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Re-thinking Legal Institutions in Central and Eastern Europe

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ABSTRACTS

PLENARY SESSION

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Constitution-making in terms of Basic Law Perpetuation: *Experiences from the German Reunification*

How to create, and how to maintain, a legitimate constitution? This complex issue is discussed on the basis of a concrete example. The speech reconstructs the constitutional side of the German reunification in 1990. Germany did not give itself a new constitution, but the GDR joined the territorial scope of the German Basic Law. This rather technical understanding of a fundamental political process is surprising for many reasons: The German Grundgesetz has always seen itself as a provisional arrangement -– a basic law, but not a genuine constitution. And according to the mothers and fathers of the Basic Law, the provisional character was supposed to end with: the reunification. Meanwhile, the East-German "Round Table" had formulated a draft constitution, which quickly disappeared into the drawer. Therefore, one can claim that the Basic Law has an East German defect. A constitutional amendment debated in the early 1990s didn't change things fundamentally. All this isn't just about history. Today, the rise of populism and right-wing parties especially in the former Eastern part of Germany prompts the question whether the East German people don't feel at home constitutionally just because of the way they joined the Basic Law. Recent sociological studies point to this direction, but also emphasize many cultural and economic aspects. Finally, reunification should also be seen – and discussed – in the context of the constitutional transformations in the rest of the Eastern bloc.

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The Nomos of Central Europe, or Five Theses on Legal Form in the Periphery

In the Centre, legal form and legal substance are two sides of the same coin of normativity. In the Periphery, legal form, divorced from the substance of normativity, leads a life of its own. Unleashed from its underlying matter, it assumes a spectral nature, haunting the Periphery and misleading the observer from the Centre. The observer from the Centre takes the form for the substance, assuming that it is a signifier which points to the same signified as it would in the Centre. Just as a gesture which, in one culture, signifies an act of politeness or of gratitude, once severed from its original context and web of symbolic entanglements, becomes an empty, theatrical move. As a result, the Periphery becomes the site of a permanent Agambenian carnival, where the power of legal form is suspended and neutralised. Recent years, and especially the 'populist revolution without a revolution,' have only contributed to revealing what has been the underlying condition of the juridical in the Periphery for decades, if not centuries. Of course, the juridical is, whether in the Centre or in the Periphery, but a structure of domination, symbolic violence, and oppression. Be it in the Centre or Periphery, the juridical is permeated by ideology and subservient to the political. It is not in this respect that the

Periphery differs from the Centre. The difference is much more subtle and in my paper I will attempt at capturing it in the guise of the following five theses on legal form in the Periphery: Thesis I: Legal form is imported into the Periphery, but not produced in the Periphery; Thesis II: Legal form is an instrument of domination of the Centre over the Periphery; Thesis III: In the Periphery, legal form is a floating, if not empty, signifier; Thesis IV: In the Periphery, the substance of normativity lies outside the legal form of the Centre; Thesis V: Ruritanians fall prey to cargo cult, while Bordurians seek the elusive alignment of legal substance and form.

These theses are not intended as definitive statements, empirical claims or philosophical propositions. Rather, their aim is heuristic. They seek to sensitise the observer, both hailing from the Centre and from the Periphery, and in the latter case, both a Ruritanian or Bordurian, to five aspects which make legal form in the Periphery essentially different from legal form in Centre, even if in its formality the legal form is formally identical both here and there.

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THE ROLE OF CONSTITUTIONAL COURTS AND CONSTITUTIONAL INTERPRETATION IN CEE COUNTRIES

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The Role of Constitutional Courts in Hybrid Regimes: the Case of Poland, Hungary and Turkey

The aim of this study is to examine how constitutional courts are affected by the democratic decline in hybrid regimes. In this context, this study discusses the situation of constitutional courts in Turkey, Poland and Hungary as case studies and try to indicate that governments in hybrid regimes try to convert the courts into a politically pliant body.
Poland and Hungary became members of the European Union in 2004 and at the same date Turkey has increased its efforts for membership of the European Union. However, these three countries were affected by the wave of democratic decline in the world and they started to move away from the rule of law and democracy rapidly. Authoritarianism in Turkey and Hungary has begun from early 2010s and in Poland with the coming to power of the PiS Party after the 2015 elections.

AK Party won power against power elites in 2010 with constitutional amendment and with the 2017 Constitutional Amendment has strengthened quite this power. In Hungary, a new constitution was prepared by Fidesz Party and adopted in 2011 and redesigned the state in line with its own interests. The process in Poland has been different from these two countries. The ruling party with the constitutional crisis that started right after the 2015 elections and the legal transformations that followed removed the court from being a threat to the government.

