pedagogy is equally problematic as it functions by dispossessing the poor of belief in any capacity for security, teaching them to accept loss and damage as inevitabilities of living. Ultimately I argue for the necessity of better images of poverty, capable of breaking from the clichéd and degrading representations of the poor to be encountered in much of political discourse today. Images capable not only of conveying the intolerability of the conditions in which the poor continue to live but the contingency of those conditions; images that serve as interventions on narratives which would reduce the poor to a life of endless struggle, resilience and suffering. For the purpose of locating new and non-cliched images of the poor and their potentials I will turn to the resources of cinema, and especially the cinematic imaginary of the Hungarian Bela Tarr, whose work has been identified as existing in the vanguard of Eastern European cinema (Kiraly 2015), and whose last film, *The Turin Horse* addresses these phenomena of rural poverty, migration and Roma subjectivity directly.

3. THE UNBREAKABLE POOR

So-called natural disasters, such as earthquakes and floods, pose particular threats to the security and wellbeing of Eastern European states and their peoples. Romania, for example, faces some of the greatest seismic risks of any European state, which is one reason why the World Bank, this summer of 2018, lent the country 400 million Euros to develop its disaster risk management policies (Banila 2018). 'Increasing resilience to shocks is a central element of our new strategy for Romania, as well as the core of our efforts to promote inclusive growth', has said the World Bank country director for Romania and Hungary, Tatiana Proskuryakova (Banila 2018).

Early in 2017, the World Bank published a more general report on the implications of natural disasters for the poor worldwide. As the report describes natural disasters have a tendency to impact on the poor much more than they do other populations of a society. Moreover they hurt the poor in ways that cannot be measured according to the traditional focus on the impacts of natural disasters on the aggregate wealth of countries.

A flood or earthquake can be disastrous for poor people, but have a negligible impact on a country's aggregate wealth or production if it affects people who own almost nothing and have very low incomes. By focusing on aggregate losses, the traditional approach examines how disasters affect people wealthy enough to have wealth to lose and so does not take into account most poor people (Hallegatte *et al* 2017, 1).

The report laments this traditional shortcoming in the measurement of disaster impacts, and argues for the greater worth of its own approach which, eschewing the measurement of aggregate losses, focuses instead 'on how disasters affect people's well-being' (Hallegatte *et al* 2017, 2). The metric it adopts aims to measure the overall affects of disasters on both poor and non-poor populations such that the management of disasters can work to the benefit of the poor as much as the non-poor, taking into consideration, as it aims to, the greater vulnerabilities of the poor, and indeed, their well-being.

The report is titled *Unbreakable: Building the Resilience of the Poor in the Face of Natural Disasters*. The title tells a lot about the overall disposition of the report, and we might suppose that of the World Bank as a whole, towards poor people as such. On the one hand an articulated concern for the well-being of the poor in the context of a world in which natural disasters are endemic and worsening in their effects, and on the other, a profound faith in the abilities of the poor to withstand those endemic effects. *Unbreakable. Resilient.*

This ascription of unbreakability and resilience to the poor in the face of their exposure to the death and damage wrought by disasters worldwide has become a governing cliché in recent years in policies and literatures concerning disasters

and poverty (Chandler, Reid 2016; Reid 2013; Evans, Reid 2013; Reid 2012). It is a cliché which the World Bank has been particularly powerful in pushing, along with other international organizations, concerned as they are with formulating policy solutions to poverty which will not interfere with the smooth running of capitalism (Felli 2016). Unbreakability is of course one thing, while resilience is another. To be resilient is not simply to be unbreakable, but to be able to absorb the shock generated by the impact of a disaster, and recover by adapting to its occurrence, not by returning to the state one was in prior to the disaster, but by evolving in form, learning from the event of disaster, and growing stronger from the knowledge established of one's vulnerability. Affirming the resilience of the poor is therefore also to affirm the productivity of disasters for their life and wellbeing, and not simply to lament their excessive exposure to disasters. It is a way of not only naturalizing that exposure, but celebrating it, as that without which the poor would not be able to lay claim to their core property of resilience. The unbreakability of the poor is predicated on their resilience, which in turn requires their exposure to disasters in order for it to develop.

The identification of resilience as a core property of poor people has a relatively recent history. Prior to that resilience was largely conceived as a property of non-human living systems within life sciences, especially ecology. Its reconceptualization as a property of human life, and its identification with poor people especially, can be traced to the 2002 World Summit on Sustainable Development in Johannesburg. A major report prepared on behalf of the Environmental Advisory Council to the Swedish Government as input to the process of the Summit introduced the concept of resilience to the human development community, describing how resilience is a property associated not just with the diversity 'of species', but also 'of human opportunity', and especially 'of economic options – that maintain and encourage both adaptation and learning' among human populations (Folke *et al* 2002, 438). Neoliberal economy, in which the function of markets as generators of economic diversity is basic, was recognized as a core constituent of the resilience which sustainable development had to be aimed at increasing. Thus was it that, post-Johannesburg, the correlation of sustainable development with resilience started to produce explicitly neoliberal prescriptions for institutional reform. 'Ecological ignorance' began to be conceptualised as a threat, not just to the resilience of the biosphere, but to humanity (Folke 2002, 438). Resilience began to be conceived not simply as an inherent property of the biosphere, in need of protection from the economic development of humanity, but a property within human populations that now needed promoting through the increase of their 'economic options.' As remarkably, the biosphere itself began to be conceived not as an extra-economic domain, distinct from and vulnerable to the economic practices of human populations, but an economy of 'services' which 'humanity receives' (Folke *et al* 2002, 437).

There was a double and correlated shift at work, here, then, in the elaboration of the sustainable-development-resilience nexus post-Johannesburg. In one move 'resilience' shifted from being a property of the biosphere to being a property of humanity, while in a second move 'service' shifted from being an element of economy to being a capacity of the biosphere. Crucified on the cross that this double shift carves were the poor. For they were the population within humanity of which resilience was suddenly most demanded and simultaneously the population said to threaten the degradation of 'ecosystem services.' Increasing the 'resiliency' of the poor has become a defining goal, for example, of the United Nations Environment Programme (UNEP) in the years post-Johannesburg (UNEP 2004, 39). Alleviating threats to the biosphere requires improving the resilience of the poor, especially, because it is precisely the poor that are most 'ecologically ignorant' and thus most prone to using 'ecosystem services' in non-sustainable ways. Thus does ensuring the sustainability of the biosphere require making the poor into more resilient kinds of subjects, and making the poor into more resilient subjects requires relieving them of their ecological ignorance, and the means to that removal was argued to reside in building neoliberal frameworks of economy, governance, and subjectivity.

Developing the resilience of the poor was said to require, for example, a social context of 'flexible and open institutions and multi-level governance systems' (Folke *et al* 2002, 439). 'The absence of markets and price signals' in ecological services is a major threat to resilience, UNEP argued, because it means that 'changes in their conditions have gone unnoticed' (UNEP 2004, 13). Property rights regimes had to be extended so that they incorporate ecosystem services and so that markets can function in them (UNEP 2004, 15). 'Markets' it is argued 'have proven to be among the most resilient institutions, being able to recover quickly and to function in the absence of government' (Pingali *et al* 2005, 518). When and where the market fails to recover, development policies for increasing resilience had to be aimed at 'ensuring access to markets' (Pingali *et al* 2005, 518). Ensuring the resilience of the poor also required the building of neoliberal systems of governance that would monitor their use of ecological services to ensure they are sustainably managed (UNEP 2004, 39). The poor, in order to be the agents of their own change, had to be subjectified so that they would be 'able to make sustainable management decisions that respect natural resources and enable the achievement of a sustainable income stream' (UNEP 2004, 5). 'Over-harvesting, over-use, misuse or excessive conversion of ecosystems into human or artificial systems damages the regulation service which in turn reduces the flow of the provisioning service provided by ecosystems' (UNEP 2004, 20). Within 'the poor' itself women were the principal target population. 'I will transform my lifestyle in the way I farm and think' became the mantra that poor women farmers in the Caribbean region were demanded, for example, to repeat like Orwellian farm animals in order to receive European Union funding (Tandon 2007, 12–14).

Since Johannesburg, resilience has developed into a governing dogma, accepted and proselytized by an ever widening range of actors, more or less univocal in their assertion of the poor's abilities to absorb the shocks of disasters, recover, and grow stronger through their exposure to disaster-ridden worlds. The World Bank's affirmation of this dogma, *Unbreakable*, is only the latest and doubtless not the last reiteration of this condescending approach to poverty. But there is a particularly dark irony to the way in which the World Bank is now formulating its approach and thinking concerning resilience. For its interest is purely and simply in what it described as 'socio-economic resilience', which is to say, 'the ability of a population to cope with asset losses' (Hallegatte *et al* 2017, 97). In other words while professing commitment to the wellbeing of the poor and not simply their economic welfare, it is concerned with measuring the risks posed at that wellbeing in fundamentally economized terms. As they readily admit, this represents 'an imperfect metric' for 'it disregards direct human and welfare effects such as death, injuries, and psychological impacts; cultural and heritage losses such as the destruction of historical assets; and social and political destabilization and environmental degradation.' (Hallegatte *et al* 2017, 100). It also disregards, as they too recognize, 'the impacts of natural disasters on natural capital, in spite of their importance to the income of poor populations across the world through their effects on soils, fish stocks, and trees, among other things (Hallegatte *et al* 2017, 100). Likewise it deliberately disregards 'the impact of differentiated disaster impacts across people, especially for children, the elderly, and, in some cases, women. Introducing gender inequality and the higher vulnerability of some groups would affect our measure of resilience and well-being losses' , the World Bank concedes, citing 'data limitations' (Hallegatte *et al* 2017, 100). Death, the loss of life, physical suffering and damage, psychological trauma and hurt, the loss of culture, heritage and history, the social and political turmoil, and the impact of disasters on the environments of the poor, including the soils, livestocks, fish, and trees on which they depend, all fall out of the purview of the World Bank, as well as the vastly unequal ways in which risks are shared across genders and age groups, in order to maintain the integrity of its datafied approach to mapping and modeling the 'unbreakable' Poor. The anaemic nature of the conception of wellbeing at work in the World Bank's approach to resilience is of course precisely what enables it to assert the 'unbreakability' of the Poor. Were they to take into consideration the death, loss and suffering caused by disasters, which cannot be quantified, the image of the poor depicted would dilapidate into that of shattered life.

4. RESILIENT REVOLUTIONARIES

The question of the nature of the image of the poor, how we see and think about poverty, is also at stake in a text apparently opposed to the policies of the World Bank; that of Michael Hardt and Antonio Negri's work, *Commonwealth*

(2009). They too are concerned with challenging what they perceive to be a dominant image of poverty, not simply in economic policies, but deep within political theory and philosophy; that of poverty understood and constructed in terms of misery, deprivation and lack (Hardt, Negri 2009, 39). For them the poverty of a population does not name any such misery or lack but a productivity and resourcefulness that make the poor a constant menace for property owning populations. The poor, they argue, is always inventing 'strategies for survival, finding shelter and producing forms of social life, constantly discovering and creating resources of the common through expansive circuits of encounter' such that 'even in conditions of extreme adversity' the poor remain defined by their productivity (Hardt, Negri 2009, 254). The capacity for the production of 'the common' is, they argue, what distinguishes the poor from property owning populations whose subjectivities are grounded in the enclosure and exploitation of the common (Hardt, Negri 2009, 39–40).

Reading Hardt and Negri on poverty we can observe a comparable strategy of construction to that of the World Bank. The poor are not defined by their weakness or lack but by what may well be called their resilience; the ability to invent new strategies for survival, find shelter, and produce new forms of social life, overcoming whatever adversity they are faced with, while proving their endless resourcefulness. Yet for Hardt and Negri these capacities of the poor are the source of their revolutionary potential rather than their subjection to neoliberal governance. They do not recognize the ways in which their account of the poor, in terms of its resilience, is complicit with a parallel shift in thinking concerning poverty in governing institutions. Yet, as we saw in the previous section, capital is every bit as invested in an understanding of the poor as resilient and unbreakable as its would-be opponents. Nor do they recognize the western bias which shapes their concept of the common; a bias which makes them oblivious to the difficulties to be had in applying it to spatial contexts outside of the west, and to Eastern Europe in particular. This ignorance of the specificities and differences of Eastern to Western European experience runs pretty much throughout their work (Smith, Timar 2010: 115–116).

It is not simply the poor that Hardt and Negri construct as resilient, but that which the poor supposedly produces: the common. The common, they suppose, is resilient to all attempts by state and capital to enclose and exploit it, forever escaping and defying those attempts to render it into property, either in the name of the private or the public. Indeed their interest in the poor is really an interest in this, its purported product, 'the common'. The common as Hardt and Negri theorize it has, from the outset, at least a double meaning. It describes 'the common wealth of the material world – the air, the water, the fruits of the soil' which it is claimed belongs to humanity as a whole (Hardt, Negri 2009, viii) and which is now in crisis on account of the historical exploitation and pollution that human beings have wrought upon it. But it also refers to the results of social

production that are necessary for social interaction and further production (Hardt, Negri 2009, viii) such as knowledges, languages, images, affects, and so on.

The differences between these two forms of the common (material versus immaterial, finite versus infinite, ecological versus social) are obviously vast. And the relation of the poor to each of them is vastly different too. The poor does not and cannot produce air and water in the ways that Hardt and Negri believe it is capable of producing images and affects. The crisis of the material common is clearly much starker than that of the immaterial in this respect. If the common is resilient to strategies aimed at its enclosure and exploitation then it is in its immaterial and not in its material dimensions. One cannot privatize and destroy the common basis of language and love in the same ways one can privatize and destroy common access to clean air and water.

For Hardt and Negri, however, the doubled aspects of the meaning of the common are not a problem. Indeed the resilience of the common when addressed as the results of social production is identified as the answer to the problem of the vulnerability of the common when addressed as the decreasing natural resources on which the poor also relies. Likewise the relative decline of the state, and the transformations in the function of sovereignty we associate with the neoliberal globalization that followed the end of the Cold War, are seen not so much as problems for the defense of the common, but necessary enablers of socio-political processes for the common to constitute itself as a political subject worldwide; both as that collective subject which is defined by the practices of social production of the common, in terms of its abilities to produce new knowledges, languages, images and affects, as well as that which is defined by its defense of the common wealth of the material world. This is the third sense in which Hardt and Negri theorize the common; as the form of political subject that the poor can become, once it passes through the necessary stages of its development. Neoliberalism, they ask us to believe, is itself productive of the socio-political development necessary for the poor to become the Common.

The emergence of the Common, this new form of political subject, represents the beginnings of a new pastoralism for the poor in world politics; whereby the abilities of the poor to care for themselves become inextricably intertwined with their abilities to care for the earth as much as each other. The promise is that through the constitution of the Common as political subject so the answers to the problems of how to secure the common, ecologically and socially, will be miraculously found too. The concept of the Common is profound, therefore, not so much as a tenable answer to the problems of poverty as well as ecological and social crisis we associate with neoliberalism, but as a mythic expression of the classically liberal desire of political thinkers and activists for a solution to the problem of psychic, ecological and social antagonism; their desire for a world beyond antagonism. Its significance is that of the expression of a classically liberal imaginary, and still existent desire, on the liberal left, for utopia. The Common

lures with its offer of the possibility of a world beyond the division between public and private – a world beyond that which neoliberalism is still in process of creating (defined by privacy), and beyond that which socialism created historically (defined by the public). A world created by an all-powerful subject, and which through the miraculous deployment of its powers destroys the market (which constitutes the private) and the state (which while once protecting the public now serves the function of protecting the market), while taking care of the environment so damaged historically by state and market.

As a world created by this subject, the Common discloses a particular kind of space, expressive of the particular characteristics of the Common as subject. It is a space that is said to belong to the Common in precisely those ways private and public spaces cannot. This is a particular mode of belonging that lures because it promises to take us beyond the modes of belonging defined by public and private; a mode in which we belong to the space in question without treating it or each other as property. Such a space is one which must be lived and experienced in order to be known – hence the importance of new spaces for constitution of the commons, and the significance in particular of the occupation of formerly public spaces, threatened by privatization, by the Common, such as the squares of major cities, where the Common can be seen to be rising up and constituting itself, since around 2011. Hence the importance, also, of the indigenous poor, and their knowledge and practices, for the constitution of the Common, as indigenous poor are said to possess culturally superior ways of producing common spaces (Trawick 2003). These are spaces in and of which their ideological proponents declare the birth of 'utopia' (Hui 2017, 7); spaces in which 'each person is valued as an organic part of the community and for what he or she can contribute' (Hui 2017, 7); mythical spaces in which the 'powerless subjects of neoliberal regimes' (Hui 2017, 9) transform themselves into the imagined community of the Common. And yet this transformation, of the powerless and poor, is itself mediated by an image of the poor, in its unbreakable resilience, as clichéd as that which the World Bank propagates in its policies for the poor's further subjection to neoliberal economic reason.

5. LEARNING TO LIVE WITH WHAT IS BROKEN

Lauren Berlant offers what is in many ways a persuasive critique of the mythic qualities of the Common (Berlant 2016). Indeed she urges us to reject the 'frictionlessness' (Berlant 2016, 396) of this impossible, romanticized and clichéd subject and embrace the realities of ambivalence and frustration instead. Rather than investing in the possibility of being able to transcend the antagonisms of the present, in creation of an absolutely other world, what we need, she argues, is a pedagogy of *learning to live with what is broken* (Berlant 2016, 394–396). Mythical accounts of the Common, Berlant argues, express the yearning to fix

what we know, what we see, and what we experience, as being broken, in desire for a liveable life. But while Hardt and Negri may understand it as a means by which to achieve a structural transformation of the broken societies we inhabit, by creating spaces that take us beyond and outside of neoliberalism, Berlant attempts to think the Common as a form that inhabits brokenness itself (Berlant 2016, 393). In this sense her approach to the Common is an extension of her long-existing commitment to understanding the tactics that make life bearable for subjects, even when those tactics offer no solutions to the conditions of their servitude, and even involve attachments which do those subjects further damage; what she calls 'cruel optimism' (Berlant 2011).

What would it mean for the poor to inhabit brokenness, and what is entailed in learning to live with what is broken? For Berlant, answering these questions requires us to conceive the Common as infrastructure (Berlant 2016, 396). Infrastructure is revealed, only, when a body breaks down, because a body that works is oblivious to the infrastructure sustaining it. The greater the health of the body the more the oblivion. In its breakdown, the infrastructure of the body makes itself known, revealing itself, to the eye and/or other senses. Infrastructure is, as Berlant expresses it, 'the living mediation of what organizes life: the lifeworld of structure' (2016, 393). When it fails, the structure of which it is the lifeworld, necessarily suffers too. However the failure of infrastructure is also a constitutive part, Berlant argues, of the creative process through which living systems, including human societies, develop and sustain themselves over time (2016, 403). In their recovery from failure, Berlant argues, infrastructures do not simply fix the problems that caused their failures, but instead indicate the emergence of new forms of life. The austerity policies issued by neoliberal governments in response to the economic crises of recent years are attempts to fix what is no longer working (capitalism). The anti-austerity movements such as Occupy, in the United States, and other related movements throughout both Western and Eastern Europe and elsewhere (Kaun, Murru 2018), are attempts to innovate at the level of infrastructure (Berlant 2016, 394). 'The question of politics', she argues, has today become 'identical with the reinvention of infrastructures for managing the unevenness, ambivalence, violence, and ordinary contingency of contemporary existence' (Berlant 2016, 394). It is in this context that Berlant urges us to recover by what she calls 'unlearning the expectation of sovereignty as self-possession' (Berlant 2016, 408). It is in this sense that the struggle over and for the Common is most important – as attempts to constitute new forms of infrastructure for social living in which the practices of the self, including its economies of possession, are to be reinvented.

