12. *Barbarians ante portas* or the Post-Communist Rule of Law in Post-Democratic European Union

Adam Czarnota

1. Introduction

It is quite difficult to write about my topic due to the extensive debate on the Constitutional Treaty, prepared by the European Convention. The work of the European Convention has been closely connected with the first wave of eastern enlargements. This connection was confirmed by Chancellor Gerhard Schroeder who, in the *Palazzo dei Congressi* in Rome on October 4, 2003, the first day of the inter-governmental conference, said that "enlargement and the constitution are two sides of the same coin."

The complexity in writing about the enlargement process is that it is difficult to decide which perspective to adopt—that of the Eastern European, which I am, or that of the Western European. It is also possible to adopt a third perspective, that of a sympathetic external observer. In this chapter I have opted for a different approach: not the position of an impartial judge nor a prosecutor or defence lawyer but that of a sceptical lawyer, similar to what is known in legal procedure as an expert witness. The arguments for such an approach are partly obvious. I am an academic lawyer with interest in the constitutional structure of the European Union. I am also an Eastern European with some insight into the problems faced by the citizens of the new Member States.

The structure of this chapter is simple. I argue that Eastern Europeans wanted, and still want to, join the European Union but a Europe from the past rather than the present. I go on to look at the issues connected with the relationship between enlargement and constitutionalization in the European Union. I finish with some sceptical remarks relating to the prospects for a European rule of law.

2. Two Visions of Europe: Enlargement and Constitutional Treaty

There is a tendency to discuss the enlargement process from a short-term perspective. This is rather normal—it is what politics is about: not too much past unless it is used politically and not too much future since the electorate does not really care too much. What is left is the present. So in the media, as well as in scholarly studies, one can find plenty of articles debating the preparation of different future member states in adopting the *aquis communitaire* and fulfilling the criteria for the adoption

Wojciech Sadurski et al. (ed.), Spreading Democracy and the Rule of Law?, 283–297.

of some policies as per the accession treaty.[1] However, even the latter issue has been overshadowed by a new one—the fiasco of Rome's inter-governmental conference and the refusal to accept the draft Constitutional treaty by Spain and Poland. After the transfer of the Presidency to Ireland discussion on the constitutional treaty continued. In the end the Constitutional Treaty was adopted before the end of the Irish presidency, i.e. signed before the end of June 2004. This was made possible by the change in Spain's position after the last election and consequently the change in Poland's position in relation to the proposed voting system.

The entire presentation of the enlargement process has been overshadowed by the constitutional debate. Is this a correct approach? There is undoubtedly more to enlargement than the new Constitutional Treaty, but it is the treaty itself which is the most important event that will determine the direction of the process of European integration. As a result it is justifiable to look at enlargement from the constitutional point of view.

Another justification is historical. The collapse of communism was a historic moment and it was clear from the very beginning that the aim of Central and Eastern European states was to join NATO and the European Union. Post-communist Central and Eastern European states wanted security and economic prosperity. Security with the enlargement of NATO in March 2004 where Slovenia, Romania, Bulgaria as well as member states from the former Soviet Republic (Lithuania, Latvia and Estonia) were included as members. Still few countries which frequently express their ambitions to join the European Union and NATO, such as Georgia, have been left out. Nevertheless, the main precondition of security is in pretty good shape. That cannot be said about prosperity.

From the very beginning the Central and Eastern European approach to the European Union was partly utilitarian (money from Brussels) and partly status oriented (being reunited with the West). In other words post-communist Central and Eastern European states had their own image of the European Union, which they wanted to join, thus focusing more on the European Economic Community rather than the "European Union" as such. The difference lies in the perception of the constitutional structure of the Union as well as the scope of state sovereignty.

