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Introduction

Law and Critique in Central Europe: Laying the Cornerstone

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Law and Critique in Central Europe

Questioning the Past, Resisting the Present

Edited by

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and Adam Sulikowski

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Introduction

Law and Critique in Central Europe: Laying the Cornerstone

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Chartering Central Europe as a Legal Space

Central Europe—here understood as the former state-socialist countries, which joined the EU between 2004 and 2013¹—remains, to a large extent, unchartered territory for (Western) critical lawyers and comparatists-at-law. In order to fill this lacuna this collection of essays aims at exploring the background, the state of the art, and new perspectives on critical legal thought in this part of Europe. The idea of the book originates in a stream ‘Reconstruction, Return or Revolution? The Phenomenon of Critical Legal Thought in European Post-Communist Countries’ convened by Adam Sulikowski at the 2013 Critical Legal Conference in Belfast. However, this book is not a simple volume of conference proceedings, but a collective research monograph in its own right, given that the scope of the chapters goes beyond the initial theoretical and hermeneutical engagement of the presented papers. Rather, the first Central European stream at the CLC should be understood as an Event which gave rise to the emergence of the critical legal community of Central Europe, for which this very first collective volume is the cornerstone. We shall return to our engagement with the British Critical Legal Conference in section III where we explore the variegated and multifaceted sources of legal critique in our region.

Whilst the geographical, cultural, and political setting of our plural engagement with law and critical theory is one of the topics informing the background of this book, it is not the only point of juncture. Our contributions aim to critically explore the status of law in national and regional contexts by asking three crucial and interconnected questions.

¹ These are, in alphabetical order: Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia. For a similar approach, see Michal Bobek, ‘Conclusions: Of Form and Substance in Central European Judicial Transitions’ in *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited*, ed. Michal Bobek (Oxford: Hart Publishing, 2015), 391.

We are interested, first of all, in exploring the sources and potentialities of critical legal scholarship in a Central European setting, secondly, the heritage of an authoritarian past and its influence over law and politics in Central Europe, and thirdly, the strategies of challenging the present legal status quo.

The notion of ‘Central Europe’ is certainly a problematic one. While before World War I, *Mittleuropa* doubtlessly encompassed the Austro-Hungarian Empire and, plausibly, eastern parts of the German Reich, the situation changed after 1918 with the emergence of numerous newly independent states, such as Poland, Czechoslovakia, Hungary, or the Baltic republics. The rise of authoritarianism during the last years of the 1930s, the outcome of World War II, and more specifically the politico-symbolic erection of the Iron Curtain, temporarily erased Central Europe from maps, substituting a strictly bipolar East/West division in its place. The fall of the Berlin Wall in 1989 immediately brought about a resurrection of Central Europe as a spatial concept and as a region understood either in geopolitical or cultural terms.² The subsequent integration of former Soviet bloc countries within the European Union justifies a pragmatic notion of Central Europe as pointing to this part of the former Soviet bloc which is now within the EU, as such including so-called new Member States.³ As Zdeněk Kühn has pointed out, the countries of the former Austro-Hungarian Empire (including Poland, the Czech and Slovak Republics, Slovenia, Hungary, and Croatia) share a common legal past with regard to legal culture, even if Hungarian law differed from Austrian law.⁴ Furthermore, all Central European countries—this time including the Baltic states (Lithuania, Latvia, and Estonia),⁵ as well as Romania and Bulgaria—share the same legal past of actually existing socialism which lasted 45 years, until the fall of the Soviet bloc.⁶ Moreover, they all—this time in contrast to Eastern Europe—share similar experiences of transformation and preparation for EU membership. These three factors militate

² A poignant example of ‘Central Europe’ as a spatial concept is the denomination of ‘Central European University’ in Budapest. On the ways in which Central and Eastern Europe has become an object of a discourse fashioned in terms of ‘region’ and ‘culture’ and the politics inherent to this reading, see Alex Cistelean, ‘From Region to Culture, from Culture to Class,’ *Journal of Contemporary Central and Eastern Europe* 23/1 (2015), 45–60.

³ The notion of Eastern Europe would include post-Soviet countries to the east of Central Europe, such as Ukraine, Belarus, Moldova, or even the Caucasic countries (Bobek, ‘Conclusions,’ 393).

⁴ Zdeněk Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Leiden-Boston: Martinus Nijhoff, 2011), ch. I.

⁵ Cf. Peter van Elsuwege, ‘From Soviet Republics to EU Member States: A Legal and Political Assessment of the Baltic states’ accession to the EU (Leiden and Boston: Martinus Nijhoff, 2008).

⁶ Kühn, *The Judiciary*, ch. II.

in favour of treating Central Europe, in terms of legal culture informed by legal tradition *and* by their present condition of being a periphery of the EU,⁷ as one bloc for many research purposes, including the present endeavour.

