

10TH CEE FORUM

Faculty of Law of
The West University of Timișoara
3d-4th of May 2018

BOOK OF ABSTRACTS

*Constitutional Identity and Social Memories
in Central and Eastern Europe*

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The automatic mechanisms behind the construction of the Constitutional Identity

Identity is not a word that can be found in all Constitutions. On the contrary, the noun and the adjective are present in just a few Constitutions. However, identity exists implicitly in all Constitutions. Some categories like values, languages, national identity etc., are a reality in all Constitutions and if the contents change, the container remains the same. All the manifestations of identity could therefore be categorized. The notion of “Constitutional Identity” first appeared in the case law of the Courts, in a context where domestic and supranational legal orders met. Constitutional Identity was revealed by the constitutional judge to prevent the change of constitutional order and “protect” it against European law’s primacy. But, according to us, the notion is just an expression of something which exists more deeply in constitutional texts. Legal doctrine as well as the Courts’ case-law do not agree about what constitutional identity means. For some authors, Constitutional Identity is the identity of the Constitution itself. For some others, it is something to be derived from national identity. Constitutional Identity is sometimes seen as the whole Constitution, sometimes as some particular provisions in the Constitution. The circumstances of the birth of the notion of Constitutional Identity in Central and Eastern Europe are not very different from the ones in Western Europe. In France, the expression of constitutional identity appeared for the first time in 2004, as a protecting instrument of the French constitutional order and of the sovereignty of the constituent power against European integration. The use is the same in the Eastern part of Europe. Although the contents are not exactly the same, we can observe some common characteristics that can justify the existence of constitutional identity and permit it to be an argument to be taken in account. The uncertainty of the

notion in Western as well as in Eastern Europe represents for the moment the strength of the States. Our hypothesis is that there are some mechanisms which enable to establish the existence of constitutional identity even if the judge had not revealed this notion explicitly. The comparative method enlightens some invariable containers, which are common for each Constitutional law. This container establishes a link between the institutions and the people. That is why, all around Europe, Constitutional Identity is an inviolable category.

Stefan Andonovic and Uros Bajovic

University of Belgrade

The role of independent control bodies in the shaping of constitutional identity

The purpose of this paper is to define, in the light of constitutional identity, the concept of independent control bodies, as it applies in the Republic of Serbia. The focus of this paper will not be kept on domestic solutions exclusively, while it will be used as a good starting point for comparing different meanings, which are given to constitutional identity. We will examine the constitutional identity in two main directions: as features of the main legal act and as constitutional democratic culture in general. The concept of constitutional identity needs itself some clarification, but the question is not only a feature of academic disputes, while it ranges from many Supreme Courts and was also addressed by Article 4, paragraph 2 of the Treaty on European Union in another form. One of the aspects of constitutional identity, as noted above, is constitutional reality – as built by different institutions and citizens in society. In order to find a crossroad of theory and practice, we will examine the roll of the Ombudsman, the Commissioner for Protection of Equality and the Commissioner for Information and Personal Data Protection in shaping constitutional identity in the Republic of Serbia. These bodies are specific because of their nature. They are independent and autonomous of other branches of government,

even though they are elected by Parliament. Their primary role is to protect the human rights and freedoms of every citizen and to take care of the application of constitutional norms. Their competences allow them to create a better society and to direct citizens towards good practice with recommendation, warnings and other gentle tools. In this way, they separate themselves from government bodies and are getting closer to ordinary citizens. They have to connect tradition and future intentions of the society in their decisions, shaping the application of constitutional norms in practice. Bearing that in mind, we will analyze the connection between independent control bodies and constitutional identity, the connection between theory and practice, and we will offer a practical perspective on very important question of constitutional identity.

Jacek Barcik

University of Silesia

Rule of Law as a part of Polish constitutional identity. A Comparison with the European Union's Rule of Law

On account of the control mechanism on the rule of law in Poland, some believe that the European Union does not have the right to interfere with Poland's internal affairs. In their opinion, these affairs belong solely to the competences of the independent state of Poland. They claim that the Polish legal regulations associated with the organization of the justice system do not violate the rule of law resulting from the Constitution of the Republic of Poland, while the European Rule of Law, specified in art. 2 of the Treaty on European Union, only refers to the activities of the European institutions. Therefore, the European Union does not have the competences to deal with the issue of whether the rule of law is followed in Poland, because no provisions of the Treaty authorize it to do so. The objective of this article is to study whether there is a discrepancy or synergy between the understanding of the rule of law at the level of the EU and Poland. At first, I will present the rule of law under the Constitution of the Republic of Poland, and,

then, for comparative purposes, the rule of law in the EU legal system. Later on, an answer will be provided to the question of whether the EU has the competences to deal with the issue of whether the rule of law is followed in that member state. Furthermore, I will present the consequences that Poland may bear if it is found to be violating the European Union values.

Marius Bălan

“Alexandru Ioan Cuza” University

National identity and constitutional patriotism - a matter of unwritten constitutional law?

National identity is antinomical to the universalist spirit of liberal constitutionalism and human rights. Every concrete polity assumes the presupposition of a pre-existing sense of belonging, based on which the people gives itself a constitution. The very existence of such a polity, the criteria and the limits of the political community cannot be the subject of regulations by means of abstract rules aiming to a universal validity. On the other hand, a sense of political attachment can emerge in respect to norms and values of a liberal constitution, as long as its procedures and institutions are ingrained in and reinforced by a constant and long established political practice of a nation. Basically, the national sense of belonging can be epitomized in the manifest or implicit dictum “we are better”, pertaining to cultural, historical, religious, ethnic or even racial peculiarities, or – most frequently – to a specific mixture thereof. It can also apply to political and constitutional peculiarities, suggesting a superior ability in discerning, respecting and enforcing universal norms and values. This paper argues that both national (and/or constitutional) identity and constitutional patriotism can be better understood and described within the framework of unwritten constitutional law. Constant political practices and persistent legal convictions, transcending changes of government and amendments of constitutional and statutory texts are far better suited to grasp the elusive reality of the identity of any concrete polity. This thesis

will be substantiated by some illustrations drawn from the Romanian constitutional practice.

Martin Below

University of Sofia "St. Kliment Ohridski"

Constitutional identity – Westphalian reflection of the constitutional heritage of the nation state or post-westphalian alternative to sovereignty in the context of supranational constitutionalism?

Constitutional identity is both a modern and a post-modern concept. It is intellectual paradigm deeply rooted in the nation state's constitutionalism. Thus, constitutional identity is involved in the conceptual network composed of constitutional tradition, constitutional culture, constitutional consensus and entrenched constitutional provisions. Constitutional identity may be perceived as a product of the nation-state's constitutionalism entrenched in the path-dependency of the axiological and institutional design of Westphalian constitutionalism. Here, Westphalian constitutionalism means the traditional constitutionalism of the nation state based upon sovereignty, closed statehood, exclusive territoriality of the public power and absolute constitutional supremacy over international and supranational law. In the context of Westphalian constitutionalism, constitutional identity is predominantly a reflection of the common constitutional past of the nation. It is a pantheon of constitutional ideologies, principles, values and institutions serving a symbolic and constructive role in the creation of the national constitutionalism and being cornerstones of the distinct national constitutional tradition. Hence, constitutional identity is a phenomenon of constitutional anthropology. It reflects the constitutional culture which is deeply embedded in the specific national civilization and is preconditioned upon the quality of the constitution perceived not only as prescriptive source of law, but also as a reflexive charter

for civilizational development. However, in the context of European constitutionalism, especially since the entering into force of the Lisbon Treaty, constitutional identity started to develop an alternative content and functionality. The constitutional dialogue of the Court of Justice of the EU and the Member States' constitutional courts and supreme courts has transformed the constitutional identity from Westphalian into post-Westphalian concept overcoming its cultural embeddedness in the distinct nation state's traditions. Constitutional identity is currently used as a key element of open statehood and constitutional pluralism and as both safeguard and alternative to state sovereignty. It is a pivotal concept for the emergence of supranational and global constitutionalism since it allows the development of relative primacy of the constitution, addresses the challenges of fragmentation and transfer of sovereignty and the crisis of hierarchy as fundamental ideal and ordering paradigm of the Westphalian statehood. Thus, constitutional identity emerges as one of the first post-modern concepts and is becoming a central element of the ideology and institutional design of the post-Westphalian constitutionalism and constitutional law. This paper will expose the tension between the Westphalian past and the post-Westphalian future of constitutional identity. It aims at deconstructing the Westphalian concept of constitutional identity and at constructing a post-Westphalian concept of constitutional identity which should play the role of supportive ideology and cornerstone of the institutional design of the emerging supranational and global constitutionalism. This will be done by emphasizing the dependency of constitutional identity on both the rational and emotional aspects of constitutionalism, being a concept allocated on the point of interception between the prescriptive and pro-active aspect of the constitution as source of law and its descriptive aspect as product and reflection of the constitutional civilization.

Karolyi Benke

Constitutional Court of Romania

The Romanian Constitutional Court's approach toward constitutional identity

The constitutional courts' case law is often seen as the invisible Constitution of a nation. While the Constitution itself contains rules on the general organization of the state and enshrines the fundamental rights and freedoms, the jurisprudence role is to solve the inherent conflicts between different state actors and to determine the concrete sphere of protection provided by the fundamental rights and liberties. In both cases, the Court has to interpret the constitutional norm in an evolving manner, as, like other fields of law, the Constitution is a living law. A great challenge for every constitutional court is to interpret the normative content of the national Constitution as much as possible in line with the requirements derived from the EU accession. This adaptation process has its limits, too, taking into account that there is no such constitutional obligation. The Romanian Constitutional Court's approach to the EU law is a euro-friendly one, as a great number of its decisions cite EU law/ ECJ case law. But, at the same time, one can notice that there is a certain fear of the national court to base its rationale exclusively or, in a decisive manner, on EU law/ ECJ case law and uses these EU instruments to legitimize the adopted solution. There are some decisions in which the Court adopts the EU approach, but warns that it will do it as long as the question at stake does not affect the national constitutional identity. As it may be noticed, there is no definition provided by the court concerning this concept, but still the Court uses it. That means that we will be the witnesses of a step by step development of this concept that will comprise the hard core principles/ rights of a nation. In this context, the next step that has to be analyzed is that such a development can become a barrier in the unitary application of the EU law throughout the EU. The Romanian Constitutional Court's case law offers some examples in which this concept has

been affirmed, but never explained. Consequently, the analysis will focus on the decisions that imported this concept in our legal order, also emphasizing the advantages and disadvantages of such constitutional transplants.

Raluca Bercea

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What's in a Name?

Fully aware that well-established linguistic theories claim the arbitrary character of linguistic signs and without disputing the popular understanding of one of Shakespeare's best known lines according to which names of things do not affect what they really are, the present paper will, however, undertake a semiotic analysis of the key terms in debate, "constitutional" / "identity". Firstly, the paper notes that not only does art. 4(2) of the Treaty on European Union state that the European Union shall respect the Member States' "national identities", but also that the very principle of supremacy of the European Union law is bordered by "the national identity of the Member States". Moreover, the protection of "socio-cultural identity" of a Member State was granted by the ECJ in more than one case. On the other hand, a Declaration on "European identity" was signed within the European supra national system already in 1973. Secondly, while some constitutional judges of other Member States have claimed the very competence to review whether European Union legal acts are compatible with the state's "constitutional identity", other constitutional courts are unexpectedly reluctant to even use the terms, let alone to give a (provisional) definition thereof. Taking as an example the Romanian constitutional legal order, the paper will, therefore, have recourse to a linguistic approach to the constitutional text itself, in search of a conceptual framework for the "constitutional identity".

Dan-Adrian Căramidariu

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Between Perestroika and the Washington Consensus. Romania's transition and the economic doctrine of the 1991 Constitution

Romania was one of the Central and Eastern Europe countries that did not accept the Washington consensus until late in the 1990s, when the second transformation crisis (the first 1990 – 1993, the second 1997 – 1999) hit the country strongly and market reforms were imposed by the IMF and the EU. Romania adopted a transition programme drawn up by local economists in 1990 with the aid of some South American, Swiss, French, Yugoslav and Soviet experts. The authors proposed a so called “third way”: a gradual dismantling of the planned economy, in order to keep social tensions low and to avoid a high unemployment rate, but also establishing a relatively functional market economy within a time span of three to four years. The programme was fully abandoned by September 1991, when the former Communists who had taken power in December 1989 were confronted with major social unrest. According to the post Communist Constitution, adopted in 1991 and amended in 2003, the Romanian economy is a market economy, based on free enterprise and competition, the State ensuring free trade, protection of fair competition and a favourable framework in order to stimulate and capitalize every factor of production. This paper argues that the Constitutional provisions regarding the Romanian economy are nothing else but the result of the doctrinal confusion of both Romanian economists and legal scholars of the time and of their unwillingness to accept the necessity of a fully market-oriented capitalist economy. This is the reason why, when designing the Constitution of 1991, they dealt only briefly with economic matters, drafted rather general provisions and relied heavily on the third-way-doctrine, thereby concealing their strong reluctance to implement genuine market reforms. In conclusion, as the neoliberal approach gained momentum (especially during the crises of 1997 – 1999 and 2009 – 2010), the

Constitutional provisions regarding Romania's market economy could be interpreted quite differently from the original understanding of 1991.