Eastern Europeans looked (and it seems to me they are still looking), at Europe as an infrastructure for economic benefit. That was the case at the time of the European Economic Communities. Even before the Maastricht Treaty which established the European Union with pillars II and III and the Amsterdam Treaty which deepened political Union there was more than just the European Economic Communities. There was a constitutional structure based on supremacy of European law and shared institutions, especially the European Court of Justice. The liberation

[1] See for instance B. Kaminski, "The Europe Agreements and Transition: Unique Returns from Integrating into European Union," in S. Antohi and V. Tismaneanu (eds.), *Between Past and Future. The Revolutions of 1989 and Their Aftermath* (Budapest: CEU Press 2000), pp. 306–331.

of Central and Eastern European countries from Moscow's yoke, with the consequent disintegration of the Yalta arrangement after the autumn of nations in 1989, has had a profound influence on the European Communities. It soon became obvious that integration will spill over the Elbe River.[2] Poland and Hungary after obtaining sovereignty expressed the desire to "join Europe." Other countries such as Czechoslovakia, and after the "velvet divorce" the Czech Republic, Baltic states, Slovenia, Bulgaria and Romania followed the same path. Very soon nearly all of the former communist states started to knock at the door of the European Union.

This enlargement not only required institutional change to prepare for a relatively smooth management of a larger number of member states. It became clear that a deeper integration over and above the economic area was necessary if integration was to be kept a live process. The outcome of that was acceleration of integration in the 1990s.[3] The Maastricht Treaty laid the political foundations for a deeper integration with the introduction of the Euro as a common currency. However, the violent lesson of the disintegration of the former Federal Republic of Yugoslavia shows how impotent Europeans were in coordinating foreign policy. This was partly addressed in the Treaty of Amsterdam with the creation of a new position of High Commissioner for Foreign Affairs. This institutional design is the outcome of a temporary political compromise. The acceleration of political integration after Maastricht is more than visible. The creation of a hard core of integration is also visible. Some countries opted out of the Euro zone or from the *Schengen aquis*. The response to that was an institutional acceleration, especially after the Treaty of Nice. The original six founding members played a crucial role in the preparation and work of European Convention.

The Treaty of Nice represented the logic of the old pattern of integration in its focus on enlargement. That is visible in its decision-making procedures and the distribution of votes between existing member states and future member states in the Council. The stress was on empowerment of the small member states at the expense of big member states. Such an institutional arrangement, which will exist until 2009, did not satisfy the powerhouse of the European Union, especially Germany, and prolonged the life of an institutional structure not suited for a Europe Union of 25 or 30 member states. Already at the inter-governmental conference in Nice, work started on future more radical changes in the European Union's institutional structures. As usual a crucial role was played by the original six founding members, especially France and Germany.

As expected, the outcome of the Convention is a compromise, but a few goals have been achieved. First, simplification of institutional structures and, second,

---

2 See Gary Marks, Fritz W. Scharpf, Phillipe C. Schmitter and Wolfgang Streeck, *Governance in the European Union* (London: Sage Publications, 1996).

3 See John Gillingham, *European Integration, 1950–2003. Superstate or New Market Economy*? (Cambridge: Cambridge University Press 2003), pp. 228–293.

simplification of the decision-making process. All of these changes will make the management of Union affairs a bit simpler. There are also proposed changes in the area of political integration in foreign affairs and defence. The most important meaning of the Constitutional Convention proposal is to shift from an intergovernmental decision-making process to a majority approach. That strengthens big states since votes will be based on population size.

This is not only a symbolic change, as some commentators suggest. Since the draft Constitutional Treaty presented by Valery Giscard d'Estaing in Thessaloniki, then discussed but with no result due to the opposition of Spain and Poland, was accepted at the inter-governmental conference under the Irish presidency, there was a more radical shift in the pattern of European integration. After the introduction of the provisions of the constitutional Treaty there will be an institutional structure to a new type of polity or using Phillippe C. Schmitter's words, a Euro-Polity.[4] A polity which does not have any parallel in history: neither an international organisation nor a federal state but a new polity which in order to be understood requires a new approach to the problem of sovereignty and democracy as well as accountability. The changes in the European Union are side effects of the collapse of communism and a direct effect of enlargement.

Are the countries of Central and Eastern post-communist Europe ready to become full members of such a Euro-Polity? Are they ready to accept limitation of their freshly discovered sovereignty? It seems to me that the answers to these questions do not have to be negative, but there is a chance that the entire project of European integration could be derailed or radically slowed down as a result of eastern enlargement. These countries are ready to become a part of a Euro-Polity in some areas and not in others. It is probably better to discuss the problematic areas involved in enlargement. Nevertheless the Union they apply to is no longer the Union they originally considered. The candidate countries applied to join an economic community and now they find themselves in a new type of polity.