The term ‘Central Europe’ readily used by Central European scholars, but often giving way to terms such as ‘Eastern Europe,’ ‘East-Central Europe,’ or ‘Central and Eastern Europe’ in the vocabularies of our Western European observers, is slightly misleading. This is because in terms of the centre/periphery dichotomy, *de nomine* Central Europe is *de facto* peripheral Europe.⁸ What is more, during the period of actually existing socialism, apart from being the eastern periphery of the Western centre of the capitalist world-system (in Wallersteinian terms), Central Europe was simultaneously the western periphery of the Soviet Union (in geopolitical terms).⁹ This experience of being a *peripheria duplex* is nothing short of a traumatic event in the region’s collective consciousness, including that of the legal community. Following the transition, the situation did not become much better, transforming itself into a unique amalgamation of postcolonialism (*vis-à-vis* the former Soviet power) and neocolonialism (*vis-à-vis* the West). A *peripheria duplex*—a simultaneous postcolonial and neocolonial area with extraordinarily liquid political boundaries turning the region into a buffer zone between East and West—indicates Central Europe’s geopolitical situation could not have been more problematic.¹⁰

We contend that Central Europe is a cultural, political, and social construct which owes much to the civilizing gaze of Western Enlightenment as much as it owes to the imperial cartographers of late 18th century, ethnologists of the 19th century, and constitutional engineers of the post-1989

⁷ Cf. the outcome of Tomasz Giaro’s monumental research project on legal transfers and modernization of law in Central Europe in the form of two volumes: Tomasz Giaro, ed., *Rechtskulturen des Modernen Osteuropa. Traditionen und Transfers* (Frankfurt am Main: Vittorio Klostermann, 2006/7).

⁸ Cf. Damjan Kukovec, ‘Law and the Periphery,’ *European Law Journal* 21/3 (2015), 406–28, 409.

⁹ For an explicit application of Wallerstein’s world-system analysis to Central Europe (*in casu* Poland) see Jakub Majmurek, ‘PRL jako projekt modernizacji peryferyjnej (perspektywa systemu-świata)’ [The Polish People’s Republic as Periphery Modernisation Project (A World-System Perspective)], in *PRL bez uprzedzeń [An Unbiased Perspective on the Polish People’s Republic]*, ed. Jakub Majmurek & Piotr Szumlewicz (Warszawa: Książka i Prasa, 2010).

¹⁰ With respect to political boundaries, the examples of Poland and Hungary are perhaps most instructive here. Poland, which emerged on the political map of Europe in 1918 and had its boundaries fixed only as from 1922, suffered from a forced displacement of territory and population to the West in 1945, losing its eastern lands (Wilno region, Polesie region, Wołyń, Eastern Galicia) and gaining formerly German lands in exchange (Warmia and Mazury, Pomerania, Silesia). Likewise Hungary, which in the former Habsburg Empire covered today’s Slovakia, Transylvania (in today’s Romania), Voivodina (now in Serbia), and Slavonia (now in Croatia) saw its borders shrink after World War I.

transition.¹¹ As such it is a space which conveyed fantasies of conquest and normalization as well as reluctance and rejection. Constructed as Western Europe's half-Other, it is already in the discourse while occupying a place of paradoxes and ambiguities, covering symbolically the space between the familiarity of Western rationality and radical otherness of the East. In this very specific sense, Central Europe conveys the idea of Freud's *das Unheimliche*, the unfamiliar which nests at the core of familiarity.¹²

This historical trajectory did not fail to significantly influence the region's legal cultures. For more than a decade now a new trend of thinking and understanding the law has insinuated itself into law's empire, once it was reconstructed from the debris of actually existing socialism. Eclectic, controversial, polemic, and to some extent marginal, this trend shares with the cultural space from which it emerged the same unfamiliarity that usually troubles the keepers of the gate in imperial settings. For, to be sure, the law in Central Europe pertains to the world of contemporary 'empire' as much as it builds upon a patchwork of historical imperial reminiscences. Central Europe is, legally speaking, an extraordinary place (in the sense used by Örüçü),¹³ that is a place where things 'out of the ordinary' are happening and where lawyers are questioning once again the tenets of the order.

Giving Voice to Europe's 'Central' Periphery

In a recent paper, a Slovenian legal scholar connected to the critical legal circles at Harvard, Damjan Kukovec, emphasized the need to introduce the centre-periphery dichotomy to the legal discourse of European law.¹⁴ We fully agree with Kukovec's stance, and indeed share his view that the lack of a centre-periphery concept in European legal discourse is a form of symbolic violence towards Central Europe, aimed at ideologically stifling our legal communities and preventing them from articulating our—specifically Central European—point of view on contentious issues of EU law such as those, inter alia, of public economic law.¹⁵ A general conclusion

¹¹ For a seminal work exploring, from a Foucauldian/Saïdian standpoint, Eastern Europe's construction as an intellectual object of knowledge, see Larry Wolff, *Inventing Eastern Europe: The Map of Civilization on the Mind of the Enlightenment* (Stanford: Stanford University Press), 1994.

¹² Sigmund Freud, 'The Uncanny,' in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, ed. James Starchey (London: Hogarth, 1955), 217–56.