Agata Cebera and Jakub Firlus

Jagiellonian University

Public administration in post-soviet era – remarks on so-called 'procedural relicts' in polish administrative proceedings

The main aim of our paper is to discuss some selected issues related to the public administration in post-soviet era. For the subject of these considerations, it is necessary to discuss 'procedural relicts' in polish administrative proceedings. Phenomena such as globalisation, the creation of accountability networks and the democratisation and privatisation of public law are not irrelevant to the institutional setting that provides the procedural framework for the functioning of public administration. The effective management of public affairs requires effective procedural instruments. In this context, the question regarding the place of several procedural institutions in administrative proceedings (i.e. internal review, the prosecutor's participation in proceedings, *ex officio* [extraordinary] investigations conducted by public authorities) in a democratic state ruled by law in the 21st century becomes increasingly important. In particular, it is necessary to establish whether the procedural framework for administrative actions dating back to the early years of the 20th century, slightly modified in the soviet era, became outdated (obsolete)? It must be stressed out that the Polish Code of Administrative Procedure established more than fifty years ago – on 14th June 1960 – is still in force. However, a positive answer to this question seems to be reductive in nature. Generally speaking, most of the procedural institutions acquired throughout the past three decades new meanings. That is to say that institutions such as the prosecutors' participation or reconciliation proceedings were not only adopted by the modern

state but also correlated with challenges coming from urban development, social welfare or environmental law. A further trend may be drawn. It is commonly known that the soviet apparatus did not accept a wide judicial review (verification) of the public administration's actions. In Poland, until 1980, the only redress available for individuals was the administrative appeal. After the administrative courts were re-established, one may state that the internal control is merely a procedural 'relict' of symbolic significance; yet in the 21st century, the administrative appeal became a useful tool for both public administration and the courts for the internal verification proceedings became a significant factor which optimizes the case flow and creates proper factual basis for adjudication. To conclude the above discussion we will try to answer the question of knowing what is the value, role and future of „post-soviet relicts” in Polish administrative law. Can it be said that those „relicts” are a part of our social memory?

Łukasz Chyla

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The critical analysis of the current Polish constitutional identity crisis in a comparative perspective with Central and Eastern European countries

Abstract: Last month, the European Commission has launched proceedings against Poland for breaching European common values and rule of law under Article 7 of the Treaty on the European Union. This resulted in one of the most unprecedented events in the history of the European Union, and its immediate reason was the adoption by the Polish legislature of a series of laws abolishing the principle of the separation of powers, by changing the judicial system in Poland in order to de facto subordinate the independent courts and judiciary to the executive and the legislature. The said changes included constitutionally questionable exchange of judges of the Constitutional Tribunal, subordinating the Supreme Court to the parliament after prior

exchange of its composition, subordinating the judges of common courts to the executive branch and the total marginalization of the judges' self-governments. Thus, the fragile balance of power in Poland has been undermined, as well as the constitutional order that has been in operation since 1997. The main argument in use of the governing party and parliamentary majority was the need to democratize the "all-powerful judiciary", deprived of allegedly adequate civic control.

Despite these moves, a specific constitutional "coup" did not result in any special social repercussions. Surprisingly, the ruling party, politically responsible for the reform, recorded a record increase in popularity in all political surveys after these changes. Could that mean, that despite the centuries-long constitutional traditions in Poland, a significant part of society not only does not identify with its values, but even considers them defective and incoherent? How is that possible, that the majority of the society is not familiar or does not embrace the Constitution's spirit, basic principles and assumptions?

Interestingly, most of the parties, almost since the adoption of the Constitution in 1997, postulated the need to change the Constitution. In many countries with a long legal tradition, questioning the constitution in force would amount to political suicide, while in Poland the norm is to publicly question its current wording and sense. The question then arises - what is the social significance of the Constitution, which is publicly and notoriously criticized or called explicitly as "post-communist" by most political options, and the only narrow social group that seems to defend the integrity and sense of its existence is a narrow class of judges and lawyers.

Therefore, what is (if there is one) the collective constitutional identity of Polish citizens compared to other Central and Eastern European countries? What is the general cause of lack of respect and understanding for certain important constitutional pillars and values and what are the underlying grounds for such a state of affairs? How did the history of the 20th century and other non-

legal aspects formed the social perception of the legal system itself?

The aim of this paper will be to present the potential reasons for this very specific weakness of constitutional identity and values in modern Poland compared to other Central and Eastern European countries and the attempt to understand various non-legal norms that may serve the constitutional order to be commonly and permanently inscribed in the collective national consciousness of a society.

Mattia Costa

University of Genoa

Constitutional identities v. common values in Central and Eastern Europe: Is there a regionalization of rights within the European legal framework?

The respect and promotion of common values – as stated by art. 2 of the Treaty of the European Union (TEU) – has been a keystone of the European legal framework since their introduction within primary law almost two decades ago. Moreover, it is noteworthy that they are largely inspired from the 1993 Copenhagen criteria, setting a benchmark for every non-member State wishing to join the European Union (EU). Altogether with the enforcing mechanism provided by art. 7 TEU, their ultimate role is to enforce liberal values in every Member State. However, according to art. 4, para. 2 of the TEU, the EU is called to respect the national and constitutional identity of each of its members. While it seems *prima facie* rather demanding to balance such provisions in order to find theoretical equilibrium to be applied to the whole EU, due to the peculiar characteristics of the manifold legal and political traditions, there are several issues opening deep gaps between the EU-15 and most of the States who applied for membership in the last two decades. The aim of this article is to scrutinize whether the national identity of Central and East European countries (CEE) is capable to readapt the content of art. 2 TEU,

read in conjunction with art. 4, para. 2 of the TEU, to the specific issues of the region and up to what extent a “regionalization” of common values should be admitted. In particular, the balance between the respect and promotion of minority rights – a relevant element of the common values – and the promotion of national identities will be considered as a benchmark. The following questions shall be addressed: Should a recently formed State restrict the access to citizenship to large national minorities residing in its territory? Should the safeguard of the national language prevent large national minorities to spell personal names in official documents according to their phonetic alphabet? Should the preservation of institutional stability restrict the enjoyment of political rights to a remarkable share of citizens?

Michał Czykierda

University of Warsaw

Social market economy in Poland and the European Union

In my speech, I would like to present the article 20 of the Polish Constitution, which should be analyzed in connection with Articles 1 and 2 of the Constitution. This article talks about the social market economy, which is determined, on the one hand, by the basic elements of market functioning (economic freedom and private property) and, on the other hand, by social solidarity, social dialogue and cooperation among social partners. This concept is also called ordoliberalism and was formulated for the first time at the end of the 1940s in Germany. The concept of socio-economic development was linked from the very beginning to Christian democracy (CDU). In practice, it was incarnated by the German Chancellor Ludwig Erhard. From the content of Article 20, one could say that the model of the social market economy is based on two pillars, economic freedom and private property, as well as solidarity, dialogue and cooperation among social partners. The first pillar is coupled with Article 22 of the Constitution. The second pillar is connected with article 1 and 2 of the Constitution: “Collaboration is very important for labor

relations. It follows from these provisions that both employers and employees are obliged to devote, if necessary and to the extent appropriate to their abilities, some self-interest or group interest for the common good” (K 17/00 - Ruling of the Polish constitutional court). This statement expresses the concept of the balance of interests of the market participants and the respect for their autonomy. The consequence of this way of solving social conflicts is the incorporation of institutions that express the idea of solidarist corporatism into the state system and that impose on the state the obligation to enable real participation of social partners. In addition, Article 20 prohibits the government to shape the socio-economic system according to its own will. I plan to divide my speech into four parts. In the first part, I would like to talk about the beginning of the idea of ordoliberalism. In the next one, I would like to talk about article 20 of the Polish constitution and about several judgments of the Constitutional Tribunal. In the third part, I will briefly present the constitutional determinants of the social market economy in other countries, especially in Germany and Great Britain and will show how their solutions influenced the Polish system and how the idea of a social market economy is perceived by Polish society. At the end, I will emphasize how this idea works in the European Union, on the basis of articles 119, 121, 152, 53, 155 of the TFEU.

Dana Diaconu

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Legal Reasoning Anew? Romania's post-1989 legal culture

The fall of the Communist regime in Romania in 1989 led to the multiplication of law faculties, which were organized in only three universities (Bucharest, Cluj and Iași). At a population of over 22 million people, in Romania only 100 jurists graduated in law every year. In addition, their status was ambiguous, due to the way in which justice and the legal system were generally regarded by the political regime. Being considered a support of the state and the party, the law practiced by the Communist state's jurists

was devoid of its natural purpose. The jurists themselves were looked upon with suspicion, being well-known that any of them could be forced by the state or the party authorities to make an incorrect, unlawful or even immoral decision. Thus, holding a marginal role, without any decisional attributes, could potentially represent a shelter against these interventions. Even if the direct authority of the State and of the Communist Party were removed by the change of regime, this has not changed much in the reception of the law in the Romanian legal culture, neither in its conceptualization by lawyers, nor in the concrete way of affirming the law in the courts of justice. Although relieved, the Romanian judges have operated a long time after the collapse of Communism without any guidance, lacking the legal education necessary to act otherwise. In this situation, some judges have "privatized" the channels of intervention in their judicial decisions, becoming corrupt. It was "normal" for these decisions, at the time, to be given most often by other criteria than the law or justice. Other judges have found appropriate to retire. The few who have considered necessary to fight for their profession, for the rights, for the law and for the idea of an independent justice are those with whom it was possible to build what Romania have today, a justice with a satisfactory degree of independence. What is that jurists had to overcome, after the fall of the Communist regime In Romania? The paper will find three questions whose answers have fundamentally changed in the Romanian legal culture, although relatively slowly, in about 20 years: Must a rule have a single form or source? Is the judge a valid source for legal argument? Are the rights (so) important? To these questions, indeed, the answers are now different in the Romanian legal culture. What has contributed to this removal of memory? In this respect, the article analyses some aspects that had positive influence (adherence to ECHR and EU legal systems, some new and progressive statutes of the Romanian law, a new approach in the legal education area) and those that had delayed the removal of old ideologies about the content and purpose of the Law or

about the status of the judge (questionable new statutes of the Romanian law and the dogmatism of Romanian legal science).

Bogdan Dima

University of Bucharest

The concept of integrity in the Romanian Constitutional Court's case law

The paper focuses on the Romanian Constitutional Court's case law regarding the concept of integrity for public offices in post-communist Romania. First, I shall make some general comments on the concept of integrity in connection with the contemporary debate about the best methods to fight against corruption in public offices. Second, I shall select from an array of Constitutional Court's decisions what the Court tells us about the social values protected by the provisions promoting integrity for public offices. Third, I shall present the most relevant case law of the Constitutional Court concerning provisions regulating the conflict of interest, incompatibilities and asset declarations for public officials. An in-depth analysis of the Constitutional Court's case law on integrity for public offices allows us to find out if those specific provisions were or were not constitutionally protected and developed over the years. As the paper will show, the Constitutional Court has been highly protective with and has set out high standards for most of the provisions aiming at promoting integrity in public offices, mostly seen as a preventive and necessary method within the many-sided process of fighting against corruption.

Sorina Ioana Doroga

The West University of Timisoara

Understanding constitutional identity through the language of the Courts. The Case of Romania

With increasing centrifugal forces putting pressure on the functioning (and seemingly, at times, on the very existence) of the European Union, the notion of 'constitutional identity' has gained new significance in recent years. Legal doctrine has metaphorically referred to this general concept either as 'a shield' or 'a sword', thus capturing the ambivalence of both its content and its use by national and European courts. The present paper aims to describe this spectrum of meanings by relying on an analysis of case-law (and language) of the Romanian Constitutional Court, read in relation to the use of the term by international courts such as the European Court of Human Rights and the Court of Justice of the European Union. The role of connected notions such as 'margin of appreciation' in determining the sphere of constitutional identity will also be discussed from the perspective of its use by state authorities in safeguarding the national constitutional identity.

Piotr Eckhardt

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Dissidents' idea of Central Europe and today's constitutional identity of the region

Abstract: Central Europe is not just a geographical region, it is an important political concept designed by anti-Communist dissidents from Czechoslovakia, Hungary and Poland. The idea of Central Europe was created by exceptional intellectuals, not only by political thinkers and activists but also by writers, essayists, historians and poets. And although many authors contributed to the idea of Central Europe, nevertheless Václav Havel, Milan Kundera, Adam Michnik, György Konrád and Czesław Miłosz were

the most influential. Their manifesto was presented by Milan Kundera in his famous essay “a kidnapped West or the tragedy of Central Europe”, in which the region was treated as a group of countries with common history, common culture and common (tragic) political situation during the period of really existing socialism. After the Autumn of Nations many of the aforementioned former dissidents became even more influential. Václav Havel became president of Czech Republic, Adam Michnik an editor-in-chief of a prominent newspaper. Have they continued using their previously voiced ideas of Central Europe somehow? The aim of the paper is to answer the question if the intellectual heritage of the anti-Communist opposition has influenced the new democracies in Central Europe in practical, or at least symbolic, dimension. The presentation will consist of two parts: first, most important features of the dissidents’ idea of Central Europe will be reconstructed. Second, the paper will investigate whether the anti-Communist dissidents’ idea of Central Europe was reflected somehow in the constitutional identity of the countries of Central Europe after the political and economic transformation (focusing particularly on Czechia, Hungary, Poland and Slovakia). The constitutional identity is herein understood as widely as possible – as the backbone of democracy, which includes constitutional law, activities undertaken by constitutional tribunals, political institutions, public discourse on constitutional matters, etc. Presentation will include analysis of current situation in 2018 and the most important processes after the collapse of really existing socialism in 1989. The author will also describe, analyze and explain differences between particular countries.

