SPREADING DEMOCRACY AND THE RULE OF LAW?

Spreading Democracy and the Rule of Law?

The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders

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Preface

The accession of eight post-communist countries of Central and Eastern Europe (and also of Malta and Cyprus) to the European Union in 2004 has been heralded—rightly—as perhaps the most important development in the history of European integration so far. European enlargement and the resultant "coming together" of the two parts of Europe raise a number of crucial questions about the operation of constitutionalism, democracy and the rule of law at both the European and the national level. While the impact of the enlargement on the constitutional structures and practices of the EU has already generated a voluminous and rich scholarly literature, the influence of the accession on constitutionalism, democracy, human rights and the rule of law among the new member states has been largely ignored. And yet it is a matter of fundamental importance not just for those new member states but for the European Union as a whole.

This book attempts to fill this gap, and to address the question of the consequences of the "external force" of European enlargement upon the understanding and practice of constitutionalism, the rule of law and human rights among both the main legal–political actors and the general public in the new member states. We have invited a number of legal scholars, sociologists and political scientists, both from Central and Eastern Europe and from outside, to address these issues in a systematic and critical way. Work on this volume has been greatly facilitated by a workshop held at the European University Institute (EUI) in Florence in November 2003 at which the authors had an opportunity to present and discuss their drafts. The editors are grateful to the EUI and its Research Council, to the Representation of the EU Commission in Rome, to the European Law Centre of the University of New South Wales, and to the Australian Research Council which generously funded the workshop. We also wish to thank Mehreen Afzal, Claire O'Brien and Cormac MacAmhlaigh, researchers at the Law Department of the EUI, for their assistance with the manuscript and to Marlies Becker for her excellent assistance with the workshop and with the volume.

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Introduction

Introduction

Martin Krygier

The essays in this collection range widely. All, of course, are concerned with implications of European enlargement in the post-communist accession states. However, they approach these from a large variety of viewpoints and disciplinary approaches, and with a variety of particular questions in mind. This is apt because so many domains are affected and intertwined in the process of enlargement. The story of enlargement is indeed in a profound sense a story of multiple interactions: between nations, states, economies, regions, social structures, political systems, and all of the above with all of the above. And just as borders are becoming blurred on the ground of Europe, so too, any appreciation of what is happening and likely to happen will tend to overrun the boundaries of established disciplines.

The chapters speak for themselves. Rather than attempt the invidious and somewhat pointless task of summarising in brief scope what each of them has to say, it seems more useful, by way of introduction, to suggest a few underlying and interwoven themes or questions to which all the chapters, in their own different ways, respond. I would suggest four. In practice answers to them will overlap, but analytically at least they can be distinguished. First, what are the goals and underlying values of enlargement? Second, what are the major challenges it has faced and continues to face? Third, what is the character of the process, in particular what characterises the means employed to achieve it? Fourth, what are the likely prospects? In relation to any and all of these questions, of course, neither the chapters nor this introduction makes any pretence to definitiveness, a pretence that, even if we had been tempted to it, is absurd in relation to this subject. No one knows what Europe will be in even ten years, still less over a longer term. All we can offer at this stage is our best-informed guesswork.

1. Goals

A story is told of a London cab driver who, on recognising his passenger to be T.S. Eliot, mentioned that he had had the honour to drive other eminent thinkers in his cab from time to time. One of them was Bertrand Russell. He explained that he had seized this opportunity for edification by asking his passenger, "Lord Russell. What's it all about? And you know what? He could not tell me." Perhaps Eliot, fortified by faith, did a better job, but for the rest of us it's a question hard to answer, in general and even in relation to something as relatively specific as the European Union (EU). What *is* the EU all about, what are the overarching themes of the Union and its enlargement? Many answers, little agreement.

Wojciech Sadurski et al. (ed.), Spreading Democracy and the Rule of Law?, 3–24.
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One reason the question is so difficult is that there are so many interested parties with different values, understandings and ambitions. Of course, at its largest that includes all citizens of the Union, and constitutionally all Member States and the overall constitutional structure of the Union itself. But even if we seek to simplify by concentrating on the major categories of political orders involved, the European Union at the moment of enlargement represented at least three very distinct sorts. Sergio Bartole speaks of the duplex character of the Union, always accommodating two different points of view – that of the European legal order as a whole, and those of the internal systems of law of the interested states – but of course that second category, at the time of accession and for the immediate future at least, is itself duplex. It includes the enlargers of the West, and the enlargees of the East, whose positions and aims are far from the same. Add to that the newly augmented club itself which the former created and will continue to dominate, and the complexities and divergences can be readily appreciated. What serves the West may, but it may not, serve the East, and vice versa. What serves the Union as a whole may not always be the goal or option of choice of its constituent parts. Not to mention that goals have changed over time, and are not always consistent with each other.

The focus of this book is on enlargees, and specifically those of post-communist Central and Eastern Europe. Even within this relatively circumscribed domain, however, all three entities are in play, though it is not always clear that they are playing the same game by the same rules. And of course, one of the players is also the selector, coach and umpire. Where differences emerge, will/should the goals of the hosts prevail or will/should they be subverted by local actors with other agendas? Answers to this question depend in important part on an estimation of the goals and values that underlie the enterprise of enlargement.

Are the political values which Europe professes universal goods, only for contingent historical reasons better instantiated in the West than in the East? Are they what E.P. Thompson took the rule of law to be: "a cultural achievement of universal significance?".[1] If so, the attempt to spread and secure them through enlargement looks like an admirable idea from which all stand to benefit. *Unless* the professed values are not the real ones, *or* the ways in which they are being spread are counterproductive, *or* they are embodied in practices, institutions and traditions so tied into local cultures and histories that they do not transplant well, *or* because the specific practices, institutions and traditions of the accession states are peculiarly ill suited to the grafts on offer. And what if they are not universal after all? All the options mentioned are explored in this volume.