The results we have reached in this study show that in these three hybrid regimes, four main methods are used in common to limit the power of the constitutional courts. The first method is that constitutional courts are deprived of judicial support networks through reforms carried out in the judiciary. Especially, judicial institutions that deal with the personal affairs of judges and prosecutors have been transformed or re-designed and put under control of the ruling parties. The second method is interventions directly to constitutional courts. It increased the number of members of the constitutional courts in Turkey and Hungary and these amendments gave ruling parties a chance assigning new members to lift their effectiveness. In Poland, the membership of three judges appointed by the previous ruling party in accordance with the law was prevented and three names chosen by the ruling party were appointed instead. After the previous president of the court retired, the opposition ability of the court was broken by ensuring that the new president was also elected by the ruling party. The third method is to change the constitutional courts' judicial mechanism and to narrow the court's field of activity. Finally, fourth method to weaken the constitutional courts, is to limit the effectiveness of the courts' decisions. In all these countries, very important decisions made against the ruling party by the Constitutional Courts have been ignored and not implemented by the ruling parties. As a result, the constitutional courts have been restricted by using similar methods and constitutional courts have become politically pliant body.

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The Constitutional Courts – Aristocrats in Fluid Legal Landscapes

How to build rule-of-law from scratch and to legitimize its guardian Court while there was no proper legal culture in the field, nor even will to adopt one? We all know, here in Central Europe, that the noble desires of the early transition were only shared by a tiny elite – if any – while a large part of the legal professionals keep on regretting the change of the regime or have quickly adapted their skills to a new context without reforming the grounds of their thinking. Thus, Constitutional Courts have appeared in the legal landscape mostly to upset than to help and have thus, had to pay a high tribute to their "courage".

Despite their famous ancestry, their pedigree as well as their demands – largely claimed as belonging to the majority of population – these Courts come in the wild post-communist world completely unprepared and naïve, being easy victims of the long trained hunters of "Western tricks". Hence, the bunch of struggles from rules of setting, to nominations and competences, but above all for the interpretations and uses of the decisions they had to make. Besides, their political character brought them always in the middle of all struggles, turning them rather into mirrors of all possible and unimaginable diseases of our societies: ill-founded concepts, legislation rules out of inner grammar, fluid rules of interpretation, double-measure for uncertain defined institutions, political fights instrumentalizing all that may be of some help. Needless to add that shaped as they were in the early 90's, little had intervened to adapt society to them and their work to the societal evolution. Set to protect a certain constitutional framework, they had witnessed innumerable changes but had to stay smart in the middle of the lack of rationality, of morality or logics that had characterized the legal dynamics of the last three decades. Did they make it? To what extend? Did they fail? How much of their original nobility remained and how much did political abuse hamper their mission?

I will use Zygmund Baumann's concept of fluidity to describe the rapidly changing legal and conceptual mindset in which we are to live. This background presumes an almost continuous semantic change doubled, in our case, by scarcely defined institutions or largely politicized others. The noble kelsenian legacy is here to be continuously reformulated and challenged both by the screwed social dynamics and by the global collapse of firm, "solid" dictionaries. Performing in a rather Ephesian world, in which everything turns everything without prior notice, The Constitutional Courts have had to stay as lighthouses for our tumultuous exit from the tunnel. Aristocrats were not among the favorite friends of the regime rulers. Nor is the rule-of-law. This paper will seek to identify the main battlegrounds that invited the Constitutional Courts to duel and tried to leave them there. They correspond with the main crossroads of our transitions as well as of our basic intellectual limits. Fluidity is a sign of a lack, aristocracy is knowledge. How far we still are one from the other may by highlighted as the consequence of this list.

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Public Watchdog in Chains? The Use and Misuse of the Strasbourg Measures in the Case-Law of the Hungarian Constitutional Court

It is widely recognised, that the case-law of the European Court of Human Rights (ECtHR) has an important role in the Member States of Council of Europe because it may affect the national human rights approach including the national constitutional court's human rights interpretation. For this reason, observing the practice of the ECtHR and applying the Strasbourg measures by the national constitutional courts could develop the human rights interpretation in the Member States based on common European human rights standards. However, beside the progression, we can detect an increasing moving away from the Strasbourg measures in the national level.

The aim of this presentation is to provide a short overview of the case-law of the Hungarian Constitutional Court (HCC) from this aspect regarding the interpretation of freedom of the press, particularly the reporting activity of the press.
It is well-known that freedom of expression and freedom of the press are essential to democratic society, therefore the safeguards to be afforded to the press are particularly important. One of the most important tasks of the press is to impart information and opinions of the public interest. This way can the press function as a public watchdog. However, it does not mean that every published statement is protected by freedom of the press. Conflicts between human rights can raise in such cases. On the one hand there is freedom of the press. On the other hand, there could be human dignity, more specifically reputation or honour or other personality rights etc. The courts have to determine the limits of freedom of the press regarding the infringement of human dignity including the reputation or the honour of public figures or other persons. The question is raised, how the courts can apply the measures of freedom of the press when the press – functioning as public watchdog – does not publish original thoughts of a journalist but makes a report about a public event or make quotations from public persons.

The ECtHR created a well-distinguished system of criteria in the above question, which may make a progressive impact on the national judicial interpretation. However, it frequently happens, that even though the national constitutional court observes the international practice and applies some elements of it with respect to the domestic relations, the practice of the court will be burdened by uncertainties because of the occasional and alternating application of the European human rights standards. In this presentation I will analyse the case-law of the ECtHR and the Hungarian Constitutional Court regarding the measures of freedom of the press. First, I will provide a short overview of the ECtHR's case-law in this regard. The second question that is to be discussed here is to what extent the Hungarian Constitutional Court's practice meets the European standards. I will give an overview about the HCC's practice and highlight the main problems in it.

