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Publication date
2020

Published in
Central and Eastern Europe as a Double Periphery?

Link to publication

Citation for published version (APA):
Manko, R. T. (2020). Being Central European, or some reflections on law, double peripherality and the political in times of transformation. In Central and Eastern Europe as a Double Periphery? (pp. 17-44). Peter Lang.

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Abstract: To be peripheral means to be subject to the economic, political and – indeed – cultural hegemony of a certain Centre. Being peripheral means to suffer from symbolic violence, permanently running after the fetish of ‘modernisation’, permanently desiring to escape the curse of ‘backwardness’, permanently behind, permanently learning, and permanently emulating. How can a legal community, burdened by such symbolic oppression (self-oppression?), ascertain its pride, its prestige, its self-esteem? How can a society, and especially its elites, endure such long-term humiliation? Recent developments have shown that it can no longer. The apprentice of the demoliberal sorcerer has announced that he is quitting school and going his own way. Joining the crowd of cynically naïve liberals, mourning the ‘rule of law’ without much understanding of the reality (or refusing to understand it) is a road leading nowhere.

Keywords: Central Europe, double periphery, transformation, demoliberalism

1 The present chapter draws on my keynote lecture ‘Central Europe as a Double Periphery,’ delivered at the 11th CEE Forum in Bratislava (25–26 April 2019). I am grateful to all those who attended the plenary session and took part in the highly stimulating discussion which helped me clarify my ideas and arguments, and especially to Professor Tomáš Gábriš for the invitation. I would also like to thank Dr Przemyslaw Tacik (Jagiellonian University) and Anna Piekarska (Adam Mickiewicz University) for reading and commenting on an earlier version of this chapter, and thereby helping me in developing the argument in its current form. All views presented here are purely personal and expressed in my academic capacity; they do not purport to represent the position of any institution or organisation.
1. What do we have in common? Central Europe as a juridical space

At first sight, there might not be anything homogenous about the countries of Central and Eastern Europe (CEE), save for being a ‘no man’s land between West and East’ (Sowa 2011, 15). Each has its own language, its own legal tradition and its own sovereign statehood. Some legal systems have been inspired by the French legal tradition, as the Romanian one, others by the Austrian legal tradition, as the Czech or Croatian one, yet others draw on the German legal tradition and its refined 19th-century Pandektistik, which has inspired lawyers in Hungary or Latvia. And yet, all these countries do have a lot in common in terms of legal culture, in line with the fact that ‘[t]he identification of Central-Eastern Europe has a deep civilisational-culture sense’ (Sowa 2011, 16). First of all, their independent statehood has a much shorter history than in the case of most Western European countries. True, the Polish statehood created in 1918 can boast pre-1795 traditions, and Hungary’s independence from the Habsburgs was preceded by the existence of a dependent and earlier independent Kingdom of Hungary in the past. Perhaps the longest uninterrupted form of statehood can be identified in the case of Romania, which, created as a state in 1881, was the result of a merger of two pre-existing principalities, Valachia and Moldavia, which had existed as state units in an uninterrupted manner for centuries. But Romania or Hungary are rather the exception than the rule. Latvia or Estonia, Slovakia or Slovenia are all countries which have emerged as nation states for the first time in the 20th century. This rather short and limited traditions of statehood are of no minor importance for legal culture. Even if state and law are not bound in their essence (law can exist without the state, and a state can be lawless), nonetheless for all practical purposes during the last two centuries the signifier ‘law’ has referred mainly to the law of a state or, more recently, of a supranational organisation of states (yet that law is still enforced by state courts, which should not be forgotten). Therefore, the fact that in the West of Europe states have existed for a much longer period (sometimes they were unified, as in the case of Italy or Germany, in the late 19th century) has a bearing on legal culture. Perhaps the most characteristic examples are the United Kingdom and France, on one hand, and the newly created Central European states, such
as Slovakia, Slovenia or Estonia, on the other hand. The contrast between the ‘ongoingness’ of legal culture (Zimmermann 1995, 84) and the continuous presence of a ‘living’ legal tradition, in the case of the West, and the incessant ruptures and changes, in the East, could not be more pronounced. This brings me to the second element which unifies all CEE countries: the massiveness of legal borrowing. Of course, it is true as Alan Watson has stated that legal borrowing (legal transplants) is a vehicle of legal development and that it is ubiquitous (Watson 1993[1974]). But whereas in Western Europe we can speak of borrowing from the past (Roman law) and the circulation of legal models, in CEE one can speak almost only about the influx of legal transplants (Mańko 2019a, 69–70).

The relatively short traditions of a national legal system and national legal culture, and the dominance of legal transfers are two factors common to all CEE countries. The transformation from state socialism to capitalism around 1989–1990 and the membership in Western European supranational forms of legal integration from 2004 onwards not only did not weaken these tendencies, but only led to their strengthening (Mańko 2017; Tacik 2019, 35).