Wojciech Sadurski is an EU universalist. He believes the spread of democracy, constitutionalism and the rule of law are central among the real and legitimate goals of enlargement. Transplanting them to countries, some of which had never known them, is to do good, even if not all the beneficiaries appreciate this. So, for

1 *Whigs and Hunters. The Origin of the Black Act* (Harmondsworth: Penguin 1977), p. 265.

him the asymmetry of power, prosperity and appeal between West and East, which has allowed the former to call most of the shots, is not an embarrassment but a useful resource. It does not result in the imposition by force of "western values", especially since it has been most successful when it "resonated with domestic preferences and political aims." Rather, it enables the spread of values good for all. Not only has the accession process required necessary modifications in the accession states" institutions, but accession itself is, overall, likely to continue to strengthen the hands of the good guys of post-communism, who might have more difficulty resisting "threats from authoritarian, populist, nationalistic forces" without it. If there are benighted easterners who do not hold all these truths to be self-evident, then it is a good thing the West has had the carrots of prosperity and democracy, and the sticks of conditionality, with their double standards that other authors decrie, to bring them in line.

Much of this looks like a particularly eloquent portrayal of what might be called the missionary position, except that Sadurski stresses – as he indeed personally embodies – the commonality of liberal democratic values, whether their bearers come from West or East. The likely and welcome result, he believes, is that

> the EU increasingly becomes a community of values, not merely a community of interests, and the values that these days predominate within the Union resemble closely the values of civic liberal-democrats in the post-communist area of Europe.

Values cross boundaries, as do threats to them. Enlargement is, he believes, a potent source of strength to the former, and opposition to the latter, whether they occur in Italy, Austria or Slovakia.

Even more than Sadurski, David Robertson stresses autochthonous sources of support for "European values" from the East. Not all wisdom moves from West to East. He argues that the specific predicaments that transitional states face appear to generate deeper consideration of common commitments than is available among many of the old guard. Focusing on the jurisprudence of post-communist constitutional courts, particularly the contrasting approaches to lustration – more broadly, dealing with the past – of the Hungarian and Czech courts, he is full of praise for them both. The novelty of the issues with which Central East European (CEE) courts have had to deal requires them to delve at greater depth into issues which the more established jurisprudence of Western European states might glide over. Thus:

> [T]o a large extent a western court analyses a troubling statute against a relatively well-established definition of a constitutional right to see if it passes scrutiny. There is, as it were, only one puzzle. Here there is a double puzzle – the statute needs to be analysed, but the right has to be as well – they are interdefined. There is thus a self-reflexivity in the process of constitutional jurisprudence over

> this period and in these countries which is highly unusual and crucial ... the great advantage is that there is far more, more thoughtful, and less formulaic discussion of absolutely core questions than one finds anywhere except in similar transition states. This cannot be stressed enough.

Democratic values, rule of law, constitutionalism: Robertson finds them all in remarkably good shape, at least at the level of the discourse of elite judicial institutions in the transitional/accessional/enlargee states. And all of it is helped by the systematic determination of these institutions to look over their shoulders at how things are done in the more established, though not necessarily more committed or reflective, western states.

In contrast, several other contributors are doubtful whether professed goals are always the real ones, and even if real, whether the grafts being attempted will take. Vittorio Olgiati believes that what is really going on is the repeat of an old story, self-defence by expansion:

> In short it has always been a question of defending-by-modernizing the legacies of the Enlightenment's features and the constitutional architecture and lifestyle (universalistic values and particularistic interests) deriving from Euro-centric liberal ideology.

What press releases (and Sadurski) might describe as the magnanimous (and expensive) spread of goods such as democracy, constitutionalism and the rule of law, he views as "a process of socio-economic colonisation" favouring "foreign investors above all", together with a "veritable policy of colonisation", of "legal implantation of western-styled legal standards", virtually forced in a top–down process that brooks no opposition, often not even discussion. Olgiati seems to suggest that what are euphemistically called negotiations amounted, in effect, to offers that could not be refused, on conditions not subject to alteration, to weak if willing supplicants, with nowhere else to go. In all this, "bottom–up social trends played the role of mere secondary adjustment patterns." Local elites were simply co-opted or willingly volunteered, to "domesticate and localise the incoming foreign models and goods."

Daniel Smilov's critique, while milder, is if anything even more radical. While focusing on a specific question – judicial independence – he highlights flaws that he believes go much deeper. With regard to that value he argues there is no underlying coherent theory or account of what the EU demands. But Smilov says a lot more. First, that notwithstanding the absence of a coherent account of judicial independence, and notwithstanding frequent inconsistent decisions and evaluations of the conditions for judicial independence in different countries, the EU propagates the myth that it has such an understanding. Second, that this is no accident, since the myth serves a number of useful functions for the EU elites. It saves bureaucrats' time; "creates a certain picture of the EU as a polity based on common principles and standards", and strengthens the Commission's bargaining position. But third,

it is not a benign myth, like, say, children's belief in Santa Claus, because while it promises presents if the children behave, it does not always deliver. Even worse, what it does deliver is not necessarily what its beneficiaries want or need. In particular it "conceals the growing political power of judges and courts", rather than encourage ways of dealing with it, "reinforces a grander myth of the EU as a community based on common normative principles and values", and expels the central *political* character of this process from sustained and serious discussion. Finally, do not just think this mischievous myth making is restricted to judicial independence. It infects EU policies on enlargement all the way up and down. Judicial independence is, he suggests, just the tip of the iceberg that is "the accession process in general."