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Legal Certainty is not a Human Right: Rule of Law and the Hungarian Constitutional Court

After the political transition, the principle of the rule of law became a fundamental constitutional value in Hungary. The Constitutional Court conceived of the rule of law and legal certainty as a 'collection' of formal and procedural requirements which the legislator and courts must comply with. In the Court's interpretation the formal values of legal certainty were primary to justice. The principle of the rule of law is one of the most important value in criminal law. In the last few years, the legislator amended several sections of the Criminal Code of Hungary, and the act on minor offences. With these amendments the legislator criminalized homelessness, it created the crime of helping immigrants who seek asylum, and the Covid 19 epidemic entailed that the legislator amended the section of scaremongering in the Criminal Code. Constitutional complaints or judicial initiatives challenged these legislative amendments on the ground (among others) that they do not meet the requirements of the rule of law. The Court rejected these complaints. The presentation will focus on the issue of how the conception and interpretation of the rule of law changed in the Constitutional Court's reasoning. In many of its decisions the Court declared that legal certainty is not a fundamental right, thus issues of the rule of law (legal certainty, predictability etc.) get 'less attention' from the Court when it exercises constitutional review of (criminal) norms.

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ADJUDICATION AND JUDICIAL INDEPENDENCE IN CEE

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(In)dependent Judiciary – Is It Necessary for Democracy? Consideration on the Role of Judicial Independence in European Union Countries on the Example of Poland

Judicial independence is one of the most important principles of the rule of law, which guarantees balance between other state powers – the legislate power and the executive power. The judiciary must be independent to fulfil its role in relation to the other powers of the state, society in general, and the parties to litigations. It must be highlighted that the independence of judges is not a prerogative or privilege granted in their own interest, but in the interest of the rule of law and of all those who seek and expect justice. Independence of judiciary is the fundamental requirement that enables the judiciary to safeguard democracy and human rights and only an independent judiciary can implement effectively the rights to all members society, especially those groups that are unpopular or groups which represent interests which are counter to aims of the legislate or the executive powers. Recently, in some Central and Western European Union countries it can be observed some populist changes in perception of the role and the meaning of the independent judiciary.

In Poland the legislate power and the executive power question the position of judiciary, pointing that there is no equal between three state powers and judiciary power must be subordinated by the will of society which in according to the government is represented by the legislate power and the executive power. New "courts legislations" in Poland like amendment to the Act of the National Council of the Judiciary, amendment to the Supreme Court Act or amendment to the Act of the structure of common courts submit judiciary to other powers and call into question the general position of judiciary in state. All new judiciary legislations force also to taking under consideration, if the country can be democratic without independent judiciary and if there is a "third way" between authoritarian regimes and Western-type democracies in case of not full independent judiciary?

In the speech, I would like to present last law changes in Poland in the sector of judiciary as an example of a European country where it came to fundamental changes in functioning of legal institutions. Then I would like to discuss changes in judiciary in the context of provisions of Constitution of the Republic of Poland and the European Union treaties to consider if the country where re-defined the meaning of independent position of judiciary can be a part of European Union and maybe polish example shows that it is necessary to re-thing about European Union (Western) institutions of independence judiciary rather the legal institutions in Central and Eastern Europe countries.

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Assessing Judicial Politics in Bosnia and Herzegovina: Independence, Autonomy and Responsibility

High Judicial and Prosecutorial Council of Bosnia and Herzegovina (HJPC) was created in the process of overarching legal and judicial reforms in Bosnia and Herzegovina (BiH) between 2002 and 2004 with the goal of ensuring and delivering 'independent, unbiased and professional' judiciary that would drive the country toward the EU accession process. Additionally, it was established as a part of wider peace and statebuilding processes that should have ensured social and legal stability in the post-socialist and post-conflict era, in the light of the rule of law principle. As a judicial council, HJPC represents an implementation of the judicial independence principle – one of the core evaluative principles of compliance with EU norms and values. When observed as essential part of judicial politics in the context of EU accession and, more generally, socio-legal transformative processes, creation of judicial councils in Central and Eastern Europe and their later functioning, never happened without involvement of institutional actors such as European Commission and Council of Europe, namely the 'Venice Commission', to a lesser („bottom-up“) or greater („top-down“) extent (Coman, 2014).

This involvement has become institutionalised in BiH via the mechanism of „Structured Dialogue on Justice between BiH and EU“ that transfers the decision making powers on all issues related to judicial reforms, namely those related to HJPC, to EU level, thus limiting the role local political and judicial actors play in the judicial politics field. The paper will analyse this radical-but-soft 'top-down' approach on the functioning of HJPC by focusing on two instances of manifestation: a) failed legal initiative of local political actors to control the HJPC and b) continuous intervention in the domestic judicial-political landscape by international actors via 'peer review' mechanisms. Second part of the paper will focus on the functioning and socio-legal effects of HJPC during the past decade through analysis of judicial independence as a performative discourse that falls into category of so-called 'third legal tradition' (Uzelac, 2010) that undermines the purposes of projected legal and judicial reforms overseen by the European Commission. Here we will juxtapose the principle of judicial independence to the princple of judicial responsibility, on one side, and to the concept of radical (sub)system autonomy on the other.