János Fazekas

Eötvös Loránd University

Centralization of Public Administration in the CEE Countries

National administrations have been facing new challenges due to globalization in the last decades in CEE countries and all over the world. These challenges are as follows: the global financial crisis

in 2008 and its effects, international migration, a much more rapid flow of information than before, broadening international free trade and the emergence of global large corporations. Earlier, in the post-war period (after World War Two), the organizational structure of the public administration in Western European countries was mainly transformed due to the principle of decentralization: lots of public administration tasks were transferred to independent bodies (on central and local level, e. g. agencies and local governments). In many cases, privatization of public services and the implementation of private sector solutions were very popular in the field of performance of public tasks (within the theoretical framework of New Public Management, NPM). This process reached central administration, too: autonomous central agencies and regulatory authorities were established in the postwar period in the Western European countries. These tendencies started in Hungary and other CEE countries after the regime changes in the 90s: separation of powers has been built up in the whole governmental system. Moreover, local governments have been separated from the state administrative system, and autonomous central agencies and regulatory authorities were established within the state administration. The outsourcing of public services began, too: numerous administrative tasks were carried out by new forms of public bodies and private organizations (companies) and NGOs. After the above mentioned tendencies, a significant wave of centralization started in Hungary in 2010. The Prime Minister and its direct executive apparatus became stronger, the ministerial structure and the level of non-departmental agencies has been become much more concentrated. In addition, local governments have become weaker: a lot of public tasks have been transferred to state administrative bodies, and their financial autonomy has been limited, too. The purpose of the paper is to examine: whether the above mentioned trends fit to an international trend, including the CEE region. In particular: whether centralization has constitutional foundations in Hungary and other CEE countries and whether centralization fits into their constitutional traditions.

Tomas Gabris

Comenius University in Bratislava

Citizens preceding their state: Trans-Atlantic views on Slovak political identities

While Slovakia was a part of the Hungarian Kingdom, Slovak population was basically inactive in the political sense. Slovaks lacked proper education and any mass political awareness at all. However, due to massive migration to the US, this has dramatically changed – under the influence of US societal and political system, Slovak immigrants were politically reborn into “Slovak citizens” even before Czechoslovakia and Slovakia were established as independent states. The immigrants then substantially – both politically and financially – contributed to the liberation of their European co-nationals in 1918. Still, immediately after the establishment of Czechoslovakia, many Slovak Americans, unsatisfied with the status of Slovaks in Czechoslovakia, kept developing the Slovak political idea further – towards independence, this being an evidence par excellence as to existence of an independent Slovak political identity. This idea grew even stronger after WWII, upon an influx of Slovak immigrants from the defeated Nazi-sponsored war-time Slovak State (1939-1945). The Slovak political idea might have thereby also served as an important factor for preserving an independent Slovak American identity in the US, during the times of Czechoslovakia, hoping to re-claim the lost Slovak political independence in the future. In the meanwhile, in Europe, prior to 1993, the official Slovak political identity was traditionally conceived rather as a part of broader Czechoslovak political identity, especially after WWII, trying to suppress and refuse any memories of the Slovak State existing under Nazi control in 1939-1945. Even the current independent Slovak constitutional identity (formed as of 1993 upon peaceful disintegration of Czechoslovakia) keeps silent on the anti-Czechoslovak and illiberal tradition within the history of Slovak political identity.

However, it also fails to explicitly refuse the illiberal values and to recognize the positive aspects of Czechoslovak tradition... Thereby, currently the two Slovak traditions and identities – illiberal and liberal – seem clashing in the context of rising illiberal movement in Slovakia, where the illiberal Slovak tradition is being strongly emphasized. The suppressed lore of Slovak political identity previously cultivated mostly among the US immigrants resurfaced in the political discourse of radical political parties in modern day Slovakia. The answer as to where this clash of political discourses and identities – one liberal and the other illiberal – will lead in the future, probably depends on the overall Central and Eastern European political evolution on the scales between liberalism and illiberalism. In the meanwhile, our paper can contribute to the debates by at least providing an interesting insight into mutual political interdependence (and fluid political identities) between the “Old World” and the “New World”, which so far seemed to be reserved only to major nations and colonial powers.

György Gajduscsek and Balázs Fekete

Hungarian Academy of Sciences, Social Sciences Research Centre
Lack of rights consciousness in the legal cultures of Central-Europe and Balkans. Myth or reality? A comparative study

During the 1980s, András Sajó, a leading scholar of legal sociology, argued that the Hungarian legal culture is deeply pervaded by the lack of ‘rights consciousness’, namely that people rely on informal practices, personal networks and emotional ties instead of referring to their formally recognized rights and liberties in conflictual situations. The lack of rights consciousness seemed to be a distinctive feature of the legal culture in Hungary, and, presumably, in most CEE countries, a feature greatly different from Western countries. However, empirical research from the 1980s have not provided convincing evidence that this feature persists in the Hungarian legal culture. Moreover, the survey item

devoted to this issue in a general survey on Hungarian legal culture carried out in 2015 indicated rather counter-intuitive results. In other words, a controversy is present here between a plausible theoretical statement and the empirical evidence. The authors find themselves at the beginning of a research project that addresses this issue. The present paper may be conceived as a conceptual paper attacking the above controversy. In this early stage of the project we suppose that the reason of controversy between theory and empirical data is largely due to the insufficient validity of research findings. The methodology applied provided an inappropriately simplified operationalization of rights consciousness, a complex and situated attitude. Firstly, solely questionnaire survey was used, with closed questions; a most rigid social sciences method of gathering data. Secondly, only one question addressed this issue directly. Thirdly, this key question was too simplistic, and seemingly wrongly formulated. This suggests that a more complex methodology needs to be applied, including potentially situational questions, interviews, focus groups and other methods probably including experiments. Moreover, a one-country-case approach, i.e. mapping solely Hungarian citizens' rights consciousness attitude without an international comparative perspective does not empower us to make substantively valid findings. This implies an internationally comparative approach, preferably with at least one other CEE country and inevitably including at least one West European country. We plan to present these issues in a much greater detail in the paper to be presented at the 10th CEE Forum, while looking forward to further suggestions and experience (data?) from the participants.

Laura Gheorghiu

The West University of Timisoara

The traditional legal culture in Banat

The region of Banat has acknowledged several kinds of governance under domestic and foreign rulers. Each of these strata has sculptured a certain approach to the idea of law, to the understanding of one's rights as well as to performing one's daily or long-term duties. Within the context of preparing the city of Timisoara to become the 2021 Europe's cultural capital, it is about time to discuss the legal order that emerged here as well as the philosophy that backs it. Above all, it is a matter of regional identity as well as of the roots of present values acting for or denying political decisions. I seek to trace the route of this legal culture, from the main inherited issues of the Ottoman millet system through the 18th century Enlightenment and later to the eras successively unveiled, in order to give the profile of the present complex case. With each step, I am going to emphasize the influences, demands and solutions formulated by the leaders and the multicultural society living here, in order to argue for a pluralistic but interconnected legal culture in the region. In addition to the various historical novelties, (acting vertically), one has to remark the horizontal complexity due to the multilinguistic, multiconfessional, later multiethnic character of the society. Whilst each of the groups has preserved the essential issues of its description, their dialogue as well as their reciprocal legal transplants have triggered a multilayered legal culture, somehow comparable to Ehrlich's Bukovina, but by far, luckier for having extended its active influence long after the incorporation of the previous into the Soviet *Weltanschauung*. Should my argumentation correlate well, the conclusion would encompass institutions as rule of law, sense of contract, autonomy, respect and multiculturalism, human rights, open economy, that is a bunch of imperial influences assimilated in a fertile local ground. Elements from the German customary law, from the Ottoman millets, from the Austrian BGB as well as from the Hungarian legal

tradition have melted to offer Banat a healthy legal system as well as a multifaceted legal culture.

Aleksandra Gliszczyńska-Grabias

Institute of Law Studies of the Polish Academy of Sciences

Constitutional identity, community belonging and constitutional referenda – the case of Poland

Until recently, the constitutional identity that had coalesced around the current Polish Constitution appeared to be firmly anchored in Polish society, despite legitimate criticism levelled at some of its provisions (the criticism never went as far as to question the very fabric of the basic law). However, support for the Constitution turned out to be fragile, as only a part of Polish society protested against obvious violations of its principles, demanding respect for the country's constitutional order. Adopted in 1997 as a symbol of social consensus for the building of a free democratic state that respected the rule of law and individual freedoms, the Polish Constitution appears to be too weak to withstand an assault from the legislative and executive branches of the government. It is still unclear what kind of new constitutional identity might emerge, should the Constitution be changed. President Andrzej Duda has already announced a constitutional referendum scheduled for November 2018, in which Poles will speak out on the direction of change they wish to see in the new Constitution. Meanwhile, emphasis in both public discourse in Poland and in the country's new laws and bills appears to be on settling issues from the past and strengthening the protection of the good name of the Polish state and nation. Settling the past takes the form of laws intended to reduce the social benefits granted to former collaborators of the communist regime (even those who successfully passed the vetting procedures at the time Poland began its transition towards democracy), whereas the good name of Poland and Poles is to be upheld by laws that enhance the protection of Poland's

reputation. In my presentation, I would like to examine whether and how the above trends could end up being incorporated into Poland's new Constitution, and what effect this would have on the constitutional identity derived from these new principles. Judging from the proclamations made in the run-up to the constitutional referendum of 2018, such principles would be aimed mainly at bringing Poles closer together as a community, strengthening their sense of national dignity and pride and their association with Christianity, while dismissing the community that includes all, regardless of their religion and ethnicity. Simultaneously, as suggested in the rationale behind the adoption of laws establishing decommunisation mechanisms, the community should be comprised mainly of individuals with no links to the former communist authorities, not even very remote or resulting from coercion. The question is whether such an approach to community is compatible with the principles of equality and non-discrimination, which in fact are at the heart of all constitutions of democratic states that respect the rule of law. I believe that this question is worth considering.

Ewa Górska

Jagiellonian University

When memories collide: memory activism and conflicting memory narratives in former Yugoslavia

The paper looks at a few chosen examples of memory activism and at the conflicting memory narratives (official and alternative) in the countries of former Yugoslavia. In those countries, activists and NGOs right now engage in vast memory work, raising awareness about the past and present and commemorating facts suppressed from hegemonic collective memory. Collective memory of the past of the nation—like battles, atrocities, victimhood, and braveness—are connected to national identity and are one of the most important tools of shaping social bonds. As Gillis (1994) shows, the “notion of identity depends on the idea of memory, and vice versa”. But what is important is that this

collective memory is not still and stable, it is dynamic, socially constructed and subjective. Societies are bonded by their shared collective memories, and in most nations there is a dominating political elite view on the past – a master collective memory (Zerubavel, 1997). Most of the time, it is at the same time an official, state sponsored memory, produced by states to “maintain social cohesion and defend symbolic borders” (Jelin, 2003). It is expressed in national calendars, legal regulations and official documents (especially preambles), monuments, museums financed by the state, as well as in the educational system. But hegemonic, state-sponsored collective memories, as they are used to build a certain dominant narrative and national identity, often exclude certain events –especially those that the nation or state cannot be proud of. In such cases, memories of the victims, state-sponsored atrocities, and other acts of violence are being suppressed and removed from official commemoration and memory discourse. Nevertheless, the past is rarely forgotten, and while in official narratives some facts tend to be excluded or even denied, usually some members of the society – memory activists – take it upon themselves to raise awareness, introduce critical thinking, and try to widen public memory discourse. Memory activism often takes shape as commemoration, as a form of political protest against official narratives and the forced forgetting or silencing of certain events in official memory practices (Gutman, 2015). In this paper, I will describe the actions of chosen memory activists and NGOs: a Batajnica Memorial initiative in Serbia, Serbian Women in Black movement and activist group Four Faces of Omarska, which is focused on commemorating Omarska camp in northern Bosnia and Herzegovina, among others. The analysis of the memory activism in societies of Former Yugoslavia can also point out the ongoing power struggles, the marginalization of certain groups, as well as how contemporary identities are built in relation to collective memory.

Petra Gūmplová

Max Weber Kolleg, University of Erfurt

The unfinished constitutionalization of the permanent sovereignty over natural resources

The focus of the paper is the international law principle of permanent sovereignty over natural resources (PSONR) and its unfinished constitutionalization. The paper argues for the necessity of the reinvention of sovereignty over natural resources consistent with international law's global constitutionalization of state sovereignty and with notions of domestic and international justice inherent to it – and outlines the contours of this constitutionalization. The first part of the paper traces the origin of PSONR to the process of decolonization in the 1960s during which it has become a firm principle of international law granting sovereign rights to natural resources equally to all states and their people on the basis of the collective right to self-determination. Seeking to correct the profound injustice of colonial appropriation of natural resources in foreign territories, PSONR granted its holders an extensive bundle of powers, privileges, and immunities and a considerable discretion in making decisions about what to do with their natural environment in accordance with their domestic law and national development strategy. The point of the first part is to identify a paradox: despite the fact that PSONR is the outcome of this emancipatory process, it universalized the system which perpetuates injustices not dissimilar from those produced by colonial appropriation of nature – e.g. political injustice of using resources for the exclusive benefit of the sovereign and the maintenance of her (unjust) rule and the injustice of exclusion and inequality in the distribution of benefits and burdens flowing from the use of resources. The second part of the paper locates the emergence of PSONR in the broader context of the profound transformation of international law in the post-WW II period. This transformation was tied to efforts to substantially reinforce the safeguards for peace, to end colonialism, and to substantially limit abuses of sovereign power

and concerned both the method of international law making and its content. The transformation, I argue, consisted mainly in the twin process of the *universalization* of sovereignty and granting sovereign equality to all states and their people and the global *constitutionalization* of sovereignty, domestically and internationally, by public international law and its norms such as human rights, self-determination, and the prohibition of the use of force which redefined and limited the legal prerogatives of sovereign states. This part identifies another paradox: despite the fact that PSONR emerged as part of this transformative process, neither theory nor practice of PSONR has reflected on the emergence of a new constitutionalized sovereignty regime (for example by stipulating that the conditions of legitimacy of the exercise of sovereign rights to natural resources have to be derived from respect for human rights). In the last part, the paper outlines what a systematic account of PSONR from the perspective of sovereignty globally constitutionalized by international law would look like. Invoking human rights, the right to self-determination, as well as other norms and principles of international law (indigenous rights, common heritage of mankind, or sustainable development), I argue that a new, constitutionalized PSONR regime is better equipped to respond to demands of both domestic and international distributive justice and global environmental justice.