2. The Curse of Formalism

There are of course other characteristic features of legal culture that could be identified. One of them is ultraformalism (Kühn 2011) or hyperpositivism (Mańko 2013), a phenomenon characteristic of judicial culture and methods of legal interpretation which places an excessive emphasis on formal law (rather than on its goals and broader context), and within formal law – on the letter of the statute, rather than on more sophisticated aspects such as general principles, systemic aspects, constitutional axiology, proportionality or balancing. Of course, to give a definitive answer about CEE formalism and comparing it to Western Europe (especially to such ‘suspects’ of formalism as France) (cf. Cserne 2015; Mercescu 2020, 15) would require a large-scale international research project which would dig through tens of thousands of judicial decisions from many European countries. Before such a project (which is, for that matter, a very desirable idea) is accomplished, we can rely only on anecdotal evidence, personal experience (as lawyers and as justiciables), as well as reflections of
experienced judges and lawyers, such as Professor Zdenek Kühn from the Czech Supreme Administrative Court (Kühn 2004, 2011), Professor Ewa Łętowska, former judge at the Polish Supreme Administrative Court and former justice at the Constitutional Court (Łętowska 1997, 2002) or Professor Alan Uzelac, an experienced Croat practising lawyer and distinguished legal academic (Uzelac 2010). Their accounts, based on their own first-hand experience as judges or lawyers, and their own knowledge of domestic and foreign legal practice, concur in pointing out that Central Europe is formalist. In our countries, judges prefer to dismiss cases on formal grounds, avoid taking courageous interpretive decisions and have a tendency to hide behind institutions, preserving their own anonymity as cogs in a bureaucratic machine of the judiciary.\footnote{The same seems to be true for Russian legal culture too (Antonov 2018, 486; Rudt 2019, 176).} Therefore, to the two features identified above, we can safely also add hyperpositivism (ultraformalism) as a specific trace of being Central European in the juridical field.

I will stop with these three features, which characterise the juridical in its inner dimension, without going to broader sociological considerations, such as the role of law and courts in society, social trust in the judiciary or its prestige in society. These are important issues, but they are not crucial for addressing the key question of the present chapter, namely the status of double peripherality.

3. Peripherality as status

Studies of peripherality (e.g. Wallerstein 2004; Zarycki 2016a) are characterised by introducing an important binary dimension: core (centre) – periphery, which is enriched by adding a ‘semi-periphery’ in between them (Zarycki 2016b, 105). As regards double peripherality, the concept used by sociologists is that of an interface periphery, that is a certain territory (with its society, economy and culture) which is exposed, at the same time, to two centres, being precisely a double periphery (Zarycki 2016b). We should note that for most of the time Central Europe was not an interface periphery, but a simple periphery, that is it was peripheral
vis-à-vis one single centre (or ‘core’). Referring only to the modern period (from the beginning of the 19th century), we can safely claim that the Central European territories of the Austro-Hungarian Empire, such as the Polish-Ukrainian Galicia-Lodomeria, the Czech Bohemia and Moravia, the Hungarian, Slovak, Croat and Romanian lands of the Crown of St Stephen – were all peripheral vis-à-vis Vienna, or German-speaking Austria, as the centre of the Empire. The lands of the Russian Empire inhabited by Poles, Lithuanians, Latvians and Estonians – its westernmost provinces – were peripheral vis-à-vis Saint-Petersburg, and so forth. Two important notes arise in this context. First, some of the areas mentioned here, such as the Kingdom of Bohemia in the Habsburg Empire, or the Kingdom of Poland in the Russian Empire, or the Baltic provinces, were actually quite well-developed economically and socially, and their peripherality was, therefore, limited to the political dimension. Second, the centres (cores) themselves – Vienna or Saint-Petersburg – did not enjoy the status of the global core, rather a semi-periphery (German-speaking parts of Austria or Russia [Turkowski 2016, 150]). This brings us to the question of double peripherality or ‘interface peripherality’ (Zarycki 2016b, 107) which would be identified already in that period, namely through the (semi-)peripherality of the relative ‘core’ towards which Central Europe itself was peripheral.

In terms of legal culture, the questions are even more complicated. Let us take the example of the Kingdom of Poland, initially a sovereign, later autonomous, and later not even an autonomous entity within the Russian Empire (or, as the Russians nicely call it, в составе Российской Империи). It stretched over land corresponding roughly to today’s central and eastern Poland, with such cities as Warsaw, Łódź, Kielce and Lublin. The origins of this entity date back to 1807, when Napoleon created the Duchy of Warsaw and introduced French law, including the famous code civil. Subsequently, the Duchy (transformed into Kingdom in 1815) could maintain its French legal system, although certain areas, such as family law, were recodified (1825) and later replaced by Russian law (1836). The same applied to procedural law, which was replaced by Russian-prepared codes in 1864, when the Kingdom had been stripped of its autonomy as a reaction to anti-Russian uprisings waged by short-sighted local radicals. In terms of peripherality, the Kingdom of Poland, with a French-Polish-Russian legal system,
was indeed a *peripheria duplex*, following the case law of the French *Cour de cassation* (reported in Polish legal press) and, as from the 1870s, the
the Saint-Petersburg *Пра̀вову̀щий Сенат* (the Governing Senate) to which
appeals in civil, criminal and administrative cases would be launched after
the Kingdom had lost most of its judicial autonomy.

The creation of independent Central European countries in 1918 –
Poland, Czechoslovakia, Hungary, Yugoslavia, Latvia, Lithuania and
Estonia – only superficially concluded the region’s peripherality. True,
first moves towards becoming a core for oneself were established: The
Polish-Czechoslovak and Polish-Yugoslav attempts at joint codification
are remarkable in this respect. Judicial decisions would no longer be sub-
ject to appeals to Vienna, Saint-Petersburg or Berlin.

