## 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 neither improved living standards nor the genuine enjoyment of democracy or basic freedoms. On the contrary, Roma poverty has worsened dramatically during the transition from Communism.

Moreover, he fears that in some accession states, with the hurdle of membership now jumped, the situation of the Roma might worsen. Indeed, Pogany observes, "it may seem as if the *territorial division* of the continent has been replaced by the erection of new 'borders' that are essentially social, cultural and economic in character, rather than geographical." This claim is echoed by a number of authors who have other subjects than the Roma in mind.

Rigo, Olgiati and Zagato each stress that "joining Europe" is not simply a matter of warm inclusion. Zagato argues that

it is the Commission itself that seems willing to take upon itself a policy of dramatic closure towards the planetary migrations of desperate hordes, in pressing for the creation of a European immigration agency, requiring new Member States meanwhile to incorporate in their laws the full weaponry with which the historical Member States are endowed: readmission agreements, etc. There is a strong impression that the 'archangel' approach within the Union and at its immediate borders counterbalances an extreme carelessness verging on cynicism on the part of the Unionist institutions in handling relations of a global character. Nor would this be for the first time.

Rigo agrees and argues further that the exclusory distinctions now insisted upon do not merely (if that is the appropriate word) stay at the border. Rather, the "transformation of European borders creates a system of 'differentiated' memberships which questions the normative assumption that post national communities are potentially inclusive". New distinctions are drawn between individuals who are members, "semi-members" and never-to-be members of the new Europe. These distinctions are no longer confronted just at borders, though they are rigorously enforced there too, but

borders are dragged into the core of Europe because they follow the biographies of the individuals whose mobility is limited ... The enlargement process challenges the theory and practice of defining European membership exactly because it brings into light how the deterritorialisation and relocalisation of the EU polity's borders leads to a fragmentation of the legal subjectivity of the *citizen*. In other words, any eastern border of Europe is a border drawn within Europe itself.

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The European project is a monumental one. It promises to affect every aspect of the life of its members. This book attempts to examine some of the early effects and their likely consequences. As we have seen, controversies are plentiful, and criticisms

# **Part I: Democratic Institutions and Practices**

## 1. EU Enlargement and Democracy in New Member States

Wojciech Sadurski\*

### 1. Introduction

Public opinion polls in the accession states of Central and Eastern Europe (CEE) have consistently shown that, among the pro-accession motives, the hope of the European Union (EU) modernizing and stabilizing the political system figures very highly. For example, a Polish public-opinion expert reported:

Respondents [to public-opinion surveys] expect that our membership in the Union will lead to improvement of the functioning of the political system, strengthen the rule of law, improve the level of knowledge and education of Poles, and improve the protection of the environment.<sup>1</sup>

This hope was echoed in the public discourse and in the literature. At a minimum, accession was viewed as providing CEE states with a guarantee against things going really bad and thus with extra protection against potentially sliding into chaos, authoritarianism, and uncontrolled corruption. Even if it will not add any positive features to the democratic institutions of these countries, the accession (it was thought) will at least help cushion democratic institutions against the worst threats should a crisis situation occur. In a word: it will render democratization irreversible.

This hope was accompanied—and supported—by a general sense of frustration with the state of democracy in the new member states. Citizens of CEE do not trust and do not particularly like their own states: 15 years after the advent of democracy, the belief in their own democratic institutions is very low. This is undoubtedly a legacy of the immediate past; as George Schöpflin notes, "[T]he state, having been seen as an alien, impenetrable, inauthentic and hostile entity, continues to be regarded with suspicion, and reliance on personal connections is widely preferred, as real." In all CEE countries there is a clear contrast between a very small number

My thanks to Ms Ania Slinn for excellent research assistance. An earlier, and largely different, version of this chapter appeared in *European Law Journal* 10 (2004), pp. 371–401.

Ewa Bojenko-Izdebska, "Postawy i oczekiwania wobec integracji Polski z Unią Europejską," [Attitudes and expectations regarding the integration of Poland within the European Union], in Marian Grzybowski and Marta Berdel-Dudzińska (eds.), *Prawo i ustrój Rzeczypospolitej polskiej w perspektywie integracji z Unią Europejską* (Rzeszów: Wydawnictwo Wyższej Szkoły Informatyki i Zarządzania 2002), p. 87.

George Schöpflin, "Post-Communism and the Perceptions of Europe," in Stefano Bianchini, George Schöpflin and Paul Schoup (eds.), Post-Communism as a European Problem (Longo Editore: Ravenna 2002), p. 100.

of people that declare their trust in the fundamental democratic institutions of their own country, on one hand, and those that harbour a rather high level of support for the institutions of the EU on the other.<sup>3</sup> This trust has a somewhat mythical quality (because the level of knowledge about how the EU institutions work is quite low), but it nevertheless constitutes an asset that responsible national political elites may use for the benefit of reforming the state.