Johanna Hase

WZB Berlin Social Science Center

The enigmatic notion of constitutional identity

Constitutional identity is one of the most contested terms in constitutional theory and in European politics. As the 21st century comes of age, countries in Central and Eastern Europe continue the political roller coaster ride of the previous 100 years: While some states further consolidate their young constitutional democracies, others seem to be taking a U-turn on this road, frequently invoking constitutional identity as a justification for

their harsh change of course. This situation urgently calls on legal, political and social theorists to clarify the enigmatic notion of constitutional identity and to determine the essence and limitations of its meaning. Since first introduced into constitutional theory in the 1990s by legal theorists, constitutional identity has remained a debated and vague concept. More clarity shall be brought into the discussion by exploring what – if anything - sets it apart from other conceptions of collective identity that have emerged since the Enlightenment and the beginning of constitutionalism, ranging from Montesquieu's *esprit général* and Hegel's *Volksggeist* to recent conceptions such as Smith's national identity and Kymlicka's societal culture. The article will discuss these theoretical approaches along several dimensions: (1) The origins of identity; (2) the subject of identity; (3) the content of identity; (4) the empirical sources expressing identity; (5) the changeability of identity; and (6) the intrinsic or instrumental value of identity. This approach will allow a sharper theorization of constitutional identity and provide the basis for a discussion of the (dis)advantages that this conception of collective identity holds in comparison to earlier approaches. The insights of this article can thus contribute both to the academic debate about collective identity in constitutional theory and offer a new perspective on the buzz word that has the power to shape the political future of many Central and Eastern European countries.

Michael Hein

University of Göttingen

Do constitutional entrenchment clauses matter? A study on constitutional politics and constitutional review in Europe (1945–2016)

Most modern constitutions are entrenched, in other words, they are harder to amend than ordinary laws. In addition, many constitutions contain so-called 'entrenchment clauses'. These are

provisions that further raise the hurdles for amending certain constitutional subjects or for amendments under certain circumstances. Several clauses even declare selected provisions unamendable (so-called ‘eternity clauses’). The vast majority of such clauses aim to protect essentials of modern constitutionalism, such as democracy, human rights or the rule of law. Recently, entrenchment clauses have become a hotly debated topic in constitutional research. However, the relevant studies are restricted in two respects. First, they almost exclusively focus on ‘eternity clauses’, leaving the various other types of entrenchment clauses aside. Second, most studies predominantly discuss normative matters, such as the appropriateness of entrenchment clauses, the problems of their interpretation, and the relationship of explicit entrenchment clauses and implicit limitations on constitutional amendments (such as a ‘basic structure doctrine’). In contrast, we still know very little about the empirical effects of constitutional entrenchment clauses. Do they substantially constrain constitutional amendment processes, in other words, do they allow for a judicialization of politics by Constitutional (or Supreme) Court decisions? And if so, do entrenchment clauses function as intended by the constitution framers? I will answer these questions by analyzing the case law of the Constitutional and Supreme Courts of all European countries (except for microstates) from 1945 until 2016 (114 decisions). First, I will show that entrenchment clauses do matter: in 43 cases, courts invalidated amendments (at the drafting stage, before promulgation or after coming into force) with reference to an entrenchment clause. The vast majority of these judgments were issued in Central and Eastern Europe after 1990, particularly in Moldova (eleven cassations), Ukraine (ten), Romania (five) and Kosovo (four). Second, I will demonstrate that about two thirds of these 43 court rulings can be assessed as dysfunctional interventions since they did not protect any essential of modern constitutionalism. Finally, I will discuss the implications of these results for the normative debate on entrenchment clauses.

Bogdan Iancu

University of Bucharest

Constitutional identity - the 'dead hand of the past' in constitutionalism and constitutional law

Constitutional identity is one facet of a wider tension between localism and universalism, past-bound and future-oriented, views of constitutionalism. This is a resilient theme in constitutional law, whose roots go back to the famous dialogue between Jefferson and Madison. The former advocated the position that 'the earth belongs in usufruct to the living' and thus that constitutions (and even run of the mill legislation) ought to lapse or be replaced in the timeline of one generation, 19 years at the most. Tom Paine 'extended' the ideal lifeline of constitutions to a term of 30 years. The general dichotomous problematics (past/future, parochialism/universalism) are compounded in modern constitutions, which, as a rule, contain unalterable eternity clauses and sometimes also expressive renvois to past common experiences or to shared, presumably eternal, values (appeals to Divinity, formative past struggles, common traditions, and various historical experiences or mythologies). In the context of the recent resurgence of conservative constitutionalism in Poland and Hungary, accusations were implicitly or explicitly made to the effect that appeals to identity and illiberal proclivities would be somehow fused at the hip. This accusation can be justified in the context where 'memory politics' is instrumentalized for immediate political purposes. I will however hypothesize that a tradition-driven, historically bounded definition of identity, although its expressions might embrace cruder overtones in the region, is an inescapable feature of constitutionalism and constitutional law. Otherwise put, as long as constitutionalism is tied to the nation state, the 'dead hand of the past' (values, traditions, understanding of history and commonality) will remain an inescapable feature of constitutional law and politics. My paper will use as a backdrop the Europe (i.e.,

EU)-related jurisprudence of constitutional courts, comparing the identity-related positions of constitutional courts in established Western democracies with those of their counterparts in the New Europe.

Iwo Jarosz

Jagiellonian University

Polish Constitution and Polish collective consciousness on ownership and limited rights in rem

The Constitution of the Republic of Poland (the “Constitution”) requires that ownership and other property rights be protected equally, with respect to any and all entitled persons (be it natural or corporate). Any statutory restrictions or limits thereof need to pass a proportionality test. The Constitution disallows the legislature and other public authorities (acting pursuant to and within the confines of the law as stipulated under Article 7 of the Constitution) to disproportionately or unjustifiably restrict the right of ownership or other property rights. It will be argued, however, that the law has effected certain restrictions in this regard that do not pass both relevant tests, but follow what is deeply ingrained in the prevalent collective beliefs of Polish society. Apart from the restrictions mentioned above, the Constitution places upon the lawmaker a positive burden to enact laws and procedures that grant proper legal protection to such rights. It will be submitted that the inadequacy and inefficiency of such measures – somewhat contrary to the Constitution – also results from the way in which the Poles’ dominant sentiments are shaped. The above means also that the Constitution bars the lawmaker and other public authorities from distinguishing between different instances of ownership, regardless of their object or subject, time of establishment or acquisition, or origin. The text of the Constitution only ostensibly mirrors the Poles’ shared beliefs. In reality the Polish communis opinio is prone to differentiate between different categories or examples of ownership rights pursuant to with whom such rights are vested

(i.e. approaching ownership rights of public bodies differently than ownership rights of private entities). Traces of such beliefs are to be found in ordinary legislation. The same principles as indicated above should apply to limited property rights (limited rights *in rem*). It is not sure, however, how these principles affect the relation between these separate categories of rights (i.e. ownership vs. other property rights). The Polish Constitutional Tribunal argued that the notion of equal protection is not tantamount to applying identically intensive protection to these particular categories of rights. It will be argued, however, that any differentiation thereof must capture and mimic the very essence of these categories of property rights, keeping the differences as to the intensity of protection proportional to the differences of the rights themselves. The law, it will be noticed, seems to favour certain rights over other, in a manner closely related to how the collective consciousness perceives them. All in all, it will be argued, the ideas of ownership as well as limited property rights tend to operate as local ones, embedded in the European legal tradition, but deeply related to the collective consciousness and the popular beliefs.

Justyna Jezierska

University of Wrocław

Responsibility for the past. Settlements with the previous system - duty of the law or history?

Memory and ideology have got a lot in common: both are focused on building the identity (of nations, individuals, community), both can use power, violence or domination to succeed. During the transition of political systems, usually there is a change of the collective memory. Furthermore, the new ideological order always wants to rebuild the collective memory - the easiest way to start this is by using legal tools. Legal institutions are also used to make settlements with the past, but they got some limitations: for example, law cannot impose collective responsibility on individuals. The basic idea of the paper is to use Paul Ricœur's

comparison between lawyer and historian. They both judge the past using their own languages, narrations. What kind of settlement should they make to overcome the past deeds? According to a research carried out by P.T. Kwiatkowski, in the memory of contemporary Poles, the Polish People's Republic is perceived as a state that used violence and restricted the freedom of its citizens. But the researcher underlines that there are strong social tendencies to idealise the past system. While simultaneously there is visible criticism of today's democratic state and the free market economy system in all post-communist countries. Is it possible that the new ideology cannot establish its own social memories about the past? Whose fault is it? In my paper, I will analyse the problem of responsibility for the past, past deeds, previous system. In which discourses/narration - legal, historiographical should it be made?

Marin Keršić

University of Split

Legal principles in the discourse of Croatian legal science: What qualifies a norm as a principle?

Legal principles still remain an intensely discussed topic in legal theory, as it was the case when the topic had just emerged in the second half of the previous century. Arising from the discussion about the nature of legal norms and sources of law, and the well-known distinction between legal rules and legal principles, put forward and elaborated by Ronald Dworkin and Robert Alexy, among others, the topic still remains of interest for contemporary authors. Setting the framework for a broader research on legal principles I plan to conduct, this paper first analyzes how legal principles are understood in the discourse of Croatian legal science. Approaching the issue from the analytical point of view, using the method of logico-linguistic analysis of discourse, the main question posed in the paper is the following: what are the conditions under which Croatian legal science characterizes a norm as a principle (as opposed to a rule) or the conditions under

which statements about principles, such as 'Norm N is a principle', are true. To this end, the inquiry starts by analyzing the discourse about legal principles in some of the fundamental parts of Croatian legal doctrine, ranging from the doctrine of civil and criminal law (both substantive and procedural) to the doctrine of administrative law. After identifying the conditions under which a norm is considered a principle and the statements about principles are considered true in Croatian legal doctrine, the paper makes an overview of the contemporary views of legal principles in Croatian legal theory, determining the degree in which Croatian legal theory is based on the discourse of Croatian legal doctrine and the degree in which Croatian legal doctrine uses the analytical tools developed by Croatian legal theory. Finally, the paper evaluates the usefulness of the theoretical tools that the Croatian legal doctrine uses in describing Croatian law in force.

Jan Bazyli Klakla

Jagiellonian University

The (memory of) customary law as a part of collective identity in contemporary CEE countries

Customary law is a very peculiar normative system at the interface of two other systems – law and custom. On the one hand, it is more than a custom, and, on the other hand, in the dominating legal science positivistic paradigm, it is denied the value of being law in the full sense of the word. It is commonly perceived as a relic of the past and analyzed mostly in a historical context. Societies that still follow customary law are seen in the best case as anthropological curiosities. It happens frequently that one faces the reasoning according to which in order to modernize a community in which customary law is still present, it is necessary to completely displace customary law as a regulator of interpersonal relationships, as this would be a backward legal system. It is said that the transition from informal social control

executed by non-professionals into formal social control executed by state authorities and professionals represents an imminent and positive change that is connected with the general evolution of society, being an expression of the progressive differentiation of labor that occurs in modernizing social systems. Although it is true that in modern Europe we encounter situations where customary law can be described as a normative system less and less often, customary law remains an actual regulator of a part of social life, and, as such, it is not yet a forgotten concept. Even though we cannot assume that particular customary law norms are valid in social reality – not only that people know about their existence, but that they also know the exact regulating content of the norms, the patterns of conduct they propose, and that they perceive this pattern as appropriate and desirable – there are still societies where making reference to customs and traditions as a whole legacy is still a key element of a self-created identity for the community members. In my presentation, I would like to argue that the shared collective memory of once followed customary law is still used as an element of collective identity among some groups in Central, Eastern and South-Eastern Europe. For that purpose, I will use the examples of Albanians and their memory of Kanun, as well as Romani community and their memory of Romanipen/Romaniya. Both cases will be treated as an opportunity to reflect on a progressive change that happens in the status of customary law in the social order among many communities.

Karolina Kocemba

University of Wrocław / Centre for Legal Education and Social Theory

Gender and Constitution. The Case of Poland

During the last few years, we could observe an increased interest about the changes in “feminist law”, especially within the leftist and conservative circles. By observing the media discourse, we could notice that people, who were against pro-feminist law,

would argue that for example anti-violence convention is not compliant with the constitution and constitutional spirit. Interestingly, the media debates pretended that phenomena such as violence against women and abortion do not occur in Poland. What is more, International law was treated as foreign, instead as part of the Polish law system. Looking at the discussions, we cannot say if the legal constitutional identity is representative for the whole society. The concept of constitutional identity is used differently in different circles. But, the essence of constitutional identity should be the same for every citizen, something like a core. The problem is that the current government behaves like only they - the conservative and Catholic community - can represent and say what constitutional identity is, despite the fact that the constitution is still compatible with feminist law, including European Law, which is actually part of our legal system. In my paper, I would like to show understanding of constitutional identity by analyzing media debates about "gender law", constitution and Constitutional Court judgements. I will also try to answer if there is a place for feminism and women's protection in Polish constitutional identity?