¹³ Esin Örüçü, 'Comparatists and Extraordinary Places,' in *Comparative Legal Studies: Traditions and Transitions*, ed. Pierre Legrand and Roderick Munday (Cambridge: CUP, 2003).

¹⁴ Kukovec, 'Law and the Periphery,' 410.

¹⁵ Kukovec, 'Law and the Periphery,' 411–15.

from Kukovec's paper is highly pessimistic and it points to the fact that lawyers from peripheral Central Europe are marginalized within European legal discourse as a result of symbolic violence inflicted by lawyers from the Western European centre, and this despite the (purely) formal possibility of participating in this discourse on an equal footing, e.g. before the CJEU.

Therefore, one of the aims of this collection of essays is to revindicate the space for Central European legal discourse and give voice to the periphery and its legal critique. However, we also take the view that a simple transplant of Western critical legal thinking to Central Europe would constitute, *mutatis mutandis*, the same form of symbolic violence as occurs in mainstream legal discourse, where lawyers are expected to take the views of the centre.¹⁶ Different socio-economic and political dynamics within the centre and peripheries of Europe require different legal tools for their articulation. We believe that this applies par excellence to legal critique. Being therefore keen on creating a space for centre-periphery (*in casu*, West-East) dialogue of critical legal communities, we are far from advocating a wholesale and mechanical reception (transplantation) of the British or American school of critical legal thought. Such a move would amount to yet another act of symbolic violence inflicted by the (Western) centre upon the (Central European) periphery. Whilst the same set of values (such as the belief in the need for emancipation of any oppressed subjects) and fundamental philosophical inspirations (such as French theory or more recently Žižekian Lacano-Marxism) may be adequate, the practically applicable *sul campo* tools of legal critique will not necessarily be the same. The ideological superstructure of critical legal thinking must correspond to its base if it is to be an effective tool for destabilizing hegemony and opposing oppression. The left-right division must be combined with the centre-periphery dichotomy, as Kukovec insists, lest it become perverted and distorted, serving the opposite interests from those it was initially conceived to further.¹⁷

Furthermore, apart from the need for devising adequate methodological tools (some of which may be of use outside the region), we must address, in our concrete historical, socio-economic and geo-political context, a number of issues which are, due to objective circumstances, of little or no significance to our Western counterparts. These include, in particular, the following: the need to build a critical transitional justice scholarship, with particular reference to a critique of the ideology of the 'rule of law'; a critical analysis of lustration and decommunization practices; and a critical analysis of post-communist privatization and its ideological

¹⁶ Kukovec, 'Law and the Periphery,' 427.

¹⁷ Kukovec, 'Law and the Periphery,' 424.

underpinnings.¹⁸ A critical school of transitional justice studies would be conceived as a remedy against the hegemonic liberal variant of this field of study, based on (neo)liberal dogmas and ideological underpinnings.

Secondly, we need a critical analysis of judicial formalism (hyper-positivism) in its Central European, peripheral version.¹⁹ A peripheral variant of formalism, distinct from its Western equivalent, requires a different, socio-legally conscious form of critique.

Thirdly, on a more general level, we need to employ throughout the critical legal discourse full awareness of the centre/periphery dynamic between the (peripheral) Central Europe and the (Western) centre, both within and beyond the EU.²⁰

Furthermore, the legacy of the socialist legal tradition, a phenomenon idiosyncratic of Central (and Eastern) Europe mandates a critical study of legal survivals of actually existing socialism and the on-going influence, from the grave, of the former socialist legal tradition.²¹

Obviously, not all of these topics can be addressed in this volume. Furthermore, a number of topics analyzed in the chapters of this research

¹⁸ For a seminal work see Liviu Damşa, 'The Incomprehensible Post-Communist Privatization,' *Global Journal of Comparative Law* 3 (2014), 137–85. An earlier version of Damşa's paper, although not published in this volume, was presented at the Central European stream convened by Adam Sulikowski at the CLC 2013 in Belfast. In his paper Damşa argues that the injunction to privatize state property, which was one of the key assumptions of the post-1989 transformation, was actually rooted in a series of false assumptions concerning the nature of state property under actually existing socialism. These false assumptions led to a series of failures for the privatization project, in particular the enrichment of the economic *nomenklatura* of communist managers. However, with regard to privatization in general it is, due to the domination of neoliberal ideology, a topic of legal critique common to Western and Eastern authors.

¹⁹ See especially Kühn, *The Judiciary* and, with specific reference to Poland and its legal culture, Marcin Matczak, *Summa iniuria. Błąd formalizmu w stosowaniu prawa* [Summa Iniuria: On the error of formalism in the application of law] (Warsaw: Scholar, 2007).

²⁰ For a seminal paper on the legal field in the peripheries, see Hanna Dębska, 'Strategia wielopozycyjności w półperyferyjnym polu prawnym. Homo academicus na rynku' [Strategy of Multipositionality in a Semiperipheral Legal Field: Homo Academicus on the Market], in *Polska jako peryferie* [Poland as a Periphery], ed. Tomasz Zarycki (Warszawa: Scholar, 2016 forthcoming).

