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.

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[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.

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[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).

13. Transformation and Integration of Legal Cultures and Discourses—Poland

Marek Zirk-Sadowski

1. Introduction: the Transformation of Law and its Integration—an Attempt to Periodize

The initial period of the transformation of law can be compared to Balcerowicz's reforms in the economy. The transformation was primarily manifest in building the foundations of the rule of law. The beginning of this process was not identical to the beginning of the new state. The turning point was the Act of 1988 on business activity, which proclaimed economic freedom for the citizens and opened a possibility to reconstruct a free market economy. Other civil liberties and rights as well as their content had been discussed as early as in the 1980s in the circles of opposition lawyers, and it was not difficult to accept them. They were primarily derived from international treaties signed by Poland. As the process of building the catalogue of these rights assumed at the same time the continuity of Polish law and taking over of the former commitments of the People's Republic of Poland, it proved relatively simple to formulate them and it took, altogether, about three years, culminating in the promulgation of the so-called Small Constitution. Prime Minister Bielecki's government closed this process, approximately.

It should be noted that the old Constitution of 1952 was not annulled; some fragments of it were merely modified and the Small Constitution was added. This was in the period preceding the integration of Polish law with European Union law. Within the framework of this law, "a social device" was constructed and it was only this that was able to integrate. There was a shift from the Law legalizing a certain political order (where law was subordinated to politics and economy), to a Law that legitimizes a political order and is, therefore, autonomous in relation to politics and the sphere of economics. It can be said that a new constitutional order was created and consisted of the gradual inclusion of unwritten constitutional customs. This was the background for the first divisions within the legal order. They were mainly connected with the conflict of different conceptions of the structure of power in Poland.

The dispute primarily concerned the relationship between the executive and the legislative powers: for instance, deciding upon the President's powers or, more fundamentally, deciding whether the Polish system was to be presidential or cabinet-parliamentary. In attempting to gain an for the advantage the President, a very active interpretation of the Constitution and fundamental laws was applied. It was only then that the general public recognized, for the first time, the role of interpretation

Wojciech Sadurski et al. (ed.), Spreading Democracy and the Rule of Law?, 299–311.

in public law, even though this was perceived of as some form of abuse or avoidance of law. This role was even given a special name: "Falandisation of law" (from the name of Professor Lech Falandysz, President Walesa's legal adviser) which has remained in use until today.

During this period, society did not regard law as a phenomenon requiring a discourse and specification in the communication processes. Lawyers played the role of "guardians of law" whose main task was to recognize law as the content of the Sovereign's will and possibly to explain it.

This period ended around 1993 when new legal acts were being introduced, and partly implemented from the European Community order. Fundamental changes took place between the citizen–state relationship due to the appearance of a new tax system. The universality of income tax and the act on goods and services tax (VAT) significantly complicated economic activity. Notably, VAT was the first to reveal the "strangeness" of the new law. VAT is a mechanism of transferring invoices and it works without being complemented with any moral norms. The question of guilt or causality is of no significance under the conditions of a legal error and is not applicable when determining the sanctions for violating the rules of VAT calculation. Since this tax is based on self-calculation, one cannot safely be its payer without the help of a skilled accountant or tax adviser.

With these foregoing measures, the Law—for the first time—went beyond the framework of everyday moral and conventional duties. And subsequent implementations of European law only intensified this feeling. As a result, a transformation of the law coupled with its integration took place. Society, however, perceived this process as the price of the law's European character and not as the construction of law serving a more complex economic role.

Another feature of the post-1993 period was the discussion on the limits of acquired legal rights. The activity of the Ombudsman (E. Łętowska) led to the preservation of a number of rights acquired in the former state, even if it was against the newly established law and moral assessments. The most important discussions concerned car purchase coupons, combatant's rights and co-operative law. The sphere of the so-called rightfully acquired legal rights became manifest for the first time. This construction was also not very transparent for the general public, which was used to treating law as a kind of instruction. The case law of the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court proved that it was necessary to shift from the understanding of law as a sort of Leviathan (Hobbes) to law understood as an order anchored in a citizen's sense of freedom and an individual's rights (Locke). However, no appropriate legal discourse appeared at the social level. Individual rights were defined by an elite group of lawyers. This gave the impression that individual rights were independent from the political dimension.

This process, in principle, ended in 1997 with the new Constitution. During its drafting, the catalogue of human rights and civil rights was finally defined. From

the point of view of the system, foundations were built in for the Parliament's (the Sejm's) advantage in the structure of the state which at present manifests itself as a kind of parliamentocracy. Courts receded into the background regarding the formulation of the content of law, and their place was taken up by political discourse which is now perceived of as a primary source of legal regulation. Thus the third period of law began. Whereas the first period consisted of building the basic structure of the state and the rule of law, and the second in defining the citizen's freedom in relation to the law made by the state, a distinctive feature of the third period was the fight for the principles of translating political interests into legal categories and legal rules limiting the political game.

In the second and the third periods, society perceived law as a construct made somehow without its participation. Between 1993 and 1997, law was regarded as a product of lawyers' elites, and after 1997—as a product of the political class.

Introducing the principles of the rule of law and building the fundamental law institutions was obvious from the social point of view, and the citizens did not find it difficult to assimilate the mechanisms of the system. To begin a more sophisticated legal–political–economic game and anchor individual rights into culture required argumentative activation on the part of society, as well as its participation in the discursive conception of legal obligations. However, in public consciousness legal obligations continued to be treated as a derivative of coercion, and legal rights were perceived as a kind of good. It was not possible to leave out this stage. A certain analogy with business activities can be noticed here: after a period of simple management in a small enterprise some capital is accumulated and it is necessary to pass to a new, more complex phase of management based on communication in the economic process.