This mix of distrust in one's own state and a quasi-mythical trust in "Brussels" (largely derived from the old. Communist-era conviction that anything coming from the West is good) offers a socio-psychological background against which the possible contribution of the accession process to the state of democracy in new member states can be evaluated. It can also be considered against the background of the contribution *already* made to the consolidation of democratic rules and institutions by the process of Europeanization in general, as well as the more specific prospect of accession to the EU. It is this contribution that may, at least in part, account for the high level of support overall that the accession process enjoyed among the citizens of candidate states, despite the uncertain calculus of material costs and benefits. CEE candidate states in the period leading up to accession attempted to emulate, with varying degrees of success, the models of liberal-democratic principles in their own institutional design and practice; no doubt a major incentive for such emulation was provided by the prospect of joining the EU, and it acquired the form of political conditionality. Its effectiveness will be discussed in the first part of this chapter; more specifically, I will discuss the extent to which the effectiveness of political conditionality is likely to survive after the accession takes place. In the three remaining parts of this chapter, I will consider in more detail those areas of democratic institutions and practices that may be affected by the entry of CEE states into the EU (and that have already been effected, to some degree, by the process leading up to accession): the relationship between the legislature and the executive, the position of constitutional courts, and the decentralization through regionalization.

#### 2. Political Conditionality Before and After Accession

In the years immediately after the fall of Communism, EC conditionality was focused mainly on human rights and on general democratic stability; it was the period in which the CEE states set up their basic institutional frameworks. Conditionality operated through co-operation and association agreements with CEE states and by the major assistance programme, PHARE. The turning point, however, was the

A Eurobarometer poll of Autumn 2003, published in December 2003, showed that the average level of trust in the acceding and candidate states for the country's parliament was 20% and for the country's government, 23%, while for the European Union: 44%. (Note that this is an average for the 10 acceding countries and three candidate countries). See http://europa.eu.int/comm/enlargement/opinion/, visited 4 March 2004.

Copenhagen summit of 1993, which established, as the political conditions for the new entrants, the "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." Nevertheless, in the period of 1993–1997 the principal focus of conditionality was on the internal market *acquis*, with the main pre-accession strategy in this domain determined at the Essen European Council in 1994. Political conditionality acquired real bite after 1997, when the Commission began evaluating the progress of all candidates in the annual reports, which included sections on "Democracy and the rule of law" (with sub-sections on the parliament, the executive, the judicial system, and anti-corruption measures) and "Human rights and the protection of minorities" (with sub-sections on civil and political rights, economic, social and cultural rights, and minority rights and the protection of minorities).

To what extent was the consolidation of democracy in CEE the result of EU conditionality? Lately, there has been a lively scholarly debate mainly among political scientists concerning the nature and relative importance of the transmission of democratic and liberal norms to the candidate states: whether it was largely voluntary or involuntary, driven mainly by external or internal forces; whether the most efficient measures were those that operated through the mechanisms of conditionality (with the coercive element inherent therein), or rather "lesson drawing" and "social learning" by the candidate states, which voluntarily adapted to the models they saw as dominant among EU member states. There is no room here to enter this debate but a few observations may be helpful for the purpose of reflecting upon how membership in the EU will affect the consolidation of democracy, human rights and the rule of law in the future.

To begin with, one must acknowledge that some of the most important institutional innovations, especially in the first period of democratic change, were taken predominantly under *domestic* public pressure. There have been some obvious demands made from the outset: for free elections to the parliament, independence of the judiciary, free press, etc. They coincided with what was perceived as the "normal" democratic system, and the elites of the CEE states more often than not found it perfectly natural to model their own systems on Western European institutions that they saw to be functioning successfully. This emulation had often been pre-configured by dissident elites before the fall of Communism. In addition, some (although admittedly not many) institutional innovations *preceded* the transition and had been installed, albeit in a carefully limited way, by the old regimes, as was the case of the Constitutional Tribunal in Poland. Also, in terms of the self-perception of the motives for reform by the elites in CEE, there has been a strong *noblesse oblige* type of view under which it was improper to accord too high importance to EU conditionality. Many institutional changes that occurred at a later stage

See the papers presented at the workshop convened by Professor Frank Schimmelfennig The Europeanization of Eastern Europe: Evaluating the Conditionality Model (The Robert Schuman Centre for Advanced Studies at the European University Institute, 4–5 July 2003).

of the 1990s were driven by the locally felt need to introduce corrections to the system as a response to the experiences with lapses in democracy; for instance, the reforms initiated by the Dzurinda government in Slovakia after 1998 were based on the lessons drawn from the authoritarianism of the Mečiar era; decentralization and regionalization may serve as examples of this type of action.