Lukasz Koltuniak and Piotr Eckhardt

Jagiellonian University

Why "Radbruch formula" was not a "philosophy of transition" in Central and Eastern Europe

Gustav Radbruch was one of the most important legal philosophers of the XXth century. His philosophy, perceived as the "German divorce" with positivism, was a very important contribution to the European discourse about totalitarianism. His formula, which explained that, in some circumstances, totalitarian law "is not a law", was the main argument to justify the Nuremberg process. However, when communism collapsed in 1989, the majority of Middle European states decided to apply the principle of continuity and, in general, these countries refrained

from punishing communist crimes. Many supporters of the “stronger” divorce with communism remembered the German example and also quoted Radbruch. According to the supporters of “strong” decomunization, political factors led to the lack of radical lustration and decomunization. However, our short analysis of Middle European legal discourse showed that communist law was perceived as “not such *iniustissima*”. We must remember that after 1956, the communist system was undemocratic and authoritarian, but rather not totalitarian. We would like to compare the discourse in Middle Europe (in every Middle Europe countries, including such publications like the books by Jerzy Zajadło or Csabo Varga) and answer whether this more “moderate” character of communist dictatorship influenced future transition. What can we say about the common Middle European perception of “*iniustissima*” of the regime's law? Or maybe this is something influenced by the differences of various national regimes? For example, we know very well that the more moderate regime in Poland or in Hungary was not comparable with Czechoslovakia’s “soft Stalinism” or Romanian “new Stalinism”. The regimes in the majority of states in Middle Europe implemented many elements of “traditional” European legal culture and the longer communism existed the less “socialists voluntarism” was present in the legal system. In the last part of our speech, we would like to try to find an answer to the question of knowing what could be the model of a future “divorce” with potentially future regimes in Middle Europe or anywhere else.

Sergiej Korolyov

State and Law Institute of the Russian Academy of Sciences
Does the term 'legal identity' make sense in the first place?

“The first place” alluded to in the title is to be understood literally, or in Aristotelian terms as the place “nearest to nature” and, subsequently, the place “remotest from us - humans”. Coming back to the roots of Western civilization, we are confronted with the preponderance of Cosmos, especially in the teachings of the

three Milesians (Thales, Anaximander and Anaximenes) and the virtual nonexistence of the human Self as a special object of scientific inquiry. Thus, 'in the first place' the word "identity", has an utterly objective dimension and means "natural, or holistic identity", where an 'anthropos' is understood as a 'micro-cosmos', as a subordinate and almost irrelevant instance of the 'macro-cosmos' and its paradigms in the terms of Logos and Nomos. This 'natural, or holistic identity' of human beings was first challenged and then almost disgraced by the Greek sophists. The famous Protagoras' maxim ("the man is the measure of all things etc.") may be celebrated as an obvious 'human (individual) twist' of the Ancient Greek philosophy and the birth of philosophical anthropology. Thus, due to Greek sophists a human existentia was divorced from the human (=micro-cosmic) essentia. Afterwards, the Socratic theme of personal moral integrity and responsibility became an obligatory philosophical inquiry not to be thought away from the works of Plato and Aristotle. The famous Socratic method of inquiry may be regarded as an algorithm of systematically expose the answerer as an impostor whose alleged self-identity eventually turns out to be false and self-contradictory. If we are to preserve this Socratic heritage, the word 'identity' becomes dialectic and procedural outcome of socially relevant communication, rather than a monotonic and decisional act of ideological embracement or challenge. The fact, that my self-imposed identity may be denied by my interlocutors, cannot be simply shrugged off, if the socially relevant communication is to be continued. Moreover, it is "my foe", rather than "my friend" – much in the sense of Carl Schmitt – who can mercilessly reveal the dark corners and even corruption of my character and thus show me the way to better (self-)identity. Coming to terms with 'legal identity', we have to simultaneously bear in mind the following interrelated features of this notion. Firstly, we have to subdivide it into a legal identity 'of us, by us and for us' (= Selbstidentität) and a legal identity 'of us, by them and for them' (= Fremdentität). Thus, the Russian self-view from Siberia has hardly anything to do with a CNN-view of "Russians as

they are” to be disseminated among average Americans. As we see, this duality may be easily translated into biased propaganda tools: a legal identity ‘of us, by us and for them’ (= Selbstidentität for sale abroad) and a legal identity ‘of us, by them and for us’ (= Fremdidentität imposed as Selbstidentität). Secondly, there comes the pair of ‘diachronic (vertical, or historic) identity vs. synchronic (horizontal) identity’. Thus, the historic legal identity virtually merges with legal tradition in its broad (inclusive) sense. It is another big problem, whether modern Germans, for example, may ideologically converge the Second Reich with the Third one and the latter again with the “era of Angela Merkel”. Thus, the synchronic legal identity may clash - and often does so - with the diachronic (historical) legal identity. Again, this circumstance leads us to the third duality of the term “legal identity’, where the Marxist analysis may be not out of place. In this Marxist vein we have to differentiate between a legal identity of the political elite and a legal identity of the ‘silent majority’, i.e. those who only occasionally exercise - or prefer not to - their voting rights. ‘Legal identity of proletarians’ is supposed to be an impossible thing. If we equate ‘legal identity’ and ‘bourgeois legal identity’, as Marx did, then we are doomed to dismiss lots of marvelous things: sociology of law, psychology of law and legal anthropology, invented by Greek sophists, among them. Coming to terms with ‘constitutional identity’, we have to conclude that the Marxist class theory may be a good start but must be cleaned of Marxist bias to-wards legal science and legal profession. The integrative function of a national constitution is impossible, if we regard it only as a manifestation of the bourgeois lip service to people’s democracy. This circumstance brings us to the fourth duality: syntagmatic vs. paradigmatic constitutional identity. The syntagmatic constitution-al identity embraces the values of plurality in the sense of give-and-take. The paradigmatic constitutional identity means the force of teleological unity, or the unity of national goals.

Mario Krešić

University of Zagreb

Legal consciousness and (de)constitutionalisation of the legal order

The constitutionalized legal order can be defined as the type of order in which legal and political practices are based on several implicitly or explicitly posited postulates on the characteristics of constitutional norms and one of these is their influence on political relations (Guastini). This model of the legal order can be opposed to the model of legislative legal order characterized by the rejection of the thesis on constitutional norms. Some specific order can be placed on the measuring line between two poles on which the opposite models are placed and the process of constitutionalisation or deconstitutionalisation of the legal order can be described as its movement on that line. Although the concept of (de)constitutionalisation of the legal order is an important term in political and legal discourse, it is still surprising that systematic empirical research on this process in specific orders is still missing. In this paper, we will present how the concept of legal consciousness developed in the theory of law could be used as a tool for better understanding and researching of the process of (de)constitutionalisation. We will especially point out the usefulness of the distinction between formal and material legal consciousness (A. Ross) for describing and measuring changes in the legal order.

Milos Markovic

University of Belgrade

Three questionable assumptions and a critique of global constitutionalism

Abstract: International constitutional law constitutes an unusual topic for many readers. The debate about the content and structure of constitutions has been developing so far within the borders of domestic states. In recent years, however, a new constitutional discourse arose at the international level.

The global constitutionalism discourse starts from the idea that a constitution may exist beyond the scope of the domestic legal system, both above and beneath state level. There is furthermore a sufficient homogeneity in the international sphere as to speak of international community. Finally, the idea of a global constitution has itself a global character, which means it is already universally accepted. These claims constitute three important pillars of the contemporary discourse about a global constitution. The adduced assumptions are rather questionable and require precise elaboration and critical analysis. For the sake of clarity and precision, a critical analysis of global constitutionalism necessitates a prior terminological diversification primarily with regard to the notions of constitution, constitutionalism and constitutionalisation. Furthermore, I will pay particular attention to the difference between constitution in a formal and material sense. A distinction between micro- and macro-constitutionalisation as well as the primary and secondary functions of global constitutionalisation shall be taken into account. After elaborating on the three assumptions, I am going to investigate three problems underlying global constitutionalism. On the one side, international law doesn't represent an all-embracing normative system, but is rather fragmented and limited to certain areas where an interstate compromise could be achieved. On the other side, soft law plays a more and more important role in the international sphere, in spite of its disputable legal character. Apart from the legal questions, political difficulty is incorporated in the potential hegemonial elements of the global constitution. In the light of the present geopolitical situation it is still implausible to claim the existence of the global constitution in a formal sense. Nonetheless, it would be plausible to say that some fundamental norms exert constitutional functions in international law. Global constitutionalism strives to achieve the highest possible tolerance of difference in the contemporary global world. The main goal of the paper is to provide a clear overview of global constitutionalism and a critical analysis of its discursive pillars.

The outcome should demonstrate that the idea of an international constitution requires permanent elaboration which would follow the development of international legal and political relations.

Marton Matyasovszky-Nemeth

Eötvös Loránd University

Parallel social identities: The Humans rights discourse in the 1980's in East-Central Europe

Throughout the Cold War, the socialist bloc and the West took advantage of the rights discourse, but in a very different manner. While the Soviet Bloc found socio-economic rights as a useful instrument in the global political battlefield, the West appeared as the guardian of classical liberal rights. In the 1970's, as Samuel Moyn wrote in his book *The Last Utopia*, human rights spread around the world and grew into the strongest social movement. After 1975, when the European socialist countries signed the Helsinki Accord, human rights became the strongest identifying ideology of the dissident politics. Arriving to the 1980's, in most East-Central European countries, human rights discourse was developed into one of the most divisive topics between the officials and the democratic opposition. The official propaganda hailed itself as the defender of the social rights, which guaranteed wide social stability but with a huge cost: the curtailment of civil liberties. On the other hand, prominent dissidents, for instance Sakharov, Michnik, Orlov or Kis, drew up an alternative perspective: a democracy where the rule of law and human rights prevailed. János Kis, a dissident moral philosopher inspired by Dworkin, developed one of the most unique examples for this vision in his moral theory of human rights. His book, *Do We Have Human Rights?*, was published as a samizdat copy in 1985. Kis composed an idea of classical human rights, the so-called moral rights, which must be guaranteed to all human beings in a moral community. The theory of Kis provided a firm ground for a well-functioning network for the protection of civil liberties in the young democracy, which filtered into the mainstream

constitutional concept after 1989. During the 1980's, the divergent views on human rights evolved into separate constitutional and social identities, which were explained also in pre- and post-transitory legal texts and scholarship. However, the rejection of social rights in the young democracy, which came to light in the new legislation and the Constitutional Court's decisions, demanded a tremendous cost for the success of human rights. On the other hand, a great obstacle surfaced following the democratization of the region: the incorporation of civil liberties failed the hopes for the majority, because it did not become part of the social identity. The imagined democratic identity of the dissident intellectuals remained merely imagination, since it disregarded the region's socio-cultural aptitudes. In the last three decades, the growing inequality paved the way for a counter-hegemonic path for populist, repulsive rhetoric on human rights, and a nostalgic view on the former dictatorship. In my presentation, I will illustrate the formation of the divergent views on rights during the time of the regime change in East-Central Europe. The discussion will focus mainly on the case of Hungary, and, with the help of Kis' theory, it will try to draw up an alternative, critical approach for rights, where social theory plays a much greater role.

Alexandra Mercescu

The West University of Timișoara

The comparative double-binds of Central and Eastern European Countries

One's identity, one's legal identity, is constructed through a number of discourses held by a number of actors: politicians, the media, actors performing on the "stage" of popular culture, and certainly not least, scholars. In the latter's world, the discipline of comparative law occupies a special place as regards the question of national legal identity or constitutional identity insofar it aims at revealing "the self" in a dialogical manner, by contrasting it with "the other", the outcome being, however, never more than a

relative analysis. In the case of countries such as those belonging to the regional space commonly referred to as Central and Eastern Europe (CEE), the question of identity is more problematic and, therefore, comparative scholarship even more needed, I would suggest, since the status of law seems to be trapped in inauthenticity as the expression of a difficult negotiation between an older legal past heavily marked by legal transplants, a recent legal past conventionally conceptualized as anomalous (or even a-legal) and a present, equally “foreign”, for under the strict guidance of the West. In this context and given that comparative law inevitably has its own politics, I want to explore what the purpose of comparative legal studies involving the legal cultures from the CEE region should be, whether it should be any different than comparative law in general and what it can achieve in terms of legal critique. In answering these questions, I argue that CEE countries find themselves in a double-bind situation from at least two points of view: first, epistemologically speaking, asserting difference from the West can be problematic in light of the “generic constitutional law” and “global constitutionalism” discourses prevalent nowadays; second, linguistically speaking, asserting identity (be it in the language of differences or similarities), in English, through English, in order to achieve a wider visibility and thus to resist the status of periphery, raises the complicated matter of the authenticity of the other’s rendering.

Miklós Merényi

Corvinus University of Budapest

Habermas vs. Castoriadis on the constitution of modernity

In his *The Philosophical Discourse of Modernity*, Habermas offers a critical excursus on Castoriadis, placing him inside the branch of philosophies of consciousness, presuming an interior world separate and prior to intersubjectivity. Through imaginary institution, this pre-linguistic unconscious is constantly

generating radically different patterns to new 'words'. Habermas cannot accept this radical political openness as the novelty of modern democracy, allowing no law that can be fixed, whose articles cannot be contested, whose foundations cannot be called into question. This supposedly sidesteps the normative dimension that Habermas draws from intersubjectivity and communicative action, since there is no general consensus over the process of rationalization. For Castoriadis however, the constitution of modernity is present in an imaginary institution that brings about a radical transformation of the social-historical being. The members of a collectivity deliberately constitute the political forms of authority in order to institutionalize their common life. During this process, spontaneous and creative power of the imagination is not and should not be completely rationalized: the core of its constitution should be constantly brought back to its actual basis – the actual human being – and established as the people's own praxis. For him, intersubjectivity is a narrow angle to look at the social-historical field. Based on the existing literature on this intersection (Whitebook, Bernstein, Arnason, Kalyvas, Arato, and, more recently, Blokker), I reconstruct the actual positions of the two philosophers not as a sharp distinction between communicative and subject-centred reason, but as a constructive dialogue. Instead of detaching the Castoriadian critique of the empire of calculability (the continual repetition of the same heteronomic divisions and hierarchies) and the Habermasian fear of aestheticizing the political, I expose this tension as the one between mastery and autonomy, two ultimate markers of the modern political and constitutional horizon. In tracing the pathways of the project of the Enlightenment and the project of autonomy, I also draw some general conclusions for constitutionalism in the post-socialist context, where the unfinished project of modernity has come out as a never-ending catching up revolution.