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Judicial Control of the Administrative Acts by way of the Exception of Illegality in Romania.

This article analyzes the indirect control of the legality of an administrative act by the Romanian court. The study investigates the historical evolution of the notion and the particularities that the exception of illegality has in Romania with regard to the regulation of French law and of the European Union legislation. The typology of the administrative acts that can form in Romania the object of the illegality exception and the competent courts to deal with this exception are considered. The study offers a complex perspective on the notion by conducting research from both a theoretical and an empirical perspective, of judicial practice, highlighting the jurisprudential orientations that result from the decisions of the Constitutional Court and the High Court of Cassation and Justice. Also, in order to carry out an equidistant research, the case law of the ECHR and of the Court of Justice of the European Union in this field is highlighted.

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New Phenomena in Fundamental Rights Protection after Fundamental Law in Hungary

The paper analyzes the protection of fundamental rights (FRs) in Hungary after the entering into force of the new constitution called Fundamental Law in 2012. It presents some new phenomena that were previously considered as marginal elements of the system of FRs protection, or even they are beyond its generally accepted toolbox. The paper detects how the emphasis of FRs protection shifted from the traditional institutions and mechanisms to these new means and techniques. It also analyzes the legal background and the reasons for the transformation.

The paper approaches the new phenomena in the field of FRs protection from two perspectives. The first is the analysis of the transformation of the institutional system of the protection of FRs, especially the modification of the law on the Constitutional Court, the ordinary courts and the Commissioner for Fundamental Rights. The analysis also takes into consideration how the institutions interpreted the modifications about their competences in their practice since it gave the actual meaning to the new regulation. It also covers the main criticisms since they influence the perception among those who are seeking a remedy.

The transformation put the enforcement of the subjective rights before courts into the focus. It can be considered a paradox. The enforcement of individual rights before courts is the core of the protection of FRs whose practice left room for improvement before 2012. Paradoxically it got a more supportive legal environment and more attention in practice after 2012 when at a general level, many scholars and FRs defenders criticized the decrease or the failure of the standard of FRs protection.

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While the enforcement of subjective rights before courts got a central role, the objective and proactive protection of FRs lost its significance. The paper analyzes the related changes in the legal environment, such as the introduction of the German-type constitutional complaint, the abolition of the actio popularis before the Constitutional Court, the new roles of the Commissioner for Fundamental Rights, the European human rights environment, the status of the independent institutions, etc. It is important to emphasize that the factors are far beyond the introduction of the new form of the constitutional complaint, and they should be examined and evaluated as interrelated changes.

In the second part, the paper presents some case studies that illustrate the new phenomena. One of them is the strategic FRs litigation driven by human rights defenders, especially human rights NGOs. We also experienced how civil disobedience by human rights activists can get a role in FRs protection when it is followed by strategic litigation to enforce human rights. Furthermore, the paper gives examples for the situation where the FRs procedures were used to enforce constitutional principles beyond FRs. Judicial independence that was the subject of constitutional complaints and the procedure of the ECtHR is not a subjective right but the essential constitutional guarantee of the enforcement of subjective rights.

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TRANSFORMING AND RE-THINKING LEGAL INSTITUTIONS IN CEE I.

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Legal Regulation and Social Capital: The Case of Legal Design of Jointly Used Property in Poland

The aim of the paper is to analyze the interconnection between the building of social capital and legal regulation of jointly used property, taking into account Polish examples. Firstly, we focus on typical commons or common-pool resources which were the subject of multi-faceted studies of Elinor Ostrom. What is important, in the view of this scholar, "bottom-up" ways of common pool resources management can be both economically efficient and conducive to the creation and maintenance of social capital. The oldest informal village organizations on Polish lands (grazing on common pastures, using community owned forests or jointly organized flood protection) operated without outside regulations.

Each member would see not only his individual interest in getting benefits and but also need to contribute to maintenance of the limited resource at the village disposal. Easements (serwituty) for the local rural community were confirmed by tsarist administration in the course of the nineteenth century and they were still valid after Poland gained the independence in 1918. However, during the communist regime, in 1963, they were replaced by obligatory partnerships. Therefore, much more formalistic approach to usage of these common areas, compatible with the entire scheme of planned economy, was implemented. Water company is another example of a tradition institution serving the management of such common pool resources as water intakes, flood protection and irrigation devices. Water companies were introduced into Polish law in 1922, but during the communist regime, they acquired new, much more formalistic legal design according to which internal organization of a company was also strictly regulated by the law. After 1989 the legal character of water companies was slightly changed. In our view due to bureaucratic character, postwar regulations of water companies lost their meaning as useful instrument for maintenance of the stock of social capital.

Secondly, we analyze the newer institution, namely property in common use for housing communities. In our view, present Polish regulation of this property is becoming more and more formalised. Legal regulation of both traditional (e.g. water companies) and new communities leaves little space for members' initiatives to run their common affaires. On the one hand, it is inherited from the planned economy, when such communities were subordinated to bureaucratic rules imposed by the state. On the other hand, formal regulation has been maintained until today. Significant part of the society still expects the state to define precisely the legal framework of communities sharing benefits from common resources. We believe, this expectation is related to the deficit of social capital, and existing mistrust among people. Moreover, a more general comment at this point should be made. It seems there is a trade-off between formal detailed legal regulation and by-laws adopted at the community level.