Adam Czarnota's skepticism moves in the other direction. He doubts that the reasons why the "Old Europe" has invited the new are the same as, or even always consistent with, the reasons the latter have accepted the invitation. Nor does he believe it obvious that either old or new will get what they want. One goal popular among many of the former is to override the dysfunctional consequences of national sovereignty. This is less likely to have appeal, as Czarnota notes, among those just beginning to learn what sovereignty is like. All the more so when these newly sovereign states recognise their even newer status as subordinate members of a union of some sort, dominated by its older members. He argues on the one hand, that the Europe the countries of CEE wanted to join is not the one they are about to join. They wanted money and they wanted status, and they might get both, but did they want to pool sovereignty? Does *Solidarność* extend to the French? To Germans? They wanted a normal economy, and they are getting into a quite abnormal, indeed unique polity, and one in which – just after they regained sovereignty, or even gained it for the first time – they are being asked to pool it in a conglomerate where they are unlikely to be major players. Not only Poles but most of the enlargees, Czarnota suggests, "will find it difficult to surrender their own sovereignty to the EU, when they are only beginning to enjoy it themselves." This is enough to raise suspicions of enlargement, particularly among enlargees who have for some time felt themselves the objects of suspicion, otherwise known as conditionality, by those they have been so keen to join. Rich in collective memories, they will find that memories in the West, of the same events, are different. Not rich in traditions of legality or democracy, they are asked to exhibit both. Czarnota does not deny that many benefits might flow from joining Europe, but there will be inevitable costs too, and he even worries that "the entire project of European integration could be derailed because of eastern enlargement."

2. CHALLENGES

Accession occurred some fifteen years after the collapse of communism. Eight of the ten enlargees are beneficiaries of that collapse. Like all the post-communist states, those eight have been spoken of as enjoying or enduring a "transition" to

democracy, constitutionalism and the rule of law ever since. Thus, unlike other enlargees, before and now, the countries of Central and Eastern Europe, as Gwendolyn Sasse *et al.* stress, are navigating a double transition: from communism and to Europe. Inevitably peculiarities of the first will affect the second, just as the unprecedented nature of the latter has already become intertwined with the former.

Long before "joining Europe" had become a practical matter of swallowing 80,000 pages of regulations, joining Europe in a larger sense was a dream of many, particularly elite central and east Europeans. Often it was spoken of as a "return". Not everyone thinks that language is realistic, nor the ambition realizable. Partly this has to do with alleged historical legacies, some of them very old. At the dawn of the "transition", even before talk of joining the EU, the Polish historian, Jerzy Jedlicki pointed out that this is not the first time that many East Europeans have sought to "return to Europe." He seems to suggest that, notwithstanding dreams of such "return" from at least the eighteenth century, they were never really there in the first place. And he argues that many of the reasons for their backwardness and marginality continue to weigh on the countries of the region. While the chances are not closed, that more recent attempts to "return" might succeed, he does not seem to regard them as highly promising:

> [I]f all those peoples who live in the narrow space between the old Russian, German, Austrian, and Turkish empires share any basic experience and any common wisdom, it boils down to this: that no victory is ever final, no peace settlement is ever final, no frontiers are secure, and each generation must begin its work anew. There is no linear development in East European history, but rather a Sisyphus-like labour of ups and downs, of building and wrecking, where little depends on one's own ingenuity and perseverance.[2]

More melodramatically, John Gray insisted that:

> [I]n throwing off the universalist institutions that supposedly nurtured Homo Sovieticus, the post-Soviet peoples have not thereby adopted the Western liberal self-image of universal rights-bearers, or buyers and sellers in a global market. Instead, they have returned to their pre-Soviet particularisms, ethnic and religious – to specific cultural traditions that, except in Bohemia, are hardly those of Western liberal democracy . . . not, manifestly, an ending of history, but rather its resumption on decidedly traditionalist lines – of ethnic and religious conflicts, irredentist claims, strategic calculations, and secret diplomacies. This return to the historical realities of European political life will remain incomprehensible, so long as those realities are viewed through the spectacles of ephemeral Enlightenment ideologies. We will not, for example, understand current developments in Poland if our model for them is the transitory nightmare of Marxian Communism;

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2 Jerzy Jedlicki, "The Revolution of 1989: The Unbearable Burden of History," *Problems of Communism* (July–August 1990), pp. 39–45 at 40.

> we will gain insight into them if we grasp them as further variations on historical themes . . . that are millennial.[3]

The authors in this book are not given to any such millennial determinism, but they are not unaware of the history that prompts it, or the legacies that may still haunt present efforts. Jiří Pribáň stresses that ethnic nationalism occurs in many western European states, but he concedes that it was much stronger in the younger states of central and eastern Europe. And, as Adam Czarnota emphasises, some of these states, if not the nations that have just come to power within them, are very young indeed.

Moreover, András Sajó observes that

> [O]ne of the striking features of East European nationalism is that it results in a value system that is indifferent (at best) to modernity and finds its values in past (ascribed and mystical) national glory. This mental attitude does not generate much popular interest in the ethics of modernity that is instrumentalized in the rule of law.

Elsewhere he points out, even more pithily, that:

> [U]nlucky Hungarian history, unfortunate Romanian history, and for that matter, any other history in East and East Central Europe are responsible for all sorts of constitutional ideas. History nestled all sorts of political ideas into people's minds, except that of classical constitutionalism.[4]

Overlaying whatever ages-old legacies are attributed to them, the post-communist states are, of course, just that: post-*communist.* And there is a vast literature on what that legacy entails. Communism established a unique array of institutional attributes, aptly compressed in Gellner's phrase, "Caesaro-Papist-Mammonism,"[5] and generated a distinctive set of social behaviours, caricatured but not without foundation in the phrase "homo sovieticus". It left a unique combination of transformations to accomplish, exacerbated by the facts that they were all supposed to be dealt with at once (the "simultaneity" problem), and that several generations of subjects had known nothing else. Though this is not the first enlargement of the EU, it is, consequently, unique in the range of problems it presents.[6]

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3 John Gray, "From Post-Communism to Civil Society: The Reemergence of the Western Model", 2 *Social Philosophy and Policy*, (1993), pp. 10–27.

4 A. Sajó, *Limiting Government. An Introduction to Constitutionalism* (Budapest: CEU Press 1999), p. 1.

5 Ernest Gellner "Civil society in historical context," International Social Science Journal, 129 (1991), p. 495; *Conditions. of Liberty. Civil Society and its Rivals* (London: Hamish Hamilton 1994), pp. 4–196.

6 On the distinctiveness of the post-communist combination of challenges, see Jon Elster, Claus Offe, and Ulrich Preuss, *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge: Cambridge University Press 1998).