The Common is, for these reasons, also to be conceived, less as a world, and more as a place, to which the poor might go, in order to be dispossessed, of their possessiveness; a place where they are possessed rather than practice possessiveness; a place where they can be dissolved of their attachments

to sovereignty and instrumentality; a place of non-use. Berlant's practice of becoming common offers in that sense a positive version of what Judith Butler and Athena Athanasiou have theorized as dispossession (Berlant 2016, 402; Butler, Athanasiou 2013). A place, then, where people are not secure, and where they go, to an extent, to experience insecurity. Indeed we must welcome the exposure to hurt and potential suffering which the place of the Common offers to us and our fellow poor, and engage in a new form of 'training', she urges, which 'collapses getting hurt with making a life' (Berlant 2016, 411).

In search of an image with which to depict this space she desires the Common to be, Berlant reaches for the circus (Berlant 2016, 411). The image of the circus foregrounds, for Berlant, the difficulty of maintaining footing and balance, and the exposure to the possibility of getting hurt, in the process of 'relearning a capacity for the common' (Berlant 2016, 411). To furnish this image Berlant turns to cinema, and the documentary film of Liza Johnson, *In the Air* (2009). The film was shot in the city of Portsmouth, in the state of Ohio, in the United States; a city abandoned by capital, leaving one industrial employer, a scrapyard (Berlant 2016, 409). It is a film that depicts a ghost town, in classic terms, of empty streets and buildings, as if captured in a state of waiting for something or somebody to move in and make use of once again (Berlant 2016, 409). And yet, as Johnson's film reveals, and as Berlant describes, the ghost town is occupied, being home to a population of children, who receive the kind of 'training' within it, of which Berlant dreams, in the neighbourhood *Cirque d'Art*; a circus school to which they go, in order to escape their derelict parents, and where they learn 'to spin and fall' and 'lean on each other' (Berlant 2016, 411). The circus in question, this circus of Portsmouth, Ohio, as depicted by Liza Johnson in film, is where people can and do go, in order 'to relearn a capacity for the common again' (Berlant 2016, 411). Such learning entails a fundamental redrawing of the boundaries of community, Berlant argues. For the training they receive there 'changes what threatens and what comforts, it changes the referent of dread and the refuge' (Berlant 2016, 411). Life itself, even, is reinvented, for these kids, the 'current crop of dreamers' living in Portsmouth, Ohio (Berlant 2016, 411).

This, then, is a very different image and pedagogy of the poor to those offered either by the World Bank or Hardt and Negri. The poor, Berlant argues, are eminently breakable. The Common represents not that form of subject which the poor might become in expression of their unbreakability, nor is it itself an unbreakable form of subject. Instead it is a radically broken kind of non-subject, and one to which the pedagogue must attend to by teaching it how to live with all that which is broken. The word 'training' appears on multiple occasions in Berlant's text. It is clear from the text that she is very keen on training and that the common is as a place and not a subject also a space where training must occur. Of course training nearly always presumes a trainer, and therefore, a sovereign subject of a kind. Berlant describes the trainer; 'we see the teacher in the front of

the room, and she is getting the kids in sync, to do tricks' (Berlant 2016, 411). No comment let alone judgement is made concerning the otherwise obscured functions of discipline, control and subjection which this training to become common must entail. Yet in the synchronicity demanded for a group circus performance Berlant identifies in the very utopian terms she derides in the images of others, a coming and working together which is the signature of becoming-common. In the abandoned architecture of neoliberal capital the kids of *In the Air,* in all their white working class bodily diversities and differences, form a synchronous union, and 'the space that someone else probably owns becomes the commons made by movement' (Berlant 2016, 412). Broken, they learn nevertheless to move again. Hurt, they learn nevertheless to feel again. And if they lack the moral, spiritual and political resources with which to fight their abandonment by capital and subjection to neoliberal austerity, they can nevertheless find the belief 'to bear each other' down at the circus school, or at least in Liza Johnson's video (Berlant 2016, 413).

6. REIMAGINING POVERTY

Against this debased vision of learning and training, it is imperative we search for and produce new images of poverty and the poor. Political discourse is, like other regimes of production, littered by clichéd images of the poor. Phillip Roberts addresses this reality in his account of the politics of cinematic representations of poverty (Roberts 2017). What interests Roberts is the capacity of cinema to produce images that break from cliché, to reveal the intolerability of poverty (2017, 84). Cinema's history is defined by works which revealed the intolerable, and which in the process, challenged the narrative strategies of other works that functioned to legitimize poverty. Gilles Deleuze, from who Roberts takes inspiration, argued that this is precisely what defined the breach between classical and modern cinema. The films for example, of Rossellini, made in the wake of the Second World War, did not just show the viewer images of the poverty of post-war Italy, but characters for whom that poverty was intolerable, and whose lives broke down, on account of that intolerability. Indeed Deleuze went further to argue that at stake in cinema of the post-war era was a new regime of the image (1989, 248) constitutive of a 'new race of characters' (1989, xi) defined by its capability to see the intolerable; a cinema 'of the seer and no longer of the agent' (Deleuze 1989, 2). This was a cinema that refused to offer the poor any hope that their lives will improve, nor any assurance of their resilience, but instead bore witness, simply, to the intolerability of their conditions. It was not a cinema that promised economic improvement, nor revolutionary transformation. It rejected both such narrative possibilities, to instead face the hopelessness of the lifeworlds of the poor, revealing it, dwelling in the otherwise imperceptible dimensions of their misery, moving beyond cliché, into images that are real, not mythic.

For Roberts a contemporary example of a cinema exemplifying these characteristics is that of the Hungarian Bela Tarr, whose work has won much acclaim in recent years (2017, 80–92). The fact of Tarr being Hungarian is of no relevance it would seem to the analysis of Robert, nor of much significance to the considerably larger and wider literature emanating from the West, which has championed his cinema. If we want to get an account of Tarr's work that situates it within its national or regional genres, or in relationship to the particular concerns of Hungary and its region, then we have to engage with literatures which themselves emanate from the region or are concerned with the region (see Kiraly 2015).

Roberts focuses among other works on Tarr's *The Turin Horse* (2011). This is a film centred entirely on the lives of an impoverished father and daughter living in an isolated farmhouse where they perform, day by day, the same repetitive tasks of cleaning, cooking, drawing water from the well etcetera, while the world outside of the house portends apocalyptic doom. As Roberts asserts it does not merely show a clichéd image of poverty but reveals the minutiae of the life of the poor (2017, 88), involving the viewer in it, in ways that are themselves insufferable. It is not enjoyable to watch, but painful, in its tiresomeness. That the viewer has to work to get through the movie is perhaps part of what Elena Gorfinkel has described as its 'aesthetic of bodily attrition and perseverance, continuity in the face of insoluble, excruciating effort' (2012, 313). As Roberts expresses it 'the troubling thing about *The Turin Horse* is that its poverty seems absolutely normal' (2017, 88).

But it is questionable whether *The Turin Horse* is best understood as a depiction of the life of the poor at all. For it is a film about a horse, as the title suggests. Franklin Ginn addresses this fact in arguing that the film deploys the horse as part of a pedagogy aimed at teaching a lesson as to the need for humans to recognize the depth of their debts and dependencies on non-human forces, in context of the damages done by the human to other species amid the anthropocene (Ginn 2015). In this sense it might be thought of as an example of what is today called 'ecocinema', a new form of cinema the politics of which is defined by its being capable of inspiring progressive eco-political discourse and action among viewers' (Rust, Monani 2013, 3). But this would be to neglect the fact that the horse depicted, the Turin Horse, is not just any horse, but the very horse Nietzsche embraced in the city of Turin, on the morning before his turning mad. As the narrator points out at the beginning of the film, we know much about Nietzsche's gesture; his embrace and tears, in recognition of the condition of the horse, who was being whipped by its owner, but virtually nothing of the horse which was the object of his sympathy. The film itself opens with a long sequence depicting the horse, as it pulls its owner in his cart back to the isolated house in the country where he lives with his daughter, and where the horse is then stationed in the barn. The following day, the owner once more decides to ride to town with the horse pulling his cart. But the horse refuses. Not only does the horse refuse to pull the cart, it also refuses

to eat. The film depicts the empathetic relation of the daughter to the horse, and the contrast between it and the relation of the father to the horse that emits brutality. The daughter remonstrates with the father, as the horse refuses to move for him, saving it from further brutality. Not only do we see the daughter asking the horse why it is unhappy and why it does not want to eat, but we also see the daughter failing to eat, in construction of a shared refusal of food. Only the father of the house eats heartily. The horse gives expression to what the daughter feels.

It is not the case, in other words, that the significance of the horse's refusal is that it 'prevents the man from going to market' (Roberts 2017, 90). The gesture of the horse's refusal is significant for its rejection of the order to which it is subject by the human, and the man of the house in particular. It concerns the horse and its gestural capacity for refusal, rather than being simply another impediment in the life of poor people. Not only is the horse missing from Roberts' understanding of the object of *The Turin Horse*, but the two most significant scenes of the entire film also go untreated. For Roberts *The Turin Horse* expresses the limitations of possibility suffered by the poor; the reduction 'of the possibilities of life to a limited set of predictable opportunities' by a regime of control which operates precisely through the limitation of possibility (2017, 91). Poverty, here, according to Roberts, is understood in terms of 'life chances' (2017, 91), and control functions through an increasing restriction of these chances, by disconnecting the relations of the poor to the outside. Certainly one can see this expressed in *The Turin Horse*, in its depiction of the suffocating internality of the house in which the father and daughter live, the difficulty verging on impossibility of their being able to reach the town (given the refusal of the horse to pull the cart) or reach another dwelling (they try and fail). Indeed, in these respects, it can be compared with another film of the present, *I, Daniel Blake*, made also to great acclaim by Ken Loach, which likewise depicts the operation of control, this time upon the urban poor, and also upon a father-daughter coupling (though they are not biologically related), in the context of neoliberal Britain (2016). In *I, Daniel Blake*, the disconnection of the poor from the outside, the curtailing of their life chances, by a regime of control is more or less totalizing; there would appear to be no way out, in spite of the desire and attempts to exercise agency of the couple. In *The Turin Horse*, by way of contrast, the extent and severity of the disconnection is openly contestable.

The latter film is staggered by two tremendous scenes, each of which operates as a kind of intervention on the life of the father-daughter couple. In the first a neighbour arrives at the house asking for brandy. Inside, sitting at a table, and in a long, direct and dramatic monologue, he addresses the patriarch, and denounces the prevailing socio-political conditions of the world outside. In the second, the girl sights a band of horse riders approaching, on the horizon, as she gazes from the window upon the outside. 'Who is that approaching?' asks the father fearfully and quizzically. His daughter indicates that they are gypsies and asks him what they should do. 'Go outside and get rid of them' her father instructs. She

goes outside, and the camera bears witness to both her and the father's failures to prevent them from robbing their water from their well. What is the point of this scene? Is it to further dramatize the poverty of the couple, and their vulnerability to parasitic forces of control and exploitation? Are the gypsies deployed by Tarr, as has been suggested by Edward Lawrenson, as 'harbingers of disaster' in a manner 'provocatively close to ethnic stereotype' (Lawrenson 2011)?

Such interpretations are to miss the point of the most poignant and important scene of the film. The gypsies are forces of intervention, invading the suffocating insular space of the house and its farmland from the outside. Throughout the film we witness how the couple gaze meditatively upon the outside, literally, from the window of the house, waiting, watching. Indeed the film itself, in its privileging of the space of the window, and its dramatization of the stasis of the occupiers of the house, recalls Hitchcock's *Rear Window* (1954), but from a peasant perspective. When the outside breaks through, however, and the gypsies appear, they are interpreted as a source of threat. On the part of the couple, and especially the girl, this can as easily be read as a tragic misinterpretation of the potentials for liberation that the gypsies in their counter-example of how a life can be lived pose. They denounce the father directly. 'You're a worm', they tell him; 'you're weak', they say. And, in fact, contrary to the fears of the father, they do not rob the couple of their water, but willingly give money for it, before leaving. Most tellingly, they also speak directly to the girl, asking her, 'why don't you come with us?' Their horses, also, contrast powerfully with the horse of the couple, being well cared for, responsive, and riding fast into the wilderness in harmony with their humans on board. 'The water is ours! The earth is ours!' the gypsies proclaim as they depart, in a tone magisterial in its declaration of their self-acclaimed sovereignty.

There is a further poignancy to Tarr's depiction of gypsies in *The Turin Horse* that has been utterly missed in the western literatures dealing with the film. The Roma are widely recognized as the poorest population of people of the whole of Eastern Europe. The United Nations Development Programme (UNDP) reports that 'Roma are more likely to live in poverty, have a higher risk of unemployment, stay in school for fewer years, live without access to drinking water, sanitation and electricity, and live in substandard, overcrowded homes. Roma are more likely to suffer from chronic illness and have less access to health services' (UNDP 2018). At the same time, in recent years, and unsurprisingly, they have become particular target populations for programmes aimed at increasing resilience in the region (Fisher, Buckner 2018; Morell *et al* 2018; Van Baar 2018). In contrast with the governing image of Roma in western discourse today, as vulnerable and abject, Tarr depicts them in an uncanny majesty, far from the frame of resilience which the west seeks to situate them within.

For these reasons it is impossible to agree with Roberts that *The Turin Horse* depicts a situation of hopelessness and total eradication of the outside (Roberts 2017: 91). And, for the same reasons, is also impossible to agree with Jacques

Rancière, who has offered a similar reading of *The Turin Horse*, as well as Tarr's wider oeuvre, as a cinema of such hopelessness and failure (Rancière 2011). It is quite the opposite. What it depicts is the blindness of the poor to the reality of the outside, its openness, and its potential. The father, especially, is a character study in not just blindness but stupidity. A stupidity which functions as a regime of control preventing the daughter from ever realizing her life chances. And a stupidity that explains and justifies the poetic gesture of refusal of the horse of Turin; the very horse, we must remember that Nietzsche embraced, not simply out of sympathy, but in solidarity with its subjection to such a regime.

CONCLUSION

Deleuze argued that the cinema of post-1945 Italy created an entirely new image of poverty, and showed the viewer the intolerability of that image (Deleuze 1989). Following the end of the Cold War, it has been the work of Tarr, and Eastern European cinema as a whole (Kiraly 2015), to produce another such image, and also to insist on not just that intolerability which Rossellini and others showed, but the powers of the poor to triumph over conditions which would seem otherwise impossibly bleak. The image of the poor in *The Turin Horse* is not one of unbreakability or resilience. Gradually the couple are broken, the film ending with a scene in which the light sustaining their life finally fades. Nor are they intrinsically intelligent in the manner which Hardt and Negri credit the poor with being. One of them is cripplingly stupid. No regime of learning or training can save them. Penetrating this image of the poor requires doing also what the World Bank refuses to do; breaking down the gender and age inequalities through which the poor are constituted. It also requires looking at this image as that of a more than human poor. For the horse is the most significant subject within the group. Nevertheless it is an image of the poor which itself contains its own outside, and in that outside its own potential to be otherwise. A potential for a poverty which takes what is wants, asserts what it possesses, and celebrates what it is capable of doing, in representation of the reality that life can be transformed into what it is not, and new conditions of being established. This is the lesson, requiring neither training nor learning, which the pedagogy of *The Turin Horse* gives its viewer.

BIBLIOGRAPHY

Allen, Craig R. David G. Angeler. Ahjond S. Garmestani. Lance H. Gunderson. C. S. Holling. 2014. "Panarchy: Theory and Application". *Ecosystems* 17(4): 578–589.

Baar van, Huub. 2018. "Contained Mobility and the Racialization of Poverty in Europe: the Roma at the Development-security Nexus". *Social Identities: Journal for the Study of Race, Nation and Culture* 24(4): 442–458.

Banila, Nicoleta. 2018. "World Bank lending Romania 400 mln euro for disaster risk management". *SeeNews: Business Intelligence for South East Europe.* https://seenews.com/news/world-bank-lending-romania-400-mln-euro-for-disaster-risk-management-617880

Berlant, Lauren. 2011. *Cruel Optimism.* Durham: Duke University Press.

Berlant, Lauren. 2016. "The Commons as Infrastructure for Troubling Times". *Environment and Planning D: Society and Space* 34(3): 393–419.

Bohland, Jim. Simin Davoudi. Jennifer L. Lawrence. Eds. 2019. *The Resilience Machine.* New York: Routledge.

Butler, Judith. Athena Athanasiou. 2013. *Dispossession: The Performance in the Political.* Cambridge: Polity.

Chandler, David. Julian Reid. 2016. *The Neoliberal Subject: Resilience, Adaptation and Vulnerability.* London: Rowman and Littlefield.

Cosens, Barbara A. 2013. "Legitimacy, Adaptation, and Resilience in Ecosystem Management". *Ecology & Society* 18(1): 3.

Craig, Anthony Arnold. Lance Gunderson. 2013. "Adaptive Law and Resilience". *Environmental Law Reporter* 43: 10426–10443.

Deleuze, Gilles. 1989. *Cinema 2: The Time-Image.* London: Athlone.

Douzinas, Costas. Adam Gearey. 2005. *Critical Jurisprudence: The Political Philosophy of Justice.* Oxford and Portlan, OR: Hart Publishing.

Evans, Brad. Julian Reid. 2014. *Resilient Life: The Art of Living Dangerously.* Oxford: Polity.

Felli, Romain. 2016. "The World Bank's Neoliberal Language of Resilience". In *Risking Capitalism*. 267–295. Edited by Susanne Soederburg. Bingley: Emerald.

Fisher, Pamela. Lisa Buckner. 2018. "Time for 'Resilience': Community Mediators Working with Marginalised Young People Offer a Novel Approach". *International Journal of Sociology and Social Policy* 38(9/10): 794–808.

Folke, Carl. Steve Carpenter. Thomas Elmqvist. Lance Gunderson. C. S. Holling. Brian Walker. 2002. "Resilience and Sustainable Development: Building Adaptive Capacity in a World of Transformations". *Ambio* 31(5): 437–340.

Ginn, Franklin. 2015. "When Horses Won't Eat: Apocalypse and the Anthropocene". *The Annals of the Association of American Geographers* 105(2): 351–359.

Gorfinkel, Elena. 2012. "Weariness, Waiting: Enduration and Art Cinema's Tired Bodies". *Discourse* 34(2–3): 311–347.

Grear, Anna. 2015. "Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene 'Humanity'". *Law and Critique* 26(3): 225–249.

Hallegatte, Stephane. Adrien Vogt-Schilb. Mook Bangalore. Julie Rozenberg. 2017. *Unbreakable: Building the Resilience of the Poor in the Face of Natural Disasters.* Washington, DC: World Bank.

Hardt, Michael. Antonio Negri. 2009. *Commonwealth.* Cambridge, MA: Harvard University Press.

I, Daniel Blake. 2016. Directed by Ken Loach. United Kingdom: Sixteen Films.

In the Air. 2009. Directed by Liza Johnson.

Kaun, Anne. Maria Francesca Murru. 2018. "Narrative Mediation of the Occupy Movement: A Case Study of Stockholm and Latvia". In *Media and Austerity: Comparative Perspectives.* 226–236. Edited by Laura Basu, Steve Schifferes, Sophie Knowles. London: Routledge.

Kiraly, Hajnal. 2015. "Leave to Live? Placeless People in Contemporary Hungarian and Romanian Films of Return". *Studies in Eastern European Cinema* 6(2): 169–183.

Lawrenson, Edward. 2011. "Edge of Darkness: The Turin Horse". *Film Quarterly* 64(4): 66–67.

Lendvay, Marton. 2016. "Resilience in Post-socialist Context: The Case of a Watermelon Producing Community in Hungary". *Hungarian Geographical Bulletin* 65(3): 255–269.

Mańko, Rafał. 2018. “Critique of the ‘Juridical’: Some Metatheoretical Remarks”. *Journal of the University of Latvia. Law* 11: 24–37.

Mańko, Rafał. Cosmin Cercel. Adam Sulikowski. 2016. *Law and Critique in Central Europe*. Oxford: Counterpress.