²¹ See, e.g. Rafał Mańko, 'Legal Survivals: A Conceptual Tool for Analysing Post-Transformation Continuity of Legal Culture' in *Tiesību efektivitāte postmodernā sabiedrībā* [Effectiveness of Law in Post-Modern Society], ed. Jānis Rozenfelds et al. (Riga: Latvia University Press, 2015). See also, e.g. Rafał Mańko, '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*, ed. Thomas Wilhelmsson et al. (Alphen aan den Rijn: Kluwer Law International, 2007); Alan Uzelac, 'Survival of the Third Legal Tradition?,' *Supreme Court Law Review* 49 (2010) 377–96; Rafał Mańko, 'Survival of the Socialist Legal Tradition? A Polish Perspective,' *Comparative Law Review* 4/2 (2013); Rafał Mańko, "'We Do Not Recognize Anything »Private«": Public Interest and Private Law Under the Socialist Legal Tradition and Beyond,' in *Private Interest and Public Interest in European Legal Tradition*, ed. Bronisław Sitek et al. (Olsztyn: WPiA UWM, 2015).

monograph have a relevance reaching beyond the Central European periphery, such as the critique of *gouvernement de juges (constitutionnelles)* in chapters one and six, the contributions to the stream on Feminist Jurisprudence (in chapters five, six, and seven), or the critique of a technocratic vision of lawyering (in chapter eight). But even those topics which are of a universal value, are addressed here with regard to their Central European context.

Sources of legal Critique in Central Europe

The emergence of critical scholarship in the field of law in the Central European context places itself also under the sign of paradox. This is because it produces an effective break with the prevailing post-ideological consensus specific to the continental tradition of treating law as (written) law and nothing beyond. From this vantage point it defines itself as a contrarian movement which opposes not only a strong tradition of legal formalism inherited from the French and Austrian schools of ‘exegesis’ as well as the formalist German ‘conceptual jurisprudence’ (*Begriffsjurisprudenz*)—significantly strengthened during the period of actually existing socialism—but also mainstream ‘soft positivism,’ which still insists on law’s autonomy and rationality.²² The strong component of ultra-formalism can even be said to form an *objet petit a* differentiating the Central European periphery from the Western European centre, perhaps even warranting the existence of a ‘Central European legal family’ alongside the conventionally accepted Romanic, Germanic, Common Law, and

²² On the sources and condition of Central European formalism, see especially Kühn, *The Judiciary* and, with specific reference to Poland and its legal culture, Matczak, *Summa iniuria*; Tomasz Milej, ‘Europejska kultura prawna a kraje Europy Środkowej i Wschodniej’ [European Legal Culture and Central Eastern European Countries], *Przegląd Legislacyjny* 15/1 (2008), 60–74; Rafał Mańko, ‘Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome,’ *Pólemos: Journal of Law, Literature and Culture* 7/2 (2013), 207–33. However, the view that hyperpositivism is a specifically Central European phenomenon has been questioned by Peter Cserne, ‘Formalism in Judicial Reasoning: Is Central and Eastern Europe a Special Case?’ in Bobek, *Central European Judges*. On the basis of his analysis, Cserne concludes that whilst Central and Eastern Europe is ‘a special case,’ he ‘seriously doubt[s]’ that this *differentia specifica* of our region is judicial formalism. He argues that the ‘distinctiveness-of-formalism thesis,’ as he calls it, ‘is misguided because it leads to an exclusive focus on the region in isolation,’ which is a flawed approach (Cserne, ‘Formalism,’ 41). In our view, a promising way out of the controversy as between Peter Cserne and inter alia Zdeněk Kühn, Rafał Mańko, or Tomasz Milej regarding the idiosyncrasy of Central European formalism could be the introduction of the centre/periphery dynamic into the analytical toolbox, as suggested recently by Damjan Kukovec. In this optic, Central European formalism is a *peripheral* formalism, and this feature could explain, inter alia, its ‘crude’ features, lamented by Kühn, Mańko, Matczak, Milej, and others. The issue definitely requires further empirical socio-legal research.

Scandinavian ones in Europe.²³

Legal critique in Central Europe also expresses an alternative gesture of renewing links to a tradition of critique well rooted in the Central European ethos and cultural heritage. Psychoanalysis, the critique of ideology, the Frankfurt School as well as the dissident counter-culture of actually existing socialism all come to mind as historical sources of legitimation and strategies of critically reading legal texts.

But critique is not, of course, a purely Central European phenomenon. Caught within the dynamics of the global present, legal cultures of Central Europe cannot escape law's recent history of contestation and intellectual struggle. French theory, the tradition of critical legal studies, feminist theory, and postcolonial studies are other sites of articulating strategies of dissent and resistance as well as places of deconstructing law's pretence of founding the truth. As such, the praxis of legal critique in the Central European context defines itself as eclectic and resolute in the struggle for voicing its disapproval of the legal and political status quo.