3. Eastern Enlargement: Problems and Prospects

In order to understand the peculiarities of eastern enlargement we have to take a closer look at the countries which became members of the European Union on 1 May 2004. But first I wish to make one historiosophical remark. Membership of the European Union is an enormously significant event in the history of the region. There is a chance that the eastern periphery of Europe will be reconnected to the main pattern of historical development. The region could be incorporated into Europe, but even with membership of the European Union it does not have to happen mechanically.

---

[4] Phillippe C. Schmitter, "Imagining the Future of the Euro-Polity with the Help of New Concepts," in Marks *et al.*, *op.cit*. n. 2, pp. 121–150.

1. First of all, with the exception of Poland which is a middle weight, they are small countries.
2. Second, eastern enlargement includes countries which do not share long democratic and liberal traditions.[5] One exception is Czech Republic. This was not the case in other waves of enlargement. Even the case of Spain, Portugal and Greece was different to that of post-communist Central and Eastern Europe. They did not suffer from what is called the "simultaneity" problem characteristic of post-communist transformations. Their transformations were primarily centred on the polity. The new members have the task of transforming the polity, the economy and the society at the same time.
3. Third, their economies and infrastructure are far behind the European Union average. In other words there are huge discrepancies between efficiency of the economies in former communist states and in member states of the Union on the other side of the Oder River. Just to give some illustration. According to Eurostat, after enlargement, the population of the European Union grew by 20%—this is not the impact of Malta and Cyprus but of Central-Eastern Europe. At the same time the gross domestic product growth was only 5%. The economic power of all Central and Eastern new member states is roughly the same as the Netherlands. For example, the average cost of labour is 2.42 Euro, in Lithuania it is 2.71 Euro, in Estonia, 3.03 and in Poland an hour of labour costs 4.48 Euro. At the same time there is a huge gap in productivity. In the 15 countries of "old" Europe, a worker earns on an average 57.6 Euro, while in Poland the figure is 16.9 Euro. The lowest productivity is in Lithuania at 10.7 Euro. This data shows huge discrepancies in the economy, technology, know-how skills, organisation of labour, etc; in other words the traditional economical backwardness of Central and Eastern Europe since the XVI century continues. The good news is that Central and Eastern Europeans produce less rubbish. For instance, the average in the old Europe of 15 is 559 kg rubbish produced by person per year while in Poland it is only 272 kg. In this case it is evident that backwardness has its advantages.
4. Last but not the least, not all of these countries have a long history as an independent sovereign nation-state. As a result, they are over-sensitive to any attempt to limit their national sovereignty. We have to remember that apart from Slovenia, the new member states were independent for 20 years in between war periods. Before that, all of them were parts of three European empires: Russian, Austro-Hungarian and German. Independence and sovereignty lay behind the dismantling of Moscow's power or, in case of Slovenia, Belgrade's power. None of the new countries have any experience in being fully independent members of a world state system. Thus prevailing in public opinion and within the political

[5] Some scholars try to identify liberal nationalism, which for me is an oxymoron, especially in Central-Eastern Europe. See for instance Stefan Auer, *Liberal Nationalism in Central Europe* (London and New York: Routledge Curzon 2004).

class is that the notion of sovereignty is understood as total independence and self-government in all areas. This became clear in the debate in Poland on the constitutional treaty. The slogan "Nice or death" illustrates that approach.

It is not difficult to discern that all these areas include different political and social institutions and also collective consciousness. In other words the hardware and the software differs between the Europe of 15 and that of 25. One way of analyzing these differences is to distinguish between three types of constitutional legitimacy: polity legitimacy, regime legitimacy and performance legitimacy.[6]

3.1. Polity Legitimacy

We understand polity legitimacy as the overall support for the polity in question. Two elements are present in that notion:

1. a political element—the degree of autonomous political authority; and
2. a community dimension—a sense of common attachment and identification with the polity.