But then, following World War II, the fate of Central Europe was sealed
at Yalta – ‘the periphery of western capitalism became a periphery of the
Soviet Empire’ (Giaro 2013, 45). The Baltic states became (in 1940, and
then again in 1944) directly part of the USSR, whereas other countries
of the region were part of the Soviet sphere of influence, just like Greece,
Italy, West Germany or France became part of the American sphere of
influence. This had an immense impact not only upon politics and the
economy, but also on legal culture. In a sense, the creation of the East-
West divide in Europe led to the consolidation of Central European legal
identity, putting all the former peripheries of Vienna, Berlin and Saint-
Petersburg once again in a peripheral position, but this time towards state-
socialist Moscow. Legal models originating in the USSR, some of them
with pre-revolutionary traditions, started flowing steadily from the East
to the West. Legal institutions like the *nadzornaia instantsiya*, the omnip-
otence of a centralised prosecution service, authorised to intervene even
in civil and administrative proceedings (Mańko 2007), Soviet civil law
institutions, such as stratified property, planned contracts or special legal
capacity (Mańko 2015a), but also institutions of public law, such as the
uniform character of state power, the system of democratic centralism,
the superiority of the Party and its decisions over the *lex scripta* (Antonov
2018) – all this became part of the legal heritage of Central Europe for
over four decades. Of course, differences existed. Czechoslovakia and
East Germany were most advanced in terms of creating socialist civil
codes (Giaro 2013, 47–48), while such countries as Poland, Hungary and
Romania preserved more traditional forms of private law. But the common elements prevailed, giving rise to what Western observers described as the ‘Socialist Legal Family’ (David and Brierley 1968; Zweigert and Kötz 1987, cf. Uzelac 2010; Mańko 2013).

Then came the demise of actually existing socialism, either negotiated and civilised, as in Poland with its Round Table Agreement (Tacik 2020, 161), followed by an accelerated implementation of the ‘shock therapy’, or brutal and bloody, as in the Romanian case. One of the countries of the region, Yugoslavia, plunged in a bloody bath of ethnonationalist fratricide that took down the whole country leaving a deeply damaged society, now divided into small nation states, which, with the exception of Serbia and Montenegro, had none or rather distant and limited traditions (Croatia) of independent statehood.

4. Of blackouts and pycnolepsy, or on the subtle art of forgetting

Today, the legacy of the Socialist Legal Family is deliberately forgotten if not downright repressed in what Tomasz Giaro described with the metaphor of a ‘blackout’ (Giaro 2013, 45–48), that is a state when the subject not only loses consciousness, but even does not recall any memories, following an excessive consumption of alcohol. Cosmin Cercel, in turn, put forward the more philosophically grounded metaphor of pycnolepsy (Cercel 2016), drawing on the erudite scholarship of Paulo Virilio. Pycnolepsy is a state in which the subject also loses memory and cannot recall any past events, but at least this is not linked to excessive alcohol consumption. After all, the period of actually existing socialism was not one big binge-drinking party, contrary to what Giaro’s metaphor might suggest. In terms of civilisation, it was probably the greatest attempt at modernising the region of Central Europe, characterised by an unprecedented advancement of society through free education and healthcare, and of the economy through planned industrialisation (Żółtkowski 2012; Leszczyński 2013; cf. Leder 2019). To cite just the Polish example, one can safely say that a backward rural society, as Poland was between 1918 and 1939, was transformed in the 1950s and 1960s into a modern industrial economy, analphabetism was eradicated, famine – a plague of the
1930s – disappeared and a massive housing programme enabled millions of Poles to move from dilapidated wooden cottages into modern blocks of flats, not worse than the social estates in the UK or France.

In legal terms, the period of actually existing socialism had its peculiarities and cannot be said to be a mere continuation of the pre-1939 situation. The legal transfers from the USSR, mentioned above, tell only part of the story. More importantly, the place of both public and private law was quite different in comparison to the capitalist period. Once the state took over key sectors of the economy, such as medium and large industry, banking and retail, the role of private law instruments – such as contract law or company law – greatly diminished, giving way to public economic law. This was reflected on the procedural side, too. Civil courts would now focus on family disputes or small property disputes between individuals, whereas the bulk of important economic cases was taken over by the State Economic Arbitration (the arbitrazh as, using the Russian term, legal Sovietologists would say).

The restoration of capitalism at the turn of the 1980s and 1990s undoubtedly took the legal community by surprise. However, one cannot say that it was completely unprepared in intellectual terms. To take the Polish example, one can point to the fact that the Commercial Code of 1934 was still partly in force, and with the transformation it was fully restored. The Civil Code of 1964, although heavily influenced by socialist legal institutions, still contained a capitalist private law core, preserved by the Polish private law dogmaticians who prepared its draft. All in all, the Civil Code was not that different from the Western capitalist laws it was modelled on, such as the German BGB and the Swiss ZGB. At the same time, it was rather different from the Czech Civil Code or Economic Code or the East German ZGB. In a sense, therefore, the bourgeois private law had survived 45 years of actually existing socialism and could be taken back into the light without much effort. Public law was a more complex issue. If administrative law is concerned, Poland had a very high quality Code of Administrative Procedure, enacted in 1960, which ensured the protection of private interest; and since 1980 Poland already had judicial review of administrative acts, with the Chief Administrative Court entitled to quash administrative decisions if they were illegal. Therefore, in the sphere of general administrative law, the legal system was quite prepared
for the transformation. In the sphere of constitutional law, one can point to the creation of the Constitutional Court in 1986 (Sulikowski 2016, 20), and the Ombudsman in 1987. However, key elements of the Rechtsstaat would be introduced only in 1990, and for want of domestic traditions (Poland did not have a democracy nor ‘rule of law’ before 1939, save for a very short period), German models would be imported. The Polish Constitutional Court after 1990 drew very strong inspiration from the case law of the German Bundesverfassungsgericht and from German constitutional doctrine. Many concepts, like those concerning ‘fundamental rights’ and their limitation, were literally copied from German models (cf. Tacik 2020, 162). The ‘rule of law’ ideology was a novelty, but the Constitutional Court became a ‘sacred cow’ (Sulikowski 2016, 21) and enjoyed a special status (Sulikowski and Wojtanowski 2019, 186–187).