There is no shortage of institutional advice, forthcoming from the EU and elsewhere, about how to deal with such matters. But though most emphasised in the accession process, formal institutions are only part of the picture. As Miriam Aziz points out, we need to distinguish "between the formal process of implementation (adoption of the *acquis*) and the legal norms and legal culture which will inform the implementation of the *acquis* in the day-to-day process." For it is these norms and culture which will be decisive in whether new or even old institutions count as normative components in social behaviour and imagination, resources and constraints in everyday life. That is a general truth, and it is all the more salient in societies where for a long time they have not and where not all contemporary trends are calculated to make them do so. On this score, our contributors *from* the region are less optimistic than our westerners who write about it.

Perhaps the most sustained examination of these issues comes from Marek Zirk-Sadowski, who combines his insider's knowledge as professor of law and judge, and his experience as a collaborator in the annual report on Poland's readiness to join the EU,[7] to offer a disturbing account of the way not-altogether-European law functions in now-European Poland. Zirk-Sadowski's argument is complex and nuanced, but essentially it is that in Poland at least there is no conception, either among citizens or among lawyers, of law as an argumentative tradition, a discourse, mastery of which might enable some disciplined, convergent but yet often novel legal responses to new situations. Rather, law is seen socially as a source of at one stage oppressive rules, at another of potential bonuses to be grabbed, but in either case "still regarded as 'received' and not resulting from negotiations or discussions", in neither case recognised as a hermeneutic practice in which beneficiaries and victims of law themselves are legitimately involved. It is viewed purely instrumentally, and as an elite imposition or gift, sometimes for elite purposes, sometimes foisted on the country by the arbiters of Europeanness.

Apart from this profound discursive incompetence, Zirk-Sadowski implies, nothing much else is good in Polish law either. Underfunded, overworked judges watch delays mount, and can do nothing about them. Society had naive hopes that post-communism would bring them justice; instead, as the former East German dissident, Bärbel Bohley, complained, "we demanded justice; we got the rule of law." But the Poles did not even get an effective version of that. And like every other arm of state, the judicial arm withers, while people watch with scorn and without sympathy, and with increasing anomie. The result of these layers of pathology is a paradoxical sort of

> disintegration in legal consciousness . . . there exists a sense of the presence of law, of its validity but it is accompanied by the sense of destruction of normativity. Law is a collection of texts, a source of certain goods but it is not a duty. . . . There exists law, legal institutions but there is no legal order.

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[7] See the EU monitoring reports on Poland, Vols. I–VII.

And Polish lawyers, simplistic positivists all, are themselves bereft of the argumentative equipment to *interpret* law. They simply know how to apply rules, apparently with machine-like repetitiveness and lack of imagination: "they did not presume that a new role in the social discourse was required of them, and especially of judges." This makes them particularly inept receivers of European law, quite unable to deal with "soft law" and more generally the kind of argumentative participation in legal discourse that it demands. Instead of a language, all they have is a book of rules. And another paradox of "integration" is that a form of law that *depends* upon all these discursive and semantic capacities that Poles lack is being introduced in a way that leads

> . . . to the strengthening of the tendency to instrumentalise law. The disintegration of legal order is a result of the narrow understanding of the harmonisation of law as the implementation of new texts. They were introduced to Polish legal order without a reference to the achievements of the European legal discourse. The consequences of this primitive implementation of law have led today to alarming phenomena.

Complementary accounts appear in the articles by Czarnota and Sajó. Czarnota also adds to these "software" considerations, ones of hard and evident realities. The new countries are poor, both in money and in infrastructure, indeed at times worse than poor: what they have is not what anyone would want, products of mis- and not merely under-development. And not all forms of transition from that state are helpful. Sajó notes what he calls some perverse effects of the ways in which accession is being managed, and their interactions with inherent perversities of already-existing "transition." Together, he suggests, these tend to reinforce harmful behavioural and attitudinal legacies of communism. We will return to these suggestions in the final section below.

Now if these pessimistic tones are warranted, they represent a serious source of concern, since no one suggests that Poland and Hungary are the *worst* prepared of the new members of the EU. On the other hand, we should heed Aziz's warning against the common tendency to speak in an undifferentiated way of the "legacies of communism" and "transition" as though all post-communist states share the same legacies and must travel the same path. Instead she insists, the legacies varied, and so too the paths from communism. We have already mentioned Robertson's enthusiasm for post-communist constitutional jurisprudence. And one reason why one occasionally finds more committed democrats in post-communist states than in more established ones, is that not all legacies were necessarily bad, and some aspects of communism that *were* bad spawned good legacies. Thus Daniela Piana suggests that

> since history is constituted by change and tradition, by novelties and memories, it is also reasonable to assume that people have learnt something useful, and helpful in the reconstruction of their political life, even from their experiences

under the communist regimes – in the negative or in the positive sense of the word.

One aspect of this sort of learning from experience is that "people who lived within communism have collective preferences about what they do not want in a new political system. This idea was often stronger than a clear idea about what they want." This accords with the observation that a number of people have made over the years, that people who experience the *absence* of something valuable, more especially its active denial, often show more insight into its worth than people who have never known life without it.[8] But such insights, though precious, are often lopsided, better at telling us what to avoid than what to have and how to get it How enduring even those negative insights are, and how easily sustained in the absence of the conditions that generated them, are among questions to which we might learn answers from the experience of post-communist entrants to the European Union.

3. PROCESS

Not only are the specific challenges faced by this latest and largest EU expansion in many ways unprecedented; so too is the way it was brought about. While our contributors evaluate this process differently, they describe it in pretty comparable terms. First of all, this was manifestly *not* a discussion among equals, but bargaining in a very lopsided sellers' market. No room here for Groucho Marx's disdain for a club which would have him for a member. Here the club had laid down stringent ground rules which had, in its estimation, to be satisfied before it would consider admitting eager applicants. And so the famous 80,000 pages.