Menchaca, William. 2018. “Analyzing Poverty Disparities Between Eastern and Western Europe”. *Borgen Magazine*. http://www.borgenmagazine.com/poverty-disparities-between-eastern-and-western-europe/

Morell, Ildikó Asztalos. Margaret Greenfields. David M. Smith. 2018. “Governing Underprivileged Roma Migrations within the EU: Receiving Country Responses and Roma Resilience”. *Local Economy* 33(2): 123–126.

Pingali, Prabhu. Luca Alinovi. Jacky Sutton. 2005. „Food Security in Complex Emergencies: Enhancing Food System Resilience”. *Disasters* 29(51): 5–24.

Rancière, Jacques. 2011. *Bela Tarr, The Time After.* Minneapolis: Univocal.

Rear Window. 1954. Directed by Alfred Hitchcock. United States: Patron Inc.

Reid, Julian. 2012. “The Disastrous and Politically Debased Subject of Resilience”. *Development Dialogue* 58: 67–79.

Reid, Julian. 2013. “Interrogating the Sustainable Development-Resilience Nexus Biopolitically”. *International Political Sociology* 7: 353–368.

Roberts, Phillip. 2017. “Control and Cinema: Intolerable Poverty and the Films of Bela Tarr”. *Deleuze Studies* 11(1): 68–94.

Ruhl, J.B. 2012. “Panarchy and the Law”. *Ecology & Society* 17(3): 31.

Rust, Stephen. Salma Monani. 2013. “Introduction: Cuts to Dissolves – Defining and Situating Ecocinema Studies” in *Ecocinema Theory and Practice.* 1–13. Edited by Stephen Rust, Salma Monani, Sean Cubitt. London: Routledge

Smith, Adrian. Judit Timar. 2010. “Uneven Transformations: Space, Economy and Society 20 Years after the Collapse of State Socialism”. *European Urban and Regional Studies* 17(2): 115–125.

Tandon, Nidhi. 2007. “Biopolitics, Climate Change and Water Security: Impact, Vulnerability and Adaptation Issues for Women”. *Agenda* 73: 4–20.

Trawick, Paul. 2003. “Against the Privatization of Water: An Indigenous Model for Improving Existing Laws and Successfully Governing the Commons”. *World Development* 31(6): 977–996.

The Turin Horse (A Torinói Ló). 2011. Directed by Béla Tarr. Hungary: TT Filmmûhely.

UNDP [United Nations Development Programme]. 2018. *Roma Data*. http://www.eurasia.undp.org/content/rbec/en/home/ourwork/sustainable-development/development-planning-and-inclusive-sustainable-growth/roma-in-central-and-southeast-europe/roma-data.html

UNEP [United Nations Environment Programme]. 2004. *Exploring the Links: Human Well-Being, Poverty & Ecosystem Services.* Nairobi: UN Publications.

Yew-Foong, Hui. 2017. “The Umbrella Movement: Ethnographic Explorations of Communal Re-Spatialization”. *International Journal of Cultural Studies* 20(2): 146–161.

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THE POLITICS OF LIMITATION OF CLAIMS IN POLAND: POST-COMMUNIST IDEOLOGY, NEOLIBERALISM AND THE PLIGHT OF UNINFORMED DEBTORS

Abstract. The text will present arguments raised by the supporters of two different positions regarding the manner of taking into account the expiry of the limitation period, namely those that are supposed to speak in favor of taking this circumstance by the courts *ex officio*, and those which prevail to take it into account only in the event of raising the plea of limitation by the one against whom the claim is due. Against this background, a polemical analysis will be made with these arguments, including inquiries about interests of which entities or social groups are implemented and protected for each of these solutions. It will be shown that some of the arguments put forward actually emphasize that the institution of limitation is to serve not so much as a party involved in a given claim (creditors or debtors), but rather institutions of the judiciary. It will also be shown that the solution currently in force in Polish civil law, within which the taking into account of the fact that a given claim is time-barred is possible only if the one against whom the claim is entitled raises the relevant claim of limitation, in fact prefers only the more affluent and better educated social strata, deepening the social exclusion of those who, due to, for example, worse property status, do not have the necessary knowledge, nor can afford to take advantage of legal aid. The latter, in effect, often do not plead the expiration of limitation period, because they do not know that they are entitled to it (in general, or are unable to assess when the claim became due, at which point the limitation period began or has ended). Polish civil law is a good example here for considering, firstly, that in the 20th century the regulations concerning the limitation of claims were changed several times, and each time a discussion on how to consider the expiry of the limitation period came to life (which provides rich argumentation with which one can confront) and also because historical and political entanglements play a significant role here. Namely, the text will show that the main resistance against taking into account the expiration of limitation period *ex officio* (which is a solution that protects the poorer people who can not afford legal assistance) is due to the fact that this solution, which was in force in the original version of the current Polish Civil Code, was modeled on the solutions of Soviet law. This means that after the political change in Poland in 1989, it was automatically attempted to eliminate it, and replace it with a solution used in European countries, where only if the one against whom the claim is entitled raises the relevant claim of limitation, even without any reflection on the substantive legitimacy of such a change and without analyzing the practical social effects of a solution, within which the expiry of the limitation period only is taking into account on when relevant plea is raised, not *ex officio*.

Immersion of considerations in the realities of Polish law will also allow to show interests that have recently clashed on the occasion of the regulation of electronic writ-of-payment proceedings. In this example, it will be shown that despite the legislator making certain facade measures to

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protect the interests of people with less legal awareness and poorer, who can not afford to get help from a lawyer, in fact, many gates have been left, which question the reality of striving for such protection, because they allow to sue for the claim after the expiration of the limitation period in this proceeding.

In this context, the latest change in Polish civil law in this area was also discussed, that is, the Act of April 13, 2018. On the basis of this Act, there has been a return to taking into account the expiration of the limitation period ex officio, but only if the entrepreneur sue the consumer. In the remaining scope, a solution was left within which the expiry of the limitation period is taking into account only when relevant plea is raised.

Keywords: claims, limitation period, taking the expiry of the limitation period into account, polish civil law, political and legal changes.

1. INTRODUCTORY REMARKS ON THE SUBJECT OF LIMITATION OF CLAIMS

The institution of limitation of claims gives rise to often fierce and incessant debate, to a degree greater than many other such issues. This should come as no surprise considering the fact that, for obvious reasons, it can be questioned on moral and ethical grounds. Indeed, limitation of claims in the civil law is a boon to the unreliable debtor, giving him the opportunity to avoid a debt which he failed to repay in a timely manner (which, in a general social sense, does not provide a particularly strong incentive to take care of one's obligations in time). In turn, limitations on the criminality of an act or enforcement of punishment against an offender allow a criminal to avoid the consequences of his actions (excepting pangs of conscience, to the extent they are felt), while limitations in tax law leads to reduced revenue in the budget of the State Treasury and local self-government units, and thus the pool of funds earmarked for projects that are intended to serve all of society (*nota bene* those members of society which have properly and in a timely fashion paid the necessary taxes can feel harmed as the indirect financers of investments designed to satisfy the needs of those who have been "released" from the obligation to pay taxes after a period of time). Attitudes in society to regulations on limitation of claims are very diverse. The very same people who press for justice to be meted out to the perpetrator of a crime even when discovered after many years are as taxpayers prone to supporting the expiration of the duty to pay taxes if they are not collected within a defined period of time. Indeed, the position of a given individual on that issue can change depending on the particular situation he finds himself in – if he is in debt to someone, and his financial situation is precarious, he can count on limitation of that claim as a means of extricating himself from the situation; however, if he is in possession of a claim towards someone else (such as for work performed), the idea that his debtor may be able to get out of that obligation by invoking the defence of limitation will seem an obvious injustice and irrationality of the legal system.

In the light of the foregoing, it should not come as a surprise that a great deal of effort has been expended in legal scholarship to convince the addressee of legal norms as to the necessity and the legitimacy of the institution of limitation. In Polish conditions this is all the more necessary when considering the jurisprudence of the Constitutional Tribunal holds that the Constitution of Poland does not establish limitation of claims as a subjective right, from which it follows that a given individual's anticipation of the limitation of a claim does not constitute a legally protected expectative, as the rule should be that a given individual performs the duties incumbent on him rather than wait for the limitation of a claim.[1] The Constitutional Tribunal consistently holds that the Constitution of Poland "does not formulate a general statute of limitations that would demand elaboration and concretization within particular branches of the law",[2] and "limitation of claims is not a constitutionally established subjective right, and even if the legislator did not create such an institution it would be wrong to claim that some constitutionally guaranteed rights or freedoms had been violated as a result".[3]

It should therefore come as no surprise that in the legal literature we may find examples of tremendous efforts to find the greatest number of justifications for the existence of legislation instituting limitations on claims. In the past I have examined this issue in more detail, exploring the effort made by Polish scholars of the civil law to convince readers of the necessity of regulations on limitations of claims. These deliberations led to a range of findings, including two of significance to the issue at hand. First, analysis of the content and the style of those statements led me to the conclusion that they are of a highly persuasive nature. In spite of the authors writing of the goals, tasks, effects, or real results of the impact of legal provisions introducing limitations on claims, it should be observed that none of them either invoked or themselves carried out empirical studies on the social effects of such laws. Thus we may treat such statements at best as the musings of particular authors about their convictions as to what those effects should be. They are always presented in a positive manner (the assumed functions of limitation), which is evidently designed to convince others to the functioning of the mechanism of limitations on claims (for more see: Kuźmicka-Sulikowska 2015, 93–118). Secondly, however, my research led me to an understanding of the wealth of justifications submitted as motives in support of norms implementing

[1] Judgment of the Polish Constitutional Tribunal of 25 May 2004, SK 44/03, Z.U. 2004/5A/46; judgment of the Polish Constitutional Tribunal of 19 June 2012, P 41/10, Z.U. 2012/6A/65; judgment of the Polish Constitutional Tribunal of 8 October 2013, SK 40/12, Z.U. 2013/7A/97; judgment of the Polish Constitutional Tribunal of 17 July 2012, P 30/11, Z.U. 2012/7A/81. A similar position is taken by the Polish Supreme Court (see e.g. order of this court of 2 July 2002, II KK 143/02, Lex no. 55526).

[2] Judgment of the Polish Constitutional Tribunal of 17 July 2012, P 30/11, Z.U. 2012/7A/81.

[3] Judgment of the Polish Constitutional Tribunal of 17 July 2012, P 30/11, Z.U. 2012/7A/81. Also: Judgment of the Polish Constitutional Tribunal of 8 October 2013, SK 40/12, Z.U. 2013/7A/97.

limitations on claims. In this context we may cite such examples as: elimination of evidentiary difficulties, protection of the debtor's expectations, refusal of legal protection for a neglectful creditor who fails to pursue claims in a timely manner, punishment of a creditor for tardiness in pursuing claims without delay, and even the conclusion that failure by a debtor to pursue a claim after a certain time gives rise to the presumption that his real intention was to "forgive" the debt. Sometimes the argument is raised that limitations serve to petrify an existing state of affairs, to achieve certainty and clarity in civil law transactions, and also to avoid unintended crediting, to maintain financial discipline, to ensure public order, and to shape desirable social attitudes (see: Kuźmicka-Sulikowska 2015, 61–71 as well as the literature and case-law cited therein).

In light of the foregoing it should be observed that deciphering this nature of statements from legal scholars on the subject of limitations on the one hand, and the multiplicity of arguments invoked to convince others of the rationality of norms implementing limitations on the other hand, paradoxically attests to the doubtful axiological foundation on which the institution of limitations on claims rests. Something which is obviously necessary need not be justified with such fervour. As it is, the majority of arguments employed in support of limitations of claims, when examined more thoroughly, emerge as being tightly enmeshed among various competing interests. For example, one may indicate that this is true of the argument in favour of limitations that they allow courts to avoid problematic evidentiary proceedings which generate difficulties due to their being conducted years after the existence of a claim and its enforceability; at times the argument of preventing an excessive number of judicial procedures is also invoked. Authors advancing this perspective are doubtlessly concerned not only with relieving the burden on courts, but also on the budget, as litigation is certainly not "profitable" from the perspective of public finances (when taking into account e.g. remuneration for judges, court employees, charges for utilities, etc., only a portion of which is covered by court fees paid by the parties). What is particularly significant in the present context, this argument is also eagerly employed by courts in rulings addressing the issue of limitation of claims, where a clear concern is evident for their own comfort and for relieving themselves of the burden of difficult cases (it means years after the occurrence of the facts which they are supposed to assess), hidden under a seemingly neutral slogan of "caring for the correctness of judicial decisions".[4] Firstly, however, in the present Polish reality this argument seems generally flawed – according to the provisions of the Code of Civil Procedure, the burden of proof rests primarily on the parties,[5] and the trial is subject to the principle of adversarial procedure. Secondly, and of

[4] See e.g. judgment of the Polish Supreme Court of 10 January 2001, I CKN 988/00, Lex no. 171258.

[5] Particularly in Art. 3 of the Code of Civil Procedure of 17 November 1964 (Dz.U. 2016, item 1822 with amendments).

particular importance in the context of the deliberations being conducted here, by its nature, limitation of claims concerns both the creditor and debtor as well as the relation between them, in light of which statutory solutions which take into account the interests of a third party (courts) comes across as entirely unjustified, as that party is not impacted by the situation.

It is worth observing that a detailed analysis and polemic approach to the whole of the arguments raised in the literature and case-law justifying the institution of limitations of claims has led me to the conclusion in other writings devoted to that issue that the sole argument which endures – and that only partially – is the one which refers to certainty of law achieved due to limitation in the context of a particular claim (Kuźmicka-Sulikowska 2015, 71–93); yet here too with far-reaching reservations that this occurs only after the litigation has definitively concluded and a claim which has been ascertained with finality in a judgement is also subjected the statute of limitations,[6] etc.

In this article, however, I would like to focus on the question of whether one of the solutions adopted in the Polish Civil Code – specifically, that concerning the manner of which the expiration of the limitation period is taken into consideration – serves the materialization of the one argument in favour of limitation that stands up in the face of the arguments against it, or perhaps is there an entirely different rationale behind that particular solution.

The Polish normative material supplies us with rich matter for consideration, as even over the last several dozen years the legal solutions applied in this area have undergone changes, and what follows, each such change opens the door to discussion of the material under consideration. What is more, the solution presently in effect was implemented in 1990, just one year after the historic events in Poland of 1989, which – as will be demonstrated – had a decisive effect on the adoption of the presently employed model of accounting for the expiration of the limitation period.

2. A BRIEF HISTORICAL OVERVIEW OF SOLUTIONS IN THE POLISH LAW CONCERNING MANNERS OF TAKING INTO ACCOUNT THE EXPIRATION OF THE LIMITATION PERIOD

To avoid reaching too far back into time, it is sufficient to point out that within the framework of legal solutions existing in the various post-partition legal regimes there were regulations in effect under which the circumstance that a limitation period of given claim pursued in court had expired could only be taken into account when set up as a defence. This construction remained in effect

[6] Under Art. 125 § 1 of the Polish Civil Code of 23 April 1964 (Dz.U. 2016, item 380 with amendments).

until the adoption in 1933 of the Code of Obligations,[7] where it was formulated in a negative manner, meaning (in Art. 273 § 3) as a prohibition on the court taking it into account on its own initiative, that is *ex officio*. Furthermore, in the legal literature it was pointed out that, as a consequence, it is impermissible for the court to ask a party if it renounces the right to set up the defence of expiration of the limitation period (Domański 1936, 919).

Similarly, under the 1950 General Provisions of the Civil Law[8] limitation of a claim could only be taken into consideration by the court upon a relevant motion by the party against which the claim is demanded, that is, *at petitionem*. It is worth noting that this rule was not expressed in the 1950 regulations directly, but rather was interpreted from the entirety of their provisions, in particular Art. 106, 107 § 1, and 115 (Gwiazdomorski 1955, 16; Gwiazdomorski 1968, 89).

The first deviations from the rule according to which expiration of a claim was only accepted upon a motion by the party against which the claim is demanded were introduced in the 1950s, when regulation went into effect introducing *ex officio* consideration of expiration of the limitation period in arbitration proceedings and proceedings concerning termination of a labour contract without notice.[9]

However, in the Civil Code adopted in 1964,[10] as concerns the manner of taking into consideration expiration of the limitation period for a claim being pursued, the general solution adopted was *ex officio* invocation subject to the reservation of accounting for the will of the party entitled to the defence, about which more will be said later on. Specifically, in respect of "socialist trade" (*id est* among entities of the socialized economy subject to state arbitration), a consequence of expiration of the limitation period was that the claim became unenforceable; the court took this into consideration *ex officio* and the parties had no way of influencing the court in this matter (Broniewicz 1965, 61). However, in relations among other entities, so-called "general trade", the court took the expiration of the limitation period into account *ex officio,* but the debtor could renounce the right to invoke the defence. Furthermore, the court could (under Art. 117 § 3 as in effect at the time) choose not to dismiss a suit for an claim despite the end of its limitation period on its own initiative, if the limitation period for that type of claim did not exceed three years, the delay in pursuing the claim was not excessive, and it was justified by extraordinary circumstances.

[7] Regulation of the President of the Republic of Poland of 27 October 1933 – Code of Obligations (Dz.U. 82, item 598 with amendments).

[8] The Act on General Provisions of the Civil Law of 18 July 1950 (Dz.U. 34, item 311).

[9] Cagara 1961, 767–768; Regulation of the Council of Ministers of 20 December 1952 on the organization of the state arbitration commission and mode of arbitration proceedings (Dz.U. 2, item 2).

[10] Civil Code of 23 April 1964 (Dz.U. 2016, item 380 with amendments).

The causes for which the provisions of the Polish Civil Code establish *ex officio* consideration of limitation of claims have been identified in a range of factors. Alongside indicating their reflection of Soviet legislation (Szpunar 2002, 17; Szpunar 1980, 16), it has also been said that this solution protects respondents less capable of defending themselves or less aware of their rights who would on their own not set up the defence of limitation of claim (Szpunar 1974, 285). It would seem that of importance in this context is also the form of regulations then in effect concerning civil procedure – particularly that they imposed far-reaching limitations on the principle of disposability (Szpunar 1970, 16; Szpunar 1974, 285), and the efforts of some scholars, including in reference to the legislative process, to unify regulation concerning limitation and preclusionary deadlines (Dobrzański 1960, 814).

A sea change in the regulation addressing the issue at hand was brought about by the Act of 28 July 1990 amending the Civil Code, which added to the Code solutions which from then on allowed for expiration of the limitation period on a claim to be taken into consideration only when invoked *ad petitionem* of the party against which the claim is pursued.

These relatively frequent changes to regulations of the Polish Civil Law concerning the manner in which expiration of the limitation period is taken into account have in every case served as an excellent starting point for lively discussions on the shape of legislation addressing the issue, while particularly fierce conflicts arose (and continue to this day) around the question of whether the expiration of a limitation period of a claim pursued before a court (or other appropriate authority) should be taken into account *ex officio*, or rather only when a relevant motion is brought. This discussion can by no means be considered finished, as both approaches enjoy their supporters and detractors, and the potential for sudden change remains an open question in light of ongoing work on a new Civil Code. For this reason it is worth taking a closer look at the most important arguments given in favour of each solution.

3. ARGUMENTS RAISED IN FAVOUR OF TAKING INTO ACCOUNT EXPIRATION OF THE LIMITATION PERIOD UPON A MOTION BY THE PARTY AGAINST WHICH THE CLAIM IS PURSUED (*AD PETITIONEM*)

To convince observers of the legitimacy of taking into account expiration upon a motion invoking that defence, the argument usually presented is the "special nature of the institution of limitation of claims", which supposedly justifies leaving the decision to employ the defence of the limitation period in the hands of the party against which the claim is pursued. An example frequently given is that of a sued doctor who may not wish for the court to dismiss claims against him on grounds of the limitation period, but would prefer to resolve the matter on the merits and

demonstrate that he did not make an error in the performance of his duties, was not at fault, and in that manner bring about dismissal of the action against him with a view to preventing his being found responsible (Gwiazdomorski 1955, 18; Szpunar 1980, 16; Wilejczyk 2014, 437).