The period between 1990 and 2004 could have been a period of relatively independent development of legal culture in Central Europe, but it was not. Reception dominated over domestic legal developments, and the prospects of integration with Western European supranational structures only strengthened those tendencies (Örücü 2007, 176; Tacik 2019, 35). However, there was a consensus in place, which did not allow to question this direction of development. The judiciary’s role was to rubber-stamp neoliberalism (Sulikowski 2016, 28). In the words of Cosmin Cercel:

> 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 (...). With the consensus that markets are the depository 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 economic actors. (Cercel 2019, 25–26)

Adam Sulikowski, in turn, notes that:

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3 A topic which remains to be researched is the role of the “rule of law” ideology in the subjection and conquest of Central Europe by Western capital and its imperial structures of domination. Indeed, as Ugo Mattei and Laura Nader point out: “The transformation of the rule of law ideal into an imperial ideology has accompanied the move from a need of social justice and solidarity towards the capitalist requirements of efficiency and competition” (2008, 3).
After 1989 the Polish elite had become part of the neoliberal Western world and accepted the imported economic system as universally true. (...) A critique of law was regarded as something useless or even dangerous, something that only impedes the correct development of the country, something that might provoke those people who are irrational and do not understand the *raison d’etat*. (…) The [Constitutional Court] had become not only a voice of the pro-Western political elites but also the guardian of Catholic influence. (…) This system was strongly supported by the constitutionalists and other scholars. (…) The Polish mainstream “knowledge-power complex” was formed around the belief that “universal Western liberal modernity” was all we needed in Poland. (Sulikowski 2016, 25–27)

This was the state of ideological hegemony prior to the arrival of populism.

5. ‘A great escape from the West’: Central Europe’s third transformation and the withering away of liberal legality

It was only with the arrival of right-wing populism that the consensus started to break down. In Poland, the leadership of Jarosław Kaczyński opened the perspective of a critique of legal transfers, especially in the sphere of public law. Populism has led to what Medushevsky describes as the ‘retraditionalisation’ of constitutional law in the region (Medushevsky 2018a; 2019b); however, we have to keep in mind that the traditions in the region are neither liberal nor democratic. As I have mentioned already above, when World War II broke out, Poland was an authoritarian country, ruled by a clique of military politicians (Garlicki 2008). The 1935 Constitution⁴ did not even provide for the division of powers, effectively sanctioning a monocentric and autocratic political regime, where the ‘uniform and indivisible state power’ was concentrated in the hands of the President (Article 2(4)). Candidates for elections could not be put forward by citizens,⁵ effectively eliminating pluralism. After World War II, these authoritarian traditions were simply continued, although initially

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⁴ Ustawa Konstytucyjna z dnia 23 kwietnia 1935 r. [Constitutional Act of 23 April 1935], Dz.U. no. 30, item 227.
⁵ See Articles 34–50 of the Ustawa z dnia 8 lipca 1935 r. - Ordynacja wyborcza do Sejmu [Act of 8 July 1935 – Electoral Law of the Sejm], Dz.U. no. 47, item 319. The rules were even less democratic in the case of the Senate – see Articles 14–39 of the Ustawa z dnia 8 lipca 1935 r. - Ordynacja wyborcza do Senatu [Act of 8 July 1935 – Electoral Law of the Senate], Dz.U. no. 47, item 320.
through a doublespeak rhetoric (formally there was pluralism, but de facto it was excluded), but in the 1980s the letter of the law and practice once again coincided (the electoral laws specified which organisation may put forward candidates to parliament and local councils) (Mażewski 2011, 68–78). Even the hegemonic role of the communist party and the eternal alliance with the USSR were codified in constitutional rules. Therefore, if we speak of constitutional traditions, they are authoritarian, not liberal, democratic. The ‘rule of law’ is not a concept invented in Poland, Czech Republic or Hungary, but it is a legal transfer, which came to the region from the West, or, more precisely, which was imposed. After all, as Mattei and Nader point out:

> Western countries have developed a strong identity as being governed by the rule of law, no matter what the actual history or the present situation might be. Such identity is obtained – as is the usual pattern – by comparison with “the other,” almost invariably portrayed as “lacking” the rule of law. (2008, 16)

If Central Europe wanted to become part of the mythical ‘West’, as it did three or two decades ago, it had no choice but to succumb to its ideological narratives, including the ‘rule of law’ and ‘good governance’ (cf. Mattei and Nader 2008, 15). Today, with the neoauthoritarian tendencies, these legal transfers are in the process of being rejected. The legal culture treats them as foreign bodies.