Not only was this asymmetry of condition and enthusiasm underlined by the conditionality process itself, with its double standards requiring of new applicants what had not been and still was not required of existing ones. But it was also conceived as a *didactic* process, as a result of which applicants would only be admitted once they had been taught, and persuaded existing members that they had learnt, what insiders purportedly already knew, and had institutionalised what insiders, again purportedly, already had. As Dionysia Tamvaki points out, "[n]ever before has the EU taken such an active stance in teaching proper state conduct to aspiring entrants." The ambition, as she puts it, "assumes the characteristics of a socialisation process, through which Western Europe diffuses its shared beliefs and institutional practices to the 'untrained' East."

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8 Adam Podgórecki makes a similar point about the insights to be gained from the experience of "crippled rights" in "Human Rights Revolution," in *A Sociological Theory of Law* (Milan: A. Giuffre 1991), pp. 102–103. I have followed him on this point in a number of places, e.g., "Virtuous Circles. Antipodean Reflections on Power, Institutions and Civil Society", *East European Politics and Societies* (11.1) (Winter 1997), p. 80.

This combination of conditionality and pedagogy assumed an asymmetry of attractiveness, competence, and knowledge-worth-having which had its own reflections in the process of implementation. As many of our authors note, it was elite driven, instrumentalist, technocratic, undemocratic, and formalistic. Hardly an exercise in progressive, participatory, dialogical education. This was both because the assumption was strong that the west knew what the east had to learn, and also that in regard to democracy, the rule of law etc., little value was placed on the *process* of achieving the benchmarks set. What mattered were the results. This top–down and instrumental orientation, perhaps inevitably, led to a process with a number of salient characteristics the desirability of which is a matter of argument.

Not only was this a process driven by elites, but it was doubly so. Criteria were devised by Eurocratic elites who "knew" what they should be, and had to be learnt and satisfied by enlargee national elites who needed to show that they too could come to know and apply them. Since the prize was so attractive to the latter, they were reluctant to endanger it by opening it up to the vagaries of domestic politics any more than was unavoidable. That had a certain logic. Fulfilling the criteria was treated primarily as a technocratic, apolitical matter, where expertise rather than values ruled. So Eurocrats met in committees primarily with national bureaucrats and executives more generally. This "comitology" had, in general terms, an anti-political character, and more specifically an anti-democratic one, involving as it did a certain sidelining of parliaments and wider democratic involvement in the accession process within accession states. As Přibáň notes,

> [t]he committee based form of European governance is neither constitutional, nor unconstitutional. It is beyond the reach of the constitutional discourse because it exceeds its concepts of different branches of government, checks and balances, principles of delegation and separation of power etc. The expansion of government by committees contradicts the proclaimed ascendancy of a common European citizenry and its ethos of public control and political accountability. It is much closer to the decisionist concept of law and state elaborated by Carl Schmitt in his critique of the liberal democratic rule of law.

Since bureaucrats had the expertise, even if parliaments had some claim to represent values, the pressures of accession tended to move power from parliamentary to executive elites, and more generally from political to bureaucratic elites, not only in Brussels but in national capitals as well. On the one hand, as Sadurski emphasises, conditionality in any case loads up the position of bureaucrats *vis-à-vis* parliaments. All the more when negotiations were conducted in secret, and more still when "a good deal depended upon informal contacts among negotiators on both sides, not easily subjected to formal control." And when matters got to parliament, there were disincentives to make them subjects of larger domestic public debate. As Přibáň points out:

> the harmonization of the EU law and national legal systems of the accession countries seriously affected the quality of democratic deliberation in those countries because national parliaments favoured a smooth integrative process and mechanically, without an adequate political debate enacted most of the proposals harmonising national laws with the EU legal framework.

And the focus on national elites meant that sub-national elites were also sidelined. As Sasse, Hughes and Gordon show with regard to regionalisation, this has left those sub-national elites ill-informed on matters where ultimately their participation will be crucial, but which hitherto have seemed to them a game played above their heads for stakes that were unlikely to fall into their hands.

According to Tamvaki, Olgiati, and several other observers, and again not surprisingly in such a "benchmarking" venture, "it is mainly the formal adaptation that matters at the elite level", leaving grounds for concern about the extent of penetration of reforms that have satisfied benchmarkers but have yet to play their role in social life. Indeed one might speculate, and Zirk-Sadowski implies, that formal conformity might be bought directly at a price in terms of social embeddedness. Thus he observes of Poland what is unlikely to be too different elsewhere:

> There is the domination of the process of developing legal institutions in the normative dimension over the cultural process of assimilating values and legal principles. The implementation of the Community law was not a process of historical evolution but a purely formal operation of introducing certain legal texts into the system of law. Thus legal institutions have been left suspended in a specific culture vacuum and therefore the actors of the legal institutions assume a purely instrumental attitude towards them; they are not able to fill the legal institutions with rational discourse. This purely external attitude to law, the absence of a social hermeneutics of law, results in the fact that legal institutions do not generate common, socially accepted symbols and meanings. . . . The lack of the rooting of law in culture brings about the attitudes of legal nihilism and legal instrumentalism. No connections are discerned between the normativity of law and moral conventional normativity.

As we have seen, Olgiati views this whole way of doing business as misconceived. Lauso Zagato, too, is sharply critical of the way in which a lot of the implementation was carried out. Thus he claims that "exporting the *acquis* has often consisted in a blind, bureaucratic operation, carried out in some countries without any criterion," and, as the examples he adduces suggest, with little attention to facts on the ground. So much has this elision of "guiding function" and "takeover" tended to ignore local developments, he claims, that

> [p]aradoxically, however, this has ended up weighing especially heavily on the legal systems of the more advanced CEEC, the first States which managed to enact legislation on competition (Poland, the Czech Republic, Hungary). In these countries the provisions were modelled *roughly* on Community law, but had

> their basis in the local system; this is particularly true of the Polish legislation on concentrations. Local experiences of this sort (involving the creation of expertise on the part of administrative and judicial organs, and of the operators themselves) have been wrecked by the activity conducted by the Association Councils of Issuing Implementing Rules (IR). The latter have naturally imposed immediate implementation, pure and simple, of primary and secondary EU law, in the manner of pre-accession strategy.