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The Polish Institution of Extended Confiscation of Property as an Example of Re-thinking Legal Institution

This paper deals with the institution of extended confiscation of property, which was introduced into the polish legal order by means of the Act of 23 March 2017 amending the Penal Code (adopted by the Sejm on 24 February 2017, which entered into force on 27 April 2017), and whose purpose is to fight with organized economic crime in accordance with the principle that no one can benefit from own lawlessness (nemo potest commodum capere de iniuria sua propria). The institution indicated above is a prime example of re-thinking legal institution, and this is because the institution of confiscation and forfeiture of property (although in a different shape) was already in force on the basis of earlier criminal codes.

The purpose of this paper is to analyze the currently applicable criminal law instruments related to the confiscation of property, and then to isolate elements of this institution that were taken – as part of rethinking – from previous legal orders (in particular from the Criminal Code of 1969 in force in Polish People's Republic), as well as an indication of completely innovative elements. As a result of the analysis, the author comes to the conclusion that the current regulation regarding the forfeiture of property is not only the result of the transposition of the directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, but also constitutes, to a large extent, a return to the institution of confiscation of property known to the Polish legislator on the basis of the Penal Code of 1969.

This article is therefore intended to find the answer to the question whether the reintroduction into the Polish legal order – a slightly modified – institution of confiscation and forfeiture of property was necessary to provide young democracy with the expected protection against organized economic crime, or is only an example of the use of a repressive institution from the past. In conclusion, the author comes to the conclusion that the introduction to the current criminal code of institutions aimed at combating economic crime was necessary to meet the current challenges related to combating – increasingly sophisticated – organized economic crime. However, according to the author, the above goal could be achieved without having to return to the repressive solutions of the Penal Code of 1969.

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Market Niche or an Unpredictable Risk Factor? Could Artificial Intelligences Participate in the Social Life in Central-Europe?

In 2017, it generated considerable resound from the public opinion, that a female robot, which was called Sophia was granted citizenship in Saudi Arabia. This was the first occasion that an artificial intelligence has been vested by the ordinary citizenship of a state, therefore, a number of issues have been raised.
The possible extension of traditional concept of citizenship to the electronic humanoids has been proposed several times, and concerns not only Asia, but also our region more closely. For instance, in 2015, the Legal Commission of the European Parliament recommended to provide citizenship for a wide range of autonomous artificial intelligences, who might be the subject of rights and duties. Are the Central-European legal systems ready to face with these new challenges?

It would be an important question to analyse, how the citizenship law shall reflect to these new challenges, which might be caused by the extensive, and dubious interpretation of citizenship. Moreover, this paper would step further, and I would conceptualize, how electronic humanoids, as citizens could participate at the social life in Central-Europe. This issue has been examined elsewhere several times, but is considered as little discussed in our region. Furthermore, the legal aspect has been rarely given priority during these studies even in the global level. My contribution would highlight some legal considerations in this field, as the case of Sophia shows clearly the urgency of real legal answers to the recent challenges of modern technology and also the updated interpretation of the principle of democracy.

If we accept, that at least certain robots shall amount to equal citizenship, as the human beings, these electronic persons might be subject to identical rights and undertakings, as traditional citizens. On the one hand, this new category of personhoods might influence the political process, and might also reveal new economic opportunities, however; on the other hand, the political, social and economic activity of electronic humanoids shall be regulated carefully. According to several contributions, the participation of electronic humanoids in the social and economic life would be riskful due to the insufficient regulation therefore; the legal framework shall be updated notably to diminish the risk factor. My aim would be to assess, whether the current legal framework could be adapted to these new challenges properly, and to add some new arguments in this regard. My assessment would be based on three strands of literature, which have been rarely used by this integrated manner. Firstly, the traditional literature of citizenship is being kept as a background of the analysis. Secondly, numerous authors are cited, who provide a deeper understanding from the impact of artificial intelligence to our life, our society, and to our legal system. Thirdly, those Central-European authors mean also important sources, who have raised several paramount issues concerning the adaptation of the currently existing legal setting to the challenges of modern technology.

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Housing Cooperatives in Central Europe: Socialist Centralization, Neoliberal Marginalization, Time to Get Back to the Roots?

The first Polish housing cooperatives were established by left-wing social activists in the interwar period as independent, non-governmental, grassroots initiatives. They managed to build several large housing estates with flats for less wealthy families. The communists who created the Polish state after the Second World War implemented the political ideology of really existing socialism. In official propaganda, they declared the key role of society in the development of the state, but in practice they had to reconcile it with a centrally planned economy. Therefore they could not simply shut down housing cooperatives, but they could no longer allow them to operate independently. The solution was to create a central, nationwide association to which all cooperatives had to belong. In this way, the authorities of the People's Republic of Poland took full control over them. For over 40 years of real socialism in Poland, cooperatives have put into use a great many flats, which improved the quality of life of a huge number of Polish families. It must be admitted, however, that their functioning was inextricably linked with bureaucracy and corruption. These were mainly the big giants, which managed whole districts of cities. It was therefore no surprise that at the time of the political transformation in 1989, the pre-war heritage of cooperatives was forgotten and housing cooperatives were perceived as a relic of socialism and associated with all the bad features of this system. Their continued existence was treated as a necessary evil.