It is also worth noticing that many of the arguments cited by supporters of consideration of limitation of claim by the court only upon a motion of the party against which the claim is pursued is of a defensive nature, *id est* it serves to refute the charges of that solution's weakness. For example, we may point out that opponents of taking into account limitation of claim *ad petitionem* point out that this may lead to court rulings contradicting the law, as well as discrepancies in the case-law involving different verdicts in similar factual situations. In response, authors supporting the solution of taking limitation of claim into account *ad petitionem* declare that this should not lead to fears as to the course and result of the trial; indeed, a respondent who does not invoke the defence of limitation of claim in spite of being entitled to do so is usually in possession of evidence that will allow the court to examine the substance of the action, leading as a rule to its dismissal. Therefore, the necessity of a motion invoking limitation of a claim by the party against which the claim is pursued will not, in the view of supporters of that construction, lead to any evidentiary difficulties for the parties and the court, nor will it generate the risk of cases being resolved in a manner that would contradict the law (Gwiazdomorski 1955, 18).

The situation is similar to that of the argument frequently invoked against taking into account limitation of claim *ad petitionem* that it is detrimental to people unfamiliar with the law and who are unable to afford an attorney. In response, supporters of the construction by which the court takes into account limitation of a claim only when it is set up as a defence by the party against which the claim is pursued, formulated the argument in the 1950s that this solution does not at all serve the interests of the "propertied classes", and does not damage the interests of workers and labouring peasants (to use the rhetoric employed at the time in the legal literature), as such a threat was perceived only in respect of the legislation in bourgeois states, but not in conjunction with the socialist model of civil procedure in effect at the time. It was pointed out that in the latter model, the active role of the court in determining objective truth was a guarantee of real equality of the parties. The court, through initiating the examination of evidence and determining the circumstances of the case by the same token protects the interests of the economically weaker side, shielding it from damage on account of ignorance of the law and lack of financial means to employ a professional attorney. What is more, it was demonstrated that these chances are all the more even when considering that in instructing a party appearing without an attorney, the court draws attention to the possibility of invoking the defence of limitation of the claim (Gwiazdomorski 1955, 46–47, 17–18).

However, under the current regulations (*id est* those in effect since 1990, and from 9th of July 2018 in with regard to claims other than those claimed by enterpreneurs from consumers)[11] of the Polish Civil Code which establish the necessity of raising the defence of limitation by the party against which the claim is pursued, supports of this solution argue that it is identical with that adopted in the laws of Western states (Wójcik 1991, 48; Brzozowski 1992, 25–26). At times they also point to the "moral superiority" of such a measure, because it is precisely the feeling of morality (defined variously, for example as loyalty towards a business partner) that can be materialized through refraining from invoking the defence of limitation. Apart from the preceding, those in favour of a construction taking account of limitation of a claim *ad petitionem* sometimes point to aspects that would seem secondary and of less importance, that is those constituting the result of such regulation being in force rather than its causes; what I have in mind is the argument that such a construction is harmonious with the potential to invoke the defence outside proceedings as well (Kordasiewicz 2008, 602), or that it is better suited to other provisions of the Polish Civil Code dealing in some capacity with the issue of limitation of claims (Szpunar 2002, 19).

4. ARGUMENTS EMPLOYED IN SUPPORT OF *EX OFFICIO* CONSIDERATION OF EXPIRATION OF THE LIMITATION PERIOD ON A CLAIM

In turn, if we are speaking of those who support a solution in which the expiration of the limitation period on a claim is taken into account *ex officio* by the court, it should be observed that their arguments are strongly characterized by the desire to protect parties weaker in terms of their economic resources and legal awareness, and thus unable to afford a professional attorney while at the same being in possession of legal knowledge insufficient to determine whether the limitation period of the claim brought against them has expired and that they should themselves raise that defence in court.

At times, particularly in the older legal literature and with the use of the vocabulary fashionable at the time, the mechanism of *ex officio* taking into account limitation of a claim as a means of preventing the use of limitation of claim as a tool for exploitation (Wolter 1953, 265), and the taking into account of limitation of claims *ad petitionem* is a solution that favours the interests of the bourgeoisie, by the same token weakening the protection available to individuals unable to afford a professional attorney (Szer 1950, 230). What is more, it is not only said that legal regulation establishing consideration of limitation of a claim solely *ad petitionem* is a solution that favours economically stronger individuals (those who can afford

[11] This reservation results from the change in the legal regulation made by the Act of April 13, 2018, which will be discussed later in this article.

representation) and those generally more resourceful, but as a result also leads to different resolutions of cases with the same factual and legal circumstances (depending on whether the respondent was aware of the institution of limitation of claims and set up the appropriate defence and/or employed an attorney who did so); this is difficult for society to accept and breeds both consternation and opposition, as well as leads to belief in the extraordinary powers of lawyers and a loss of trust in the courts (Cagara 1961, 768–769).

The argument is also raised that taking limitation of a claim into account *ex officio* is more suited to achieving the social function which the institution of limitation is supposed to perform, specifically, the stabilization of legal relations and the elimination of conditions of uncertainty; this objective would not be achieved if limitation were to be dependent on the uncertain and chance circumstances of whether the respondent is aware of having the ability to invoke the defence of limitation, or even if so, whether he will use it, as he be guided by other motivations (Dobrzański 1955, 51–53).

It is also pointed out that taking limitation of a claim into account *ex officio* removes the odium of unfavourable moral judgements against the debtor's seeking to avoid claims against him by invoking limitation of the claim, for the reason that in every case the court will take into account on its own initiative the fact that the limitation period of the pursued claim has ended, without an application from the respondent, and even without asking for his opinion on the matter (Dobrzański 1955, 55).

5. ASSESSMENT OF THE JUDGEMENTS PRESENTED ABOVE. POSITION ON THE MATTER OF HOW EXPIRATION OF THE LIMITATION PERIOD IS TAKEN INTO ACCOUNT. THE PRACTICE OF POLISH COURTS REJECTING THE DEFENCE OF LIMITATION ON GROUNDS OF ABUSE OF A RIGHT UNDER ART. 5 OF THE CIVIL CODE

Of course, we may cite further arguments in support of one of the aforementioned manners of taking into account the expiration of the limitation period on a claim pursued before a court, but considerations of space do not permit us to do so, and the arguments already cited are of fundamental significance for the deliberations being conducted here; the remaining are of a secondary and less important nature (*id est* they are an effect of the adoption of a particular solution, such as invoking the accomplishment of simplification of the institution of limitation on claims by adopting the *ex officio* model – see: Wasilkowski 1954, 145. Which itself is also called into question – see Szpunar 1974, 285). That said, what is, for substantive reasons, worthy of note is that the arguments previously mentioned, particularly those concerning the supposed benefits of the model under which a court is to take into account limitation of a claim only in the event the

party against which that claim is pursuit makes an appropriate motion are less than convincing, and even inconsistent with the actual state of the law in Poland at present. This is frequently the result of certain points of view being expressed in a time when different regulations were in force. A particularly vivid example of such a situation is the obsolescence of the argument that under the model of taking into account limitation *ad petitionem*, there is no risk of harm to that person in light of the active role of the court which informs a party appearing without an attorney of the possibility to set up such a defence. In the light of the present wording of the Code of Civil Procedure[12] such an act by the court would be seen as impermissible favouritism towards one of the parties to the dispute, and thus in violation of the general principles governing civil procedure in Poland, such as adversarial process and equality of parties to proceedings (this remark and further considerations, after the entry into force of the already mentioned Act of 13 April 2018, remains valid in relation to all claims other than those claimed by entrepreneurs from consumers). It is true that under Art. 212 § 2 of the Code of Civil Procedure, in the event of a justified need the court may provide the parties with vital instructions, but this provision is not understood to allow for substantive support being given to a party by the court (e.g. pointing out there are grounds for invoking the defence of limitation of a claim); rather, it is interpreted as permitting information to be provided as to the possibility of e.g. submitting a motion for relief from court costs and/or for the appointment of an attorney by the court, and instructing a party as to the formal conditions and deadline for submitting an appeal against a judgement (Jędrzejewska 2006, 93). This interpretation of the aforementioned provision finds strong confirmation in the fact that when amending to the Code of Civil Procedure in 2011[13], the legislator added a clear reservation under which the instructions that the court may provide to the parties appearing before it were described using examples such as the possibility of drawing attention to the advisability of employing an attorney. What is more, in the amended Art. 5 of the Code of Civil Procedure[14] the legislator declares that in the event of justified need, the court may provide necessary instruction to parties and participants to proceedings appearing before the court without the representation of an advocate, legal advisor, patent attorney, or attorney from the State Treasury Solicitors' Office. The scope of instructions which the court is allowed to provide has been clearly limited to issues concerning procedural acts, and does not encompass an indication of the consequences of substantive regulations for the parties (from which it follows that the court may not inform a party that the limitation period set out in the Civil Code or other legislation on the claim being pursued against him has expired, never mind the legal consequences of such, including the possibility of raising such

[12] The Code of Civil Procedure of 17 November 1964 (Dz.U. 2016, item 1822 with amendments).

[13] On the basis of Art. 1(29) of the Act of 16 September 2011 amending the Code of Civil Procedure and some other acts (Dz.U. 233, item 1381).

[14] Under Art. 1(2) of the Act cited in the preceding footnote.

a defence. This conclusion, although justified differently, is also reached by Adam Jedliński – Jedliński 2012, 735). This solution should be considered appropriate, as it helps to avoid controversy regarding the impartiality required of judges. On the other hand, it is clearly disadvantageous for parties lacking in knowledge about provisions on limitation of claims; they are unable to determine whether a limitation period of a claim has expired (whether the running of the limitation period has been interrupted, suspended, etc.), or they are unaware that the relevant defence must be invoked and they are without professional representation before the court (primarily due to a lack of funds to hire an attorney). In these circumstances the party which is clearly at an economic disadvantage (with neither legal education nor an attorney) is naturally in a worse position in court compared to the party which is stronger in this respect (e.g. a well-off enterprise with the assistance of lawyers). An opportunity to ameliorate this imbalance is adoption of the model under which limitation of a claim is considered *ex officio*. This model would also facilitate avoiding potentially negative moral assessment of individuals who avoid resolving claims against them by invoking the defence of limitation, as the decision would be taken by the court, and the relevant regulations would require in all circumstances taking account of the fact that a limitation period of a claim had expired.

There also seems to be no justification for the fear that depriving the respondent of the right to decide whether to invoke the defence of expiration of the limitation period will make it impossible for that individual to demonstrate he is in the right on the merits, for example that a doctor is being wrongfully sued for damages because he is not at fault and did not err in the performance of his duties. Firstly, it should be observed that even those raising this argument at the same time declare that it is a quite rare exception. Secondly, it is very difficult to find real examples of judicial disputes during which a party aware of the possibility of invoking the defence of limitation of a claim, thus effecting dismissal of the action, would not do so out of a preference to engage in a substantive dispute and demonstrate the baselessness of the claim being pursued. The absence of such cases has a deeply rational justification. It would be irrational from the economic point of view, a needless waste of time, energy and money on a long process with an uncertain result, whereas the pace of modern life generally inclines people to engage in the most efficient use of those resources. It is obvious that time, attention and finances are better used elsewhere, since one may quickly and easily win a trial by raising the defence of limitation of the claim (insofar as it is justified). Even if the respondent possesses evidence that, in his view, would allow him to prove he is right on the merits and that the action brought against him is baseless, the engagement of financial resources and invaluable time necessary to do so coupled with the risk of failure (e.g. considering that the other party may succeed in proving its claim's merit, or the opinion of a court-appointed expert may demonstrate negligence) does not come across as a solution that

a rationally-thinking person would choose.[15] What is more, opting to discard the defence of limitation of a claim and engaging in a potentially long dispute over the merits, even assuming one will ultimately prevail, does not entail any particularly substantial benefits in comparison with a situation where the respondent simple takes advantage of the defence. Indeed, the mere fact of being sued (e.g. in the case of a doctor) for negligence in the performance of his profession and the resulting trial would itself damage the doctor's reputation, causing him to be perceived in light of that fact by society and potential patients in particular. His reputation will therefore be ruined, particularly if the case is highlighted in the media. The resolution in the case will favour him (dismissal of the action) after years of an exhausting trial (which is very likely in Poland), but will not ameliorate the damage suffered by the doctor (loss of patients, profit, promotion, suspension at work and of the right to practice professionally, etc.). What is more, experience demonstrates that, as a rule, public opinion is only presented – if at all – with the conclusion of the proceedings in the sense of who was "victorious" without going into details and explaining why. When taking into account the general conviction that the victor is in the right, it makes no difference whether the suit was dismissed owing to expiration of the limitation period, or because the respondent proved that the claim was baseless on its merits. However, a quick dismissal of the claim owing to the limitation period allows for avoiding the aforementioned negative effects of a long trial (including wasted time, resources, money, and unfavourable social impact), which is a hugely important practical argument.

Doubtlessly as well the model under which the fact of expiration of the limitation period on a claim is taken into account *ex officio* would help avoid divergence of verdicts in cases with similar legal and factual circumstances, by the same token facilitating development in society of the conviction that all parties are treated equally by courts (which many also believe to be just treatment, although it is not necessary to agree with this, because we must consider what concept of justice we have in mind in this context), or at least that there is no preference extended to those with the financial resources to employ an attorney.

Furthermore, taking into account limitation *ex officio* would be more consistent with the functions which are generally associated with the institution of the limitation period, including in particular motivating the creditor to relatively quickly conclude the pursuit of his claims, thereby achieving certainty of law (legal safety) that after the end of a specified length of time, nobody will be able to sue a debtor for receivables long past due. The fact that the circumstance of the expiration of the limitation period on the pursued claim is taken into account only *ad petitionem*, as is presently the case under the regulations of the Polish Civil Code

[15] And even if such an individual were found, this would be an extraordinary situation, certainly with additional motivation to participate in such proceedings; however, these exceptional circumstances should not be the grounds for drafting legal norms, but rather typical and dominant ones, as legal norms are applicable to all of society.

(except in cases where the entrepreneur has sued the consumer),, allows a creditor in possession of an claim after the expiration of limitation period to pursue it before a court, counting on the respondent not setting up the defence of limitation. What is more, even if this defence is invoked, in many cases it may turn out that the court awards the claim in light of the deeply-rooted jurisprudence of the Supreme Court applied by the common courts, which allows for assessment of the defence of limitation through the lens of Art. 5 Civil Code as an abuse of the law by the party against whom the claim is being pursued; in consequence, the court may reject the defence, and then rule for enforcement of the claim, despite the expiration of limitation period.[16] Such regulation and jurisprudence rather serves to reinforce uncertainty as to the legal situation applicable to a given claim and its status after the end of limitation period, not only in respect of the creditor (who does not know whether the respondent will raise the defence of limitation) but also the debtor as well (who, in setting up the defence of limitation has no certainty as to whether this will in fact lead the court to dismiss the action). This condition of uncertainty is all the greater when considering there is frequently no way to predict whether a court in a given case will hold that the right is being abused, as courts in the past have rejected the defence of limitation on grounds of abuse as defined under Art. 5 Civil Code not only when it could be easily judged as such (e.g. the debtor was in talks with the creditor and gave assurances that he would soon repay the debt, after which then it occurred that this was only a manoeuvre to run out the clock on the limitation period and prevent the creditor from bringing an action in time), but also in situations rather surprising in that context; even when the debtor was not at fault and cannot be said to have acted in bad faith, or even had no knowledge of the relevant circumstances.[17] In addition, the debtor can surprise his remaining creditors by renouncing the defence of limitation in the event of being sued by one of them; this possibility is afforded to him by the regulations presently in force

[16] *Inter alia* judgment of the Supreme Court of 13 September 2012, V CSK 409/11, Lex no. 1230163; judgment of the Supreme Court of 1 December 2010, I CSK 147/10, Lex no. 818558; judgment of the Supreme Court of 9 July 2008, V CSK 43/08, Lex no. 515716; judgment of the Supreme Court of 16 February 2006, IV CK 380/05, Lex no. 1799977; judgment of the Supreme Court of 6 October 2004, II CK 29/04, Lex no. 194131; judgment of the Supreme Court of 7 June 2000, III CKN 522/99, Lex no. 51563; judgment of the Supreme Court of 9 February 2000, III CKN 594/98, Lex no. 520031; judgment of the Court of Appeals in Łódź of 6 June 2014, I ACa 1533/13, Lex 1480475; judgment of the Court of Appeals in Katowice of 24 May 2013, I ACa 157/13, Lex no. 1327520; judgment of the Court of Appeals in Szczecin of 24 April 2013, I ACa 36/13, Lex no. 1375878; judgment of the Court of Appeals in Kraków of 21 November 2012, III APa 29/12, Lex no. 1236897; judgment of the Court of Appeals in Warsaw of 12 April 2011, VI ACa 1374, Lex no. 1143498 and many other rulings.

[17] See e.g. judgment of the Supreme Court of 25 February 2010, V CSK 242/09, OSNC 2010, no. 11, item 147; judgment of the Supreme Court of 16 November 2005, V CK 349/05, *Prawo i Medycyna* 2007, no. 1, p. 133; resolution of the Supreme Court of 29 November 1996, II PZP 3/96, I PK 48/11, Lex no. 1125243; judgment of the Court of Appeals in Warsaw of 12 October 2012, I ACa 376/12, Lex no. 1238221.

(Art. 117 § 2 Civil Code). With this normative solution, which entails taking into consideration limitation *ad petitionem* (and allows for renouncement of it) and the jurisprudence which has developed on its basis, there is no chance of achieving legal certainty regarding a specified claim thanks to the institution of limitation. Similarly, it cannot be viewed as a solution that provides motivation for creditors to pursue claims before the expiration of their limitation period, since even after that time it is possible to effectively do so before a court (e.g. if the debtor renounces the right to invoke the defence, or simply fails to invoke it before the court, or after invoking it the court rejects it on grounds of abuse).

The remaining arguments cited in favour of allowing the defence of limitation *ad petitionem* can also be disputed in a similar manner; for example, a more in-depth analysis of the provisions of the Civil Code demonstrates they are not particularly well-harmonized with such a solution – either they are irrelevant, or even in opposition (for a broader analysis of the issue: Kuźmicka-Sulikowska 2015, 476–477).