Ziemowit Szczerek, one of the most inspiring Polish writers of the young generation, in his novel Międzymorze (‘Intermarium’) has recently recalled the two ways of perceiving Central Europe in the eyes of the West – Ruritania and Borduria (Szczerek 2017, 337–343). Ruritania (a term invented by Anthony Hope) stands for a mythical, rustic and backward Central Europe, which is docile towards Western influence, but at the same time sheepishly naive. Borduria (a term invented by Hergé), in contrast, stands for Central Europe which rejected ‘Western values’, and went down the track of nationalism and authoritarianism. ‘Regardless of what it was, Ruritania did not want to be Ruritania’, writes Szczerek, adding that: ‘It is understandable, who would want to be it’ (2007, 339). As a result, ‘Borduria returned’, and in the Intermarium region ‘a great escape from the West is taking place’ (Szczerek 2007, 343). When back in 2002 Radoslav Procházka entitled his book on constitutional courts in Central Europe resorting to the characteristic idiom Mission Accomplished
(Procházka 2012), he seemed to suggest that the well-behaved Ruritania was addressing, in a neocolonial gesture of homage, the Western big Other (cf. Reid 2019, 113). At that time, early on in the post-socialist transformation, nobody expected that the idyllic picture of Westernized Ruritanian neophytes, where legal transfers from Western Europe – constitutional courts, judicial independence and the ‘rule of law’ functioned ideally – would soon be disrupted by the return of old Bordurian demons. Today, the West’s mission civilisatrice seems to have been unsuccessful, at least with regard to some Central European nations. The liberal vision of the ‘rule of law’ as something essentially apolitical shattered into pieces before our eyes. The myths have fallen, and the political – as an inescapable dimension of social antagonism – has been laid bare (Sulikowski and Wojtanowski 2019). The role of the judge, initially understood according to the classical formalist paradigm as a faithful interpreter and ‘applicator’ of statutes, first gave way to a liberal ‘functional formalism’ of the Constitutional Court. Now, following the constitutional crisis of 2015–2016 in Poland, neither myth holds. As Przemysław Tacik observes:

The Constitutional Court, previously hailed by the liberal doctrine as a stronghold of impartiality, independence and loyalty to the Constitution (…) was now denounced — in a vulgar version of the typical critical approach to law — as elitist, postcommunist and politicised. (2020, 168).

Following the so-called takeover of the Constitutional Court, its role changed. It became ‘loyal’ to the coalition, endorsing its key decisions and effectively desisting from protecting the constitutional order against unconstitutional measures (Tacik 2020, 167).

There can be no doubt that Central Europe is currently going through its third transformation, if we take the transformation from capitalism to state socialism as the first one (effected in the later 1940s) and the transformation from state socialism to liberal-democratic capitalism (effected in the early 1990s) as the second one. This third transformation is leading from liberal democratic ‘rule of law’ capitalism to capitalism ‘with Central European values’, to paraphrase the notion of ‘capitalism with Asian values’ (Žižek 2018). These ‘Central European values’ are, of course, ‘conservative-clerical’ and ‘authoritarian’, including especially a ‘revision of the principle of division of powers and the concentration of competences in the hands of the executive’ (Medushevsky 2018, 131). Of
course, at this point we do not know where this transformation will lead, but if the current direction is upheld, we can safely speak of a rejection of Western legal transfers in the field of public law, especially constitutional review and liberal ‘rule of law’ more in general. The ‘Central European values’ are Bordurian *par excellence* and are the embodiment of anti-liberalism in all spheres. They include an ‘illiberal democracy’ (Sadowski 2020, 176–177) but also a very illiberal approach to social life and culture, especially in the sphere of human sexuality and reproductive rights, what Medushevsky describes as ‘conservative-clerical values’ (2018a, 131). At the same time, however, the tenets of capitalism are not being questioned (Tacik 2019, 35–36).

6. **A look into the future**

The current situation in CEE is characterised by the withering away of liberal legality (Medushevsky 2018a, 114; Cercel 2019, 21; Tacik 2019, 41), that is the breaking down of a given Symbolic order (in the Lacanian sense). As Cosmin Cercel openly characterises the situation:

> Authoritarianism is here and most likely here to stay, and legality does not have any necessary connection to democracy and liberalism as our colleagues acting in the populism and constitutionalism and democracy cottage industry would have it. (2020)

This opens up new possibilities. One of them is the simple ‘retraditionalisation’ of our constitutionalism (Medushevsky 2018b), that is a simple transition towards authoritarianism, effected in a subtractive manner (*status quo* minus liberal ‘rule of law’). However, the breakdown of liberal legality opens up also new possibilities which, I think, could

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6 As Medushevsky correctly affirms, the point of no return is the moment when the principle of political pluralism is rejected or can no longer be fulfilled (Medushevsky 2018a, 132–133).

7 Lacan identifies three orders: the Symbolic, the Imaginary and the Real. The Imaginary concerns the illusory surface of phenomena which conceals their inner structure, and is linked to our self-image. The Symbolic order, in contrast, is the big Other, that is the expectations of society towards the subject. The Real is what escapes symbolisation, that is cannot be verbalised, described in the available language (ideology).
be used to build something new. I have two specific ideas in mind. The first one is the construction of a Central European school of critical legal thinking. The ‘masks have fallen’, as Sulikowski and Wojtanowski (2019) write, and the smokescreen of liberal legal mythology no longer covers the political. Our reaction to right-wing populism should not be the defence of the ‘trenches of the Holy Trinity’ of liberalism, but rather the embrace of a left-wing populism, as advocated by Mouffe (2018). The weakness of the liberal intellectual set-up has never been greater since 1989, and such an occasion may not repeat itself in the foreseeable future.

Indeed, the development of Central European critical legal theory has recently accelerated. As the founding moment of a certain movement one can indicate the 1st International Workshop on Law and Ideology (the first and only truly critical workshop of this series) which ultimately led to the publication of a collective volume of a highly programmatic nature: *Law and Critique in Central Europe: Questioning the Past, Resisting the Present* (Mańko, Cercel and Sulikowski 2016). It is precisely there that we formulated the idea that Central Europe is a *peripheria duplex* (ibid., 3). In 2015, the University of Wrocław hosted the Critical Legal Conference (CLC) – the main annual gathering of English-speaking critical legal scholars. This was the first time that the CLC was held in Central Europe and the importance of this event cannot be overestimated. A selection of papers from the CLC 2015 came out last year (Bieś-Srokosz, Mańko and Srokosz 2019). The most recent expression of Central European critical legal theory is a special issue of the *Folia Iuridica* journal (Mańko 2019a).