An important building block of legal critique in Central Europe has been the inspiration drawn from the British critical legal community, informally known as the 'BritCrits'.²⁴ The links between the two communities have been gradually emerging since 2012, when the first group of Central European legal scholars (Cosmin Cercel, Rafał Mańko, and Jakub Łakomy) attended the Critical Legal Conference ('CLC') on 'Gardens of Justice' at the University of Technology in Stockholm. Since then, the Central European presence at the CLC has strengthened year by year.

In 2013, at the CLC in Belfast devoted to 'Reconciliation and Reconstruction' where some of the papers in this volume originate from, Adam Sulikowski and Bartosz Greczner convened a stream on 'Reconstruction, Return, or Revolution? The Phenomenon of Critical Legal Thought in European Post-Communist Countries.' The stream proved to be very successful and was attended by critical legal scholars from Poland,

²³ For a preliminary formulation of this argument, see Rafał Mańko, 'Survival of the Socialist Legal Tradition? A Polish Perspective,' *Comparative Law Review* 4/2 (2013). Cf. Alan Uzelac, 'Survival of the Third Legal Tradition?,' *Supreme Court Law Review* 49 (2010), 377–96; Jaakko Husa, *A New Introduction to Comparative Law* (Oxford: Hart-Bloomsbury, 2015), 219–20; H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed. (Oxford: OUP, 2014), 347; Alan Uzelac, 'Mixed Blessing of Judicial Specialisation: the Devil is in the Detail,' *Russian Law Journal* 2/4 (2014), 162.

²⁴ For a historical account see Costas Douzinas, 'A Short History of the British Critical Legal Conference or, the Responsibility of the Critic,' *Law and Critique* 25/2 (2014), 187–98. A Polish translation of this text appeared earlier as Costas Douzinas, 'Krótka historia brytyjskiej Krytycznej Konferencji Prawniczej albo o odpowiedzialności krytyka' [A short history of the British Critical Legal Conference or the responsibility of the critic], trans. Rafał Mańko, *Archiwum Filozofii Prawa i Filozofii Społecznej* 1/8 (2014), 5–17.

Romania, the Czech Republic, as well as Croatia.²⁵ It was in Belfast that, following a suggestion made by Costas Douzinas earlier during the year, the University of Wrocław officially submitted its bid to organize the 30th Critical Legal Conference, to be held for the first time on Central European territory in 2015.

During the 2014 Critical Legal Conference held at the University of Sussex at Brighton, Wrocław's bid was officially accepted, by acclamation, by the critical legal community. CLC 2014, devoted to 'Power, Capital, Chaos,' saw an ever stronger presence of Central European scholars, with two streams convened by Central Europeans.²⁶ In the meantime, we witnessed the publication of a special 'critical' issue of *Archiwum Filozofii Prawa i Filozofii Społecznej*, the official academic journal of the Polish section of the International Association for the Philosophy of Law and Social Philosophy ('IVR'), with texts by Polish critical legal scholars and a translation of Costas Douzinas's article on the history of the CLC.²⁷ In parallel, Michał Stambulski, Michał Paździora, and Rafał Mańko developed the idea of holding annual international workshops on law and ideology,

²⁵ For a detailed report from CLC 2013, focusing on the Central European stream, see Jakub Łakomy and Rafał Mańko, 'Critical Legal Conference, Belfast, Irlandia Północna, 5–7.09.2013 r.,' *Archiwum Filozofii Prawa i Filozofii Społecznej* 8 (2014), 88–91.

²⁶ Romanian crits Cosmin Cerceel and Alex Cisteleanu convened a stream on 'Beyond the Law: State of Exception and Powers of Capital'; Polish crits Adam Sulikowski, Rafał Mańko and Jakub Łakomy convened a stream on 'Ideology, Hegemony and Law: An East/West Perspective,' attended by some two dozen critical legal scholars from Poland, the Czech Republic, Romania, Russia, and Japan. Furthermore, the Ukrainian critical legal scholar based in Ireland, Ekaterina Krivenko, convened a stream on 'Thinking Resistance Beyond Power, Violence... and Law?' A conference report (in Polish) from CLC 2014 by Paweł Snopek is forthcoming in the *Archiwum Filozofii Prawa i Filozofii Społecznej*.