6. POLITICAL MOTIVATIONS FOR A CHANGE IN THE LAW CONCERNING THE MANNER OF TAKING INTO ACCOUNT EXPIRATION OF THE LIMITATION PERIOD IN THE POLISH CIVIL CODE. A HIDDEN LEGAL RELIC

Here, however, with consideration to the subject matter of these divagations, it is necessary to pay particular attention to the fact that the moment in time the change made in the Polish Civil Code consisting in a shift from a model under which limitation was taken into account *ex officio* to one in which it is taken into account only *ad petitionem* at the initiative of the party against which the claim is pursuant is significant. As has been mentioned already, this occurred in 1990, and we cannot fail to see the link between what must be termed a radical change in the law with the breakthrough changes in the Polish political order which took place in 1989 and, in a broader sense, the transition from communism to democracy; in the geopolitical sense this involved exiting the Soviet sphere of influence (to put it mildly) and an attempt at developing closer relations with the countries of Western Europe. Against this backdrop, the tendency to automatically reject everything associated with the Soviet past, all solutions, including legal ones, comprising a sort of 'legal transplant',[18] comes as no surprise. In conjunction with

[18] For more on "legal transplants": Watson 1991, 73; Watson 1993, 21; Mattei 1994; Szpak 2011, 57. See also Miller 2003, 845–868. It should be noted that the typology of legal transplants developed by the last author does not necessarily allow for it to classify the transplant I write of in this article. This is likely the result of the fact that the author does not have direct experience with the reality of Poland during the Stalinist era and the imperial policy conducted by the USSR. Doubtlessly, thus, in this case we are not dealing with what that author distinguishes as 'the cost-saving transplant', 'the entrepreneurial transplant' or 'the legitimacy-generating transplant';

these changes it was thus determined necessary to eliminate from the Polish Civil Code regulations determining the *ex officio* consideration of limitation of claims as a model taken from Soviet law (the fact of its provenance is not contested), and in their place to introduce models accepted in the legal systems of European states. This is the description given in the literature on the Polish civil law of the model under which the circumstance that the limitation period of a pursued claim has expired is only considered by the court when the party against which the claim is pursued invokes the defence of limitation. It is strenuously emphasized that the introduction of such a model into the Polish Civil Code following the changes of 1989 is an obvious necessity, as it is the same one in use in other European countries. Clearly, then, one factor in the Polish Civil Law's transition from taking limitation of claims into account *ex officio* to *ad petitionem* is the drive to immediately and radically repudiate all aspects of Soviet law, as well as to introduce legal solutions that function within the countries of Western Europe. Against this backdrop it is worth observing that it would seem such a direction of changes in the law, strongly motivated by obvious political considerations, was done somewhat unthinkingly. Indeed, scholars generally quite thorough in their publications who, at the time, argued in favour of taking limitation of claims into account *ad petitionem* clearly felt that the ultimate argument for why such a model should be adopted was that it is the one present in European legal systems;[19] these authors thus did not even perceive the need to cite any examples of legal norms from particular countries where this solution was employed, nor – what is more surprising – they even did not bother to research data on the function of such a solution in practice, to learn whether it is positively assessed in places where it us used. It should be noted that this approach is widespread (Szpunar 2002, 19; Brzozowski 1992, 26; Brzozowski 2008, 525; Wójcik 1991, 48; Pałdyna 2012, 254; Kordasiewicz 2008, 602).

Meanwhile, it would seem that such a one-dimensional view on the matter and rejection of a given solution only because it has some association with the previous political order, as well as treating as an imperative the implementation in its place of a model in effect in states which feature the political order that

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what is more, despite what the name might suggest, this is not the last type distinguished by the author, namely 'the externally dictated transplant', as this is understood to mean acceptance by an economically weaker family state of certain legal solutions imposed by a stronger state or international organization as a condition of e.g. trade between the two, or of refraining from excluding the weaker from trade. However, in the transplant under consideration in this article, we are also dealing with pressure to adopt a certain solution, but of an entirely different etiology.

[19] Here we may perceive something like "the legitimacy-generating transplant" according to Jonathan Miller, where the legal authority necessary for a newly-introduced solution is provided essentially by the prestige of the foreign model itself (Miller 2003, 845 et seq.). See also emphasis of the role of this factor in judicial decisions: Watson 1996, 351. The occurrence of this type of legal transplant is perceived precisely as of significance for countries emerging from a long period of despotic governments (Szpak 2011, 66).

we desire to emulate, is difficult to justify. There is no substantive approach to the issue, no assessment of the practical effects of the functioning of the two competing solutions, no consideration of the goals we wish to achieve using a given legal institution where only after serious consideration do we decide which solution will better serve those goals, without associating the decision with needless emotional factors. In light of the political backdrop that has been elaborated of the 1990 introduction of changes in the model under which the expiration of the limitation period was taken into account in the Polish Civil Code, we may not escape the impression that this took place without any reflexion, or even with the *a priori* assumption that such reflection will not be entered into, as the solution adopted in the times of socialism is bad for the very reason that it was adopted then, and should for that same reason be changed. We may clearly perceive a particular process of discrediting solutions adopted in Poland during the socialist period. In the phase of conflict between Solidarity and the communist party, the discourse of the opposition party was based *inter alia* on undermining the government's legitimacy, accusations of betraying Poland and abandoning it to Soviet influence. Patriotism and memory of Poland's history were invoked, in particular about independence movements which took the form of uprisings. Against this backdrop, the socialist state was assigned solely negative attributes, and was presented as an external entity in respect of individuals (Charkiewicz 2007, 61). However, the resulting automatic treatment of all legal solutions with a Soviet pedigree as "bad" and their elimination after the political changes of 1989 from the Polish legal order should not necessarily be seen as something which turned out well for Poles; I have shown this on the example of the change made at that time in the manner of taking into account the expiration of the limitation period on a claim. From a model generally assuming this was done *ex officio*, and thus with equal treatment of all, including less financially well-off and legally aware respondents, preventing the pursuit against them of claims when limitation period expired, in 1990 the law transformed into a model under which the expiration of the limitation period is taken into consideration *ad petitionem*; this solution clearly favours more aware respondents and those the financial wherewithal to hire an attorney with the capacity to set up this defence. Therefore, with this particular observation in mind, we can agree with E. Dunn who calls into question whether the post-socialist transformation in Poland can be considered as an absolute success, considering the changes made by it serve to increase disparities and deprive of power the same workers who had previously taken the fight to the socialist state. The referenced author demonstrates that neoliberalism, in its drive to liquidate institutions of the socialist state, primarily destroyed what the most valuable aspects of the socialist era from the social point of view – this is no apology for socialism, but merely an indication that there were some elements of reality from that era which people would be glad to retain, including various forms of levelling the economic situation of members of society (Dunn 2008,

193). In light of the analyses conducted in this article there is no way to escape the impression that the loss of a legal solution desirable from the social point of view occurred precisely within the framework of the changes made in 1990 to the Polish Civil Code regarding the manner in which consideration is given to the expiration of the limitation period.

The position presented here also draws support from the view convincingly articulated recently in the relevant subject literature that rejection of certain solutions is not always justified solely on the grounds that they comprise legal relicts (Mańko 2015, 207–208), and should not be treated as pathologies but rather as a natural characteristic of the legal culture (Mańko 2016, 67, 86–89). Such a relict should be sought in the context of Polish jurisprudence applied presently to the question of limitation of claims.

It is true that the concept of 'legal relict' is generally understood to mean a particular type of legal phenomenon (norm, concept, institution) which was implemented during an earlier social and economic phase under the influence of factors specific to it, and which, following transformation of the political order, was not eliminated from the legal order (Mańko 2015, 187, 191–192); thus, on first glance it may come across as strange that I mention this here as just a moment ago I clearly indicated that within the framework of the political transformation that took place in Poland in 1989 and the associated revisions to the Polish Civil Code, provisions requiring the court to take expiration of the limitation period of a claim *ex officio* were stricken and replaced with regulations involving giving such consideration *ad petitionem*. However, it should be considered that here I perceive not a classic 'normative' relict (a provision or construction retaining its unaltered shape in spite of a change in the prevailing political order; Mańko 2015, 192), but rather a type of relict called a "hidden relict". This concept is understood to encompass situations in which the language of a legal text formally does not indicate continuity (to simplify: the further existence of a legal solution from the previous regime), yet this continuity can be identified at the level of judicial practice (Mańko 2015, 196, 199–200). It would seem to me that we are dealing with just this type of legal relict in the case under consideration here. In spite of the formal derogation of the norm requiring consideration of limitation of claims *ex officio* and the present norm assuming consideration *ad petitionem*, courts are clearly striving to maintain the previous legal order in respect of the issue at hand – because then it was up to the courts to decide about the effects of expiration of the limitation period (not asking the parties for their opinion courts dismissed an action, although they could have chosen exceptionally to not take into account the circumstance of expiration of the limitation period under Art. 117 § 3 Civil Code, what made them „masters of the situation" within the scope encompassed by the application of that provision, and thus in respect of claims whose limitation period did not exceed three years; they could either take limitation of claim into consideration and dismiss the action, or not and award such a claim essentially as

they saw fit – the factors limiting the court's discretion were not made restrictive by the legislator, and were in fact quite freely and broadly defined [*id est* it was up to the court to decide that the delay in pursuing the claim was not excessive and was justified by some exceptional circumstances], which gave the court discretion to decide in a given case whether to take account of the expiration of the limitation period or not). Presently, however, courts – evidently striving to maintain this *status quo* – in their case-law have usurped for themselves the right in cases where limitation of claim is invoked *ad petitionem* to reject this defence by holding it to be an abuse of a subjective right under Art. 5 Civil Code. Courts have thus decided and consolidated the position in their case-law (and to be precise, the position was first taken by the Supreme Court, then adopted by common courts[20]), that they may assess the invocation of the defence of limitation of claim through the lens of whether the respondent is making use of his rights in a manner contrary to its social and economic purpose and/or the principles of social coexistence (those criteria are set out in Art. 5 Civil Code). This judicial practice gives rise to serious doubts. First, because we may question whether the category of defences (to which limitation of claims belongs) can be classified as a subjective right, and what follows, of whether the aforementioned Art. 5 Civil Code applies to them, which *expressis verbis* addresses cases of abuse of a right he possesses.[21] Secondly, this practice can be assessed as the form of proceeding *contra legem* – since the legislator removed from the text of the law the norm establishing consideration of expiration of the limitation period *ex officio* and introduced a model under which it is done *ad petitionem*, the behaviour of courts which nevertheless hold that they may act *ex officio* and ignore the raising of this kind of defence, awarding the claim despite its limitation period expired and invoking – in a quite elusive and vague manner – the principles of social coexistence, is clearly in contradiction with the law as it is written. However, what is of particular importance from the perspective of these deliberations is that, at the practical level, this line of jurisprudence has petrified the aforementioned practice of courts deciding on their own, *ex*

[20] See *inter alia* the judgements referred to in previous footnotes: *Inter alia* judgment of the Supreme Court of 13 September 2012, V CSK 409/11, Lex no. 1230163; judgment of the Supreme Court of 1 December 2010, I CSK 147/10, Lex no. 818558; judgment of the Supreme Court of 9 July 2008, V CSK 43/08, Lex no. 515716; judgment of the Supreme Court of 16 February 2006, IV CK 380/05, Lex no. 1799977; judgment of the Supreme Court of 6 October 2004, II CK 29.04, Lex no. 194131; judgment of the Supreme Court of 7 June 2000, III CKN 522/99, Lex no. 51563; judgment of the Supreme Court of 9 February 2000, III CKN 594/98, Lex no. 520031; judgment of the Court of Appeals in Łódź of 6 June 2014, I ACa 1533/13, Lex 1480475; judgment of the Court of Appeals in Katowice of 24 May 2013, I ACa 157/13, Lex no. 1327520; judgment of the Court of Appeals in Szczecin of 24 April 2013, I ACa 36/13, Lex no. 1375878; judgment of the Court of Appeals in Kraków of 21 November 2012, III APa 29/12, Lex no. 1236897; judgment of the Court of Appeals in Warsaw of 12 April 2011, VI ACa 1374, Lex no. 1143498 and many other rulings.

[21] Correct remarks on the subject also from: Wilejczyk 2014, 249–250.

officio, as to the effects of the expiration of the limitation period. What is more, it would seem that under the present Polish law, we may observe normative signs of a return to this model within the framework of regulations on electronic small-claims proceedings, of which more will be said in a moment.

Here is it worth observing that a similar conclusion, albeit applying somewhat different logic, has been reached by R. Mańko, who here sees a hidden legal relic in the form of the court's discretional authority to take into consideration the expiration of the limitation period on a claim. However, this author sees the relic in a slightly different light. Specifically, applying – as he calls it – "a broad analytical approach", he does perceive the relic in the sphere of case-law, not legislation, but points out that it is grounded in the wording of Art. 117 § 3 Civil Code in effect prior to 1 October 1990; this provision gave the court the possibility to influence the effects of expiration of the limitation period. The striking of this provision did not, however, deprive courts of this influence as the Supreme Court has allowed that courts may seek grounds for annulling the effects of the limitation period's expiration in other provisions of the Civil Code, particularly those containing general clauses (Mańko 2015, 206); naturally, in this context Art. 5 Civil Code comes to the fore.

This is not, however, an entirely convincing position. Within the framework of legal solutions in force under the previous political order, courts generally had to take limitation into account *ex officio* (except in cases where the entrepreneur sues the consumer), and only by way of exception could they invoke Art. 117 § 3 Civil Code to avoid doing to in the event of extraordinary circumstances concerning claims whose limitation period did not exceed three years. Presently, however, under the law as it is written, courts are not permitted to take limitation into account *ex officio*, but only *ad petitionem* (submitted by the party against which the claim is pursued); it is courts which have usurped for themselves the potential to interfere *ex officio* through holding the use of such a defence to be an abuse of one's rights, and therefore awarding the claim in spite of expiration of its limitation period – which they do on grounds of Art. 5 Civil Code, while expressing the reservation that the application of this provision as a lens for assessing the defence of limitation can only occur in exceptional circumstances. To summarize: it must be pointed out that the previous rule was different – taking limitation into account *ex officio*, with exceptions as to when the court did not do so, whereas the rule today is considering limitation *ad petitionem* (except in cases where the entrepreneur sues the consumer), with exceptions when the court, in spite of invocation of the defense of limitation of claim, decides *ex officio* to award the claim. In this respect I see no continuity of the legal solution in the context of the manner in which expiration of the limitation period is taken into account by Polish courts. That said, I do perceive it in something else – in the retention of the model under which the court decides *ex officio* as to the effects of the expiration of the limitation period. Prior to 1 October 1990, this was done

on the basis of a specific provision of the law, whereas after that time it was grounded in case-law invoking Art. 5 of the Civil Code in support;[22] this tendency is receiving reinforcement at the statutory level, an excellent example of which is supplied by regulations concerning electronic small-claims proceedings.

7. ELECTRONIC SMALL-CLAIMS PROCEEDINGS AND THE ISSUE OF LIMITATION OF CLAIMS

To provide at least a general outline of the issue for readers who are not familiar with all the minutiae of the Polish legislative process and its socio-economic backdrop, it should be pointed out that within the framework of the Polish civil procedure, following a great number of proposals in this area, the possibility of using computerized means of communication has been admitted within a limited scope; this includes regulation in the Code of Civil Procedure governing electronic small-claims proceedings. However, shortly thereafter some undesirable elements cropped up – entities whose commercial activity consisted in the purchase of receivables and then seeking enforcement began to ruthlessly take advantage of their significant advantages (teams of lawyers, capital) over debtors by filing e-actions where e.g. an erroneous address of the debtor was purposefully provided. As a result, the court's warrant for payment was thus not properly served, and as a result the deadline for entering an objection expired (Potejko 2010, 16 et seq.), which meant that the debtor did not learn of the case against him until enforcement proceedings were underway.[23] I mention this in the context of the present divagations because it should be noted that this manner of pursuing claims was employed on a large scale to pursue claims which limitation period expired. Thus we should not be surprised by the negative assessment of such exploitation of the law as detrimental to the interests of the weakest debtors who are unfamiliar with the law and deprived in the foregoing manner of the possibility to plead their case before a court. Understanding this situation, on 10 May 2013 the parliament passed legislation amending the civil procedure,[24] which intended to eliminate

[22] This is why at a more general level I can concur with the opinion of Rafał Mańko, if continuity is to be found in how the discretionary authority of the court as concerns taking into consideration the expiration of the limitation period on a claim (Mańko 2015, 206).

[23] It is another thing that this has been the fate of debtors for other reasons as well (e.g. because of the widespread conviction that if you do not accept a registered letter containing a warrant of payment, the warrant has no legal effect, whereas the presumption of notice being served is applied under which two unsuccessful attempts at delivery are treated as though the notice had, in fact, been served to its addressee; many people ignore as well the fact that the deadline for entering an objection to a warrant of payment is quite short, under the conviction that there will be a later possibility to employ some legal means of proving one's claim, what isn't true).

[24] This refers to the Act of 10 May 2013 amending the Code of Civil Procedure (Dz.U. 2013 item 654), in force from 7 July 2013.

such abuses. The changes included introduction of the obligation to provide precise information identifying the respondent, including PESEL (number in the Universal Electronic System for Registration of the Population) and NIP (taxpayer ID number) if the individual is obliged to possess one or possesses one without being under a duty to do so (Art. 505^{32} § 2 point 1 Code of Civil Procedure). The complainant is also required to provide the pursued claim's due date (until July 8, 2018 it resulted from art. 505^{32} § 2 point 3 Code of Civil Procedure, and from July 9, 2018, as a result of the amendment made by the Act of April 13, 2018, such an obligation follows from Art. 187 § 1 point 1^1 of the Polish Code of Civil Procedure). This last solution, combined with other new regulation under which electronic small-claims proceedings can only be used to pursue claims which came due in a period of three years prior to the day of the action being filed (Art. 505^{29a} of the Code of Civil Procedure), is generally understood as a step by the legislature to prevent the pursuit of claims after expiration of limitation period via electronic small-claims proceedings (see e.g. Flaga-Gieruszyńska 2014, 986; Infor 2017; Vis Legis 2017). We are evidently dealing with a paternalistic approach by the legislature, which desires to protect "weaker" (debtors without the relevant legal knowledge and assistance of an attorney) players from the "stronger" ones (professional debt-collection companies), and this to a greater extent than in respect of considering limitation of a claim *ex officio* – it consists of taking it into account at the statutory level, before judicial proceedings are initiated. This results from the possibility to pursue only those claims which came due not later than in the three years before the submission of the action (which is an evident move towards ensuring that on the day of the action's submission a limitation period of a given claim is not expired, as many claims have a three-year limitation period [including those under Art. 118 of the Civil Code for payment provided regularly and payment associated with commercial activity, unless otherwise determined by statute], and the limitation period, pursuant to Art. 120 § 1 of the Civil Code, runs from the day on which the claim came due).

However, as to the question of whether the legislature has really succeeded in creating a mechanism to protect weaker parties, we may have significant doubts. Primarily it should be observed that while the aforementioned amendments to the Code of Civil Procedure in 2013 introduced Art. 505^{32} § 3 did give courts the power to impose a fine on a complainant, statutory representative or attorney who, either in bad faith or out of failure to take appropriate measures, gave incorrect information listed in Art. 505^{32} § 2 point 1 and/or point 2 and Art. 126 § 2 point 1 of the Code of Civil Procedure, this fine cannot be imposed for giving incorrect information as to the maturity of the pursued claim, even if done purposefully and in bad faith (Art. 505^{32} § 3 of the Code of Civil Procedure does not list Art. 505^{32} § 2 point 3, nor does it sanction violations of Art. 505^{29a} of the Code of Civil Procedure). There is thus no threat of a fine in respect of attempts to pursue via electronic small-claims proceedings those claims which came due earlier than

within three years of the day of the action's filing. What is more, the court is in fact deprived of the possibility to verify the date of the claim's maturity as given by the complainant, as evidence is not included with the action (under Art. 505^{32} § 1 of the Code of Civil Procedure, the complainant should indicate in the action what evidence exists in support of his claims, but this evidence is not attached to the claim itself). The court this has no way of examining information provided by the complainant, as there is no evidence to compare it to (owing to lack of access); all the court can do is to trust in the declarations of the complainant and assume their truthfulness (Tchórzewski, Telenga 2010, 43–44; Franczak 2017, 50; Potejko 2010, 17), which can at times be a counter-factual assumption.

The opportunity to make such an examination arises only in the event of an objection against the warrant of payment (and whether this is possible in practice depends on the effects of the aforementioned new regulations concerning identification of the complainant, and thus whether the warrant of payment was properly served – to the correct respondent, and not e.g. another person of the same name) and assignment of the matter to a court with jurisdiction under general provisions (Art. 505^{36} § 1 of the Code of Civil Procedure), which will hear the case (of course, if all the necessary requirements are fulfilled, including those in Art. 505^{37} of the Code of Civil Procedure). However, in the meantime the court will be able to dismiss an action for a given claim on grounds of limitation of claim only when the respondent raises the defence of limitation – and in this case we return to the general provisions governing limitation of claims. At the same time, all the previously discussed reservations concerning consideration *ex officio* of limitation of claims apply. This also clearly conflicts with the objectives the legislature claims to be guided by when introducing the aforementioned amendments in 2013; here we have no mechanism for protection of weaker parties (in the context of legal awareness and financial resources).