Sadurski, on the other hand, takes precisely the rigidity and inflexibility of the enlargers to work to the benefit of enlargees. As he writes, provocatively since much that he praises is precisely what many others condemn:

> The combination of the relative inflexibility and rigor of principle of conditionality, on the one hand, with the relative malleability, open-endedness and speed of the political transformations in post-communist states, on the other, contributed to the high degree of effectiveness of the attempt to transplant the rule of the "club" to the "applicants". The EC/EU could dictate the terms because the candidates had more interest in joining than the Union did in enlarging. The democratic forces in the CEE states could bravely design new institutions because the forces of the *ancien regime* were demoralised, traumatised and easily embarrassed.

Christian Boulanger mounts an argument that in part supports Sadurski's. He focuses on the Hungarian constitutional court, and emphasises the extent to which "the prospect of joining Western institutions also has an informal, culturally based impact on constitutional politics." Local elites were speaking to more than local audiences, and they knew it, partly because they could feel the breath of Eurocrats on their necks, but partly too because they *wanted* to be participants in a European discourse. They consequently were concerned to appear proto-Europeans not merely in the local context but at large, partly because they wanted to think of themselves and their country as European already. Now Boulanger emphasises that this cultural identification and aspiration is not uniformly spread around the region. It is important to ask how realistic it is, and to the extent that it is not, how quickly and successfully it might become so? And then it is important to know who, apart from the highest elites, shares it.

4. PROSPECTS

The Copenhagen criterion most relevant to the concerns of this book is the one which requires "the stability of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities." Taken literally, there are three aspects of the passage worth noting. One is the success language. To qualify for accession, you need to ensure your institutions are *stable*, and they must *guarantee*. It is hard to know how you ensure stability of such things in

a short time (1997–2003), let alone how you can know you have done so. But more striking, a guarantee is an extraordinarily ambitious requirement for things as complex as democracy, the rule of law, human rights and "the respect for and protection of minorities." Particularly since the assumption must be, for otherwise the criterion would be otiose, that they had not been in less than perfect shape hitherto. If candour had been thought appropriate about what institutional design can accomplish, starting in several cases from scratch (or behind scratch), in hard circumstances, in a very brief period, it might have been more honest, if rhetorically somewhat flatter, to require something like

> institutions that appear to have some prospect of lasting, and which there is some hope might, *ceteris paribus*, contribute positively to the achievement of some degree of democracy, the rule of law, [etc.] or in any event not render such degree of achievement impossible.

But that sort of candour is unlikely in an official benchmarking document.

A second notable feature is that it is *institutions* that are to do all this good work. That is not an innocent assumption, though it is a common one. Marc Galanter once observed[9] that, just as health is not found primarily in hospitals so legal institutions are not necessarily the first place you should look to find law. That is a remark with a rather long central and eastern European pedigree, of course, stretching from the Bukovina (Eugen Ehrlich) through Cracow (Bronislaw Malinowski) to St Petersburg and later Warsaw (Leon Petrażycki). Whatever you think about it as applied to *law* writ large, the remark has particular pertinence to the rule of law, human rights, minority protection, and so on. I also think it is true of democracy,[10] though that is more controversial. Whoever wants these things wants a social and political *outcome*, not just laws and legal institutions. They want certain ways of behaving to be established and generalised and above all to become *normative*. They want the norms on which these thing depend to *count*, in people's heads and in their acts, as reliable restraints on, and resources and channels for, the ways in which social and political power are routinely exercised and contested.

What makes such things count in such places and ways is only partly dependent upon the formal institutions one has. Sometimes, if you inherit a strong legal or liberal culture you can have a good deal of legality and liberality even when your institutions are lousy, as happened in the convict origins of my own country. Other times, your institutions might in fact be way better than the legality in the surrounding culture and ways of behaving, but no one much notices. That is one way of interpreting Kathryn Hendley's remarks that post-communist Russia has

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9 "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," *Journal of Legal Pluralism*, 19 (1987), pp. 1–47.

10 See Krygier, "The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law," in András Sajó (ed.), *Out of and Into Authoritarian Law*, (Amsterdam: Kluwer 2002), pp. 221–56 at 231–236.

not such a bad *supply* of appropriate laws and legal institutions in some areas, but often still less than optimal demand.[11] So, if Olgiati is right to allege that "the transition towards a Western-style constitutional democracy and market system of former Socialist countries was considered accomplished with the 'adoption' of a cluster of imposed and heteronomous, formal-official parameters", that conclusion is at the very least premature.

A third point is that what Daniel Smilov shows of judicial independence is true of the key political and legal requirements mentioned in this criterion: their meanings are highly contested and the EU has not rendered perspicuous the specific meanings favoured.[12] So the enlargees were asked to ensure *stable* institutions that *guarantee* something the meaning of which is uncertain, even apparently to those who ask for it. That is a challenge. As Smilov shows, it is already hard enough in the much more specific context of judicial independence, and since no one says that independence is all that you need for democracy, the rule of law, human rights or minority protection, it is exponentially harder in the larger context.

I would not belabour these linguistic quibbles so, if I did not think that they reflected some rather common beliefs. One is that a stable and effective rule of law, not to mention other good things like democracy, is something specifiable, tangible, and constructible, and that the tools for construction are laws and legal institutions. Another is that we know which ones will work (as distinct from which ones have worked, which is not the same thing).

Anti-communist dissidents knew democracy, the rule of law, human rights, were great things (and some thought about minority protection too), since they knew something about life without them. But for all their fineness, wisdom, and at times heroism, they also typically shared (with the rest of us), over-simple ideas of what these good things might require. Thus, it was common in 1989 to insist that what distinguished these revolutions from any of their forebears was that the former intended "no more experiments." Successful models existed in normal countries, and the job was to adopt them, not even to adapt them. Timothy Garton Ash faithfully captures what this was taken, at least by many prominent activists, to mean at the time:

> In politics they are all saying: There is no "socialist democracy", there is only democracy. And by democracy they mean multi-party, parliamentary democracy as practiced in contemporary Western, Northern, and Southern Europe. They are all saying: There is no "socialist legality", there is only legality. And by that they mean the rule of law, guaranteed by the constitutionally anchored independence of the judiciary.[13]

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11 See Kathryn Hendley, Stephen Holmes, Anders Åslund, András Sajó, "Debate: Demand for Law," 4 *East European Constitutional Review*, 8 (1999), pp. 88–108.

