Sortuz. Oñati Journal of Emergent Socio-legal Studies
Volume 6, Issue 1 (2014) pp. 01-12
ISSN 1988-0847

Post-Communist Rule of Law in Post-Democratic European Union. A sceptical legal sociologist's reflections on European Unity

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Abstract:

It is quite difficult to write about the topic of European political unity. Few years ago discussion has started and Europe is still dreaming on potential political unity. Particular states are declaring their positions and changing their opinion depending of current political and economic climate. From legal point of view the problem of European unity is encapsulated in an idea of constitutionalisation of Europe. The process to write a constitutional treaty has been derailed, and at present, European Union live in institutional setting of the Lisbon Treaty. It is also not easy to write about the so-called eastern part of EU after double enlargements. There are different perspectives one can adopt. One possibility is the perspective of an Eastern European. The second is to look from the perspective of a Western European. It is also possible to adopt a third perspective, that of a sympathetic external observer. In the end I decided to adopt a different approach: not the position of an impartial judge, not the position of a prosecutor or defence lawyer but that of a sceptical lawyer close to what is known in legal procedure as an expert witness. I will argue that Eastern Europeans always wanted to join Europe, but a Europe from the past not the European Union of the present. Then I will look at the issues connected with the relationship between enlargement and constitutionalisation in the European Union. I will finish with some sceptical remarks as far as prospects for European rule of law are concerned.

Keywords:

European Union, Rule of Law, Constitutionalism, Post-Communism, Eastern Europe.

1. INTRODUCTION

It is quite difficult to write about the topic of European political unity. Few years ago discussion has started and Europe is still dreaming on potential political unity. Particular states are declaring their positions and changing their opinion depending of current political and economic climate. From legal point of view the problem of European unity is encapsulated in an idea of constitutionalisation of Europe. As we know, the process to write a constitutional treaty has been derailed, and at present, European Union live in institutional setting called the Lisbon Treaty.

It is not easy to write about the so-called eastern part of European Union after double enlargements namely first big one in 2004 and smaller when Romania and Bulgaria join the EU. First of all, it is difficult to decide which perspective I should adopt. One possibility is the perspective of an Eastern European, who in fact I am. The second is to

look from the perspective of a Western European. It is also possible to adopt a third perspective, that of a sympathetic external observer. In the end I decided to adopt a different approach: not the position of an impartial judge, not the position of a prosecutor or defence lawyer but that of a sceptical lawyer close to what is known in legal procedure as an expert witness. The arguments for such an approach are partly obvious. I am an academic lawyer with interest in the constitutional structure of the European Union. I am also an Eastern European with some insight into problems faced by citizens of the future new member states.

The structure of my paper is very simple. I will argue that Eastern Europeans always wanted to join Europe, but a Europe from the past not the European Union of the present. Then I will look at the issues connected with the relationship between enlargement and constitutionalisation in the European Union. I will finish with some sceptical remarks as far as prospects for European rule of law are concerned.

2. TWO VISIONS OF EUROPE: ENLARGEMENT AND CONSTITUTIONALISATION

There is a tendency to discuss the process of present enlargement from a short time perspective. This is rather normal – that's what politics is about: not too much past, unless it is used for politically, and not too much future, since the electorate does not care too much about it. What is left is the present. So in the media but also in scholarly studies we can find plenty of articles debating the state of preparation of different future member states in adoption of the *aquis communitaire* and fulfilment of the criteria for adoption of some polices as mentioned in the accession treaty (see for instance Kaminski 2000).

Well, undoubtedly, there is more enlargement than the new constitutionalisation of Europe but the constitutionalisation process itself is the most important process, which will determine the direction of the process of European integration. In this regard, it is justifiable to look at enlargement from the constitutional point of view. Another justification is historical. The collapse of communism was a world-historical event and from the very beginning the aims of Central-Eastern European states in foreign policy were to join NATO and the European Union. Post-communist Central-Eastern European states wanted security and economic prosperity. From the very beginning the Central-Eastern European approach to European Union was partly utilitarian (money from Brussels) and partly status oriented (being reunited with the West). In other words post-communist Central-Eastern European states had their own image of the European Union and they wanted to join that version of the Union, focussing on the European Economic Community, not so much the European Union. The difference is in perceptions of the constitutional structure of the Union and the scope of state sovereignty.

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

The liberation of Central-Eastern European countries from Moscow's yoke, with the consequent disintegration of the Yalta arrangement after the autumn of nations in 1989,

has had a profound influence on the European Communities as they were called then. It became obvious that integration will spill over the Elbe River. First part of former Soviet block to join European Community was former DDR. Poland and Hungary after receiving their sovereignty quickly expressed the desire to "join Europe". Other countries such as Czechoslovakia, and after the 'velvet divorce' the Czech Republic, Baltic states, Slovenia, then Slovak Republic, Bulgaria and Romania, Croatia and Serbia, Moldova followed the same path. Very soon all of the former communist Central-Eastern European states from Baltic Sea to Adriatic and from Elbe River to Caucasus Mountain started to knock on the European Union door. Exception is only Belarus and Armenia. Interesting is situation in Ukraine where the government choose Moskov but the people opted for EU.

That required not only institutional change to prepare the structure for relatively smooth management of a larger number of member states. It became clear that deepening of the integration outside economic areas is necessary if integration is to be kept a live process. The outcome of that was acceleration of integration in the 90's. The Maastricht Treaty prepared the political ground for real deepening of the integration in the introduction of Euro as a common currency. In the meantime the violent lesson of the disintegration of former Federal Republic of Yugoslavia shows how impotent Europeans were in coordination of foreign policy. Partly this was addressed in the Treaty of Amsterdam with creation of the new position of High Commissioner for Foreign Affairs. This institutional design is the outcome of a temporary political compromise. Acceleration of political integration after Maastricht is more than visible. Also visible is creation of a hard core of integration. Some countries opted out from the Euro zone or from the *Schengen aquis*. The response to that was an institutional acceleration, especially after the Treaty of Nice.