The interests protected by law were still regarded as "received" and not resulting from negotiations or discussions. Those who received them sought to keep them at all costs, not joining the game of arguments revolving around the content of legal duties. This phenomenon can be defined as the "lack of consolidation", i.e. authoritative reforms introducing new rules of the game are effected but in order for these reforms to "work", large groups of society must incorporate the new rules of the game into their activities. However, these new rules have not even been fully understood; nor have interest groups, founded on these new rules, appeared—as a consequence the "entrenching" of known or already articulated interests took place.

The law of the period of the Polish People's Republic was based on orders and so was a sort of instruction. During the transformation, it should have turned into an argumentative game but instead, it became a more complicated hyper-instruction. In this way, the court stopped being regarded as "justice" and is perceived as a place of granting social "bonuses", i.e. it generates a division into bonus-granters and bonus-receivers. The interpretation of law is perceived as "justifying decisions" and not as the argumentative development of the content of the law.

2. Disintegrating Factors in the Legislature

An ideal social position in this game is to be a "hyper-instruction" maker. Besides the division into lawyers and citizens, a new division became visible: into "hyper-instruction" makers and those who are subject to it. The legislature is not perceived as a place of the translation of political interests into legal categories but as a place of granting secret privileges.

From the legal point of view, the legislature translates the political, economic, social interests, articulated in democratic discourse, into legal categories. The primary set of legal categories is created by the doctrine of the "rule of law" state. What results from the legislature's activity are general norms (addressed to classes of receivers and regulating classes of behaviours), expressed in natural language and published in the form of legal text. This text must, by the nature of things, be interpreted since natural language is an imperfect tool of communicating norms, of controlling human behaviors.[1] Even in direct communication it is a fallible instrument. The legislature, in turn, is a source of indirect communication in which language itself plays a decisive role. The generality and totality of legal norms (following from the prohibition of building law as a set of privileges) intensifies the problems of communicating legal norms. In principle, there is no possibility of the direct application of legal provisions contained in a legal text. Passing a sentence and a decision and then its enforcement requires prior "adjustment" of the text to a concrete case through a special legal discourse called the adjustment of law.

The application of law is from this point of view a discourse conducted by lawyers and the legal text is its point of departure. Using special types of argumentation and associating legal and actual issues (hearing of evidence or explanatory proceedings) they formulate judgments deciding in individual and concrete legal problems.

In this approach, building a good model of the legislature is highly dependent on the quality of democracy itself. Democratic discourse of bad quality, difficulties with determining political, economic or social interests and a wrong choice of interest diminish (from the point of view of the content) the quality of the legislature itself. This is a principal matter in Poland. However good the legal service of the legislative process is, it cannot repair the deficits of democracy itself. Thus, the legislature cannot be improved without improving the democratic process of articulating social interests; therefore this issue is an object of research in the political dimension. At this point, it is necessary to note the isolation of Polish political, economic and legal thought. The weakness of the Polish reflection on the quality of the legislature comes from the lack of syntheses, which would embrace all these aspects. The legislature is usually investigated in one of the mentioned dimensions without attempting to give holistic diagnoses.

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[1] Jerzy Wróblewski, *The Judicial Application of Law*, trans. Zenon Bankowski and Neil MacCormick (Dordrecht, Boston, London: Kluwer Academic Publishers, 1992), p. 97.

This problem is to a great extent transferred into the public discourse on the legislature. Initially, in the period of introducing the fundamental institutions of the state of rule of law the dimension of legislative technique was mainly discerned in law-making. The quality of the legal text was considered and in its defects the weakness of the legislature was seen. Discussions on the clarity of legal text dominated.

With legal regulations becoming more and more complicated, there appeared considerations on the economic dimension of the legislature. Only recently have the so-called corruption affairs led, paradoxically, to understanding the multi-dimensionality of the legislature. The public discourse, taking place primarily in the mass-media, concerns the problem of the legislature's ties with the quality of democracy as such and its capability of expressing the political interests of particular social groups in terms of the rule of law state.

During the third term of office, as many as 640 Acts were adopted while the previous also full term of office the Sejm, adopted 473 Acts. The current Sejm also works very fast: 394 Acts have already been adopted and it is not even half-way through the fourth term of office. During the previous term of office five Acts on average were adopted at each of the meetings and last year the number of adopted Acts exceeded an average of nine falling on each meeting.

The evaluation of the works of the Polish legislature made in the mentioned institutions is not good: a lot of legislative work is being done but its quality is low. In the first place, the translation of economic and political interests into the categories of the rule of law state is often incomplete in the sense that legal categories are most frequently sacrificed in favor of the economic or political good. Retroaction can be regarded as an obvious error in the art of legislation. However, the most frequent error consists of formulating normative acts in a lengthy and descriptive language, which results in it losing its normative force.

There are legal regulations whose function is not to express and protect the economic interest of a specific social group but only to delay the moment of facing the real solution to the problem. Through apparent legal categories, i.e. those which have weak normative force as a result of using vague formulations in the legal text, the political authority gains time to prepare itself for the next stage of the dispute.

Such measures sometimes serve to transfer political responsibility for the content of a normative act onto the judicial power since the vagueness of the text requires that a court, in the process of the application of law, effects its purposive interpretation. From the argumentative point of view, this kind of interpretation weakly connects a judgment with the legal text. The doubtful rules of reasoning based on purpose relationships result in the fact that the judgment itself loses its normative force. In this way, the political authority which created a vague legal text to simulate a solution of a social conflict shifts the responsibility for this conflict onto the judicial authority.

A similar role is played by the lack of terminological uniformity, using notions from different branches of law, which leads to the incompleteness of patterns of