These institutions were not offered any support tools, and the outdated cooperative law was not reformed. Instead, the state supported the development of private real estate developers in many ways. Currently, the residential market is dominated by commercial enterprises. In recent decades, new housing cooperatives have generally not been established. even those housing co-operatives that have been in existence for years and are building anything now, do it mainly for sale on the market. There is no legal framework for the easy creation of non-profit initiatives to build affordable housing. A complete reform of cooperative law is needed. The countries of Western Europe, where cooperatives are often smaller, could serve as an example. In such cases, their members have a greater influence on the management of the buildings and housing estates they live in. Such changes could represent a 30-year delayed transformation from real socialism to civil society in this area.

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TRANSFORMING AND RE-THINKING LEGAL INSTITUTIONS IN CEE II.

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Constitutional Innovations in the Non-Democratic Regimes Before the World War II: Baltic Perspective

Strong tension between democratic and non-democratic traditions was typical for the Central and Eastern European countries between World Wars. Creation of new states in the Central and Eastern Europe after the World War I was based on ideas of liberal democracy, strong parliamentarism and constitutionalism. By different reasons democratic regimes collapsed almost everywhere in Europe in late twenties and early thirties of last century with just few exceptions. Non-democratic regimes were established via coup d'état and offered strong and popular alternative to liberal democracy.

In the Baltic region non-democratic regimes were established in two attempts – in 1926 (Poland and Lithuania) and 1934 (Estonia and Latvia). Creation of the regime almost everywhere finalized with adoption of new constitutions – in Lithuania 1928 and 1938, in Poland 1935 and in Estonia 1937. In this line exception was Latvia where authoritarian constitution wasn't even drafted.

This constitution provided some important constitutional innovations which would be useful to analyze in details. First of all, in this constitution was strictly stipulated the supremacy of constitutions. There was even created special constitutional institutions for protection of legality and overviewing quality of legislation. The Constitution of Lithuania, 1928 created the State Council (Valstybės taryba), which was following to classical French Conseil d'État traditions. The main function for the State Council was evaluation of legislative proposals and advice to the Government for new legislative iniatives. The Constitution of Estonia, 1937 provided Chancellor of Justice (Õiguskantsler). His main duty was to control the legality of the acts of state institutions.

By other hand, it was typical that there existing real difference between the constitutional text and the real system of power. The best known example in this could be Poland with the extra-constitutional role of Marshal Józef Piłsudski. In this context also typical was strong limitation of the Parliament's power which made this institution almost decorative in this systems. The real power was concentrated in the hands of executive. It would be useful to analyze this system also in context of the militant democracy, concept developed by Karl Loewenstein. For example, Estonian regime he mentioned as good model for protection of democracy.

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Renewing the Role of the State and its Public Administration from the Perspective of Hungarian Territorial State Administration

This presentation focuses on some of the peculiarities that has characterized the last 30 years in the development of Hungarian territorial state administration. The validity of the topic stems from the fact that the Democratic Transformation not only renewed Hungarian public administration, but also fragmented it to a certain extent, as one of the goals of the transformation was to get rid of all the administrative elements of the system considered undesirable before 1989/90. As part of this aspiration, local administrations gained preference over state administration, and legislation started favouring the municipal level instead of the territorial level of state administration. Because of these tendencies, the territorial level of state administration has been neglected.

The new state administration offices have been created from the former network of soviets; however, they have started operating in the administrative space not by any common guiding principle, but rather along departmental goals. This organizational proliferation eventually resulted in the fragmentation of the territorial level, and because of this, Hungarian public administration has seen an excessive amount of territorial state administration bodies founded by the mid-1990s. Albeit each and every Government elected since the Transformation was determined to reduce the number of said bodies and rationalize the deconcentrated organizations related to the central level of public administration, none of them managed to follow through with a long-lasting solution, due to a variety of factors.

The middle of the 2000s saw two, fundamentally different sets of reforms, both of which affected territorial state administration. The first campaign “swept through” the territorial level in 2006-2009 and resulted in a regional reorganization. Following that, in 2010, a new era of public administration development started, primarily based on Neo-Weberian principles, and annulling the changes that took place between 2006-2009.
The administrative trend in effect since 2010 is focusing on the rediscovery of the classic Weberian values, mixed with some of the proven solutions of New

Public Management to meet current expectations. To achieve this, it counterbalances the administrative elements that were deemed too negative or excessive back in the days of the Democratic Transformation. Thus, the current principle favours state administration over local administration, and prefers the territorial level instead of the municipal, with the common ground of these aspirations being the territorial level of state administration. In light of these goals, it is probably clear now why the institution of Capital and County Government Offices (or simply “government offices”) was founded on January 1, 2011 – their network was the primary new deconcentrated state administration body acting as the territorial branch of the Government.