12 See, for a similar argument re the rule of law, Dale Mineshima, "The Rule of Law and EU expansion", *Liverpool Law Review*, 24 (2002), pp. 73–87.

13 "Eastern Europe: The Year of Truth", *New York Review of Books*, February 15, 1990, p. 21.

This taste for democracy and legality "without adjectives", as dissidents used to put it, can be readily appreciated. They had more than enough experience of distasteful adjectives being forced upon fine nouns to glorify ghastly parodies. They were rightly allergic to such substance-cancelling qualifiers. But, to the extent that saying "there is only legality" might suggest that there exists one obvious incarnation of legality which merely needs to be copied by eager imitators, then the taste for legality unqualified is misleading. *Mutatis mutandis*, democracy, human rights, minority protection.

For we have no recipes to produce such results, even less single general recipes. We know what democracy and the rule of law are about (more controversially human rights), but we can more easily recognise them where they are well established, than we can specify the particular institutions that will promote them, with any combination of generality, detail and ability to travel. What might go to accomplishing (or thwarting) them will vary with time, place, history and tradition. That makes it a complicated matter to decide what might foster them or even affect them. These complications are evident in the variety and controversy among the authors in this book.

Sadurski focuses on institutions. He is concerned about the bypassing of parliaments, though he thinks it can be exaggerated and that there are counter-trends. He also worries about the increasingly powerful position in which accession will place constitutional courts in the accession states. This novel implant has thrived unexpectedly in its new soil, and Sadurski worries that the issues to be resolved at the intersection of the EU and national constitutional orders in an enlarged Europe will augment the role of these courts as "significant political and legislative players" still further. As a democrat he favours neither over-powerful executives nor over-active courts.

Still, notwithstanding these particular sources of concern, Sadurski is confident that the larger consequences of accession will be positive for the acceding states, and for Europe as a whole. On one hand,

> by providing the democratic forces within the post-communist states with additional support, encouragement and discursive assets against the threats from authoritarian, populist, nationalistic forces, the democratic transition itself has been strengthened. In this sense, the position of democratic elites in new member states will not be all that different from the position of liberal and democratic forces in, say, Italy or Austria, where those with authoritarian tendencies invariably find themselves in the "anti-European" corner, because the institutional and ideological structure of the European Union tends to support liberal and democratic arguments.

And as this last sentence already begins to suggest, Sadurski believes that the positive effects of enlargement will not all travel one way. Indeed, it is the *Europeanisation* of issues to do with democracy, etc., the discovery, or reaffirmation, that so many of the key issues are ones that do not start or stop in particular nations,

that he sees as *the* great significance of enlargement. He believes national identity will become less and less salient, to the extent that

> [t]he understanding of who is part of the *demos* will inevitably be transformed: traditional loyalties and the ethnic and cultural sense of belonging will need to give way to something more akin to "constitutional patriotism", under which the polity is bounded by common civic rights and duties rather than by tradition and ethnic identity.

Pessimists might agree that the need is there, but not on how likely it is to be satisfied.

These are examples of what might be called Sadurski's maximalism. His minimalist position is that "[a]ccession to the EU may not be a panacea for all of the problems of political democracy but it may well be a reasonably good protection against possible future disasters." In this hope and prediction he is strongly supported by Přibáň, who sees "[t]aming ethnos in European nation states . . . [as] the primary purpose of both economic and political integration." Already during the lead-up to accession, the EU has played a crucial role "as a neutralizing force of ethno-national divisions, tensions and conflicts." That central role is not due to diminish. How is this to occur, given that there is no European demos? The answer, it appears, is not to attempt to build such a demos on infertile soil, but rather, not to presume that it is necessary:

> [u]nlike the utopian image of one European people, the European identity is most likely to be constructed as a hybrid mixture of common civil ethos and persisting different national loyalties. It will be the dilemmatic identity which will be impossible to consolidate at the symbolic level. European identity and legitimacy will thus remain an open-ended process of the symbolisation of the common social, cultural and political space. . . . The European constitution-making is therefore accompanied by multi-dimensional identity which is disentangled from the traditional concepts of solidarity, community, and face to face relations. Cultural rigidity is replaced by flexibility of social networks and multiplied personal choices. . . . The European identity can emerge only as a symbolic space of heterogeneity, permanent contestation of existing practices, compromise-oriented negotiations and the conversational model of politics.

Can this possibly work? Yes, says Miriam Aziz, so long as Europe works. That is,

> [w]hether sovereignty resides at the level of the nation state or elsewhere is largely irrelevant. What is important is that sovereignty *exists*. It will, by nature, command affiliation and trust. The level at which sovereignty resides is irrelevant to the affiliation of the trust of the citizen because sovereignty is intrinsic to whether citizens feel confident that states perform certain duties and the citizens feel comfortable with the obligations. Drawing on performance theories, the

> following expectation can be voiced: If the EU performs, it will attract both support and affiliation.

Aziz emphasises that in the new Europe, performance operates in a multiplicity of domains and at a multiplicity of levels. Foci of trust and allegiance will proliferate, and so "[m]atters of trust and loyalty also have to be reconfigured in the face of the plurality of public spheres."

But what does it mean to perform? Sasse *et al.* emphasise that now that accession has been won by the new member states (though not by all who have sought membership), there will necessarily be a shift in focus, from satisfaction of formal criteria to

> the implementation and sustainability of the institutions, rules and norms adopted over the last decade. Thus, the post-enlargement context will add a new impetus to the discussion about the successful transition and consolidation of states, democracy and market economies in CEE.