Furthermore, it should be noted that the model of electronic small-claims proceedings developed with the aforementioned goal in mind does not necessarily itself constitute an effective mechanism for reasons other than those already discussed. For example, we may indicate that the limitation consisting in the possibility of pursuing in those proceedings only claims which came due in the three years preceding the day of submission of the action does not exclude the pursuit of an claim after the expiration of limitation period, meeting that criterion. This is because many claims have a shorter limitation period than three years (such as claims from widespread contracts of sale, which under Art. 554 of the Polish Civil Code are subject to a two-year limitation period). Such a claim can come due two years and eight months prior to submission of the action, limitation period expired after two years, and yet on the day of the action is brought it fulfils the aforementioned condition, as it came due in the three years prior to the initiation of the court action. On the other hand, we may also observe that the length of the standard limitation period for claims in the civil law according to the Polish Civil

Code is 6 years (Art. 118 in wording binding from 9th of July 2018; earlier it was 10 years), and thus there will be many claims which, in spite of coming due more than three years before the day of submission of an action in pursuit of them, would not be after expiring them limitation periods at the moment of filing suit in order to pursue them after the passing of more than three years from the date of their maturity.

8. CHANGES IN THE LEGAL REGULATION MADE BY THE ACT OF APRIL 13, 2018

The above-mentioned social phenomena, in particular the perception of a mechanism in which limitation is only taken into account when a defendant raises a complaint, as a harmful poor person, without financial means to receive the help of a lawyer, caused the Polish legislature to react to it. This reaction took the form of the Act of 13 April 2018 amending the Act – Civil Code and some other acts[25] that entered into force on July 9, 2018. It brought with it another fundamental turn with regard to the manner in which the expiry of the limitation period in Polish civil law is taken into account. Namely, with regard to claims that entrepreneurs have against consumers, the legislator ordered from now on that the court's should take into account *ex officio*, that the limitation period has expired (Article 117 § 2^1 interpreted in conjunction with Article 22^1 of the Polish Civil Code). This change in the justification of this law was motivated by the fact that in this way the aim is to obtain legal certainty as to the claim by virtue of expiration of the limitation period. Despite this declaration, the real shape of the introduced regulations does not fully support its implementation, because at the same time the court was given the opportunity to consider of the parties' interests and fairness, and fail to take into account the expiration of the limitation period of the claim against the consumer, and, however, to award the claim against him (Article 117^1 of the Polish Civil Code). It should also be stressed that in relation to all other claims (that is, other than those claimed by entrepreneurs from consumers), the existing solution has been maintained, that is to take into account the expiration of the limitation period only to the plea raised by the debtor. This results in a rather strange duality in the ways of taking into account the expiration of the limitation period in Polish civil law, where the question which method will come into play in a given case depends on whether the person against whom the claim is entitled will be qualified as a consumer, or not.

The above also leads to the conclusion that in fact the Polish legislator considered the weaker entities, requiring special legal protection in the context of prescription, consumers and this social group is protected by the

[25] Dz.U. of 2018, item 1104.

provisions of the above mentioned Act of 13 April 2018, moreover not only those indicated above, but also, for example, on the basis of its intertemporal regulations. To illustrate this, it can be pointed out, for example, that although the abovementioned act shortened the basic period of limitation of claims from 10 to 6 years and generally to claims arising before the date of entry into force of this law (ie before July 9, 2018) and which limitation period didn't expire before that date, there should be applied from that day the provisions of the Polish Civil Code in the wording after this amendment (Article 5 paragraph 1 of the Act of April 13, 2018), but the situation of entrepreneurs and consumers has been shaped diametrically differently. Namely, for the former (similarly to all relations other than those in which the consumer would be a creditor), the said amendment will generally shorten the time for pursuing claims, because either this new, shortened period of limitation will start running from the day that the amendment enters into force, or if, however, the period of limitation began before the date of entry into force of this Act and it would end earlier if taking into account the previous limitation period, the period of limitation ends that earlier date (Article 5 paragraph 2 of the Act of April 13, 2018). However, in the situation in which the claim is due to the consumer, and was created before the date of entry into force of the Act of April 13, 2018 and on that day the limitation period hasn't been finished, and was subject to the limitation period specified in Article 118 or art. 125 § 1 of the Polish Civil Code, the provisions of the Polish Civil Code in the previous wording are applicable, and so the limitation period of these claims shall expire within 10 years (pursuant to Article 5 paragraph 3 of the Act of 13 April 2018). What's more, the legislator went so far as to favor the situation of consumers, that it accepted, that outdated claims against the consumer, which until the day of entry into force The Act of April 13, 2018 no plea of limitation has been lodged, are subject from 9 July, 2018 to the limitation effects set out in the Civil Code, as amended by the Act of 13 April 2018, and therefore the court will have to take into account the expiration of the limitation period *ex officio*. This may raise doubts as to the fairness of such a solution in relation to entrepreneurs who filed a lawsuit against consumers at a time when this regulation was not in force and they could count on the action being awarded (because, for example, the debtor would not plead the statute of limitations), and now they will lose as a result of a change in the legal regulation, as a result of which the court will take into account the expiration of the period of limitation *ex officio*. All the more so because this is also facilitated by the law of April 13, 2018 (pursuant to Article 2 thereof, it was added item 1^1 in Article 187 § 1 of the Code of Civil Procedure) the requirement to submit, from July 9, 2018, in lawsuits for awarding a claim indication of the due date of the claim. Interestingly, in view of the general wording of this new provision, this requirement applies to all matters, irrespective of whether the expiration of the limitation period of the claim is taken into account by them *ex officio* or

on an complaint; which, in relation to the latter, raises serious doubts, because it immediately draws the attention of the defendant to the issue of limitation of the claim, seriously disrupting the balance of the parties' procedural position.

9. FINAL CONCLUSIONS

In summary, it should be observed that the change introduced into the Polish Civil Code in 1990 consisting in a transition from the model under which limitation of a claim is taken into consideration at the initiative of the court to one under which the court takes into consideration an expiring limitation period of a claim only in the event when the defence of such limitation is set up against it by the party against which the claim is pursued was clearly motivated by the political transformation that came about in 1989 in Poland, as well as the emotions associated with it. These emotions demanded the most expeditiously possible rejection of everything that could be considered "Soviet", and to absorb the legal solutions present in Western European countries. Thus, on the one hand, this was an attempt at literally freeing ourselves in all aspects from the Soviet sphere of influence (including in legal regulations), while on the other hand a sort of "aspiration" to become westernized, with the *a priori*, silent assumption that everything from there is better than what we have here. As the experience of the twenty-plus years since then has proven, this has not always been true, including in the legal sphere. The practical functioning of many institutions has demonstrated that not all Western solutions are necessarily beneficial for us – if for no other reason than they are incompatible with other elements of our reality, mentality, etc. At times it is the case that a given solution, although in effect in Western European countries, is also criticized there for its undesirable social impact, etc. However, in adopting a great deal of solutions from there, nobody here took those things into consideration, nobody examined the practical functioning of those legal institutions. This was also the case in respect of adoption into the Polish civil law of the model under which consideration of limitation of a claim is taken into account only *ad petitionem* rather than *ex officio*. As has already been demonstrated, this solution is preferred in the Polish legal scholarly literature only because it is "Western" and "not Soviet", even without providing specifics as to where it is in effect, never mind exploring the practical effects of such regulations.

Meanwhile, various phenomena are beginning to demonstrate a clear longing for the model in which limitation of claims is accounted for *ex officio*. One of the primary ones indicated already is the judicial practice of Polish courts, initiated by the Supreme Court, within which the courts did not allow the party against which the claim is pursued to have the last word as to what potential effects the pursuit of an claim after the expiration of its limitation period would have (and thus in effect the courts rejected the decision of the legislature in 1990 which imposed

consideration of limitation of claims *ad petitionem*). They created for themselves a means by which, in the event of invocation of the defence of limitation, they could submit that claim to review; as grounds for this activity they invoke Art. 5 of the Civil Code (the question of whether they are entitled to do so remains highly controversial).

What is more, as has been shown in this article using the example of the peripeteia associated with the provisions of the Polish Code of Civil Procedure concerning electronic small-claims proceedings, the legislature itself is beginning to perceive the need for protection of weaker parties against the effects of the current provisions on limitation of claims as it can only be taken into consideration *ad petitionem*. By "weaker" I understand poorer respondents who cannot afford professional representation, and do not themselves possess the relevant legal knowledge. It is not sufficient to counter this by arguing that they can apply for a court-appointed attorney – in polish courts' practice this is not an easy thing to do, it must be demonstrated that one is not in a position to bear the costs of remuneration for an advocate or legal advisor without harming one's ability to maintain oneself and one's family, filing – under pain of criminal liability – a detailed declaration on the condition of one's family, income and sources of maintenance. In practice, the courts frequently do not admit such applications, even from people who are objectively poor, with the explanation that awareness of the approaching court case means they should have begun earlier to set aside funds for that purpose.

The step taken by the legislature to exclude in statute the potential to pursue claims after the expiration of limitation period, consisting in provisions on electronic small-claims proceedings that they may only be used to pursue claims which came due in a period of three years prior to submission of the action, is a clear signal that at the legislative level we may see a "longing" for the solution assuming *ex officio* consideration of limitation of a claim. This model, for the reasons cited above, does, however, have its faults which prevent it from being judged a successful attempt by the legislature at protecting weaker parties from having claims after expiration of limitation period pursued against them.

Against this backdrop it would seem that instead of "smuggling in" a solution under which limitation of claims is taken into consideration *ex officio*, whether by way of judicial practice or through particular legal solutions, it would be advisable to consider a general return to the principle of limitation of claims being taken into account *ex officio* by the court as the rule. This solution is, as demonstrated already, the object of desire, although not necessarily in a conscious manner; besides, it would go much further in performing the primary functions assumed for limitation of claims, including the achievement of legal certainty in the context of a given claim, as well as providing creditors with strong motivation to pursue claims in a timely manner. The fact that the earlier norm of taking limitation into account *ex officio* was borrowed from Soviet law is here a secondary

consideration, while the rejection of that solution for political and emotional reasons is overshadowed by the substantive arguments in favour of it. And as has been sufficiently demonstrated above, legal relicts are not *ex definitione* bad, and they may not be rejected for the sole reason that they are relicts.

The changes introduced by the Act of April 13, 2018, discussed in this article, are in fact a partial return to this relict, restoring, at least partially, taking into account the expiry of the limitation period *ex officio*, which is an evident response to the above-mentioned public needs in this area. However, because this resulted in a kind of dualism in the ways of taking into account the expiration of the limitation period of claims in Polish civil law – *ex officio* when the entrepreneur sues the consumer, and in all other situations only if the defendant raises an appropriate charge – disputes can be expected as regards the qualification of claims as being claimed from the consumer, and perhaps anticipate an increase in emphasis on introducing the consideration of the expiration of the limitation period *ex officio* in all cases.

BIBLIOGRAPHY

Broniewicz, Witold. 1965. "Przedawnienie roszczeń w stosunkach między jednostkami gospodarki uspołecznionej według kodeksu cywilnego". *Przegląd Ustawodawstwa Gospodarczego* 3: 61–65.

Brzozowski, Adam. 1992. "Nowa regulacja przedawnienia w prawie cywilnym". *Państwo i Prawo* 3: 21–31.

Brzozowski, Adam. 2008. „Tytuł VI. Przedawnienie roszczeń". In *Kodeks cywilny. Komentarz do artykułów 1–449*[11]. Vol. I. 522–537. Edited by Krzysztof Pietrzykowski. Warszawa: C.H. Beck.

Cagara, Jan. 1961. "Na temat przedawnienia i prekluzji słów kilka". *Nowe Prawo* 6: 767–770.

Charkiewicz, Ewa. 2007. "Od komunizmu do neoliberalizmu. Technologie transformacji". In *Zniewolony umysł 2. Neoliberalizm i jego krytyki.* 23–84. Edited by Ewa Majewska, Janek Sowa. Kraków: Korporacja Ha!art.

Dobrzański, Bronisław. 1955. "Problemy kodyfikacyjne przedawnienia. Uwagi na marginesie artykułu J. Gwiazdomorskiego pt. 'Podstawowe problemy przedawnienia'". *Nowe Prawo* 2: 50–58.

Dobrzański, Bronisław. 1960. "Czy uzasadnione jest zachowanie w kodeksie cywilnym PRL różnicy między przedawnieniem a terminem zawitym?" *Nowe Prawo* 6: 813– 819.

Domański, Ludwik. 1936. *Instytucje kodeksu zobowiązań. Komentarz teoretyczno-praktyczny. Część ogólna*. Warszawa: Marian Ginter – Księgarnia Wydawnictw Prawniczych.

Dunn, Elisabeth. 2008. *Prywatyzując Polskę*. Warszawa: Wydawnictwo Krytyki Politycznej.

Flaga-Gieruszyńska, Kinga. 2014. "Objaśnienia do art. 484^{1}–505^{37}". In *Kodeks postępowania cywilnego. Komentarz*. 909–992. Edited by Andrzej Zieliński. Warszawa: C.H. Beck.

Franczak, Katarzyna. 2011. "Elektroniczne postępowanie upominawcze – zalety i wady dla stron postępowania". *Przegląd Prawa Handlowego* 7: 48–54.

Gwiazdomorski, Jan. 1955. "Podstawowe problemy przedawnienia". *Nowe Prawo* 1: 4–24.

Gwiazdomorski, Jan. 1955. "Przedawnienie czy zarzut przedawnienia?". *Nowe Prawo* 4: 44–52.

Gwiazdomorski, Jan. 1968. "Terminy zawite do dochodzenia roszczeń w kodeksie cywilnym". *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 3: 87–110.

Infor. 2017. http://www.infor.pl/prawo/w-sadzie/e-sad/320461,Nowelizacja-kodeksu-postepowania-cywilnego-zmiany-w-EPU.html [Accessed: 11 January 2017]

Jedliński, Adam. 2012. "Tytuł VI. Przedawnienie roszczeń". In *Kodeks cywilny. Komentarz. Część ogólna*. Vol. I. 728–769. Edited by Andrzej Kidyba. Warszawa: Wolters Kluwer Polska.

Jędrzejewska, Maria. 2006. In *Kodeks postępowania cywilnego. Komentarz*. Vol. I. Edited by Tadeusz Ereciński. Warszawa: Wolters Kluwer Polska.

Kordasiewicz, Bogudar. 2008. „Rozdział XI. Problematyka dawności". In *System Prawa Prywatnego*. *Prawo cywilne – część ogólna*. 563–698. Edited by Zbigniew Radwański. Warszawa: C.H. Beck.

Kuźmicka-Sulikowska, Joanna. 2015. *Idea przedawnienia i jej realizacja w polskim kodeksie cywilnym.* Wrocław: E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa.

Mańko, Rafał. 2015. "Relikty w kulturze prawnej. Uwagi metodologiczne na tle pozostałości epoki socjalizmu realnego w polskim prawie prywatnym". *Przegląd Prawa i Administracji* 102: 185–208.

Mańko, Rafał. 2016. "Demons of the Past? Legal Survivals of the Socialist Legal Tradition in Contemporary Polish Private Law". In *Law and Critique in Central Europe. Questioning the Past, Resisting the Present.* 66–89. Edited by Rafał Mańko, Cosmin Cercel, Adam Sulikowski. Oxford: Counterpress.

Mattei, Ugo. 1994. "Efficiency in Legal Transplants: An Essay in Comparative Law and Economics". *International Review of Law and Economics* 14: 3–19.

Miller, Jonathan. 2003. "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process". *The American Journal of Comparative Law* 51: 845–868.

Pałdyna, Tomasz. 2012. *Przedawnienie w polskim prawie cywilnym*. Warszawa: Wolters Kluwer Polska.

Potejko, Patrycja. 2010. "Elektroniczne postępowanie upominawcze – fikcja wymiaru sprawiedliwości?". *Monitor Prawniczy* 1: 16–23.

Szer, Seweryn. 1950. *Prawo cywilne – część ogólna.* Warszawa: Państwowe Wydawnictwo Naukowe.

Szpak, Jagoda. 2011. "Kontrowersje wokół zagadnienia 'legal transplants'". *Acta Erasmiana* 1: 53–71.

Szpunar, Adam. 1974. "Z problematyki przedawnienia roszczeń majątkowych". *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 3: 283–298.

Szpunar, Adam. 1980. "Zrzeczenie się korzystania z przedawnienia". *Palestra* 4–5: 15–23.

Szpunar, Adam. 2002. "Uwagi o zrzeczeniu się zarzutu przedawnienia". *Rejent* 10: 13–27.

Tchórzewski, Mariusz. Przemysław Telenga. 2010. *Elektroniczne postępowanie upominawcze. Komentarz*. Warszawa: Wolters Kluwer Polska.

Vis Legis. 2017. http://vislegis.biz/dochodzenie-roszczen-przedawnionych-w-epu/ [Accessed: 11 January 2017]

Wasilkowski, Jan. Ed. 1954. *Projekt Kodeksu cywilnego Polskiej Rzeczypospolitej Ludowej.* Warszawa: Wydawnictwo Prawnicze.

Watson, Alan. 1991. *Legal Origins and Legal Change*. London: The Hambledon Press.

Watson, Alan. 1993. *Legal Transplants. An Approach to Comparative Law*. Georgia: University of Georgia Press.

Watson, Alan. 1996. "Aspects of Reception of Law". *American Journal of Comparative Law* 44: 335–351.

Wilejczyk, Magdalena. 2014. "Nadużycie zarzutu przedawnienia przez dłużnika czy nieuwzględnienie upływu przedawnienia ze względu na szczególne okoliczności leżące po stronie wierzyciela – uwagi de lege ferenda". *Monitor Prawniczy* 5: 248–254.

Wilejczyk, Magdalena. 2014. *Zagadnienia etyczne części ogólnej prawa cywilnego*. Warszawa: C.H. Beck.

Wolter, Aleksander. 1953. *Prawo cywilne – część ogólna.* Warszawa: Państwowe Wydawnictwo Naukowe.

Wójcik, Sylwester. 1991. "Przedawnienie w prawie cywilnym po zmianie kodeksu cywilnego ustawą z 28 lipca 1990". *Przegląd Sądowy* 1–2: 25–36.

Legal acts

Act of 13 April 2018 amending the Act – Civil Code and some other acts (Dz.U. of 2018, item 1104).

Act of 10 May 2013 amending the Code of Civil Procedure (Dz.U. 2013 item 654).

Act of 16 September 2011 amending the Code of Civil Procedure and some other acts (Dz.U. 233, item 1381).

Code of Civil Procedure of 17 November 1964 (Dz.U. 2016, item 1822 with amendments).

Polish Civil Code of 23 April 1964 (Dz.U. 2016, item 380 with amendments).

Act on General Provisions of the Civil Law of 18 July 1950 (Dz.U. 34, item 311).

Regulation of the President of the Republic of Poland of 27 October 1933 – Code of Obligations (Dz.U. 82, item 598 with amendments).

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IDEOLOGY IN MODERN RUSSIAN CONSTITUTIONAL PRACTICE

Abstract. The article focuses on Russian constitutional ideology with overview of its historical preconditions and analysis of recent significant cases of the Russian Constitutional Court. There is a discussion of gay activist Alekseyev's case and "foreign agents' law" case in constitutional practice as most significant examples of positivistic way of legal reasoning.

The paper argues that legal positivism through its form – legal formalism is the main ideology in the modern constitutional practice in Russia. This ideology is based on the assumption that constitutional justice can find social truth. German positivistic and Soviet Marxist views have strongly determined the modern Russian constitutional discourse.

Keywords: Constitutional court, constitutional reasoning, formalism, legal positivism, Russian constitution.