Jolita Miliuviene

Myklos Romeris University

Influential vectors shaping the constitutional doctrine

Being stable and almost unchanged, the Constitution of the Republic of Lithuania, adopted 20 years ago, continues today to provide the answers for the dynamic changes of society and adapts to the political and legal reality. It is a living Constitution. Its viability is manifest in the interpretation of constitutional norms and principles provided by the Constitutional Court, which seeks its inspiration in various internal and external factors. Nowadays, national constitutional orders cannot be seen in isolation anymore, as they are part of a global constitutional context. Therefore, international law is one of the most important sources of inspiration for the construction of constitutional norms, especially when it is enshrined in the Constitution itself. The explicit wording of Art. 135 of the Constitution compels Lithuania to follow the universally recognized principles and norms of international law. In the official constitutional doctrine, as developed by the Constitutional Court, international law is perceived to be a minimum constitutional standard of the human rights protection. The case law of the European Court of Human Rights and the one of the Court of Justice of the European Union are recognized both as the official source of interpretation of national Lithuanian law, including constitutional law. This is something that was confirmed by the Constitutional Court itself. Going further, one must admit that the distinctive quality of the Constitution is that it has not only to be effective in the future, but also to create the future. Therefore, the idea that constitutional case law and doctrine may be influenced not only by traditional international law, but also by norms of soft law, which are created by international constitutional organizations, also enjoys some legitimacy. These norms created by law professionals at the international level (for instance, within the framework of the famous Venice Commission) are not officially binding, however, they deserve appropriate attention. Lithuanian Constitutional

Court has already had such experience while construing constitutional provisions and after consulting some of these documents it managed to reach important conclusions in its case law. The international constitutional soft law norms, promoting democracy, the rule of law and the protection of human rights, might help to ensure that the future constitutional doctrine will be developed in coherence with the universally and commonly known constitutional principles and with the newest tendencies. The usage of soft law norms while interpreting constitutional provisions, are meaningful in the context of modern times, when in some states the national constitutional background seems to be a bit staggered and even faded, especially when it is influenced by certain political decisions. From time to time across Europe, constitutional courts experience crises, a sense of insecurity and menace to their independence and impartiality, thus coming under pressure from executive and legislative powers of the state. These soft law norms, tacitly and universally accepted, but not transformed into binding legal norms because of lack of political will, could be a signpost for national constitutional systems and thus help to find the right solutions in the presence of constitutional crises.

Marica Mišić

University of Niš

Collective Memory of Totalitarian Communist Regime: Show Trials in Yugoslavia

After World War II, new revolutionary authorities declared a new political and legal system along with the declaration of a new state, breaking the bonds with the earlier Kingdom of Yugoslavia. The transition from monarchy to republic made many victims, besides those lives that the war had taken away. There were a lot of political trials and convictions for high treason and other crimes against the people and the state. The most famous trial was the trial of Draža Mihailović and collaborators, the so called Belgrade Process. The process was controlled by the Yugoslav

government and the Yugoslav Communist Party. Draža Mihailović was sentenced to death, as were some others of the twenty-three accused. In the very beginnings of The Federal People's Yugoslavia, the Yugoslav Communist Party, as a legitimate ruling party, based the political and legal system on Stalin's view of communism, so called Stalinism. The period from 1948/9 to 1953 could be referred as the phase of state reforms. Another consequence of the aggravation of the relations between the Yugoslav Communist Party and Cominform and the Tito- Stalin split, apart from the reforms, were show trials. A lot of Stalinists (the political opponents of Tito and his regime – Titoism) were accused. Some of them were convicted and sent to prison and to the Goli otok (Barren Island) labour camp, and some of them were even found dead. According to the official reports, those who were found dead committed suicide, but doubts regarding those reports' credibility can be raised. The situation was the same in other countries of the Eastern bloc. The political opponents of state regime, and ultimately, Stalin, were also prosecuted in show trials. After the Tito-Stalin split, Titoists were persecuted and trialed, since they were deemed to be state enemies. In total, 275 individuals were convicted in 41 proceedings. Among those prosecuted, 68 were sentenced to death and 207 to imprisonment. The most famous are the Budapest process and the Sofia processes, against Laslo Rajk in Hungary and Trajče Kostov in Bulgaria. However, there is a significant number of people who were "sentenced to death" without any trial or verdict. Those who have committed suicide under unclear circumstances were not an exception in the satellite states. In conclusion, this research will be focusing on totalitarian regimes, primarily on the communist regime in post-war Yugoslavia and, in particular, on show trials from the point of view of legal theory and history.

Magdalena Nazimek

University of Lodz

Constitutional identity and global migration – The Polish Case

According to M. Zirk-Sadowski, constitutional identity is based on the recognition of one's own cultural and national distinction, through a reflection on fundamental rights accepted in the society. But should the effect of this reflection be applied only to the members of this nation, if it may lead to treating non-citizens differently and even to discriminating against them? In the age of European integration and global migration, should constitutional identity be interpreted in this traditional way, based on national states? Where is the fine line between taking care of national identity and discriminating against others? By using the examples of the Polish constitution and the decisions of the constitutional court, I will try to show how constitutional identity is based on national identity in Poland and how this concept can lead to discriminating procedures. In *The Origins of Totalitarianism*, Hanna Arendt drew our attention to the situation of a stateless person. She tried to show that with the loss of state rights a person would also lose his or her human rights as well, because one is contained in the other. A similar idea can be adopted in order to analyze the situation of a foreigner in a given state where its constitution protects mainly its citizens and where the rights of foreigners are minimized to the very basic human rights. That kind of issue is related to, among others, the difference between democratic and liberal equality, which was the subject of a critique made by C. Schmitt. While a liberal perspective gives everyone equality just by virtue of being human, democratic equality confers it only to the people who are part of a state's community, with the exclusion of others. Constitutional identity based on the democratic concept of equality can exclude some of the new members of the community from constitutional protection, which can be dangerous in the age of global migration, refugee crisis in Europe and predicted increase in the number of climatic migrants. My paper will definitely argue for a prospective

manner of reading and interpreting the constitution, which would aspire to create a constitutional identity that would guarantee the maximum of rights for foreigners, starting with a different understanding of citizenship and conception of the multicentricity of the law.

Lukasz Necio

Jagiellonian University

Controversial approach to the concept of nation in the newest Polish legislation

Demarcation of a non-controversial border between Poland and Ukraine has always been a problematic issue. Before the Second World War, in the Eastern territories of the former Polish state, the Poles and Ukrainians lived together. Today this area belongs to the Eastern territories of Poland and the Western territories of Ukraine. After the Second World War, the communist authorities of the USSR and Poland, based on the ethnic concept of nation, decided to solve the ethnic question through a series of resettlements. Poles living East of the new Poland-Ukrainian SSR border were resettled in Western Poland. In turn, the Ukrainian population, which remained on the Western side of the Bug river, was partly displaced. Firstly, they were resettled in the area of the Ukrainian SSR. The rest of the Ukrainians on the Polish side were dispersed throughout the areas of Northern and Western Poland (the “Vistula” operation). The after-effects of these resettlements are paradoxically strengthened by the latest Polish legislation in the field of migration policy. This affects particularly on the immigrants from Ukraine who have come to work to Poland in recent years. One of the possibilities for obtaining the right of permanent residence was to get it on the base of having Polish ancestors. Before 2018, the formulation “Polish ancestors” meant that one should have ancestors who were Polish citizens. From this year it means that they should prove that they simply were Polish. A similar regulation was introduced in the Act on the so-

called Polish Charter, which was intended as a series of facilitations for citizens of the Eastern Bloc countries (Ukraine, Belarus, Russia), who have Polish origin. For example, it provides tuition-free studies in Poland. Applicants for this document must submit a statement that their ancestors were not resettled from Poland after the Second World War on the basis of agreements between communist Poland and the Soviet Union. They must also prove Polish origin, not just citizenship. In my paper, I will describe the latest changes in Polish legislation and consider the controversy over them. Depending on the time limits of presentation, I will also present case studies from my professional work, where I deal with issues related to the legalization of stay of foreigners in Poland.

Radu Odangiu

The West University of Timisoara

Between collective memories of European territories and the concept of state unity in the constitutional order

The purpose of this article is to extend the debate on the independence and autonomy trends of European territories to some of its constitutional implications. While trying to keep a strict border between independence (separatist) trends and autonomy trends, the article will focus on constitutional provisions that spark tension in such matters and seek to identify some common ground for a constructive discussion. It is a known fact that all over Europe, certain territories thrive for independence, claiming autonomy or trying to radically separate themselves from the political, administrative and financial hold of their central governments. The trend is clear, sub-territories of European states like Catalonia or the Basque Country in Spain, the North of Italy, Kosovo in Serbia, Transnistria territory of the Republic of Moldavia or the Szekely territory in Romania and so forth desire independence. Furthermore, talks of Ireland and Scotland leaving the UK appear trailing independence, following

the Brexit. In such circumstances are European constitutional orders ready to face such challenges? Perhaps constitutions cannot provide mechanisms for self-determination to such traditional minorities, however certain provisions may ensure particular instruments for regional autonomy and still uphold unitary and indivisibility principles. By way of literal interpretation, moral reading and “originalist” approach conflicts emerge and such approaches of corresponding constitutions will reflect categorical answers from the conservative interpreter and often even from the most liberal commentator. The constitutional issues relating to such situations are very delicate and although some may stress that there is no place for debate, other may argue that basic and fundamental freedoms pertaining to minority rights would definitely justify such talks. The short answer and the most probable mean of response, as depicted in the recent events relating to the independence conflict in Catalonia, is that states will try to repress and contain any such challenges, based on the fundamental ideas of unity, sovereignty and indivisibility. Nevertheless, other constitutional systems have found ways to deal with such claims for independence or autonomy. There are questions that are yet to be answered, however no state answer will be identically applicable to another state and territory, considering the vast elements concerning the specific historical, social, cultural and political corresponding context. To this extent, the article will search for the essential questions and try to identify a path for finding an answer.

Andreas Orator

WU Vienna University of Economics and Business

The rise of arguments based on constitutional identity in the judicial dialogue of the European compound of constitutional courts

This paper addresses the increasing role that arguments based on constitutional identity play in the “judicial dialogue” of constitutional (or supreme) courts of EU Member States, and in particular of CEE countries. The effectiveness and primacy of EU

law, as interpreted and applied by the Court of Justice of the European Union (CJEU), relies, not least, upon the cooperation of domestic constitutional courts to set domestic law, at times even domestic constitutional law, aside. To this end, the CJEU has entered into a continuous judicial dialogue in what Voßkuhle calls the European compound of constitutional (and supreme) courts. Since the early days of European integration, Member States' constitutional courts have, generally speaking, complied with EU law in general and the CJEU's judicial pronouncements in particular (with the notable exception of the German Bundesverfassungsgericht's Solange case-law, which the CJEU addressed in time). In recent years, however, a number of judgments of the CJEU has been met with more resistance by domestic courts, and constitutional courts have been taking recourse to arguments based on constitutional identity or the like to counter fully effective EU law and its interpretation by the CJEU. When the German Bundesverfassungsgericht first developed its identity (and ultra-vires) review case-law in the early 1990s, it ensured its activation would be subject to a set of strict conditions, making it highly unlikely it would ever be used. The arguably only German case of a review of constitutional identity so far related to a fundamental rights issue, which also amounted to a form of Solange case-law and was immediately resolved by the CJEU itself (Aranjosi). In other cases, however, the judicial dialogue proved to be less constructive (e.g. Landtová), culminating in the antagonist stances in the Taricco and Ajos cases: In both cases, national supreme courts took recourse to arguments of constitutional identity to shield their legal orders from the consequences of certain CJEU judgments. In a similar fashion, the Hungarian identity decision introduced the notion of "constitutional self-identity" against EU law. The paper argues that cases involving arguments based on constitutional identity and unsettling the EU rule of law will increase, especially in the wake of a more critical perception of an "activist" CJEU and the return of more eurosceptic political majorities in many EU Member States; with Weiler, the new "constitutional identity"

discourse often only is masked sovereignty in a fashionable constitutionalist guise. While the CJEU seems to be more open to constitutional dialogue with judicial actors in preliminary rulings and take into account concerns of constitutional identity, which are also recognized in Article 4(2) TEU, this contrasts with the seemingly “tougher” stance shown in infringement or annulment proceedings (cf. the CJEU’s decision in the Polish Bialowieza case to grant penalty payments for non-compliance with interim measures against a Member State). In doing so, the paper also links up the debate of constitutional identity doctrines with the erosion of the EU rule of law and stressing, in particular, its judicial perspective.