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By now, the territorial level has been clearly integrated by the 20 government offices: about half of the existing deconcentrated bodies have been merged into them; they boast an extensive set of authorities and responsibilities (such as the legal supervision of local governments); and they employ a sizeable amount of public servants (in 2017, the capital government office alone had 5500 employees). The leader of the government offices (the so-called Government Commissioner) also coordinates the high-priority projects of national economic interest since 2012. In 2013, the system of government offices was expanded with district-level offices as well – these offices gained additional responsibilities and authorities from central administrative bodies in 2016/2017.

In parallel with the foundation (and gradual year-by-year transformation) of the government offices, legislation also fine-tuned other territorial state administration bodies (such as the treasury directorate or the tax authority). Because of these, even though Hungarian territorial state administration has become more integrated in the last 10 years, the institutional system saw constant momentum. Besides the shifting tasks and responsibilities, this also entailed several organisational modifications, procedural changes, and personal corrections as well. The most recent phase of this administrative evolution rolled out in multiple stages throughout 2020 (in January, March, etc.), and consisted of modifications that seemingly retract some of the changes that came to effect during 2016-2017. This is mostly due to the changing focus: while the reforms that took place three years ago meant to reinforce the district offices, the latest corrections aim to return some of the district level responsibilities into the county level.

Based on the above overview, the question arises whether the changes planned for 2020 mean a new or different direction compared to earlier developments. However, it is also worthy to discuss whether the implemented reforms can be considered Hungarian specialties, or rather solutions that are used in other (Central- and Eastern-European) countries as well.

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Dance on the Edge of the Blade: The Transformation of Direct Democratic Institutions in Hungary

Hungary's experience with direct democracy began in 1989, when the last Parliament of the one-party state adopted the first Hungarian law on national referendums (Act XVII of 1989). The law was, on the one hand, one piece in the series of constitutional acts that were planned by the Hungarian Socialist Workers' Party (MSZMP) in order to reform the constitutional system of the country. It was, on the other hand, a result of the request of environmental organisations which protested against the construction of the Bős/Gabčikovo-Nagymaros Dams and wanted to submit the issue to the referendum. The most important innovation of the new regulation was that it allowed bottom-up citizens' referendum initiatives: if 100,000 voters supported the initiative, the Parliament was obliged to order the referendum. The new institution was first used still in the same year by different oppositional parties in order to prevent the election of Imre Pozsgay, the candidate of MSZMP, to the position of the head of state.

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It turned out, however, very soon, that the new law had serious shortcomings. The few prohibited issues proved to be insufficient to protect important constitutional institutions; there was no deadline for the collection of signatures; and the law didn't provide for an independent authority that could check the legality of initiatives before the collection of signatures. The Constitutional Court developed, step by step, a series of constitutional requirements that must be met by a citizens' initiative in order to be legally valid. The Parliament laid down further prohibited issues, increased the signature quorum and established a verification process for the formal and substantial control of the initiatives. The constitutional framework of direct democracy was revised in 1997 and 2011, completely new laws were adopted in 1998 and 2013. All these changes imposed, however, so heavy constraints on the direct democratic procedure that its possible benefits are hardly to be exploited. No citizen-initiated national referendum was held in Hungary since 2008 and over 90% of all initiatives are now rejected by the National Election Committee in the verification process by reason of violating some legal limits.

The practice of direct democratic institutions in Hungary is a dance on the edge of a blade from two aspects. On the one hand it is clear that the dangers of demagogic, unlawful initiatives, which may violate human rights or overthrow the constitutional order, should be prevented. Many initiatives of this kind testify of the destructive potential of direct democratic institutions. It is not easy to find the proper way to filter them out but to allow at the same time other initiatives, which will hopefully solve serious conflicts, increase the legitimacy of decisions, put under democratic control the government, accomplish political innovations or carry out other positive effects for the sake of common good.

On the other hand, making extremely difficult to start citizen-initiated direct democratic processes and bring them to a successful end, will most likely open the way for plebiscitary practices: for the use of various kinds of popular consultations and top-down initiated referendums, which usually serve the political goals of those being in power. Examples for such a development can be brought from the Napoleonic era, the interwar period and our days as well. Also the current Hungarian practice seems to be halfway between the democratic and plebiscitary models.

The paper will argue that there is no "third way" between "Western-type" direct democratic institutions and authoritarian plebiscitary practices, at least not in the long run. The current Hungarian developments will also be explained by the low level of democratic consciousness in Hungarian society.

LEGALITY AND THE RULE OF LAW IN CEE COUNTRIES

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The Rule of Law and Artificial Intelligence

Although the impacts of the technological revolution on the legal system is still far from being clear, some of the challenges are clearly visible. The answers to such challenges seem to reshape our view upon the role of the state and the conceptual framework of liability and of property in private law. Codes of conduct are not only provided by the legislator but also by companies implementing algorithms in automatic decision-making mechanisms, Internet browsers and social media. Innovation is the key for economic development and it is task of the legal environment to support it. Internet of things and applying artificial intelligence in the health care sector may reduce the costs of health care as well as the risk of diseases. In other sectors it may reduce the probability of accidents, reduce production costs and increase welfare.