1. INTRODUCTION

In 2013 Valery Zorkin, President of the Russian Constitutional Court, wrote a monograph on *Law from the perspective of global changes* in which he broadly described the meaning of historical background and cultural uniqueness of a state through its legislation (Zorkin 2013). In his opinion, the historical approach gives the option to choose the right features in a social system. This is meaningful for the definition of the place of the Russian Constitutional Court nowadays in political and legal system of the state.

The institution of constitutional justice is recent for Russia, however the role of the Constitutional Court during last 20 years has become stronger in resolving politically and culturally complex questions such as: elections, self-governance, traditional role of women in society, gay rights, etc.

In this chapter I will analyze the historical and legal preconditions as well as, the recent constitutional practice of the Russian Constitutional Court as an evidence of its formalistic ideology.

In the first part, the historical and legal background of modern Russian constitutional practice is presented. This is followed by a case analysis that illustrates my presumption about the legal approaches used by Russian

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Constitutional Court. The hypothesis is that legal formalism is the dominant interpretative approach of the Russian Constitutional Court that served to a specific goal: to find one truth for society.

The words "constitutional ideology" and "legal formalism" recur throughout this article so let me to explain them.

As Sergey Pojarkov defines the constitutional ideology as not only a set of ideas but at the same time the world-view, values, rules and system of tolls for influence on social relations (Pojarkov 2013, 19). Theoretically there is the intention of the Russian multinational people in the ground of the national constitutional ideology (Khorunzhij 2014, 4). However, the constitutional ideology justifies the political domination, social injustice and social exclusion (Frankenberg 2006, 441). For the goal of this chapter I define the constitutional ideology as set of ideas and tools used by the constitutional court to serve the current interests of the state. In this meaning the legal formalism is a part of constitutional ideology.

Legal formalism depicts the law as a system of norms and rules, judicial decisions as the result of deduction from applicable rule. Michel Rosenfeld noted that new legal formalism "is properly considered to be a type of formalism to the extent that it maintains that something internal to law rather than some extralegal norms or processes determines juridical relationships and serves to separate the latter from nonjuridical social relationships, including political ones" (Rosenfeld 1998, 33). These don't make formalism 'evil'. Serious arguments show that it is in demand: "enhancing the predictability and stability of law and curtailing judicial discretion" (Matczak 2016, 3). Nevertheless, in Russian context formalism doesn't necessary connect with rule of law but with law supremacy.

In the legal literature there are attempts to examine the effectiveness of Russian Constitutional Court functioning through judicial decisions. For instance, Jane Henderson analyzed the unique case of the constitutionality of the Communist Party of the Soviet Union compared with the Russian Communist Party in 1992 (Henderson 2007). Marie-Elisabeth Baudoin found the factual approach of European judicial practice as a test of proportionality and "reserves of interpretation" in Russian constitutional convention (Baudoin 2006). James Richardson and Marat Shterin observed the constitutional courts' cases under religious freedom and freedom of association for religious organizations in a comparison of Russia and Hungary (Richardson, Shterin 2008).

Methodologically, I decided to analyze two recent cases from the Russian constitutional practice. Both were continued at international legal level in the form of applications to the European Court of Human Rights (ECtHR). I will examine the case of gay activist Nikolay Alekseyev and the foreign agents' law as two recent cases in which the Russian Constitutional Court has dealt with a set of international human rights provisions that could stimulate it to use all possible interpretative tools to find the balance between private and public interests. The significance of these cases is also rooted in its connection with European legal doctrine and ECtHR practices.

2. DEVELOPMENT OF CONSTITUTIONAL COURT OF RUSSIAN FEDERATION AS OFFICIAL INTERPRETER

The idea of a special body with the function of constitutional review was implemented in the Constitution of the USSR in 1988 leading to the establishment of a Committee of Constitutional Supervision (Butler 1991). In 1990 the Supreme Council of USSR elected 25 Committee members, yet in December 1991 they voluntarily ceased the existence of the same body. In parallel, in the summer of 1991 the Constitutional Court of the Russian Federation was created and started its activity in October 1991. As Alexei Trochev mentioned: "[d]esigning, redesigning, and staffing the Russian Constitutional Court was an arduous political process in which reformers and conservatives simultaneously clashed and cooperated to benefit from constitutional review" (Trochev 2011).

The main structure and jurisdiction of the Russian Constitutional Court was formulated in the Constitution of 1993. According to the article 125 of the Russian Constitution, the Constitutional Court has the right of the official interpretation of the act, through a special procedure at the request of the President, Government and chambers of the federal and regional parliaments. However, in Russian constitutional theory, the concrete constitutional review practice in terms of complaints from individuals of the Constitutional Court is studied as a "shadow" interpretation or even a transformation of the constitutional norms (Anichkin 2010).

The 2010 Russian Constitutional Court reform included: changes in the organization of the Court (the chambers were ceased) and in procedural rules of concrete constitutional review (the amount of cases without hearing were expanded). Moreover, according to its amendments, the citizens have the right to claim to the Constitutional Court only after the judicial decisions under their cases in the courts of general jurisdiction or arbitration courts in Russia. The judicial decision before the Constitutional Court of Russia must include the reference to legal provisions that are under the question of constitutional confirmation. This decision, at the same time, could be appealed in courts of general jurisdiction or arbitration courts according to procedural laws. After the petition's admission, the Constitutional Court of Russia notifies the court that has adopted the latest judgment on the case and the court considering a case for which this court judgment may be of relevance. This is a legal meaning as the "law that has been applied in a specific case" whose consideration has been completed in court (the jurisdictional court level does not matter). The next significant criterion for the admission of the petition is the presence of a violation of rights and freedoms by the applied law (art. 3, 96 Federal Constitutional Law On Constitutional Court of Russian Federation 1994).

Before the latest reform, the citizens had the right on the constitutional petition after a decision by administrative bodies and when the case was under

consideration in the courts but there was no decision yet. However, the broad interpretation of "citizen" still exists and allows the procedure of making constitutional appeals by foreign citizens, stateless persons or any legal types of associations of citizens. Another achievement of previous constitutional practice that has been continued, is the broad understanding of term "law" which could be the object of constitutional control. In theory, however, it is also presented the claim to extend this understanding (Nesmeianova 2004). From these reforms I see that the Court has parallel tendencies in strict and broad construction of the procedural rules. For strict interpretation the instrument of law-making is used and for broad construction the Court uses the judicial practice.

The Federal Constitutional Law of 1994 on the Constitutional Court of Russia allows to carry out a constitutional review through three types of acts: decisions on the merits of the case; decisions, which dismiss a case without hearing; decisions in the procedure of presidential impeachment (art. 71). The decisions on the merits of the case and without hearing are based on the special techniques of the constitutional interpretation. The important features of such decisions are that they shall be final, may not be appealed and shall come into force immediately upon pronouncement. The decision of the Constitutional Court of the Russian Federation shall be directly applicable and shall require no affirmation by other bodies nor officials. According to the Federal Constitutional Law of 1994 the legal force of the judgment of the Constitutional Court of the Russian Federation deeming an act to be unconstitutional may not be overcome by the new adoption of the same act (art. 79).

The legal positions in the judgments of the Constitutional Court play the crucial role for legal practice in Russia. Officially, the formal status of those elements of decisions is not defined, yet the Court and modern constitutional theory recognize their normative nature.

The nature of legal positions is broadly discussed in theoretical terms. The Judge of the Constitutional Court Gadis Gadzhiev called legal positions as "crystallized law", "legal source" "and legal principle for the solution of similar legal collisions" (Gadzhiev 1999, 22). Former Judge Boris Ebzeev noted that the legal positions of the Court are not the ordinary argumentation of the decision but the outputs as a result of constitutional interpretation (Ebzeyev 2000, 24–25) The theorist Vladimir Kriazhkov defined the legal positions as the legal-logical base of the courts' decision into resolution consisting of inferences and installations, which have common obligatory value (Kriazhkov 1999, 109).

In the judgment of 7 October 1997, the Constitutional Court of Russia pointed out that the provisions of a motivation part in a judgment of the Court which have constitutional interpretation or the interpretation of the constitutional meaning in laws are legal positions and have an obligatory character. In this case the Constitutional Court referenced the article 6 of the Federal Constitutional Law "On Constitutional Court of Russian Federation", however under inspection in

this article the mention of legal position is absent. Here the obligatory character of Constitutional Courts' decisions is maintained. The Court gives broad interpretation to article 6 and expands the compulsory character to legal positions which are a part of judgments. In the resent judgment of 8 November 2012 the Court pointed out again that courts of general jurisdiction and arbitration courts must follow the Constitutional Court's decisions and the identified legal positions (Constitutional Court's Judgment 2012, №25-P).

Sergey Belov considers the changing in usage of legal positions of Russian Constitutional Court by other judicial bodies. He noted that, generally, courts comply and use these positions however, not systematically. The practice show us that courts use Constitutional Court's legal positions spontaneously and behindhand (Belov 2014). For instance, the Federal Arbitration Court of the Northwestern District in its judgment of 20 March 2014 essentially recognizes the need to prove the guilt of the legal entity (Case №A56–56482/2013). The arbitration court used the legal position set out in the Judgment of the Constitutional Court of the Russian Federation of 27 April 2001 №7-P. According to the Constitutional Court's position, legal entities cannot be denied the opportunity to prove that the violation of the rules has been caused by extraordinary, objectively unavoidable circumstances and other unforeseeable, insurmountable for the data subjects concerning obstacles beyond their control. However, in similar cases arbitration courts have often come to the same conclusion without references to legal positions of the Constitutional Court or even didn't pay attention to the evidence of legal entity's guilt.

The comparison of theoretical and practical estimations of the Constitutional Court's legal positions is significant. Despite the attempts of constitutional judges and scientists to show the normative character of these positions the real situation bring to light its neglect. This situation is connected with the question of judicial autonomy of Russian Constitutional Court. Courts in many nations have seen a rise in terms of their authority and independence in recent decades. However, the Russian Constitutional Court has been strongly affected by the political situation that doesn't allow showing independence. Anders Fogelklou named this situation as "fundamental paradox" of Constitutionalisation in post-Communist states: "The constitution is adopted in order to introduce political and societal changes, and at the same time, it must not deviate too much from the political and social environment in which it is supposed to function. But this latter demand is problematic. The potential positive function of a constitution as a legal transplant capable of promoting change could be lost" (Fogelklou 2003, 181, 186).

Formally, the Constitutional Court of Russia is an independent body however it has a lot of critics among scientists and practitioners in constitutional law. In comparison with the active and powerful Hungarian Constitutional Court, Russia: "had an activist court that was forcibly closed for political reconstruction in 1993 and reopened only in 1995 under severe constraint. The Russian

Constitutional Court then kept its head down in fractious national politics and has survived" (Scheppele 2003, 219–220).

At the same time, during its twenty years of activity, the Court, accomplished substantially in terms of human rights development and bringing about change in Russian economic and political sectors: "By using small-scale delimitations instead of issuing so many large opinions on important political matters, the court has bought itself some space for developing constitutional ideas and perhaps having a bigger effect in Russian political life in the long run." (Sheppele 2003, 232). "On the one hand, decisions adopted since the end of the 1990s show the use of new reviewing tools, sometimes borrowed from other supranational jurisdictions, which enable the Court to somehow participate in the rationalisation of the constitutional system. On the other hand, to try and reduce gaps in the legal system and to regulate its internal contradictions, it has adapted its methods of control so as not to destabilise the state or legal order. With the benefit of experience over 10 years, the Court case law is becoming richer at both a substantial and methodological level" (Baudoin, 689).

In early December 2009 Anatoly Kononov (one of the longest-serving Constitutional Court judges who often had the special opinion during judgments) resigned his tenure starting with 1 January 2010. This case is a mirror of the question of independence of the Court. Kononov as an independent lawyer resigned as a judge, as tired of fighting with the system. Another judge of the Constitutional Court of Russia Vladimir Yaroslavcev said in an interview to the Spanish newspaper *El País* that he feels himself "on the ruins of justice" and that during the rule of Vladimir Putin and Dmitry Medvedev the courts in Russia work as an administrative instrument of executive power (*News of "Èkha Moskvy" Judge of the Constitutional Court will leave Constitutional Court early in the next year* 2014).

The historical development of the Russian Constitutional Court was always in connection with power-building of the post-Soviet state and this fact cannot be neglected. In 1990s – early 2000s the Court served to strengthen the presidential power and executive branch to fulfill legal uncertainty. In the second decade of the 2000s, when the common structure of political power was fixed, the new tasks of constitutional justice were found – to construct political and cultural identity under the principle of "sovereign democracy" (Polyakov 2007, 59). The question is how did the changes in the status and content of Constitutional Courts' position influence on its interpretational approaches.

3. INTERPRETIVE METHODOLOGY AND EVIDENCES OF LEGAL FORMALISM IN MODERN CONSTITUTIONAL PRACTICE

The researchers recognize the fact that Russia shares the same Western legal tradition as other European states. Bill Bowring stated: "Russian law since the twentieth century is German law; the Russian Constitutional Court is modeled on German *Bundesverfassungsgericht* and the 1993 Russian Constitution bears strong traces of the German Constitution, especially the *Sozialstaatsprizip*, the constitutional commitment to a social state" (Bowring 2013, 206–207).

This tendency is similar to Central European states' legal cultures. Rafal Mańko explains that in Central European states the method in legal education, practice and scholarship has been dogmatic and positivistic: "Central European legal culture was always in the shadow of the West, and in this context, West meant, first and foremost – Germany and Austria" (Mańko 2005, 527, 531). However, as well as in other Central and Eastern Europe socialism restrained Russia from legal realism, which had its greatest influence on the United States and Western European legal cultures. Csaba Varga considers Central and Eastern European legal mentality as it still exists in terms of its:

> continuity of text-centrism in approach to law, with the law's application following the law's letters in a quasi-mechanical way. Consequently, what used to be legal nihilism in the Socialist regime has turned into the law's textual fetishism in the meantime. This is equal to saying that facing the dilemma of weighing between apparently contradictory ideals within the same Rule of Law, justice has in fact been sacrificed to the certainty in/of the law in the practical working of the judiciary. Especially, constitutional adjudication mostly works for the extension of individual rights while the state as the individuals' community is usually blocked in responding challenges in an operative manner (Varga 2013, 207).

These specificities determine modern Russian legal culture as a mix of post-Soviet heritage and positivistic tradition. It is not hyperpositivism as in Soviet times (Mańko 2013, 207). Russian lawyers live in the German legal tradition and think in a deductive direction when the analysis of facts depends on the general legal norms which they should follow. The lawyers' level of professionalism and fairness of decision are connected with the quality of the facts' correlation with the norms. There is no place for the changing of the meaning of the norms towards ordinary legal practice. In such a situation the constitutional practice could be presented as extraordinary for Russian legal thinking. However, in practice the transformation of the legislator's will as expressed in the law is highly rare and complex for constitutional judges. As ordinary judges they prefer to wait for formal legal change rather than to change the judicial practice by their own decisions (Marchenko 2011).

In the interpretive practice of the Russian Constitutional Court, the domestic law (Constitution, federal and regional legislation, case law of domestic courts, case law of the Constitutional Court and other high courts) is broadly used.

However, one can notice a tendency towards the development of references to the international law (international treaties (conventions, declarations, pacts, etc.), general principles, recommendations, case law), and human rights law in particular. For instance, the first reference to the European Convention on Human Rights and Fundamental Freedoms took place even before its official ratification by judgment on 4 April 1996 (Constitutional Court's Judgment 1996 №9-P). In this decision, the Court pointed out that freedom of movement is recognised by numerous international human rights acts including the European Convention. The international case law has been used more actively in argumentation of the Constitutional Court in last. This trend is particularly visible in cases when the Court is searching for a balance of public and private interests and seeks to strength its position with the support of the ECtHR decisions.

The frequent praxis of European human rights law can be examined in terms of the broader discussion of its own constitutionalisation. As C.J. Van de Heyning noted the European Convention on Human Rights might well become a "constitutional instrument of European public law" (Van de Heyning 2012, 128). The same the ECtHR's claimed in the case *Loizidou v. Turkey* from 1995 (no 15318/89, 23 March 1995, para 75). Wojciech Sadurski alleged that it has become fashionable to call the ECtHR as the "constitutional court" for Europe (Sadurski 2012, 1). Famous scientists and practitioners such as: Steven Greer, Luzius Wildhaber attempt to discuss this idea through the usage of the modern understanding of constitutionalism and constitutional order (Wildhaber 2007, 2012; Greer 2012). The extensive diversity of Member-states of the Council of Europe as a consequence of the accession of Central and Eastern European states is the biggest challenge of the enlargement of the ECtHR power. Additionally, the question of the *erga omnes* effect of the ECtHR's judgments remains open.

Russia ratified the Convention in 1998. The Russian Constitution in article 15.4 established the principle of the supremacy of the "universally recognized norms of international law and international treaties and agreements of the Russian Federation" under the rules "those envisaged by law". Alongside EU members, Russia is also a Member of the Council of Europe and practices the human rights' interpretation in the light of the Convention. The Constitutional Court of Russia in this sense plays the main role in the implementation of doctrines and interpretation from ECtHR to the constitutional legal order into state.

For Russian constitutional practice the question of references to international law is sensitive in light of the specific role of the national legal order in social organization. The relations between Western law (particular European human rights law) and Russian law are described by the President of Russian Constitutional Court Valery Zorkin as both cooperative and competitive (Zorkin 2013, 454). His view is inspired by German classic philosophy (G. Hegel, I. Kant), Russian legal philosophy (Boris Chicherin, Vladik Nersesyants) and modern philosophers such as Pierre Bourdieu and Jürgen Habermas. These philosophical

positions uphold the endeavor to argue that constitutional justice is a tool for finding the truth that not always correlates with the civil opinion. Moreover, the following claim is that this truth tends to be stable and should be protected by law. Consequently, for the purpose of achieving it, the judicial power must select "good" elements of social norms and other institutions and protect them. As the former judge of Russian Constitutional Court Tamara Morshakova said the Russian "tradition has the desire to have the truth and fairness in law" (Morshchakova 1995, 283–284).

This precise connection, between legal positivism and law, truth and fairness is carried forward and illustrated in the next section of this paper through an analysis of the case law in Russian constitutional practice.

3.1. The *Alekseyev* case

The Constitutional Court of Russia took decisions regarding the Alekseyev's lawsuit twice: once before the decision made by the European Court of Human Rights and once after it. Nonetheless, the approach as well as the central position of the Constitutional Court of Russia did not change. The following subsection of the paper will review the main facts of the *Alekseyev* case.

3.1.1. Facts and court's decisions in the *Alekseyev* case

Even though, in general terms the concrete circumstances of the cases in the two decisions of the Constitutional Court of Russia and the one of the ECtHR were different, for the purpose of this paper and our thesis, the analysis targets them as one entity. The reason for this unification is that the core arguments of petitioners and the substance of laws under proceeding did not change.

Mr. Nikolay Alekseyev is a gay rights activist in contemporary Russia. Together with other individuals he tried to organized marches, demonstrations and pickets in an effort: "to draw public attention to discrimination against the gay and lesbian minority in Russia, to promote respect for human rights and freedoms and to call for tolerance on the part of the Russian authorities and the public at large towards this minority".

The judgment on 19 January 2010 (№151-O-O) of the Constitutional Court of Russia found that the demonstrations and pickets in Ryazan organized by Nikolay Alekseyev did not receive permission from the local authority in 2009. Consequently, two other applicants were sentenced by the Ryazan district court to a fine, the reasoning being that they did a picket near a school with posters exhibiting slogans like: "Homosexuality is normal", "I am proud of my homosexuality". The legal ground of these limitations of freedom of assembly and expression in these cases was based on the regional law on administrative offenses and the law "For protection of morality of children in Ryazan region" which ban and punish the public actions for homosexual propaganda.