Teodor Papuc

The West University of Timisoara

The inconstant essence of the “constitutional identity” in the area of fundamental rights

The notion of “constitutional identity” is used in German constitutional law to interpret Article 79 (3) of the Basic Law. Article 79 (3) provides that constitutional amendments that affect the principles laid down in Articles 1 and 20 of the Basic Law shall be inadmissible. A similar clause can be identified in Article 152 of the Romanian Constitution. As opposed to the German clause, which protects only the human dignity and the right of resistance, Article 152 prohibits, *inter alia*, revisions that result in the suppression of the citizens’ fundamental rights and freedoms or of the safeguards thereof. This paper is limited to the issue of suppressing certain safeguards. The reader of the Romanian Constitution may notice that its Second Title contains rights written in a general manner and specified rights. The specified rights are definitive rules, such as Article 30 (2) (“*Any censorship shall be prohibited*”) or Article 31 (4) (“*Public and private media shall be bound to provide correct information to the public opinion*”). Once specified, the rights become absolute, but their

absolutism on the national level, which is an aspect of the constitutional identity, can be contrary to their *de facto* relativism, as it may be determined, for instance, by the convergent practice of other states or through the case-law of the international courts adjudicating human rights disputes. Proportionality, a principle that dominates the global constitutional law, requires that limitations of rights be justified. Can we limit the specified rights, if the limitation is justified? Wouldn't this limitation mean a suppression of their absolute character? Isn't this tantamount to a suppression of the absolute right and a creation of another, relative one? This paper argues that a fixed doctrine of "constitutional identity" in the area of fundamental rights may prevent the application of the principle of proportionality, which is contrary to the primary purpose of the Constitution – the effective protection of human rights – and which may contravene to the international obligations of the State. In fact, with regard to fundamental rights, there is a constantly changing "constitutional identity", which the Constitution does not lay down, but which is determined by the judges, through the decisions they deliver.

Filip Rakoczy

University of Wrocław

Social justice as a base for constitutional identity and an axis of political struggle

Article 2 of the Polish Constitution states that "*The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice*". This principle is one of the most essential elements of Polish constitutional identity. Our Constitutional Tribunal, although hesitantly, throughout the years, had created a more or less consistent understanding of this statement. In the first part of my paper, I will try to reconstruct this way of interpreting social justice. In this understanding, social justice is a goal to be achieved, also by implementing the rule of law into the Polish political system. What is most important here, that is in the

contemporary decisions of the Constitutional Tribunal, is that the rule of law was the main tenet of Polish democracy, while the usage of the idea of social justice was incidental, and was rather considered an exception to general rule. The second part of my presentation will be an attempt to reconstruct the main axis of modern political conflict in Poland, where the government and its supporters try to use the idea of restoration of social and historical justice, as a legitimization for carrying unconstitutional reforms and changes in the balance of powers within the state. Their opponents, on the other side, have embedded their argumentation on the rule of law fundament, as opposed to the arguments based on social justice. In this perspective, both principles are autonomous and often even contradictory. In the final part of my presentation, I will try to compare those two perspectives on social justice. Then, I will try to analyze the impact of the juridicization of the concept of social justice by the professional legal culture, which, in my opinion, can be viewed as a cause of the modern Polish crisis of the rule of law.

Mirosław Michał Sadowski

University of Wrocław

Bánffy, Roth, Rankov, Kundera, Ash, Mikanowski – CEE Countries' social memories revisited, or what is left of CEE 100 years after the first fall of the Empires

Albeit a cliché, it is true that when WWI started, people in Berlin, London, Paris, Vienna, Budapest and St. Petersburg actually celebrated. Only four years later, not one of the main actors in the war was in celebratory mood. The three Central and Eastern European empires, which have controlled the region for over a hundred years, laid in ruins. Out of their rubble, several countries have reborn, trying to find their independent place on the European map once again. However, geopolitics caught up with them quickly, leaving them not only in debris, but also dependent again. Another half a century passed, and they managed to resurge once more, transformed, however, for perpetuity. The aim of this

paper is to examine, through the eyes of six miscellaneous thinkers, what is left of the CEE in terms of identity and collective memory, and then to apply the findings to the primordial legal text of any country – the constitution, in this case the ‘new’ Central and Eastern European constitutions, trying to establish the traces of past and distinctiveness in them. In the first, introductory part of the paper, M. M. Sadowski presents different theories on local identity and on collective memory, and then tries to define these terms. The second part of the article is devoted to the critical analysis of works on CEE by six thinkers: Miklós Bánffy’s *The Transylvanian Trilogy*, Joseph Roth’s *Radetzky’s March and Emperor’s Tomb*, Pavol Rankov’s *It Happened on September the First (or Whenever)*, Milton Kundera’s *A Kidnapped West or Culture Bows Out*, Theodor Garton Ash’s *Revolution in Hungary and Poland* and *Revolution: The Springtime of Two Nations*, and, ultimately, Jacob Mikanowski’s *Goodbye Eastern Europe*. These works span almost a century and are essays, articles and novels, but they have one thing in common: they capture the evolving and the constant in the Central and Eastern European spirit. The author first gives an overview of these texts, then, on the basis of them, ventures to establish whether or not there is such a thing as a common CEE identity and shared CEE collective memories, and, if they do exist, how have they shifted since the first fall of the empires one hundred years ago up to this day. In the third part of the paper, M. M. Sadowski focuses on the constitutions of several CEE countries. Looking at the constitutions as ‘the mirrors of nations’, the author searches for Central and Eastern European peculiarities and collective memories in the fundamental laws of these states. The fourth, final part of the paper is devoted to a more general socio-legal reflection of the past one hundred years in CEE and is also an attempt to respond to recent claims that in CEE the ‘Empires strike back’ and that we should say ‘Goodbye’ to Central and Eastern Europe.

Agnieszka Skora

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The collective rights of national, ethnic and regional minorities in Poland. The problem of minorities in a homogeneous state?

The aim of this article is to present the legal situation of national, ethnic and regional minorities in Poland. The rights of minorities in Poland are above all guaranteed in Article 35 of the 1997 Constitution of Poland. The legal situation of minorities is also regulated by the Act on National and Ethnic Minorities and the Regional Language of 2005. The Republic of Poland has ratified the European Charter for Regional or Minority Languages on 12 February 2009. This is a very significant problem, because the population of Post-World War II Poland became nearly completely ethnically homogeneous as a result of the German-Nazi Holocaust, the radically altered borders, the deportations ordered by the Soviet state authorities, who wished to remove the sizeable Polish minorities from the Baltics (today Lithuania) and Eastern Europe (Western part of today's Belarus and Western part of today's Ukraine). It is worth emphasizing that at the 2011 national census, 1,44% of the 39 million inhabitants of Poland declared to be descendents of another single ancestry than Polish. Now there are presently 3 categories of minorities in Poland: 9 national minorities (Belorussians, Lithuanians, Czechs, Slovaks, Germans, Armenians, Russians, Ukrainians, Jews), 4 ethnic minorities (Karaites, Lemkos, Roma, Tatars), and only one regional linguistic minority (Kashubians). However, Poland is not free from discussions about minority rights. The minority problem is important to us for two reasons. First of all, lately the inhabitants of Silesia (Silesians) also want to be a national minority and fight for it. Silesia (Polish: Slask) is a historical region in Central Europe divided by the current national boundaries of Poland, Germany and the Czech Republic. There have been some debates on whether or not the Silesians constitute a distinct nation. The problem of minority rights is also important because ca. 2 million emigrants from Ukraine have come to Poland in the

last two years. For the first time since 1945, Poland is no longer a country of Poles only. In this article, I would like to show the legal and factual actions done by Poland to manage this new problem.

Viktorija Soneca

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Constitutional identity from the perspective of the case C-673/16 Coman and Others

The Constitutional Court of Romania submitted a reference for a preliminary ruling to the Court of Justice of the European Union (case No. C-673/16 Coman and others). The referred questions concern the definition of “spouse” in Article 2 (2) (a) and “family member” in Article 3 (2) (a) of Directive 2004/38/EC in conjunction with Articles 7, 9, 21 and 45 of the Charter of Fundamental Rights of the European Union.

The preliminary reference concerns the case of a same-sex couple, Mr Relu Adrian Coman (a Romanian citizen) and Mr Robert Clabourn Hamilton (an American citizen). The two have been engaged in a long-term relationship and were legally married in Belgium in 2010. They are challenging the refusal of the host State, Romania, to recognize and give effect to the marriage contracted in Belgium. They argue that this impedes Mr Hamilton from receiving a permit to reside legally in Romania on the grounds of family life. Romania defines marriage as the union of one man and one woman and specifically prohibits same-sex marriage and the recognition of same-sex marriage or civil partnerships concluded abroad. The question of this case is whether European Union Member States acting as host States are under an obligation to give legal effect to civil acts concluded under the conditions and legal order of another Member State, despite the fact that such an act could not be legally and validly concluded under the internal legal rules of the host State. This case asks whether European Union Member States (including Member States which specifically prohibit same-sex marriage) are required by European Union law to recognize cross-border marriages concluded between two

persons of the same sex. In case No. C-673/16 Coman and Others, Advocate General Wathelet stated that literal, contextual and teleological interpretations of the term 'spouse' used in Article 2(2)(a) of Directive 2004/38 lead to an autonomous definition, independent of sexual orientation. First of all, it is a requirement of the uniform application of European Union law and of the principle of equal treatment that the terms of a provision of European Union law that has not been defined and that makes no express reference to the law of the Member States for the purpose of determining its meaning and scope should be given uniform autonomous interpretation throughout the European Union. Next, if the structure of Article 2(2) of Directive 2004/38, in conjunction with Article 3(2)(b) of that directive, requires the concept of 'spouse' to be associated with marriage, the legislature deliberately chose, moreover, to use a neutral term, without further detail. Last, both the development of the European society – which is reflected in the number of Member States whose legislation permits marriage between persons of the same sex and in the current definition of family life in Article 7 of the Charter – and the objectives of Directive 2004/38, facilitating the free movement of Union citizens while respecting their sexual orientation, lead to the concept of 'spouse' being interpreted independently of sexual orientation. To the author's mind, this case raises question about national identity (which is codified in the Member State's constitutions) and European Union's obligation, which is set out in Article 4(2) TEU, to respect that identity. Therefore, I will analyze the constitutional identity of several Member States (for example, Latvia and Poland) in the context of case C-673/16 Coman and Others.

Laura Stănilă

The West University of Timisoara

Legal acculturation and criminal law. Between uniformity and preservation of identity

European Union is a concept that, despite initial enthusiasm marked by ambitious and inspiring goals, proved to raise problems that could not be solved, despite the best intentions of all involved. The displayed slogan - "Unity in diversity" or "Unity without uniformity and diversity without fragmentation" - has proven to be as logically difficult to accept as easy to use, whenever a problem of alignment and uniformity of national laws of the Member States arises. What does "Unity in Diversity" mean? How come such a desideratum be compatible with the concept of independence and national spirit, so prominent in the essence of the European people, especially of Central and Eastern Europe ones? Is this a practical achievable goal, or is it just a content-free concept that is used as a universal key for over-solving any kind of problems that might arise in the interaction of EU member states? The legislative area, the issue of aligning national laws with EU law, the issue of configuring EU legislation so as to take into account all the national particularities of the member states, are matters that, with all the good intentions of the European Legislator, are far from being solved. The European space is dramatically facing the phenomenon of legal acculturation, a phenomenon that occurs naturally when multiple social groups, each with its own rules and specificity, interact for a long time. If uniformity, a natural consequence of the phenomenon of legal acculturation, occurred easily in some branches of law, such as national commercial law, other branches of law, namely those belonging to national public law, and in particular national criminal and criminal procedure law - continue to resist. What would be the explanation for this fact despite the evidence of uniformity so far? This is the subject of the present study, which does not aim to find trenchant explanations, but only to provide a radiography of the phenomenon of criminal law resistance facing

the European legislative colossus. We also propose an honest analysis of the long-term effects of the legal acculturation phenomenon on national criminal and criminal procedure law and try to anticipate its long-term positive or negative effects in terms of preserving national identity, in a neutral key.

Flaminia Stârc-Meclejan

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Social responsibility and legal consciousness: our less ecological common bequest

Any principle invoked as a basis for rights gains value only if the collective memory steps in to guarantee its application (Halbwachs, 1950). Memory and present experience coincide, like in Eliot's *Burnt Norton* opening lines "*Time present and time past/ Are both perhaps present in time future/ And time future contained in time past*", or how would you verify the original state of affairs if the group did not preserve a remembrance of it (Halbwachs, 1950)? After the fall of Communism, new economic and political systems have emerged in Central and Eastern Europe (CEE) (Scriciu and Stringer, 2008; Bradshaw and Stenning, 2004). Past realities were abandoned and post-Communist Europe adopted the substantially different Western values and institutions. Previously centrally planned economic systems moved away from state control, top-down decision-making and five-year economic development plans, towards liberalization, macro-economic stabilization, privatization and internationalization (Scriciu and Stringer, 2008; Aslund, 1995). Communist governments typically embraced the Marxist ideology on natural resources, which was altered to fit the Stalinist and post-Stalinist ideology advocating that the environment has no intrinsic value but to serve human needs (Mazurski, 1991; Duțu and Duțu, 2014). On the whole, environmental degradation during Communism was regarded as a necessary and logical approach to production (Chaisty & Whitefield, 2015). "Doublethink" was the defining feature of

Soviet-style totalitarianism, so that the fact that Communist countries were the first ones to entrench in their Constitutions the collective right to environmental protection should come as no surprise. Under the auspices of The United Nations Conference on the Human Environment, held at Stockholm in June 1972, Romania officially adopted important environmental regulations and institutions (e.g. the Environmental Protection Act no. 9/1973 that set up the National Environmental Council). The separation between thinking and action however brings over a divided life, and isolates the individuality from the community. The age we left behind seems to be one in which we ended up separated from the other. Current literature concludes that the post-Communist region remains to this day distinctive in the attitudes of its citizens to environmental issues, widening the gap in environmental policy orientations between West and East (Chaisty & Whitefield, 2015). Should we look at our "way of being" when we search for the future effectiveness of the environmental laws?