7. **The idea of Central European legal identity and the importance of research networks**

The second idea I have in mind is a deepened reflection upon Central (and Eastern) European legal identity. We are, after all, ‘a post-colonial space which should reclaim the right to do things for oneself’ (Mercescu 2020, 16). In the current atmosphere of an upheaval, we could take a step back and think more deeply on what we have in common as Central Europeans, following the ‘logic of distinctiveness’ (Mercescu 2019, 52). I have tried to indicate some areas of a common past and common legal culture in the first section of this chapter. I think we ought to make them a subject of in-depth
research, involving transnational teams. Even if we agree with Alexandra Mercescu that ‘Central and Eastern Europe remains too heterogenous for one to be able to speak of a common culture’ (2019, 57), the same probably obtains for Europe as a whole. Nonetheless, in her view ‘it is possible to work with Central and Eastern European cultural resources’ (ibid.) The same applies to the notion of a legal family: Even if we do not accept the plea for recognising a fully fledged ‘Central European Legal Family’ (Mańko, Škop and Štěpániková 2016), we can nonetheless speak of a Central Europe as a ‘legal union’ (Mańko 2019, 74–75; cf. Nazmutdinov 2019, 90–91) or perhaps of a ‘legal space’ (Mańko 2019, 75–76). Balázs Fekete highlights the importance of Central European legal mentality (2011, 47–49), and together with Katalin Kelemen puts forward the idea of Central Europe being an ‘autonomous group’ within the Civil Law Tradition (Fekete and Kelemen 2014, 222). These vexed questions are open to debate and cannot be resolved in national isolation; rather, they should be subject to transnational, pan-Central European research fora. The idea of a Central (and Eastern) European legal identity, or shortly ‘CEE legal identity’, can be conceived as an antidote against the narrow nationalism that is currently waking up. Too different from the West to identify with Western Europe, we are still similar enough among ourselves to overcome ethnic divides in the broader space between the Baltic, Black and Adriatic seas that we have shared for centuries, despite differences and even conflicts.

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8 A first step in this direction could be the project “European Constitutional Imaginaries: Utopias, Ideologies and the Other” led by Professor Jan Komárek, a Czech scholar now based at the University of Copenhagen, who intends to research Central European “constitutional imaginaries.” See the website of the project: [https://jura.ku.dk/icourts/research/imagine/, accessed 29 March 2020].

9 Cf. Cercel 2020: ‘What becomes apparent is the resilient ideological trope of the nation as a distinct organic unity grounded in both blood and soil, constructed and rooted in the long-standing effects of the revolutionary defeats and derails of the past centuries. This opiate with its particular strength, surviving as an undead, as precisely the shadowy double of the globalized capital and never actually challenged as such, is not some extraneous alien by-product of crises befalling otherwise rule-of-law centred democracies, let alone some trick employed by power-thirsty demagogues. Rather it has always been at the core of our constitutional arrangements, beyond pledges, safeguards and supranational, regional or international scrutiny.’
In this respect, the importance of Central European research networks cannot be underestimated (Mercescu 2019, 55). Currently, there are three such networks, which I mention here in chronological order of their creation: the Central and Eastern European Network of Jurisprudence (‘CEENJ’), established in 2005 in Pécs, Hungary; the Central and Eastern European Forum of Young Legal, Political and Social Theorists (‘CEE Forum’), established in 2009 in Katowice, Poland, and the newest one, and at the same time most inclusive and versatile, that is the CEE Network of Legal Scholars (‘CEENELS’), established in 2015 in Brno, Czech Republic. Each of these three networks has different characteristics, appeals to different milieus of legal researchers and has different goals. The narrowest focus of appeal is that of CEENJ, a network clearly limited to legal theorists (Mańko 2018, 97). The focus of the CEE Forum is broader in terms of subject matter (not only legal theorists, but also social theorists and political theorists), but at the same time it is addressed mainly to young scholars, which – 10 years later – also includes young full professors, but still it is a rather narrow area of appeal. Its subject-matter limitation is also due to its focus on theory, thereby excluding legal historians, empirical sociologists of law, comparatists and dogmaticians. Finally, the CEENELS is a network that is addressed to all legal scholars, and indeed the only CEE legal network open not only to legal theorists, but also legal historians and representatives of the legal dogmatics – specialists in private law, administrative law, criminal law and constitutional law. As a result, it has chances to establish itself as the broadest network.

Whereas the 12th CEENJ conference in Riga in 2017 gathered 62 participants (Mańko 2018, 97), the subsequent ones have been reduced to only 32 participants,\(^\text{10}\) effectively transforming the CEENJ into a small specialised workshop limited to legal philosophers. In contrast, the CEE Forum has grown from only 34 participants at the 1st conference in Katowice to as many as 72 at the 10th edition in Timișoara (Fekete 2020, 29), which shows a clear tendency towards inclusiveness and openness. The CEENELS conference initially hosted some 40 participants at its 1st and 2nd editions (Zomerski 2017), but the number later grew considerably,

\(^{10}\) See the call for papers for the 13th edition held in Zagreb: https://ivronlineblog.files.wordpress.com/2018/02/ceenj_cfp.pdf.
exceeding 60 participants at the 3rd edition in Riga (Szymaniec 2018), and reaching 71 participants at its latest, 4th edition that took place at the Higher School of Economics in Moscow (Poldnikov 2019b). The 5th edition was to take place in Debrecen in June 2020, but has been postponed to 2021.