There is no problem of a shortage but rather of an oversupply of polity legitimacy in all Central and Eastern European post-communist countries. All of those countries are very proud to have recovered or received national independence. The political struggle against communism was mainly fuelled by national ideology. Support for national independence is shared by a broad spectrum of political opinion in these societies. It is visible in the *invention of traditions* of the glorious past of the nation and the belief that the nation can only flourish in the form of an independent nation-state. There are plenty of examples of growing nationalism.[7] The Constitutions of those countries reflect that rather romantic nationalism. A dominant attitude is expressed that the nation is based on primordial bonds of blood, culture and language. That the nation is a pre-political and pre-constitutional entity. The state belongs to the nation and the nation is more than just a political community of citizens. Citizens are bearers of rights but those rights are secondary to the interests of the nation.[8] The constitutions are not simple expressions of constitutional nationalism, but they are closer to constitutional nationalism than liberal constitutionalism.[9]

---

6 N. Walker, "The Idea of Constitutional Pluralism," *Modern Law Review*, 65 (2002) and attempt of application in "EU Constitutionalism in Transition: The Influence of Eastern Enlargement," *European Law Journal*, n. 9(3) (2003), pp. 365–385.

7 See Vladimir Tismaneanu, *Fantasies of Salvation. Democracy, Nationalism and Myth in Post-Communist Europe* (Princeton: Princeton University Press 1988), pp. 65–87.

8 A. Czarnota, "Constitutionalism, Nationalism, and the Law. Reflections on Law and Collective Identities in Central European Transformation," in *Teoria Prawa, Filozofia Prawa, Współczesne Prawoznawstwo* (Toruń 1998), pp. 29–48.

9 See J. Kis, *Constitutional Democracy* (Budapest: Central European University Press 2003).

Polity legitimacy is expressed in constitutions of member states usually in the form of a grand historical narrative in the preambles to the constitutions. Legitimacy expresses itself in a historical narrative, which plays an important role for the legal system of the state and has a very important role in the functioning (or non-functioning) of the rule of law. The historical narrative provides the legal system with normative coherence. Polity legitimacy is necessary for the existence of any state. Polity legitimacy based on a historical narrative is concentrated on high values and quite often is very difficult if not impossible to operationalize in the form of specific legal institutions. Polity legitimacy provides members of a nation with a historical roadmap giving answers to the questions where we come from and where are we going. That type of legitimacy is usually overlooked by constitutional lawyers and legal theoreticians. But the fact that it is overlooked by lawyers does not mean that it does not exist.

Polity legitimacy is not static but the process of its change is rather slow. It is always in the process of change. One thing is necessary for the very existence of polity legitimacy—namely a *demos*. Neither a *demos* in the form of citizens or nations, political community or romantic notion of a nation, exists at the EU level. Such nations exist in member states or future nation states but this does not mean that the sum of all *demoi* will create a *demos* of the European Union. The European Union, as a new type of a polity, does not possess its own *demos*. That is why there is so far no European discussion on the future of European Union. There is no sense of collective sharing of a foundational myth either.

As I mentioned above only nation-states need and depend on polity legitimacy. The European Union is a new type of polity and does not need that type of legitimacy. This does not exclude the possibility of creation of such legitimacy for the European Union in the distant future. In the discussion on the work of the Constitutional Convention there were some shy voices expressing hopes that Eastern European countries will be able to give a new life to the European integration process, including some input on how to lay the foundations for polity legitimacy. This was a wishful thinking. Eastern Europeans support the European Union but for totally different reasons. Some sociologists in the early 1990s formulated the theses that Central and Eastern European states were not ready to join the European Union since they did not go through the period of enjoyment of sovereignty. Arguably, they will find it difficult to surrender their own sovereignty to the EU, when they are only beginning to enjoy it themselves.