This is not to say that conditionality was unimportant but rather that it was most efficient when it resonated with domestic preferences and political aims, where there existed significant domestic factors in the "importing" states that favoured the importation, adoption and the maintenance of these mechanisms. These domestic factors came in different shapes and sizes. One major factor has been the extent to which an imported rule or institution has resonated with public opinion and those widely shared values within a given community: the relative ineffectiveness of measures aimed at protecting the Roma minority throughout the region may be largely traced to a broad social hostility towards and prejudice against this group in CEE and thus to the absence of resonance between the externally required anti-discrimination measures and the local consensus. Another factor was the "density" of the previously established rules, practices and institutions in any given area in each candidate state: the more entrenched these practices were, the higher the resistance to the rules imported from the EU. Yet another factor, obviously related to the former two, was the magnitude of social costs incurred by the domestic political elites in adopting a rule advocated (or imposed, in the form of "conditionality") from the outside.

It also needs to be remembered that conditionality was a broader phenomenon that just the highly structured, formalized EU policy towards its applicants. Right from the outset, there were a number of outside sources, other than the EU, that provided their advice, inspiration and pressure upon post-communist transitional states: Council of Europe and its related bodies and agencies (including the Parliamentary Assembly and the very active and influential Venice Commission), the Organization for Security and Cooperation in Europe (OSCE), NATO (which had made accession subject to the same conditions as the EU), and various NGOs, in particular Open Society Institute, the Helsinki Committee, etc. It is clear that the impact of these sources was the strongest whenever there was a high degree of consistency among those various influences. One good example is the case of Latvia's law and practice regarding its Russian speaking minority. Here the EU had followed the policy of the OSCE and its High Commissioner on National Minorities (HCNM). As early as December 1993 the EC made it clear that Latvia would have to change its citizenship law if it wanted to be admitted, and in the 1997 Opinion on the applicant countries, the European Commission reiterated the concerns of the HCNM regarding then position of the Russian-speaking minority in Latvia. As a result of these combined pressures, Latvia kept gradually changing its naturalization and state language laws, initially in a way judged unsatisfactory by the West, but eventually in conformity with EU demands, thus opening the way to accession negotiations.

More often than not, however, the influence of conditionality was not in the form of suggesting very specific institutional solutions and devices—perhaps for the simple reason that there is no single model of democracy and rights-protection in the EU—but rather through general templates or thresholds. Those thresholds had the form of certain minimal conditions to be fulfilled rather than of specific institutional designs to be installed. The very fact, however, of the generality of these templates or the minimalistic nature of the thresholds renders it very difficult to trace the "emulation" to one specific source—or even to determine whether it was indeed emulation in the first place. To be sure, the degree of specificity of EU political conditionality varies from one domain to another, and so political conditionality might have been much more effective where there was a determinate set of rules that the candidate states were expected to observe than in cases in which the criteria laid down could at best be characterized as a vague template.<sup>5</sup> The credibility of the conditionality varied depending upon whether they corresponded to the seriousness and determination with which the EU has held its own member states to those standards. When the EU set certain political conditions that were not part of the EU legal system and in addition were not actually shared by the current members states themselves (such as minority rights), the credibility and hence effectiveness of this area of conditionality must have been suspect. Apart from the legitimacy and "double standards" problems, candidate states could not know what exactly was expected from them.

But what will happen to conditionality now that the "candidate states" have become "new member states"? The formal measures of conditionality have, of course, expired: there is no more political *acquis*, no more annual Commission Reports, no more scrutiny for membership eligibility towards new member states. A rich body of expertise and advice stored in, among other things, the annual Commission Reports will ostensibly retain only a historical value. New member states will be judged—alongside the others—on their continued compliance with theexisting EU rules rather than on their suitability to join. This may mean a

Compare, for example, the conclusions by Antoaneta Dimitrova who found high effectiveness of conditionality in the area of civil service reform ("Conditionality meets post communism: Europeanisation and administrative reform in Central and Eastern Europe", paper presented at the workshop "The Europeanization of Eastern Europe: Evaluating the Conditionality Model", The Robert Schuman Centre for Advanced Studies at the European University Institute, 4–5 July 2003, p. 33) with the conclusions by Martin Brusis who claims that if conditionality had been an important factor, we would not be able to explain the significant differences in the regionalization policies between the Czech Republic and Slovakia ("Instrumentalized conditionality: regionalization in the Czech Republic and Slovakia", paper presented at the same workshop, pp. 13–14).