According to the facts in the second constitutional case of 24 October 2013 (№1718-O), Nikolay Alekseyev was sentenced for an administrative offense: he made homosexual propaganda in Saint Petersburg, where the regional legislation has similar provisions as the Ryazan laws. As an applicant in constitutional cases Mr. Alekseyev asked for the recognition that the regional laws are non-conforming to the articles 15, 17, 19, 21, 29 and 55 of the Constitution of the Russian Federation. The applicant argued that these legal provisions allow the authorities to discriminate persons who want to take part in public events on the basis of their sexual orientation.

Between these two constitutional cases, the ECtHR recognized that the ban of Alekseyev's organization of public events on the issues of homosexuality and human rights of gays, lesbians, transgender people in Moscow during three years were not in accordance with the Convention and ruled that there has been a violation of Article 11, 13, 14.

3.1.2. Methods and source of constitutional interpretation in the Alekseyev case

An interesting observation is that in the second constitutional case, the Russian Constitutional Court did not change its motivation and interpretation based on European human rights law even after the judgment of ECtHR. Moreover, the motivation by the state authority in the ECtHR Judgment and in the one by the Constitutional Court in these cases was similar. The Constitutional Court used the reference to judgment of ECtHR in its second decision in the *Alekseyev* case however, this reference did not follow the aim of the correction to the previous legal positions. This stability in the argumentation could be estimated as the will to secure the traditional social values and protect the Russian understanding of minorities' rights in a national context while considering the historical preconditions on the ground.

In the first Decision of 19 January 2010, the Constitutional Court used the reference to the Convention just nominally without any references to the ECtHR cases nor the Recommendations of the Council of Europe bodies in terms of the protection of the rights of people of homosexual orientation. The main sources of constitutional interpretation in this decision were the Constitution of Russian Federation (in a formal way) and regional laws. The later source was used in a teleological interpretation as an attempt of the Court to formulate the legislative aim for the restrictions of freedom of expression. This aim is the protection of children health and moral development. The Court concluded that the legislator of Ryazan region has established measures "aimed at ensuring the intellectual, moral, and psychological safety of children, including a prohibition to make public actions aimed at propaganda of homosexuality". Children are persons "who because of their age lack the ability to independently evaluate" information deemed harmful by the Court and legislator. Consequently, in the view of the Court, the prohibition

of such so-called propaganda cannot be considered as violating the constitutional rights of citizens.

Formal textualism in European human rights law's interpretation was founded on the discussion about possible limitations of the freedom of expression that might be necessary in a democratic society in order to uphold the interests of state security, territorial sovereignty, health and moral protection or justice, etc. The key element of these broader debate that was brought up in the motivation, charged with a highly volatile textual interpretation, is the "protection of morality". The Russian Constitutional Court had concluded that the limitation of public events that publicize or promote non-traditional sexual orientations is reasoned by the purpose to protect the society, especially the youth and children from the information that might be of harm for morality, and which try to define-as the Court sees it-the wrong attitudes of "social equality of traditional and non-traditional marriage relationships". As a result the claim of Alekseyev in this case was rejected by Constitutional Court of Russian Federation because, in their interpretation, there was no unlawful limitation of human rights.

In the decision of the Russian Constitutional Court on 24 October 2013 a similar direction of using European human rights law was conferred (Constitutional Court's Judgment 2013, №1718-O). The main sources for interpretation were twofold: a regional legislation and the Constitution of the Russian Federation. These focused on the same aim as previously mentioned – to identify the purpose of the regional legislation that bans a public events that promote non-traditional sexual orientations in a positive light. On the other hand, the Court mentioned in its decision the judgment of ECtHR on 21 October 2010 and subsequently gave its interpretation: "All persons without reference to their sexual orientation are under the protection of the Constitution of Russian Federation […] and the Convention".

According to Russian Constitution, these points do not exclude the necessity to define the limitations of human rights while considering the balance of competitive constitutional values (art.17, 55). In this way the Constitutional Court of Russian Federation formulated an exception from the principle of non-discrimination. In essence, on the one hand there is the freedom of expression of minorities and on the other hand the need to uphold the morality of the majority (as well as some of their rights such as: the right to bring up children; the right of the protection of moral beliefs) – the second becomes more significant. The Court concluded that in the current historical and social conditions the majority interests and values can justify the exception from the principle of non-discrimination.

This motivation and the direction of pragmatic interpretation of European human rights law are interconnected with the government authorities' position in the ECtHR judgment under *Alekseyev* case. But there are some obvious collisions in the interpretations of the Constitutional Court's and the ECtHR. In paragraphs 78 and 79 the ECtHR had noted that the argument of government that "propaganda

promoting homosexuality was incompatible with religious doctrines and moral values of the majority and could be harmful if seen by children or vulnerable adults […] do not constitute grounds under domestic law for banning or otherwise restricting a public event". The ECtHR also stated that the government cannot "substitute one Convention-protected legitimate aim for another one which never formed part of the domestic balancing exercise".

The logic of the ECtHR was very clear: that for the acceptance and tolerance of a minority, the majority should permit them to express themselves. The role of government in this balance of interests and values is to protect the public order during such demonstrations, pickets, marches and other public events. Nevertheless, such logic was not a part of the motivation in constitutional cases in Russia.

Nowadays in the Russian regions the practice of the ban of homosexual public events is remains and is in accordance to the position of the Constitutional Court of Russia that has been described in this research. There are no alternatives for organizing of such public events – the ban is upheld without exception. An alternative that might lead to the achievement of the freedom of speech and of assembly for citizens like Alekseyev was absent in the argumentation of the Russian Constitutional Court. The Constitutional Court's decision was detected as institutional decision. This clearly constitutes an example of how this Court does not like to discuss the alternatives in sensitive questions because the truth should be one. This is so-called "magisterial" style of adjudication is typical for the Central and Eastern Europe (Mańko 2005, 542).

3.2. "Foreign agents' law" case

On 8 April 2014 the Russian Constitutional Court decided that the legal provisions about the recognition of the NGO which uses foreign financial resources and have a desire to act in political sphere as "foreign agents" is in conformity with constitutional principles and norms. The interpretation of European human rights law in relevant judgment is discussed in the upcoming section of this paper. This analysis is important because the ECtHR is working with the same case under "foreign agents' law" as a result of the common application from 11 Russian NGOs in 2013.

3.2.1. Facts and court's decisions in "foreign agents' law" case

In 2012 the Federal Assembly adopted the amendments to the Federal Laws "About Non – Governmental Organizations" and "About Civil Associations" regarding the new status for a part of NGOs in Russia which have been named in laws as "foreign agents".

According to Law, the NGOs that receive money or other property from foreign sources as well as participate (or have an intention to participate) in political activities on the territory of the Russian Federation shall be obliged

to apply to the Ministry of Justice for state registration as nonprofit organizations acting as the foreign agents.

In 2013 the Russian Ombudsman has prepared the application to the Constitutional Court of Russia for the protection of rights of NGO "LGBT – kinofestival Bok o Bok" and three citizens – the chairpersons of Russian NGOs: Kostroma Centre of Public Initiatives; Amur ecological club "Ylukitkan" (this part of application was rejected after the information about results of cassation by Amur Oblast Court); and the Association of NGOs "For protection of rights of voters "GOLOS". At the same time the three applications were separately submitted by three Russian NGOs' chairpersons however under the same question about the constitutionality of legal provisions of foreign agents.

The facts in the cases of applicants showed their participation (personal or collective) in political activity in Russia in different forms: public debates, roundtables, information on the web pages, meetings with members of parliament. These NGOs had used or just had the will (as "GOLOS") to use the financial support from foreign foundations.

Each of these chairpersons of Russian NGOs were punished or warned about future punishment according to the provisions of the Federal Laws "About Non – Governmental Organizations", "About Civil Associations" and Administrative Code of Russia (Article 19.34) because they violated the obligation to notify the government about their status as foreign agents (Constitutional Court's Judgment 2014, №10-P).

The claim of the applicants to the Russian Constitutional Court was based on the argumentation that such limitation of the activity of a part of NGOs in Russia is not conform to the Constitution of the Federation as it brings about discrimination and contradiction with the principle of the legal certainty. Moreover, the applicants argued about the potential disproportionate punishment for them for the violation of legal provisions. According to Administrative Code the minimal size of the fine is 100 000 rubles, around 1 700 dollars (art. 19.34 Administrative Code of the Russian Federation 2001, №195-FZ).

The Constitutional Court in the judgment of 8 April 2014 decided that the legal provisions of Federal Laws about foreign agent status are in conformity with the Russian Constitution because it includes legal certainty, legitimate aim and presume the *bona fides* for Russian NGOs as foreign agents. At the same time the article 19.34 of Administrative Code did not include the possibility for a lower limit of punishment in the case of minor offense and here it stated that it is not in conformity with the Constitution of Russia.

3.2.2. Methods and source of constitutional interpretation in the case of "foreign agents' law"

It is significant for the broader usage of international law in Russia that the 54-pages judgment of the Constitutional Court included multiple references to the ECtHR practice and Recommendations of the Parliament Assembly of the Council of Europe.

The paragraph 2 of the judgment of the Constitutional Court of Russia noted that the precedents of the ECtHR witnessed about the special meaning of the freedom of assembly in democratic societies and unreasonable limitation of it, has a negative impact on the NGOs activity and such practice is not conform with obligations of Member-States. In this paragraph the Constitutional Court also referenced one of the important Judgment of ECtHR in the understanding of the freedom of assembly – the case of *Jehovah's Witnesses of Moscow v. Russia* (2010). These references are doctrinally relevant and helped the Court to construct the framework for its decision. Moreover, in the same paragraph the Court also mentioned that the Article 11 of the Convention allows the limitation of the freedom of assembly in order to achieve several goals: state and social security; prevention of the disorders and crimes; for the recognition, respect and protection of rights and freedoms of others; protect the health and well-being and the satisfaction of the morality. An interesting contradiction to be observed is that while these provisions were used as an argument for the possible restriction of human rights, none of the previously mentioned purposes were actually proven to be at risk by the Russian Constitutional Court. Moreover, there is a lack of clarity in the judgment as to which one of these purposes they are referring, hence leading to a possible weakness of the decision itself.

The Constitutional Court used the reference to the European doctrine and precedents about legal certainty for the protection of the legitimate aim to secure public order from "foreign agent". The Court noted that the value phrase "foreign agent" is clear, well defined in law and adequate to the legitimate aim. In paragraph 3 and 3.2 the Constitutional Court relied on the Recommendations of the Committee of Ministers of 10 October 2007 with the Decision of the Committee of Ministers of the Council of Europe of 16 April 2003. The Court concluded that the European principle of the pluralism in legal regulation of NGOs status allows Russia to distinguish the NGOs who use the foreign support from those who are not.

In this judgment the Court paid much of attention to the purpose of legislator in the amendments to NGOs' legislation in 2012 (as a part of teleological approach). It pointed out that the construction "foreign agent" did not have a negative value from the state for such nonprofit organizations and follows the aim of financial transparency of political oriented activity in state. The simple way to prove the legitimacy of any law is to use the reference to the Preamble of the Russian

Constitution stating that there is one source of power in state – the people and the representatives in Parliament translate peoples' will to laws. The legitimacy of law is in legitimacy of Parliament. The same reasoning was included in the Courts' motivation in this case. There is no statistical information about public interests being infringed in the case of special status NGOs or any issues that might arise in terms of the communication between citizens and NGOs who are using foreign support. There is just statement that such problems have public policy meaning. Without any relevant information in this sense it is hard to find the evidence that such public policy meaning is not just masked interests of national elites.

The case of "foreign agents' law" in Russian constitutional practice shows that the Constitutional Court freely uses the legal formalism and rationality to achieve a "legitimate aim". However, the legal analysis of legitimacy of such aim is poor and looks toward substitution of social interests with states' goal that could be equal to powerful groups' interests.

CONCLUSION

The legal analysis of politically and economically sensitive questions is a difficult task on its own for constitutional judges, not mentioning that at the same time they are under political and social pressure. These circumstances partly represent the reasons why these judges are restricted in choosing of the constitutional techniques and methodologies. Nonetheless, in the Russian constitutional practice there are examples of enlargement in usage of the international law as a tool for constitutional interpretation. However, the set of developing methodological approaches is not fully implemented. The Constitutional Court relies on ideologies of formalism and rationalism as adapted to the current economic, political and social development in Russia. The Court follows the idea around one truth in constitutional cases with the presumption that this truth is included in the axiomatically legitimate aim of legislators of Russia.

Both Russian Constitution and European Convention on Human Rights include general and broad reservations for limitation of human rights. Thus the Russian Constitutional Court selects convenient (not necessary relevant) ECtHR judgements to justify legislative designs. Following the conventional obligations, the Constitutional Court denied that the minorities themselves are a threat to society. There are formal refusals to recognize the restrictions as such.

The findings in this article should not be a reason to judge the Russian Constitutional Court as underdeveloped in constitutional interpretation because during its twenty years' of activity many Western constitutional theories and techniques were implemented in practice. For example, this includes the partial implementation of the principle of proportionality and idea about the balance of public and private interests (Gadgiev 2004; Dolzhikov 2012).

Constitutional formalism in Russian legal practice is not unique and it shares similar evidence in Central and Eastern Europe where legal problems are simplified and restricted to legal collisions, legislators' will without correlation to social reality and context. Consequently, the Russian Constitutional Court used abstract and bold notions of social wills, social fairness, social interests, traditions as positive facts.

The legal formalism is a part of national constitutional identity's formation with one constitutional truth which the constitutional court can find. However, if the constitution is a civil agreement where in constitutional disputes there is no axiomatically right person for the constitutional court. While the courts focus for solutions, they might play the role of mediators. This idea is connected with future development of international human rights law and soft law regulation in this sphere. The mediation of the national and international interests, the interests of minorities and majorities, the interests of powerful groups and others is an intrinsic part of the constitutional justice mission.

BIBLIOGRAPHY

Anichkin, Yevgeny. 2010. *Preobrazovanie Konstitutsii Rossiyskoy Federatsii i razvitie konstitutsionnogo zakonodatel'stva v kontse XX – nachale XXI vekov: monografiya.* Barnaul: Altay State University Pub.

Baudoin, Marie-Elisabeth. 2006. "Is the Constitutional Court the Last Bastion in Russia against the Threat of Authoritarianism?" *Europe-Asia Studies* 58: 679–699.

Bowring, Bill. 2013. *Law, Rights and Ideology in Russia. Landmarks in the Destiny of a Great Power.* New York: Routledge.

Butler, William. 1991. *Basic Documents on the Soviet Legal System.* 2nd ed. New York: Oceana Pubns.

Dolzhikov, Alexey. 2012. "The European Court of Human Rights on the Principle of Proportionality in 'Russian' Cases". *TEISE* 82: 215–224.

Ebzeyev, Boris. 2000. *Kommentarii k postanovleniyam Konstitutsionnogo Suda Rossiyskoy Federatsii*. Volume 1. Moscow: Yurist.

Fogelklou, Anders. 2003. "Constitutionalism and the Presidency in the Russian Federation". *International Sociology* 18: 181–198.

Frankenberg, Gunter. 2006. "Comparing Constitutions: Ideas, Ideals, and Ideology – toward a Layered Narrative". *International Journal of Constitutional Law* 3: 439–459.

Gadgiev, Gadis. 2004. *Konstitutsionnye printsipy rynochnoy èkonomiki. (Razvitie osnov grazhdanskogo prava v resheniyakh Konstitutsionnogo Suda Rossiyskoy Federatsii).* Moscow: Yurist.

Gadzhiyev, Gadis. 1999. "Pravovye pozitsii Konstitutsionnogo Suda Rossiyskoy Federatsii kak istochnik konstitutsionnogo prava". *Konstitutsionnoe pravo: vostochnoevropeyskoe obozrenie* 3: 81–95.

Greer, Steven. Luzius Wildhaber. 2012. "Revisiting the Debate about 'constitutionalising' the European Court of Human Rights". *Human Rights Law Review* 12: 655–687.

Henderson, Jane. 2007. "The Russian Constitutional Court and the Communist Party Case: Watershed or Whitewash". *Communist and Post-Communist Studies* 40: 1–16.

Khorunzhij, Sergey. 2014. "Konstitutsionnaya ideologiya kak èlement pravovoy sredy". *Gosudarstvennaya vlast' i mestnoe samoupravlenie* 10: 3–5.

Kryazhkov, Vladimir. 1999. *Konstitutsionnoe pravosudie v subyektakh Rossiyskoy Federatsii: pravovye osnovy i praktika.* Moscow: Formula prava.

Mańko, Rafał. 2005. "The Culture of Private Law in Central Europe After Enlargement: A Polish Perspective". *European Law Journal* 11: 527–548.

Mańko, Rafał. 2013. "Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome". *Journal of Law, Literature and Culture* 7(2): 207–233.

Marchenko, Mikhail. 2011. *Sudebnoe pravotvorchestvo i sudeyskoe pravo.* Moscow: Prospect.

Morshchakova, Tamara. 1995. *Sudebnaya reforma: yuridichesky professionalizm i problemy yuridicheskogo obrazovaniya.* Moscow: Prior.

Nesmeianova, Svetlana. 2004. *Konstitutsionny sudebny kontrol' v Rossiyskoy Federatsii: problemy teorii i praktiki*. Ekaterinburg: Ural State Law Academy Publisher.

Pojarkov, Sergey. 2013. "Tsennostnye osnovaniya ideologii rossiyskogo konstitutsionalizma". *Konstitutsionnoe i munitsipal'noe pravo* 6: 18–20.

Polyakov, Leonid. 2007. "'Suverennaya demokratiya': politichesky fakt kak teoreticheskaya predmetnost'". *Obshchestvennye nauki i sovremennost'* 2: 59–68.

Richardson, James. Marat Shterin. 2008. "Constitutional Courts in Postcommunist Russia and Hungary: How Do They Treat Religion?" *Religion, State and Society* 36: 251–267.

Rosenfeld, Michel. 1998. *Just Interpretations: Law Between Ethics and Politics.* California: University of California Press.

Sadurski, Wojciech. 2012. *Constitutionalism and the Enlargement of Europe*. Oxford: Oxford University Press.

Scheppele, Kim Lane. 2003. "Constitutional Negotiations: Political Contexts of Judicial Activism in Post-Soviet Europe". *International Sociology* 18(1): 219–238.

Trochev, Alexei. 2011 *Judging Russia. The Role of the Constitutional Court in Russian Politics 1990–2006*. Cambridge: Cambridge University Press.

Van de Heyning, Catherine. 2012. "The Natural 'Home' of Fundamental Rights Adjudication: Constitutional Challenges to the European Court of Human Rights". *Yearbook of European Law* 31(1): 112–127.

Varga, Csaba. 2014. "The Changing Judicial Patterns in Central Europe". *Acta Juridica Hungarica* 55(2): 87–106.

Wildhaber, Luzius. 2007. "The European Convention on Human Rights and International Law". *International and Comparative Law* 56(2): 217–231.

Zorkin, Valery. 2013. *Pravo v usloviyakh global'nykh peremen: monografiya.* Moscow: Norma.

Internet sources

Belov, Sergey. 2014. *Soblyudenie sudami pravovykh pozitsy Konstitutsionnogo Suda RF, svyazannykh s tolkovaniem deystvuyushchego zakonodatel'stva.* http://monitoring.law.edu.ru/kategorii_del/processualnoe_pravo/soblyudenie_sudami_pravovyh_pozicij_konstitucionnogo_suda_rf_svyazannyh_s_tolkovaniem_dejstvuyuwego_zakonodatelstva/ [Accessed: 19.12.2016].

Matczak, Marcin. 2016. *Why Judicial Formalism is Incompatible with the Rule of Law*. https://ssrn.com/abstract=2831477 [Accessed: 29.06.2019].

Novosti «Èkha Moskvy». *Sud'ya Konstitutsionnogo Suda Anatoly Kononov pokidaet KS v nachale sleduyushchego goda*. http://echo.msk.ru/news/638554-echo.html. [Accessed: 19.02.2017].

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