The problem of polity legitimacy is present in social rather than legal institutions, and especially in collective memory. The crux is the remembrance of collective experiences. Eastern enlargement is not only unhelpful in the creation or stimulation of polity legitimacy but it also triggers new problems. The European integration project has been premised on the negative experiences during WW II and the Cold War. The foundational myth for post-communist Central and Eastern European polities is the memory of suffering during the communist period as well as the struggle for independence and freedom. There is no one unified collective memory

in the European Union but rather two different collective memories and thus at least two expressions of European identity. Perhaps Jacques Derrida's claim that Europe bears a crisis of memory, that it has forgotten its past was somewhat premature.[10] There is an explosion of memories in Western, Central and Eastern Europe. The problem lies in the fact that such memories are often incompatible and contradictory. Furthermore collective memories are not about the past but about the present. An example of two different memories dividing Europe was given by a recent reaction to the speech by Sandra Kalniete (Latvian Minister for Foreign Affairs and a future commissioner of the European Commission) at the Leipzig Book Fair on the 17 March 2004 in the historical *Gewandhaus* concert hall. In her talk she expressed what all people in post-communist Central and Eastern Europe accept as a given, namely the equality of suffering under two totalitarian regimes: Nazism and Communism. Such a statement, with which the large majority of Central and Eastern Europeans agree, caused enormous critical reaction from the German media. As a consequence the Western European, especially German, media accused Central and Eastern Europeans of moral relativism and . . . anti-semitism. Another example of this division can be found in the variant reactions to the publication "Black Book of Communism."

Due to the fact that historical collective memories diverge from one another the construction of a common European identity becomes a difficult (albeit possible) task.

Over the past two decades the European Commission has sponsored actions to enhance European identity using flags, hymns, TV channels and space programs as the means to create a sense of unity. These efforts have been useful but, as emphasised by Gerard Delanty,[11] what remains lacking is the "emotional value" of European identity. This "emotional value" is usually expressed by a memory of collective suffering. In Europe this idea of suffering has a different meaning for Western and Central and Eastern Europeans. So far, negative identity is enough to start the process of building a positive one. André Malraux observed that "(t)here is no Europe. There never was one." The history of European integration, and especially eastern enlargement, has undermined that statement. Political legitimacy is still a dream to be realised and the European Constitutional Treaty has provided the trigger for old and new member states to embark on this challenging journey.

3.2. Regime Legitimacy

This form of legitimacy relates to the type of organisation of the state, its institutional structure and the basic principles of operation, the constitutional structure of the state, and its socio-political organization. Regime legitimacy is a politically

---

[10] Jacques Derrida, *The Other Heading: Reflections on Today's Europe* (Bloomington: Indiana University Press 1994), pp. 2–5.

[11] Gerard Delanty, *Inventing Europe: Idea, Identity, Reality* (London: MacMillan 1995), p. 132.

contested area, and in comparison with polity legitimacy is not only about high values but about the implementation of values in institutional practices. From this perspective, it is interesting to compare the European Union of 15 and Central and Eastern European states.

The European Union has some problems with regime legitimacy but they are not, at present, considered serious problems. It appears that the task of the European Convention was to improve regime legitimacy. But it is possible to say the same about each new inter-governmental conference which initiates a new political push. With eastern enlargement further problems will occur with respect to regime legitimacy, and will be quite distinct from the normal criticism of democracy deficit.

So far the main criticism of the European Union's institutional structure has been focused on this deficit. If we apply the dominant criteria of liberal-democratic constitutionalism, we will easily discover that the European Union institutional structure does not fit in that matrix. The institutional structure does not express the basic principles of a democratic polity, such as one person one vote or majority rule, and also does not express the basic principles of constitutionalism, such as a clear division of powers between the legislative, the executive and the judiciary. Even the independence of the judiciary could be doubted since judges of the European Court of Justice and the Court of First Instance are restricted to teleological interpretations of European law. This is all true, but the criticism is, in my view, based on a misconception. The European Union is not a state in the traditional sense. It is not an authoritative state but rather a "not yet fully conceptualised" *new type of polity*. This new type of polity is similar to network organisations. From the constitutional point of view it is better to apply the so-called new constitutionalism to the analyses of the operation of the institutional regime of the European Union.[12] Such an approach has a better explanatory power than the traditional sovereignty centred understanding of constitutionalism. A distinguished legal theoretician and former MEP, and also member of the European Convention, calls it "*suigenericity.*"[13]

Notwithstanding the fact that the European Union is not organised according to the principles of democratic-liberal constitutionalism, it has presented itself as a guardian of (the implementation of) such principles at the member state level. The incoming eastern enlargement plays an important role in this. The European Union has for a long time already possessed a functional constitution but not a formal one. It is possible to argue that the Constitutional Treaty displays two tendencies with respect to governance of the Union.