²⁷ The special issue encompasses the following papers: Costas Douzinas, 'Krótka historia brytyjskiej Krytycznej Konferencji Prawniczej albo o odpowiedzialności krytyka' [A short history of the British Critical Legal Conference or the responsibility of the critic]; Hanna Dębska, 'W okowach prawniczego sensus communis. O trudnościach uprawiania krytycznie zorientowanej socjologii prawa' [Shackled by the legal sensus communis. On the difficulties of a critically oriented sociology of law]; Karol Kuźmicz, 'Dlaczego kooperatyzm Edwarda Abramowskiego może nie być utopią?' [Why Edward Abramowski's cooperativism may be not the utopia?]; Rafał Mańko, 'Koncepcja interpelacji ideologicznej a krytyczny dyskurs o prawie' [The Notion of Ideological Interpellation and Critical Discourse on Law]; Michał Paździora and Michał Stambulski 'Co może dać nauce prawa polityczność? Przyczynek do przyszłych badań' [What 'The Political' Can Bring to The Polish Theory of Law. Toward a Further Investigation]; Lidia Rodak, 'Are we all feminists now? Wyzwania ze strony Feministycznej Jursprudenencji wobec tradycyjnej teorii prawa' [Are we all feminists now? The Challenge of Feminist Jurisprudence to Traditional Legal Theory]; Adam Sulikowski, 'Afirmatywna amnezja i konserwatywni crits. Kilka uwag o kondycji krytycznej myśli prawniczej w Europie Środkowej i Wschodniej' [Affirmative amnesia and conservative crits. Some remarks on the condition of critical legal thought in Central and Eastern Europe]. The volume also contained two conference reports: from the CLC 2013 in Belfast (by Jakub Łakomy and Rafał Mańko) and from the 1st International Workshop on Law and Ideology, Wrocław, 29–30 March 2014 r. (by Wojciech Kauczor and Wojciech Zomerski).

which have a clear critical legal inspiration. The first exploratory one was held in Wrocław in May 2014,²⁸ followed by a second one in Sarajevo, held in May 2015, which was devoted to a critical exploration of issues of transitional justice under the title ‘Memories of Struggles, Struggles of Memories,’ convened jointly by Samir Forić, Rafał Mańko, and Michał Stambulski.²⁹ The third workshop, devoted to a critical exploration of the ‘rule of law’ rhetoric took place in May 2016 in Tbilisi, Georgia.

A turning point in the history of Western and Central European critical legal thought was the 30th Critical Legal Conference held in 2015 at the University of Wrocław, devoted to the topic of ‘Law, Space, and the Political’ (convenors: Adam Sulikowski, Rafał Mańko and Jakub Łakomy). The conference was a huge success, and was attended by over 200 delegates from the Czech Republic, Ireland, Romania, Slovakia, Slovenia, Sweden, and the UK, as well as from Australia, Brazil, Canada, China, India, South Africa, Taiwan and Turkey. Plenary talks were given both by scholars belonging to the core of the ‘BritCrit’ community (Costas Douzinas, Illan Rua Wall, Stewart Motha) or closely connected with it (Andreas Philippopoulos-Mihalopoulos), scholars critical of the current neoliberal status quo but not necessarily applying the classical toolbox of BritCrit research (Marija Bartl, Harm Schepel), as well as Central and Eastern European academics directly engaging in critical legal scholarship (Marija Bartl, Cosmin Sebastian Cercel) or sympathizing with the critical legal movement (Jiří Přibáň, Monika Płatek, Ekaterina Krivenko).

As Costas Douzinas mentioned in one of his emails to the organizers of CLC 2015, it was destined from the outset to become ‘the beginning of a beautiful friendship’ between the British critical legal community and the emerging critical legal groups in Central Europe.

Challenging the Present

The legal and political changes brought by 1989 were followed by major social upheavals which kept most Central European countries under the label of post-communism and their respective constitutional laws under the scrutiny of theorists of democracy. The legal present of Central Europe finds its roots in the confused theoretical enthusiasm of the 1990s linking, unwittingly, democracy and capitalism in a convincing narrative specific to the ‘end of history’ mindset. It also follows the social practices of excluding

²⁸ Rafał Mańko, Wojciech Kauczor and Wojciech Zomerski, ‘Conference Report: 1st International Workshop on Law and Ideology (Wrocław, 29–30 May 2014),’ *Wrocław Review of Law, Administration and Economics* 3/2 (2015), 84–7.

²⁹ A conference report from this workshop, by Filip Rakoczy, is forthcoming at the *Wrocław Review of Law, Administration and Economics*.

otherness (and transforming it into a Schmittian enemy) and implementing economic ‘shock therapy.’

Western Europe’s reunifications with its peripheral half-Other, the ongoing crisis of capitalism and the growing concern with Europe’s future have significantly influenced the emergence of new forms of critique inside the legal field. Critical legal scholarship thus tries to question the existing hierarchies in public space, to open new fora for debate at the interstices of law and politics and ultimately to challenge the monolingualism of existing discourses of power.

Overview of the Chapters

To address these issues, this collection brings together both emerging and established scholars engaged in the field of critical legal scholarship in Central Europe. It aims to provide a unique range of perspectives on this topic, providing both system-specific theoretical analysis and broader critical engagement with the deeper significance of legal thought and praxis in Central Europe.

The chapters are preceded by a foreword by Costas Douzinas, which has strong symbolic value. Through his gesture Douzinas, a founder of the British school of critical legal thought and of the Critical Legal Conference, creates a bridge between the BritCrits and the emergent Critical legal communities of Central Europe.