Przemyslaw Tacik

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Polish Constitutional Identity under Illiberal Turn

In my presentation, I would like to examine the evolution of the Polish constitutional identity with particular reference to the illiberal turn after 2015. Polish constitutional identity was born in the years 1989-1992, while the previous Constitution from the Stalinist era (1952) was still in force. The 1952 Constitution was amended as to the general principles, although it did not form a coherent whole. It was creatively interpreted by the Constitutional Court, which relied heavily on the principle of democratic state in order to deduce from it some detailed resolutions. Meanwhile, the new constitution was being prepared in heated discussions and finally adopted in 1997. The 1997 Constitution was a clear compromise between liberals, post-

communist centre-left and moderate right-wingers – best epitomised in the preamble, which aptly juxtaposes a reference to those who perceive God as source of values with references to those believing in other, non-religious sources. It mixed two concepts of the Polish people: apart from all liberal references to the people construed as “demos” (the community of persons holding Polish citizenship) it assumed also the existence of Polish “ethnos”, i.e. a community that has “endured” historical calamities (partitions, wars and the real socialism). Nevertheless, despite conciliatory formulas, the 1997 Constitution was at that time fiercely contested by various right-wing groups and organisations (including the “Solidarity” trade union), which labelled it even as “Bolshevik” for the alleged liberalism, atheism and cosmopolitanism. This initial split gave rise to surreptitious currents that continued to delegitimise it. Since 1997, the constitution lived two lives. The Constitutional Court, general courts and, to a lesser degree, public institutions used it as anchoring point for building up the constitutional tradition of the Polish Republic. Nevertheless, it has never produced a truly resonating constitutional identity like, for example, the German *Verfassungsgesetz*. For this reason it was relatively easy to extrapolate the initial right-wing criticism into fully-fledged strategies of delegitimation. They came in handy after the 2015 elections, in which the far-right populist Law and Justice party gained power. As it did not win constitutional majority, it could not follow the path of the Hungarian Fidesz. Therefore the constitution was not amended, but effectively suspended by sub-constitutional laws. With the concurrent paralysis of the Constitutional Court, the Constitution became thus practically inapplicable in certain areas (e.g. the organisation of the judiciary). Nevertheless, it remained crucial for some general courts and the Supreme Court, as well as for a vast majority of practicing lawyers. Since 2015, the 1997 Constitution is once again a source of political rift. For the governing majority it has been either completely neglected, dismissed as “elitist” and incompatible with “the will of the sovereign” or manipulated in

order to justify illegal moves. In the latter respect, the unlawfully taken over Constitutional Court has used the very same Constitution in order to interpret it in an illiberal way (among others, strengthening the role of “ethnos”). For the opposition, the 1997 Constitution has been a source of new constitutional identity in resistance against the ruling majority.

Andraž Teršek

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CEE constitutional identity must be understood as a foundational constitutional democracy

By virtue of a theoretical presupposition, every political authority is founded on the sovereign decision and political self-determination of the Nation. It is the expression of the unalienable right to the political self-determination and political self-being. The concept of “Nation” is broader than the concept of “People”. “The People” as a concrete and present, politically organized group of individuals are not sovereign in the CEE parliamentary and representative democracies. The notion “authority of the People”, mentioned in the Article No. 3 of the Slovenian constitution, does not mean Sovereignty of the People. Another aspect of the concept of sovereignty is represented by the fact that the State or the Government as its authoritative representative is only more or less autonomous or superior over its territory and citizens, but not in fact and genuinely sovereign.

The concept of sovereignty as a political and moral quality should be recognized to the fundamental human rights and freedoms, constitutional principles, especially the rule of law and social state, and to the concept of humanity. These are the political, moral and normative presuppositions of sovereignty. CEE constitutional democracies, like the Slovenian constitutional democracy, must be understood and addressed as an example of the (model of) democracy of fundamental rights, freedoms and principles - s.c. foundational democracy. The fundamental human

rights and freedoms must be conceptually understood as sovereign – as having such a political, legal and moral quality. These definitional elements should have a direct, essential and pressing influence on defining CEE constitutional and general legal (normative) identity, including the scope and conceptual understanding of legal formalism, pure legalism, statutory legalism, the nature and authority of the decisions of constitutional courts and ECHR, the relation between parliaments (as the most dangerous branch) and constitutional courts (as the least dangerous branch) or the relation between ordinary courts and constitutional court.

Stanislaw Tosza and Dominik Zajac

University of Liège / Jagiellonian University

Independent judiciary, a cornerstone of a constitutional order – but how to do it? A comparative study in view of the latest reforms in Poland

The construction of the judiciary is one of the cornerstones of a country's legal identity. It strongly, even if subconsciously, reflects its history as well as its social and political texture. The recent changes introduced in Poland have occurred amidst a relatively uninformed and highly politicized debate. One side of the political spectrum presents them as the end of judicial independence while the other as a necessary reform and democratisation of the judiciary. While no consensus has been built around the current changes, one may expect that there will come a point when the judiciary will have to be reconsidered and this study aims at contributing to this debate. The paper will examine the previous and the current design of the judiciary from the perspective of its relationship with other powers (executive and legislative). It will, in particular, focus on the nomination of judges, heads of courts at different levels, rules of promotion, selections of judges to hear concrete cases and disciplinary proceedings. It will compare these

aspects with the solutions from the communist and the pre-war period. It will also contain a study of these issues in selected countries (US, UK, Spain, Belgium/the Netherlands). Against this comparative setting, the Polish solutions will be critically analyzed. The final aim of the study is to show the potential parameters and core elements guaranteeing the independent functioning of the judiciary. Both backgrounds – the historical and the comparative – should reveal the influence of the Polish social and political context and allow for the identification of particularities and essential features, which should be taken into account when looking for the new construction of the judiciary. Given that the processes that occur in Poland are not foreign to other Central and Eastern European countries, we believe this paper to be of interest for an international audience, while our work can highly profit from inspiration stemming from the latter.

Norbert Tribl

University of Szeged

Through hardships to the stars: Human rights and constitutional identity

Human rights and constitutional identity. From these two concepts, fundamental rights have long been known as evident since they form the foundation of constitutional systems in Europe. In comparison, constitutional identity is only beginning to be recognized, even though it is no less an essential element of the constitutional space of Europe and of the constitutional systems that create it. A protection system of fundamental rights has been built up at both the international and the European levels and at the level of Member States as well; moreover, without the validation or enforcement of certain constitutional values and fundamental freedoms, we cannot speak about European constitutional systems and about European integration either. By raising the Charter of Fundamental Rights to the rank of the Founding Treaties, respect for human rights as in the case of common constitutional traditions, has become a decisive force

behind integration, both from a constitutional legal and a social-ideological point of view. As Sulyok argues “since the Constitutional Charter of the Treaty of Lisbon, Europe is experiencing a period of constitutional transition”. Raising the Charter of Fundamental Rights to the level of the Founding Treaties could be interpreted as the development of integration from a constitutional point of view, which would contribute to the consolidation of the stability of integration. However, in practice, we do not really see any evidence to that effect. Indeed, perhaps the opposite is true. Despite growing efforts to consolidate the integrity of integration, it becomes increasingly unstable. Behind this phenomenon lies the juxtaposition of the sovereignist and integrationist approaches since the creation of the Union, but it is only a projection of a much more elementary phenomenon, which could primarily be described as a search for identity. If we look at the process of this problem of “seeking identity” more closely, we confront a diverse system of issues, which encapsulates European cultural identity as well as the existence (or non-existence) of European demos and the political-economic relationships that define the European integration. One aspect of this search for identity is the constitutional identity debate as part of European integration. Contrary to fundamental rights, constitutional identity does not have a clear-cut conceptual system and the components of the national identity, constitutional identity of some Member States have not yet been identified, although we one could argue that the itemized definition of the constitutional identity of Member States may entail risks and can further strengthen the political (and constitutional) tensions in Europe. Keeping in mind that there is no exact definition for constitutional identity perhaps an attempt can be made to circumscribe it in order to obtain insight into the subtler substance of the above-mentioned integrationist-sovereignist opposition and through it we might get closer to resolving the issues at the basic level of defining identity. One of the approaches to examining the constitutional identity of Member States and the tensions

between Member States and the Integration can be approaching the problem from the aspect of certain fundamental rights.

Ionuț Tudor

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The Rule of Law as state of exception

In countries like Romania or other ones from Central and Eastern Europe, one can easily identify a disquiet regarding the rule of law, expressed either by officials from Western states or by certain citizens from these countries. My inquiry tries to show how far the threads to rule of law extend to, if the threads are truly against the rule of law, if in public discourses the notion of rule of law is used predominantly from its formalist or its substantive meaning, if the uses of the concept are in fact incorporable in a larger political strategy to impose an unreachable horizon that works as an “exception”. For the latter, I will be using Agamben’s state of exception to assess if in fact the rule of law is used fallaciously precisely in order to maintain and reproduce mechanisms of power that are denounced in the discourses promoting the rule of law.

Andreea Verteș-Olteanu

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The separation of powers principle under the Romanian Constitution(s) – constitutional transplant, chimera or self-defence mechanism?

The separation of powers represents one of the essential principles governing the rule of law; as a fundamental dogma of democratic societies, it is enshrined within the architecture of constitutions throughout the world. The principle’s hard core resides in the desiderate of not leaving the individual, perceived as a free being, exposed to an overwhelming concentration of state power. As with other public law concepts, the crystallization of a coherent notion of the separation of powers has occurred

gradually, without pretending to have reached an unequivocal meaning. Institutional theorists have always been preoccupied with the exercise of governmental power, vital to the achievement of societal values, and, more exactly, its control, so that it should not be destructive of the democratic purposes it was meant to protect and promote. Among the various theories designed to offer a solution to this conundrum, the doctrine of the separation of powers has been the most significant, both from the point of view of the intellectual debate, and of its influence upon institutional structures. However, the doctrine is by no means a simple or unambiguous collection of concepts. On the contrary, it represents an area of relative confusion both in its definition, and in the use of terms. The present paper aims at distinguishing three major phases of the principle of the separation of powers in Romanian history: 1) the 1866 Constitution and the constitutional transplant of the principle into the Romanian governmental order, approached from an epistemological perspective through the theories of “synchronism” and “forms without substance”; 2) the “myth” of applying the principle during the communist regime, despite the command economy and the one-party rule; 3) the post-communist Constitution, with the initial absence of an explicit articulation of the separation of powers at the level of the constitutional text and, later on, its transition into a checks and balances approach, similar to the “shields and swords” theory, with a focus on the current constitutional devices that are meant to help the state institutions to simultaneously empower and defend themselves; to what extent can it be said that they proved efficient and how much of the original scope and purpose of the separation of powers principle has been sustained?

Wojciech Zomerski

University of Wrocław / Centre for Legal Education and Social Theory

"As You Sow, So Shall You Reap": The Crisis of Rule of Law in Poland as a crisis of a legal discourse

According to the prevailing narrative among Polish liberals, the Republic of Poland has been an example of a healthy democratic state ruled by law till 2015 and it is Law and Justice to blame for its dismantle. When it comes to the question why it has been so easy for populists to undermine the rule of law and simultaneously keep the support of the majority of the voters, liberals tend to believe that ordinary, often – as they want to see them - not well-educated, citizens were “bribed” by social benefits introduced by the government. Limitations of this perspective are clear. It does not provide a satisfying answer to the question why it has been so easy to do it, meanwhile an honest answer to this question might lead to a disturbing conclusion that the Polish constitution has been severely violated by former governments, at least in the sense of failing to implement rules of “social justice”, which according to the Article 2 of the Polish Constitution shall be a material component of democratic state ruled by law. It goes without saying that this perspective is very attractive to lawyers and liberal legal scholars, as it completely free lawyers from any responsibility for the crisis of rule of law and justifies their reluctance to change anything within the judiciary or legal education. In my opinion, there are however sound reasons to see this approach as an unsatisfactory one and instead of it, I propose to see the crisis of rule of law in Poland as a crisis of legal discourse. Why is that? Legal discourse in Poland has been heavily tainted by formalism and legal dogmatism. This is particularly visible in a style (culture) of justifying legal decisions by the common courts, which according to L. Morawski and M. Zirk-Sadowski is “deductive, legalistic and magisterial”. Moreover, as the quoted authors put it, one may observe a domination of the deductive style over the discursive one, which all together leads

to the fact that legal decisions may be often incomprehensible to laymen. Judicial decisions are presented as authoritative acts of a state and not as decisions of a concrete person which is even strengthened by the fact that there is “tendency to regard judicial decisions rather as the only correct solution than as the choice of the best alternative”. This, according to the authors, finds its justification in the ideology of the rule of law, accepted in Poland, “which seems to assume that the law should give only one correct answer for every situation”. As L. Koczanowicz put it, a language used in practice might be treated in a formal and abstract way or as a social realm *per se*. In the latter perspective, the style of legal reasoning disposed in legal decisions might be a proof that between institutions implementing law and its citizens there is no dialogue, which might in turn mean that the roots of the crisis of rule of law run deeper than the lawyers would like to admit. As a consequence, the crisis of legal institutions can be seen as the result of a lack of democratic dialogue between the judiciary and the citizens. This shifts our attention from legal practice to legal education – the existing crisis of the rule law might be seen as the result of a lack of soft competences of lawyers, who cannot engage with citizens in a robust dialogue on the democratic rule of law. In my paper, I would like to provide some empirical material proving validity of the above-stated hypothesis. Moreover, I would like to show that this formalistic style of legal reasoning, being itself a threat to democracy, is a consequence of the still-alive scientific ambitions of legal discourse. My final claim is that since the very idea of democracy is a sign of “confession to a failure of a reason” (L. Koczanowicz, s. 200), if a legal discourse aims to meet the needs of democratic challenge, it has to resign from its scientific claims and transform itself into a practical discourse of dialogical nature.

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