1. A populist approach—which focuses on the election of representatives to European offices by the mythical population of Europe. That approach is based on

---

12 J. H. H. Weiler, *The Constitution of Europe. "Do the new clothes have an emperor?" and other essays on European integration* (Cambridge: Cambridge University Press 1999), pp. 221–286.

13 Neil MacCormick, *Questioning Sovereignty* (Oxford: Clarendon Press 1999), Chapt. 9.

the presupposition that state sovereignty continues to exist but that each state exchanges its autonomy for some other goods. It assumes that at any moment it is possible to exit the Union and return to the *status quo ante* of full sovereignty. Such an approach underlies the equality of actors in the European Union. The borders of sovereignty are blurred, however. In effect stronger actors can manipulate the weaker members of the Union.

2. The second approach is legal where the sovereign is the law. Politics is not perceived as arena of struggle for power but as the means to achieve the aims. The crucial issue is the autonomy of the Union's institutions that create their own rules of the game. These are created through law. Thus it follows that strong states should control the lawmaking institutions.

In earlier waves of succession, prior to the eastern enlargement, issues relating to political regimes were not articulated. The criteria for accession were codified with the adoption of the *acquis*. The question only arose when the former communist states began to knock on the European Union's door. The political criteria for membership was formally specified at the European Council meeting in Copenhagen in 1993, thereby creating the "Copenhagen criteria." The Council announced what Wojciech Sadurski has called the "canonical yardstick" where the applicant state, in order to be successful in the pursuit of full membership, must enjoy, inter alia, ensure the "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." Thus future membership becomes conditional upon the fulfilment of some regime criteria therefore crossing the threshold to liberal constitutional-democracy. It is interesting to note that all candidate states were, at the time, members of the Council of Europe. This meant that they had ratified and complied with the European Convention of Human Rights and were under the monitoring system established by the Council of Europe. Since 1990 the Council of Europe set up the European Commission for Democracy through Law, the so-called Venice Commission, with the aim of helping draft constitutions for Eastern European states. Despite the assurances by Eastern European brothers and sisters to embrace democracy, the rule of law and human rights the EU adopted a suspicious approach. Political criteria conditionality was assessed in yearly reports of each candidate country, but I doubt if these played any significant role in the process of building human rights and constitutional culture in Central and Eastern Europe. It is true that Slovakia was admitted to the process once again after Meciar lost the last election but in all the 8 plus 2 (Bulgaria and Romania), this process was rather insignificant. We now know, after the successful and completed accession negotiations in Copenhagen in December 2002 and after the signing of the accession treaty in Athens this year, which of these criteria did not play an important role in the negotiation process. As a symbolic weapon these criteria help to distinguish between "old" and "new" Europe, to use the expression born of a totally different situation by US Defence Secretary Rumsfeld. It shows the sort of ambivalent approach to poor fellow Europeans from the East tainted by

a communist past. The more positive interpretation of this is the EU's point of view that they are trying to encourage Central and Eastern European countries to develop institutions similar to those of Western Europe. A more cynical understanding is that the political criteria were designed to be used as a deterrent should there not be enough political will to include a certain member state.

The political criteria used for Central-Eastern Europeans—let us call them here "B" Europeans, started to be mentioned in relation to old Europe. In article 6(1) of the Treaty of Amsterdam we read "(t)he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to member states." In that way the principles in the Amsterdam Treaty became an explicit precondition for European Union membership.[14]

Austria's boycott in 2001, when the Freedom Party became a member of the ruling coalition, was not a complete but a partial application of these criteria to member states. A higher emphasis on political criteria can be seen in Parts 1 and 2 of the Draft Constitutional Treaty prepared by the European Convention and presented to the Council in Thessaloniki.