More interesting than the sheer number of participants is the intellectual journey each of these conferences has made. In this respect, CEENJ is a static one: Each year’s topic is simply defined as ‘Jurisprudence in Central and Eastern Europe: Work in Progress’ meaning that no *leitmotiv* is selected. However, given the topics of the 12th edition, which I have attended, it is visible that there is no attempt to focus on typically Central European questions; rather, a general analytical jurisprudence approach, emulating the Western mainstream, dominates (cf. Mańko 2018, 101). The CEE Forum, in turn, initially focused on rather abstract topics, such as ‘separation of powers’ (5th edition), ‘important features of law’ (6th edition) or even ‘global governance’ (7th edition), before making a turn towards more CEE-focused topics – ‘Central and Eastern European Socio-Political and Legal Transition Revisited – Theoretical Perspectives’ (8th edition), ‘Constitutional Memory and Social Identities in Central and Eastern Europe’ (10th edition) and ‘Central and Eastern Europe as a Double Periphery?’ (11th edition in Bratislava). A characteristic feature of the CEE Forum, which unfortunately has not been followed by CEENJ or CEENELS, is the habit of publishing conference proceedings in book form. A special series, called the ‘Central and Eastern European Forum … Yearbook’, has been established for this purpose at the German publisher Peter Lang (Fekete 2020, 30–31), thereby ensuring a global distribution and a high-end quality of publication.\(^{11}\)

As far as the CEENELS network is concerned, the focus of its annual conferences presents an interesting pattern of development. The first and inaugural conference of this informal network, hosted by the Masaryk

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11 Until now eight volumes have been published, and especially the last two ones have provided an important insight into Central European legal identity – the seventh volume on *Central and Eastern European Socio-Political and Legal Transition* (Fekete and Gárdos-Orosz 2016) and the most recent one on *Constitutional Identities in Central and Eastern Europe* (Mercescu 2020b).
University in Brno, the capital of Moravia, in April 2015, was devoted to 25 Years After the Transformation: Law and Legal Culture in Central and Eastern Europe Between Continuity and Discontinuity (Zomerski 2016). With distinguished keynote speakers – Professors Czarnota, Koczanowicz and Sulikowski – the network kicked off by taking a deep dive into Central Europe’s most vexed legal conundrum: the transition from state socialism to capitalism and Western-style liberal democratic ‘rule of law’ state. The second edition, held in freezing (-20 °C!) and smog-covered Kraków, former capital of the Kingdom of Poland, was devoted to the topic of An Uneasy Legacy: Remnants of Socialist Legal and Political Thinking in Central and Eastern Europe. Acknowledging the importance of the 1989 transformation as a kind of watershed, we nonetheless recognised the importance of what had been before, the ‘remnants’ and ‘legal survivals’ (Mańko 2015; 2016) of our common state-socialist past (cf. Kuźmicka-Sulikowska 2019, 148). We discovered that this experience, perhaps problematic from some points of view, is nonetheless a great force of unifying character for our region. Having made an ‘examination of conscience’ with our past, we could move towards the present. In Riga, at the 3rd CEENELS conference, we focused on Legal Identities and Legal Traditions in Central and Eastern Europe (Szymaniec 2018). Although, for obvious reasons, the discussion was dominated by the evolution in Poland and Hungary (ibid., 151), nonetheless I think that we did make some progress in attempting to answer the question regarding our common elements, on one hand, and the differences, on the other. I have tried to articulate them in a paper, written about that time¹² jointly with Professor Martin Škop and Dr Markéta Štěpáníková from Masaryk University in which we claim that we, Central Europeans

...need to define ourselves in terms of neighbouring legal families, with their distinct legal identities. On the one hand, we cannot agree to being amalgamated in an unqualified manner with the Romanic and/or Germanic legal family – Central Europe is certainly distinct from Western Europe and its legal families, even if it was (and is again) subjected to the taking in of legal transfers originating from that region. Of course, the gesture of (re-)establishing Central Europe as a legal

¹² The issues of the Wroclaw Review of Law, Administration and Economics are ante-dated by two years.
family is a counter-hegemonic one, and therefore not easy or straightforward to take. (2016, 22)

We acknowledged that the division of Europe into legal families is a dynamic one, something that can change over time, and something which is linked to the political:

 Legal taxonomy is political. This is a fact which we cannot deny, and proposing Central Europe as a *sedes* of a legal family we are making a conscious move. A move intended to underscore the similarities and common heritage, whilst concealing the differences. And, at the same time, a move distinguishing us from the West and the East, but not closing down channels of juridico-cultural communication. To the contrary, if the last three decades were marked by an unprecedented reception of juridico-cultural transfers from the West, and the previous decades (of Actually Existing Socialism) were marked by the infiltration of Soviet legal ideas, we hope that the self-identification and self-determination of our legal communities qua Central Europe will be instrumental in promoting a greater equilibrium in the flow of legal ideas within geographical macrospaces. (2016, 22)

If the above quote describes the idea and atmosphere of our 3rd conference in Riga, at our next meeting we decided to ask if we have something constructive to offer to the world. Hence, the convenors of our 4th conference, Professor Poldnikov and Dr Starżeniecki, opted for the topic of *Legal Innovativeness in Central and Eastern Europe*. However, it seems that the original legal solutions, which were to be discussed in the conference,

...were limited to marginal examples (...) and often met with a negative evaluation. Moreover, the sessions revealed that the very concept of originality is inadequate with regard to law and legal scholarship. (Poldnikov 2019b).