See Bruno de Witte, "The Impact of Enlargement on the Constitution of the European Union," in Marise Cremona (ed.), *The Enlargement of the European Union* (Oxford: Oxford University Press 2003), p. 240.

dramatic reduction in the strictness of the standards by which they will be judged, and so will radically transform the pattern of incentives for adopting and preserving the rules of democracy, human rights and the rule of law. The huge carrot of conditionality (with an extremely desired prize in the form of an invitation to the club) will be replaced by the not-too-threatening stick of Article 7 TEU, further enhanced by a Treaty of Nice (the "lex Austria" clause), sanctions—or rather, its equivalent in the future Constitutional Treaty of the EU, if and when it is adopted.<sup>7</sup> According to this provision as it now exists, a member state found to be in "serious and persistent breach" (or, after Nice, when there is "a clear risk of a serious breach") of the values of the Union (which include democracy, the rule of law and respect for human rights) will risk having its Union membership rights suspended.

But will such a decline in the EU's effect upon the institutional, non-acquis related structures and norms in new member states really happen? It is unlikely. For one thing, while formally stating that all member states are equal, the truth is that some are more equal than others, and the inequalities between them vary from one domain to another. New member states will be for some time suspect in the eyes of the general public of Western Europe, and the awareness that the democratic institutions and the rule of law are of a rather new pedigree will surely affect the way in which they will be perceived by more established democracies. It is very probable that the elections in, say, Slovakia or Latvia will be, whether we like it or not, more critically scrutinized than those in Austria or Italy. After all, the annual Commission Reports will not simply be erased from the institutional memory of the Union, and its critical comments will be able to be revisited at will. Moreover, the membership of the Union will be a powerful strategic and rhetorical asset in the domestic politics of new member states. Both the governing and opposition parties (as well as various "veto players", such as disgruntled trade unions, NGOs, extra-parliamentary opposition, etc.) will be able to use the argument from membership in their political actions. Some of these actions will have the form of demands for constitutional and other institutional changes. The argument: "We need to adopt the rule X because our membership in the Union so requires" admittedly has a different force than the argument "We need to adopt rule X because this is a condition of our accession." The answer: "So much the worse for the accession decision" applies to the latter but not to the former argument. One can, of course, reply: "We told you so; we should not have asked to join the EU", but this response will ring increasingly hollow with time, and will sound more like a grumbling loser's complaint—not a good rhetorical device for any political actor to adopt.

This suggests that the pattern of incentives regarding the adoption and maintenance of rules, standards and institutions of liberal democracy will be altered

Article I-58 of the Draft Treaty establishing a European Constitution.

compared to the pre-accession circumstances. One may speculate that these changes will have at least two forms, leading in two opposite directions. On the one hand, the burden of argument will shift even more to those seeking to *resist* the adoption of the rules or institutions presented as in compliance with EU standards: if such a characterization of a particular measure is credible, there will be a strong presumption in favour of its adoption, and resistance to this will be more difficult. On the other hand, however, those supporting the adoption of such a rule or institution will not benefit from the argument about the *other* gains of accession to the EU: the argument, "We have to adopt this rule, otherwise we will not be admitted," will no longer be valid. In the situation of lowered sanctions for non-adoption, what could have previously been represented as part of a non-negotiable package that on balance is good for the candidate state, will from the moment of accession take on a much more discretionary character for each new member state.

Naturally, the alteration of the pattern of incentives and of the calculi of costs and benefits will affect much more than the discursive assets on both sides of any future domestic controversy over rule adoption. There will be also a very substantial alteration of control in terms of knowledge of the relevant facts, of which the most important will be: to what extent a proposed rule or an institution is indeed part of the EU acquis, part of the "EU model", part of the "common constitutional traditions" of EU Member States, or part of any other such formula that suggests that membership in the EU *commits* a Member State to adopt a given rule or institution. Once in the EU, some elites in new Member States will be able to claim a better expertise in what the EU really requires than others: they will be able to gain public and political support for their knowledge-claims based on proximity to the EU centres of power, due to the much higher level of interaction between national governing elites and the "Eurocracy" than was the case during the accession negotiations. One can speculate that the governing parties, which will all have extra incentives to be "pro-European" regardless of their official positions pre-2003, will acquire this asset of inside knowledge and be able to use it more effectively against the "anti-European" oppositions, with the knowledge-claims of the latter suffering from lower credibility, and thus less potency in resisting the claims for the adoption of any given rule.

### 3. THE ROLE OF PARLIAMENTS

Both the very process of managing the preparations for accession by a *candidate* state, and the dynamic of participation in the EU decision-making process by a *member* state, inevitably strengthen the powers of the executive branch of government to the detriment of the legislature. The former phenomenon has already left its imprint upon the government-parliamentary relationships in CEE, and with good reason; with only minor exaggeration it has been stated that conditionality "can be seen as the functional equivalent of war: [it] give[s] the executive more