

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

Edited by
Wojciech Sadurski, Adam Czarnota
and Martin Krygier



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Sergio Bartole

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.

W.S., A.C. and M.K.

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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.

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 decry, 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;

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

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.

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