Artificial intelligence is a combination of a great bulk of transferred data and algorithms. This necessarily involves a high level of connectivity. This complexity results in lack of transparency of AI decision making and the openness of such systems for further updates and upgrades make them vulnerable against illegal interferences. Duty of disclosure is the basic element of compliance with market paradigm which requires informed and voluntary consent to transactions. The algorithms as a code

(Lessig) work as rules of conducts just like the law. Thus, revealing them is to be seen not simply as a contractual or non-contractual obligation in private law, but is a precondition of maintaining rule of law in the society as well.

The paradigm of rule of law requires the existence and the opportunity of accessing and understanding the rules by the addressee prior to the relevant conduct. Rules are to enforced without discrimination, that is, the same cases are to be decided the same way while different cases are to be decided differently. The opaqueness of such technology and the implied risk of discrimination however, are not simply risks of market failure but undermine the rule of law as well. This is actually the main factor of underlying the importance of disclosing algorithms (the code) and other elements of AI decision making. The technological revolution is an answer to challenges of mass production and mass distribution of goods and services. From this angle, the technological revolution, including AI is just a new stage of a development started with standard contract terms and boilerplate clauses at the beginning of the 20th century. The EU White Paper on Artificial Intelligence focuses on liability issues reshaping product liability. The answer to challenges like regulation of social media and Internet requires involvement of users and the active role of Internet Service Providers which call for innovative solutions and may result in a kind of privatisation of justice.

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Social Legitimacy and the Crisis of the Rule of Law in the CEE Countries

The author proposes to combine the concepts of social legitimacy and the Rule of Law to study of the state of affairs in the countries of Central and Eastern Europe (hereinafter, CEE). In the literature, the development of the European Union (hereinafter, the EU) is presented as a history of recurrent crises, from which the EU emerged stronger and renewed, with new institutions and a further growing pan-European identity. The concepts of democracy, legitimacy (political, social, etc.), Rule of Law, sovereignty and many others have attracted the attention of scientists and politicians as arguments for political disputes about the future of the EU. For our part, we offer our own view of these processes in terms of Cognitive Science. The Rule of Law is understood here as "…one of the ideals of our political morality and it refers to the ascendancy of law as such and of the institutions of the legal system in a system of governance. The Rule of Law comprises a number of principles of a formal and procedural character, addressing the way in which a community is governed" [Waldron, 2016]. Social legitimacy refers to a certain level: trust to the authorities and actions of the authorities of national and supranational authorities; and approval of such actions. The data of sociological surveys do not distinguish the concepts, and it is possible to intuitively relate the responses of respondents to the semantic field of legitimacy, political legitimacy, social legitimacy, etc. Conceptual confusion accompanies questions of legitimacy and serves as a source of an infinite number of speculations, both in democratic states and in states of authoritarian, semi-authoritarian types.

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"Law Is Not Politics" – the Role of the Liberal View on Law in the Rise of 'New Populism'

While it is widely accepted that the recent political developments in Hungary can be traced back to many factors (e.g. political, social, economic etc.), it may be worthwhile to focus on one of them in particular: I examine one of the characteristics of the liberal theory of law which facilitated the spread of a conviction amongst democratically thinking people with an interest in public affairs. This conviction is based on the assumption that there is a sharp boundary between law and politics, and following from that, that neutral legal institutions, by relying solely on the law, are able to defend the rights of the citizens against any political attack. Believing in this myth, democrats did not appreciate the true weight of the political nature of legal decision-making, and populist politicians were able to capitalize on their naivety.

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Populist Legality in CEE: A Mystified Post-Colonial Response?

The paper aims to develop the view on populist legality in CEE (with its two distinct, yet mutually informative forms – Hungarian and Polish regimes) in the post-colonial perspective.
I will take for my starting point Homi Bhabha's remarks on the condition of the semi-peripheral subject, which is always ambiguous and caught in a play of mimicry. Law, as a linguistic phenomenon, may be understood in the Lacanian perspective as producing a structural position of the subject-speaker, particularly discernible in constitutional law. Consequently, a semi-peripheral legal or constitutional 'speaker' is a position afflicted by unique incoherences. In CEE it is ensnared in the interplay between the imposed language of liberal legality and liberal constitutionalism and an acute practical awareness of relations of domination that this language conceals. Therefore populist legality may be construed as a kind of counter-reaction of the legal 'speaker' against, but simultaneously within the imposed form. Hungarian and Polish populists use the legal language profusely (as evidenced, among others, by the logorrhoea of constitutional amendments in Hungary), but with mimicry of legal legality that they do not treat seriously. Their legal consciousness is a kind of vulgar hermeneutics of suspicion, which treats law only as a form of forcing and concealing domination. Nonetheless, the result of their actions on the legal system are always more complex due to the law's inherent inertia and systemic effects. For this reason populist legality in CEE tends to produce an incoherent legal system which eludes a meaningful, all-encompassing logic proper to the ideology of liberal legality. It is patchy and based on punctual application of force.
Basing on the ambiguity of this semi-peripheral position in legality, I will try to assess the validity of post-colonial paradigm in its application to CEE legal history of the 90s and the 2000s.

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