Sociological polls conducted in the countries of Central and Eastern Europe show that there are great expectations connected with the membership of the European Union. These not only relate to the love of the Euro as a mighty currency. It is true that in the past 13 years one can observe a shift in the approach of Eastern Europeans, from Eros to Euro, but still the perception that the EU represents a rise in status persists and exists. One important expectation is that of improvement, not only of efficiency in government and administration but also in the basic structural sense of organising the institutions of future member states. People do believe that the Union will fix the constitutional structure of the state. Such an expectation is unrealistic but it could happen as a side effect of membership in the Union. There will be pressure coming from the Union and other countries for adjustment of the institutional structure. For instance, institutions dealing with customs and border control within the *Schengen aquis* or the court system within the new member states. We have to keep in mind that, in the European Union, institutions of member states play a crucial role in the implementation of Community law and policy. The relationship between Union and member states is not based on a classic federal distribution of powers but on dependency and cooperation.

This leads me to one of the crucial issues—namely the rule of law in post-communist countries and its relation to enlargement. One of the crucial problems which undermines the legitimacy of regimes in Central and Eastern Europe is related to issues of law and order as well as the delay in the implementation of justice. The first problem is partly connected with the almost permanent crisis of public

[14] Manfred Novak, "Human Rights "Conditionality" in Relation to Entry to, and Full EU Membership in the EU," in Philip Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press 1999), pp. 689–690.

finances whereas the second is concerned with constitutional and institutional decisions. The majority of Central and Eastern Europe cases before the European Court of Human Rights in Strasbourg are due to the delay of justice. One problem is the inefficiency of the court systems, which in turn impacts upon the operation of the market. The implementation of Community law in member states was mainly through the direct application of that law by state courts of the lowest magistrate level. The two basic principles of the Community law, namely supremacy and direct applicability were realised through active support given by member state courts. This requires judges that are competent in Community as well as their own legal system. The main legal device which worked in the implementation of Community law was the preliminary ruling which enabled local judges to be able to ask questions to the judges in the European Court of Justice and the Court of First Instance. I am not sure that judges in Central and Eastern European countries are ready to use this mechanism. I am not confident that they are sufficiently familiar with Community law. One of the indications in the Polish case could be the direct use of the Polish Constitution by ordinary courts. In recent years judges are able to do so albeit cautiously. Years 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.

This very centralised system of courts does not support efficient harmonisation of domestic law with the *acquis communataire*. Harmonisation can not solely be left to national legislature but should be pursued by the actions of the courts. However, during the candidacy period this was not the case since the method of harmonisation by courts was controlled by the highest domestic judicial bodies.[15]

3.3. Performance Legitimacy

This type of legitimacy is sometimes referred to as "output legitimacy." This concerns the capacity of the state to produce effective and efficient performance in accordance with chosen criteria that are important from the point of view of the particular political community. It focuses on "delivering the goods" understood over and above the purely economic sense. This type of legitimacy is closely connected with regime legitimacy and sometimes it is difficult to analytically separate the two.

In all eight countries there is a problem with the efficiency of the government, with ineffective administration, with corruption and all the ills connected with "political capitalism" where public position is translated in order to extract economic rents. The blurred boundary between the public and private sphere, connected with

[15] See Zdenek Kuhn, "Application of European Law in Central European Candidate Countries," *European Law Review*, 18 (2003), pp. 551–560. For an overview of the problem with the system of the administration of justice in post-communist states, see J. Priban, P. Roberts and J. Young (eds.), *System of Justice in Transition. Central European Experiences Since 1989* (Ashgate: Aldershot Burlington 2003).

the extraction of public funds to private pockets, is one of the obstacles, from the citizens point of view, of efficiency of the economy. This phenomenon was described by a sociologist as a "recombined property system" or "hybrid type of property."[16] There also exist organised markets with restricted entry depending on political decisions.

Citizens of Central and Eastern European countries have the expectation that membership to the European Union, and thus the role of the European Commission, will solve the problems of inefficiency and corrupt administration. The surprisingly high turnout in referenda on the association treaty shows that these expectations are pretty high. The choice made by those who voted in favour was a "civilizational" one. They voted for efficiency and economic well-being. They believe that the European Union will provide proper infrastructure for "life with dignity." This of course can not be fully done by the European Union alone. After signing the accession treaty in Copenhagen in December last year, more clouds have appeared over the expected enjoyment of full membership by new member states. It looks as though they will not be able to use all the funds committed in Copenhagen due to inefficiency of domestic administration and lack of matching funds in the state budget.