The first chapter by Adam Sulikowski (Professor of Legal Philosophy, University of Wrocław) is entitled ‘Government of Judges and Neoliberal Ideology: The Polish Case.’ The main purpose of Sulikowski’s contribution is to formulate a diagnosis of Polish discourse on the constitutional court, using selected critical tools inspired by the Frankfurt School and by French Theory. He argues that the Court has enjoyed immunity from legal critique due to its perceived role in the post-communist transformation and makes a sustained attempt at piercing the protective veil of mainstream legal ideology and opening up a space for critique of the government of (constitutional) judges.

In the second chapter entitled ‘The Importance of Being a Linguist: Critical Legal Thought in Central Europe,’ Martin Škop (Reader in Legal Theory, Masaryk University in Brno) points to the challenges created by the hegemony of the English language in critical legal theory and its development in Central Europe.

The third chapter by Cosmin Cercel on ‘Law Out of Bounds: Legal Picnolepsy, Intellectual Austerity and Romania’s Legal Past’ points out that law in Central Europe resists acknowledging its own past, which—in the author’s view—not only has implications for historical scholarship

and collective memory but also, and above all, for politics. With these assumptions in mind, Cercel aims at subjecting this collective oblivion to a critique. For this purpose, he draws on Paul Virilio's concept of 'picnolepsy,' that is a momentary lapse of consciousness, after which the interrupted narrative and action are picked up again as if they had never been subject to the interruption in question. The author argues that the metaphor of picnolepsy aptly describes the Romanian legal community's approach to its communist past, it was simply a momentary lapse of consciousness (which never took place), and after 1989 Romanian legal discourse allegedly emerged from the point where communism was just about to start. Drawing also on the theoretical framework of Walter Benjamin and Giorgio Agamben, Cercel analyses the contemporary constitutional discourse in Romania as regards its dealing with the communist past, where he detects the presence of 'intellectual austerity.' In conclusion, the author advocates the redemption from law's amnesia, which in his view is instrumental towards destabilizing the grip of its authority under conditions of late capitalist state of exception.

In the fourth chapter entitled 'Demons of the Past? Legal Survivals of the Socialist Legal Tradition in Contemporary Polish Private Law,' Rafał Mańko (External Fellow at the University of Amsterdam) discusses the phenomenon of legal institutions which had been introduced under Actually existing socialism and which, in certain cases, were subject to a change in social function rather than removed following the transformation of 1989. Mańko's critical methodology is inspired by Marxist theorists, Karl Renner and Hugh Collins, and attempts to give a socio-legal account of the dynamics of legal continuity and the tensions created by the pressure on law's adaptation to the new circumstances of (neoliberal) capitalism. The thrust of Mańko's critique is directed at the stereotypical picture of Actually existing socialism being merely a 'black hole' or 'blackout' in the legal development in the region. This chapter represents an example of a locally important topic, which is specific for Central European scholarship due to its post-communist condition, but has not yet been sufficiently accounted for, either in Western scholarship (where the problem of post-communist legal survivals is not present) or in Central and Eastern Europe (where the centre-periphery dynamic has resulted in a repression of the traumatic communist legal past from mainstream discourse).³⁰

Three following chapters touch upon feminist jurisprudence. In chapter five, entitled 'Feminist Legal Education in Croatia: A Question of Fundamentalism or a Fundamental Question?' Ivana Radačić (Ivo Pilar Institute, Zagreb) contends that legal education in Croatia is gendered both in its conceptualization of legal education as the transmission of

³⁰ Cf. Mańko, 'Weeds.'

technical apolitical knowledge and in its exclusion or insufficient attention to feminist (or even gender) issues. She argues that the exclusion of feminist (and other critical) perspectives in legal education has a significant negative impact as it maintains and perpetuates the patriarchal nature of law and the legal profession in Croatia.

The thread of gender-sensitive legal critique is picked up by Hanna Dębska and Tomasz Warczok (both assistant professors at the Pedagogical University in Kraków, Poland) in their chapter on ‘The Social Construction of Femininity in the Discourse of the Polish Constitutional Court.’ Dębska and Warczok apply the tools of Pierre Bourdieu’s critical sociology, combining them with Norman Fairclough’s critical discourse analysis as well as with Berger and Luckmann’s sociology of knowledge to show how the Polish constitutional court perpetuates patriarchal ideological visions of the female subject. This chapter not only critiques the patriarchy in the discourse of the Polish constitutional court, it also offers an innovative methodological proposal. It was Warczok who, in a seminal text published in 2013, suggested the possibility of combining Bourdieu’s critical sociology with Fairclough’s critical discourse analysis.³¹ Warczok’s methodological blueprint was applied to the legal field for the first time by Dębska,³² who further enriched the toolbox by adding to it Berger and Luckmann’s sociology of knowledge. Indeed, we believe that the toolbox they have jointly put forward, i.e. an original combination of critical sociology, critical discourse analysis and sociology of knowledge has immense potential for bringing forward applied critical legal theory. Dębska and Warczok’s input constitutes an important and universally relevant contribution of Central European scholarship to legal critique, as it can be perfectly applied to any other courts in Europe and elsewhere to unmask their latent ideological entanglements. Their methodological *instrumentarium* can also be deployed as a tool for destabilizing the currently hegemonic and highly formalistic systems theory approach which, we contend, lacks the critical potential of Bourdieu’s and Fairclough’s toolbox.³³ In chapter seven,

³¹ See especially Tomasz Warczok, ‘Dyskurs Ucieleśniony—dyskurs skontekstualizowany’ [Embodied Discourse—Contextualised Discourse], *Qualitative Sociology Review* 9/1 (2013), 32–47, accessed 8 September 2015, http://www.qualitativesociologyreview.org/PL/Volume21/PSJ_9_1_Warczok.pdf.