These findings are, as such, important. They indicate that originality and innovativeness is something *yet to be accomplished* by Central Europe, it is something to be sought after, rather than something to be uncovered in our common legal heritage. Furthermore, these findings do not really come as a surprise to us: given the fact that our common legal history has been dominated by incoming legal transfers (Mańko 2019, 69–70), and so is

13 A 4.5-hour video recording of the plenary session of the 3rd CEENELS conference is available on YouTube: https://www.youtube.com/watch?v=Z8k2AiNulN0, accessed 21 March 2020.
our present predicament (Mańko 2017), originality and innovativeness are only to come, they belong to a Central Europe à venir. Importantly, these findings resonated with the findings of general cultural studies, which indicate that in CEE there are no “own” models, because cultures of this region have always been derivative (...). Practically in any sphere of culture (...) we cannot find serious achievements which would have impacted upon European culture, let alone world culture. (Sowa 2011, 19)

Having come to these painful conclusions, for our next, 5th conference, to be held in June 2020 in Debrecen, hosted by Professor Matyas Bencze and Dr Krisztina Ficsor, we were supposed to discuss the somewhat more humble topic of Re-thinking Legal Institutions in Central and Eastern Europe.15 Hopefully, the 5th CEENELS Conference will take place in June 2021.

8. Conclusions: From the shame of (double) peripherality to the pride of populism

Peripherality, let alone double peripherality, is no reason to pride. It is, ‘with all due respect to the scientific objectivity of the concept, a humiliating condition. To be peripheral means to be subject to the economic, political and – indeed – cultural hegemony of a certain Centre’ (Mańko, Škop and Štěpáníková 2016, 21, emphasis added).16 Being peripheral means to suffer from symbolic violence (Mańko 2019, 69–70). Permanently running after the fetish of ‘modernisation’ (cf. Gałędek 2020), permanently desiring to escape the curse of ‘backwardness’, permanently behind, permanently learning and permanently emulating. How can a legal community that is burdened by such symbolic oppression (self-oppression?) ascertain its pride, its prestige and its self-esteem? How can a society, and especially its elites, endure such long-term humiliation? Recent developments have shown that it can no longer. The former ‘best pupil in class’, the apprentice

16 Peripheral actors suffer from being deprived of agency, and they attempt to compensate this lack in the ideological narratives they create (Zarycki 2013).
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of the demoliberal sorcerer, has announced that he is quitting school and going his own way. Where will his path lead him? Is Ruritania’s transition into Borduria – Central Europe’s third transformation in a century – a definitive or temporary one? Concluding this chapter today, when the outbreak of Covid-19 is spreading through my native Central Europe, I have no final answers to offer. What I can say, though, is that there is no return to pre-populist times. Liberal legality is ‘dead and buried’, at least on this side of the former Iron Curtain. The ‘masks have fallen’ (Sulikowski and Wojtanowski 2019, 193); and nobody will believe in the old liberal myths about an ‘apolitical judiciary’, ‘rule of law not men’ or other ideological fantasies from the worn-out imaginary of ‘demoliberalism’. We are perhaps facing the same situation as the one described by our fellow Central European philosopher, Slavoj Žižek, in one of his first Western books, Tarrying with the Negative (Žižek 1993): the scene of Romanian workers, flying the Romanian flag but with the national emblem cut out – for Žižek this symbolised the ‘intermediate phase when the former Master-Signifier, although it has already lost the hegemonical power, has not yet been replaced by the new one’. Today, when the decay of liberal legality is occurring before our eyes (Cercel 2019, 21; Tacik 2019, 41), the old Master Signifier of the ‘rule of law’ and other ‘Western values’ are exiting the historical scene, being replaced – in Central Europe – by authoritarian, right-wing populist regimes. Whereas in political terms the situation remains, at least in Poland and at least as of now, still open, in intellectual and ideological terms we have crossed a Rubicon. We, the legal community, can remain passive and, as in 1989, allow ourselves to be ‘taken by surprise’ (Maňko, Škop and Štěpáníková 2016, 21), but equally well we can try to take an active part in the shaping of our future. This does not necessarily mean joining the populist bandwagon, even if right-wing populists are using, in a distorted manner, some selected tools of critical legal thinking (Zomerski 2018, 101), but rather by taking carefully chosen ideological positions. On one hand, building our common, Central European legal identity can help us articulate regional interests, bringing into focus our regional ‘self-determination’ (Mercescu 2020, 16); on the other, insisting on a critical legal programme (Maňko 2019b, 11) can help rebuild the legitimacy of the judiciary, and more generally, of lawyers,
in the future (Otręba 2020, 132). As Sulikowski and Wojtanowski argue with regard to the Polish Constitutional Court (the ‘TK’):

If the TK survives the storm (or, to be more precise, if it is resuscitated as a true constitutional court by some future political majority), it should undertake an attempt to regain social trust; it should present its decisions as an outcome of a deep reflection, also in a political sense, as a result not only of an analysis of norms, but also the possibility of political representation (in a substantive, not merely formal sense) of the interests of various social groups. Raising the sensitivity (towards social justice) and a partial giving up of legalistic camouflage are, in our view, desirable. A constitutional court more conscious of its political character should seek broad social support, not just support of the elites. (2019, 194)

I think this should be the minimum programme of our critical legal engagement in these times. Reviving legal hypocrisy and joining the crowd of cynically naïve liberals, mourning the ‘rule of law’ without much understanding of the reality (or refusing to understand it) is a road leading nowhere (cf. Tacik 2019, 38–41). The stakes are high, and the old Master-Signifier of demoliberalism is gone. Although the majority of Central European legal scholars will go with the tide, a minority of critical jurists has the duty to resist and to lead the way.

References


Cserne, Peter. 2015. Formalism in Judicial Reasoning: Is Central and Eastern Europe a Special Case? In Central European Judges under the


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