In the opening discussion about the next European Union budget there are already deliberations on the nationalization of the structural fund, which shows that European solidarity after enlargement is not in good shape. The Lisbon strategy is not in the interest of the new underdeveloped countries but rather of the developed countries of the hard core of the European Union, which wants to stimulate their own stagnant economies. High technical, ecological and social standards are not in the economic interests of new member states. The idea to compete with the USA in the so-called frontier technologies is also not expressing the interests of new member states. Similarly, the financing of the super speed train (TGV–Paris–Berlin) from the Union's budget is also not taking the new member states into account.

In other words the economies of new member states before their full convergence, which will take a generation, require soft standards in the regulation of the market. The example of the former DDR, which is in stagnation since 1996 despite huge amounts of subsidies from the German federal budget, shows how not to integrate Central and Eastern European markets.

Adjusting to this hard economic reality by soft, exceptional regulations could, however, collide with expectations regarding efficiency of the law itself. The rule of law requires clear, stable, predictable legal frameworks. Soft economic regulation is based on discretion which in turn stimulates corruption or other types of abuse of the system.

---

[16] J. Staniszkis, *Postkomunizm: Próba Opisu* (Gdańsk 2001), pp. 190–227 and D. Stark and L. Bruszt, *Postsocialist Pathways. Transforming Politics and Property in East Central Europe* (Cambridge: Cambridge University Press 1998).

One of the specialities of Central and Eastern Europe is the pattern of informal operations due to the distrust of authorities.[17] Such a phenomenon was independently discovered in two parts of the region at the beginning of the XX century—Leon Petrażycki called it intuitive law and Eugen Ehrlich gave it the name living law. After accession the informality present in eight new states will undoubtedly become a noticeable phenomenon in the European Union. According to legal sociologists, such informal practices will have a corruptive effect on the rule of law. Would membership in the European Union be a remedy for informal practices? Would it provide another stimulus to strengthen the very fragile rule of law in post-communist Central and Eastern Europe? There is no clear answer to these questions. One way to approach the question is to show tendencies present in the European Union and then speculate upon their impact on the rule of law in Central and Eastern Europe.

Within the European Union there are two different tendencies, described above in the context of constitutional debate, as far as vision of the governance of the Union is concerned. The choice of direction—more rule of law oriented or more populist oriented—will have a profound impact on prospects for the rule of law in new member states. In any case, the contemporary institutional structure of governance of the European Union favours the executive branch of power. Taking into account the weakness of the judiciary it does not promise a bright future for rule of law.

4. Infranationalism and Post-Communist Rule of Law

There is another phenomenon which shows some similarities between the European Union and Central and Eastern European states. Some more intelligent lawyers and political scientists have noticed a new development in the governance of the European Union. Joseph Weiler called it *infranationalism*,

> based on realisation that increasingly large sectors of Community norm creation are done at the meso-level of governance. The actors involved are middle-range officials of the Community and the member States in combination with a variety of private and semi-public body players. Comitology and the remaining netherworld of Community committees is the arena, and the political science of networks is the current analytical tool which tries to explain the functioning of this form of governance. From the constitutional point of view infranationalism is not constitutional or unconstitutional. It is outside the constitution. The constitutional vocabulary is built around "branches" of government, around constitutional functions, and around the concept of delegation, separation, checks and balances among the arms of government, etc. Infranationalism is like the emergence of viruses for which antibiotics, geared towards control of microbes

[17] See for instance D. J. Galligan and M. Kurkchiyan (eds.), *Law and Informal Practices. The Post-Communist Experience* (Oxford: Oxford University Press 2003).

> and germs, were simply ill-suited. Infranationalism renders the nation and state hollow and its institutions meaningless as a vehicle for both understanding and controlling government. . . .[18]

If Joseph Weiler is right, and I believe he is, then post-communist Central and Eastern European countries with their own networks and façade-type rule of law are well prepared to become part of an *infranational* European Union.[19] In 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.

---

[18] Weiler, *op. cit.* n. 12, pp. 98–99.

[19] See M. Łoś and A. Zybertowicz, *Privatizing the Police-State. The Case of Poland* (New York: St. Martin's Press, 2000).