³² Hanna Dębska, ‘Legal Doxa as a Form of Neutralization of Values in the Law. The Case of Constitutional Tribunal Judgments’ in *Neutralization of Values in Law*, ed. Krzysztof Palecki (Warsaw: Wolters Kluwer 2013). For a large-scale application of this methodology, see Dębska, *Władza, symbol, prawo. Społeczne tworzenie Trybunału Konstytucyjnego* [Power, Symbol, Law: The Social Construction of the Constitutional Court] (Warszawa: Wydawnictwo Sejmowe, 2015).

³³ Obviously, this introductory chapter is not an appropriate place to put forward a sustained critique of the systems theory approach. However, it is worth pointing out that Luhmann’s highly formalist and abstract sociology of law is fully subservient to affirmative

Lidia Rodak (Lecturer in Legal Theory, University of Silesia, Katowice) investigates the central forms of structural violence perpetrated within law against women in the Polish socio-legal context. She concludes that gender not only differentiates but also discriminates, dominates, and excludes, leading to a hierarchical submission of women in both official and non-official law. These findings allow Rodak to unmask the notion of so-called ‘objectivity’ of/in law which—as she argues—is nothing more than a ‘masculine narrative’ that underpins structural violence.

Following the chapters on feminist jurisprudence, the book moves to a focus on the legal profession. Jacek Srokosz (Lecturer in Legal Theory, University of Opole) discusses ‘a technicist perspective and the contemporary perception of the role of lawyers in Polish society,’ focusing on the impact of neoliberal capitalism upon legal education in Poland. He argues that a technicist approach to law in Poland is becoming increasingly hegemonic. In his view, this situation results from the positivist programme of neatly separating law from the spheres of politics and morality. For him, law is perceived as ‘being clear, strict, precise, predictable and easily justifiable.’ This, in turn, leads to the proliferation of a formalist paradigm of interpretation, whereby lawyers are seen as merely applying the linguistic sense of legal rules. On a more sociological note, Srokosz points out that the technicist approach to law is reinforced by the capitalist ‘market’ which perceives legal practice as a form of service provision, rather than as a socially responsible mission driven by the desire to deliver justice. Srokosz is critical of this technicist approach which ‘constitutes a threat to the proper functioning of law in society, because it makes it narrow, shallow, schematic, and overly technical.’

The penultimate chapter comes from a legal historian whose research focuses on applying contemporary legal theory/philosophy of law tools to the legacy of the *ius Romanum*. In her chapter entitled ‘From Sublimation to Naturalisation: Constructing Ideological Hegemony on the Shoulders of Roman Jurists,’ Paulina Świącicka (Jagiellonian University, Kraków) looks at the role of Roman law in the ideological construction of reality within legal discourse. An analysis of a number of cases from the Polish Supreme Court leads Świącicka to the conclusion that Roman law is instrumentalized to produce and sustain the hegemonic ideology of legal continuity which,

positivism (and opposed to any form of legal critique), as it ‘insists that law is a separate subsystem of society, differentiated from politics as well as from morality. Only the law, and not politics or morality or any other system of communication, determines what the law is.’ (Hugh Baxter, ‘Niklas Luhmann’s Theory of Autopoietic Legal Systems,’ *Annual Review of Law and Social Science* 9 (2013), 174). As Baxter further points out, Luhmann’s sociology of law neatly coincides with the mainstream legal philosophy of Herbert Hart, situating itself at odds with the critical legal tradition, focusing on laying bare the true (class) interests and ideological entanglements of the legal enterprise.

as she points out, directly serves the interests of neoliberal governmentality. Święcicka's chapter is a valuable engagement of legal history with legal critique, a link which can be instrumental to enlarging the space for the critique of ideology within the legal field.

The final chapter by young Czech critical legal scholar, Markéta Klusoňová, explores 'The role of Václav Havel in the Czech critical legal thought.' Václav Havel was not only a politician and playwright, but—as Klusoňová persuasively shows—his literary work had 'a crucial influence over civic legal consciousness during the era of actually existing socialism.' Klusoňová points out that by resorting to the form of literature, Havel actually 'subverted the communist ban of any form on resistance to the law' and remains a central figure to Czech legal critique.

Leszek Koczanowicz, philosopher and social psychologist from the University of Social Sciences, concludes this volume with an afterword.