Formal implementation has been, above all, the concern of national elites, but sustainability will need to delve more deeply, as it spreads more broadly. In their study of regionalisation, Sasse and her colleagues stress the different interests, stakes, and commitment of national and sub-national elites, a difference of increasing significance given that

> [d]espite the weak attitudinal "Europeanization" of sub-national elites, their position and functional importance guarantees their involvement in key policy areas, thereby raising doubts about effective implementation of EU policy, at least in the short-to-medium term.

And, though elites are key, they are not the only people who need to be persuaded to support the European enterprise, and not everyone will find persuasive what persuades elites. Tamvaki points out that while the focus has hitherto been on formal adaptation of institutions, and while the bulk of the scholarly literature focuses on "the international aspect of social learning", formal adaptation matters most at elite level and "the internalisation of EU norms by the public is taken for granted or is even ignored." She does not suggest that is wise. On the contrary, what will be crucial over a longer term, and what we do not know much about, is transformation of what she, following March and Olsen, calls "the logic of consequentiality" to "the logic of appropriateness." The latter involves habituation, and that is crucial, Tamvaki argues, since:

> Habituation as opposed to institutionalization is expected to go beyond individual decision-makers and reach the public. If that is not accomplished then the long-term effectiveness of socialization cannot be guaranteed, because it is not just the State that constitutes the people. The people, in turn, form the State, and their readiness to abide by the new norms determines state actors' future behaviour in the international arena.

Piana, similarly, stresses that

> [f]or the CEECs, the development of a democratic culture depends not only on the presence of democratic institutions and the rise of civil society, but also on the willingness of the citizens to view the emerging democratic framework as historically legitimate.

This, she insists, is not something that can just be imposed from outside, but must mesh with internally generated attitudes, histories, and developments. These, in turn, differ significantly among the new members of the EU and have to be taken into account.

And so, beyond the caution that top–down requirements, however refined, can only be *part* of a successful accomplishment, these arguments serve as a reminder that different recipients will respond differently, and a crucial element in successful transition is the state of the recipients themselves. Our contributors from the region, as we saw in section 2 above, speak with some apprehension of that. Like Zirk-Sadowski, Czarnota does not find much aptitude for the rule of law in Poland or other CEECs, and particularly not aptitude for *European* law. At the level of elites, again, it is the national centre that has controlled. Czarnota believes that most lawyers in the region, and particularly lower court judges, have little understanding of European law and are poorly trained to understand it, let alone interpret and implement it. Like Zirk-Sadowski, he believes that "[y]ears of training in a positivist perception of law and with 'judicial dependence' in thinking has left Central and Eastern European courts ill prepared to become part of the European legal space."

More broadly, there is one thing that post-communists – citizens as well as elites – are well trained in, and that is what the sociologist Adam Podgórecki, called "fellowships of dirty togetherness", or what Czarnota calls "informal operations due to the distrust of authorities." That might, he darkly suggests, be a real source of comity between the accesses "with their own networks and façade type rule of law" and the European network-based "infranationalism" that Joseph Weiler describes as a central feature of the EU. Czarnota concludes, with sardonic gloom, that "[i]n this sense post-communist rule of law will join a post-democratic European Union. But then such a marriage will be at the expense of the average citizen on both sides of the Elbe River."

As we have seen, Sajó, too, is less than enthusiastic about the propensity of his fellow citizens for "democracy, rule of law, human rights and respect for and protection of minorities." Moreover, he suspects that the way accession has been implemented might operate, at least in the short term, to reinforce already-entrenched proclivities inconsistent with these goals. Thus he argues that "the accession process as well as the drafting of the European Constitution has reinforced the irrelevance of constitutional democracy in the eyes of the public who continue to see it as a matter of majoritarianism" and more broadly that

> [s]o long as "European solutions" are felt as being imposed and detrimental to local self-interests, "modernity" (i.e. efficiency considerations and pragmatism in decision-making, irrespective of traditional values and communitarian sentiments) will be detested.

And Sajó suggests that it is not only "primordial" attachments that challenge Europeanisation while, at least short term, being accentuated by aspects of its implementation. There are also characteristics engendered by communism that the top–down process of accession and the "prevailing solidarity culture" of the more prosperous welfare states of the Union might reinforce, particularly "socialist welfare dependence". This has "dramatic" fiscal consequences that enlargee states can ill afford, and will perpetuate the phenomenon of "complaint-subjects", that is, "citizens who behave like subjects of a paternalist state, who refuse to take responsibility for their fate through democratic participation, and whose 'voice' . . . remains limited to complaints."

Still, in what passes for optimism in CEE, Sajó concedes that the upshot of these pathologies and high-handed dealings might not be all bad:

> [T]he long-term perspectives are not hopeless for constitutionalism in the new member states. After all, the emerging supranational separation of powers adds to what remains of separation of powers at the national level. With regard to restricting the chances of elected dictatorship the changes are favourable to constitutionalism. It will take time to learn to live with, use and perhaps appreciate the new constitutional arrangement where the traditional branches of power operate within (and complement) networks of interest representations which have limited democratic legitimation and partial representativity. It is possible that these alternative interest representations will operate as new checks and balances: it certainly does not satisfy traditional expectations of democracy and popular representation but may perhaps provide counterbalances and at the same time contribute to a more efficient steering of the European administrative state.

Whatever their enthusiasm for the Euro-project, none of our authors denies that the benefits of Euro-membership will fall unequally: on states, on citizens, and on inhabitants who are not citizens. In discussion at the European University Institute in Florence over the early drafts of chapters included in this volume, Jan Zielonka pointed out that a major challenge to be faced will have to do with the *quality* of membership and democracy. State members are not and will not be equal, members will be more and more differentiated, and this will generate difficult political issues. And, of course, the differentiations will not merely be between states.

In his close study of the post-communist conditions of the Roma of CEE, Istvan Pogany argues that, notwithstanding Euro-monitoring and financial incentives to acceding states,

> for the bulk of an estimated six million Roma, or Gypsies, constituting by far the largest ethnic minority in the region, the post-Communist era has brought