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

The outcome of the European Convention was a compromise but a few goals have been achieved. First of all, simplification of institutional structures and, secondly, simplification of the decision-making process. All of these changes could make management of Union affairs a bit simpler. There are also proposed changes in the area of political integration in foreign affairs and defence. The most important meaning of the Constitutional Convention proposal was to shift from an inter-governmental decision-making process to a majority approach. That strengthens big states since votes will be based on population size.

That was not only a symbolic change, as some commentators suggested. If the Constitutional Treaty presented by Valery Giscard d'Estaing in Thessalonica was accepted, that would make a radical shift in the pattern of European integration. After introduction of the provisions of the constitutional Treaty there will an institutional structure of a new type of polity. A polity which does not have any parallel in history: not

an international organisation, not a federal state but a new polity which in order to be understood requires a new approach to the problem of sovereignty and democracy as well as accountability. As we know the Constitutional Treaty has been not accepted but its provisions have been saved in Lisbon Treaty.

What I want to stress is that the changes in the European Union integration process and especially the process of the constitutionalisation of European Union are side effects of the collapse of communism and a direct effect of enlargement. Are the countries of Central-Eastern post-communist Europe ready to become full members of such a new polity? Are they ready to accept limitation of their freshly discovered sovereignty? It seems to me that the answers to these questions don't have to be negative but there is a chance that the entire project of European integration could be derailed because of eastern enlargement.

These countries are ready in some areas and not in others. It is probably better to discuss areas of problems involved in enlargement. Nevertheless the Union they join in is not anymore the Union they thought about. The countries applied to join an economic community and now they find themselves in a new type of polity.

3. EASTERN ENLARGEMENT: PROBLEMS AND PROSPECTS

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

1. First of all, apart from Poland, which is a middle weight, they are small countries. Exception is Romania which is a middle size.

2. The second characteristic is that eastern enlargement includes countries which do not share long democratic and liberal traditions. That was not the case in other waves of enlargements. Even the case of Spain, Portugal and Greece was different to that of post-communist Central-Eastern Europe. They did not suffer from what is called the 'simultaneity' problem characteristic of post-communist transformations. Their transformations were primarily centred in the polity. The new members have the task of transforming the polity, the economy and the society at the same time.

3. Third their economies and infrastructure are far behind the European Union average. In other words, there are huge discrepancies between efficiency of the economies in former communist states and in member states of the Union on the other side of the Oder River.

4. Last but not least, not all of these countries have a long history as an independent sovereign nation-state. As a result, they are over-sensitive to any attempt to limit their national sovereignty.

It is not difficult to discern that all these areas include different political and social institutions and also collective consciousness. One way of analyzing these differences is to distinguish between three types of constitutional legitimacy: polity legitimacy, regime legitimacy and performance legitimacy (Walker 2002a, 2002b).

3.1 POLITY LEGITIMACY

By polity legitimacy we can understand overall support for the polity in question. Two elements are present in that notion:

1. A political element – the degree of autonomous political authority.

2. A community dimension – a sense of common attachment and identification with the polity.

There is no problem of a shortage, but rather of an oversupply of polity legitimacy in all Central-Eastern European post-communist countries. All of those countries are very proud to have recovered or received national independence. The political struggle against communism was fuelled mainly by national ideology. Support for national independence is shared by a broad spectrum of political opinion in these societies. It is visible in the *invention of traditions* of the glorious past of the nation and the belief that the nation can only flourish in the form of an independent nation state. There are plenty of examples of growing nationalism. The Constitutions of those countries reflect that rather romantic nationalism. There is expressed a dominant attitude that the nation is based on primordial bonds of blood, culture and language. That the nation is a pre-political and pre-constitutional entity. The state belongs to the nation and the nation is more than just a political community of citizens. Citizens are bearers of rights but those rights are secondary to the interest of the nation (Czarnota 1998). The constitutions are not simple expressions of constitutional nationalism, but they are closer to constitutional nationalism than liberal constitutionalism (See Kis 2003).

Polity legitimacy is expressed in constitutions of member states usually in the form of a grand historical narrative in the preambles to the constitutions. Legitimacy expresses itself in a historical narrative which plays an important role for the legal system of the state and has a very important role in the functioning (or non-functioning) of the rule of law. The historical narrative provides the legal system with normative coherence.

Polity legitimacy is necessary for the existence of any state. Polity legitimacy based on a historical narrative is concentrated on high values and quite often is very difficult if not impossible to operationalise in the form of specific legal institutions. Polity legitimacy provides members of a nation with a historical roadmap giving answers to the questions where we come from and where are we going.

That type of legitimacy is usually overlooked by constitutional lawyers and legal theoreticians. However, the fact that it is overlooked by lawyers does not mean that it does not exist. Polity legitimacy is not static but the process of its change is rather slow. It is always in the process of change. One thing is necessary for the very existence of polity legitimacy – namely a *demos*. Neither a demos in the form of citizens or nations, political community or romantic notion of a nation, exists at the EU level. Such nations exist in member states or future nation-states but this does not mean that the sum of all *demoi* will create a *demos* of the European Union.

The European Union as a new type of a polity does not possess its own *demos*. That is why there is so far no European discussion of the future of European Union. There is no sense of collective sharing of a foundation myth either.

As I mentioned above only nation-states need and depend on polity legitimacy. The European Union is a new type of polity and does not need that type of legitimacy. This does not exclude the possibility of creation of such legitimacy for the European Union in the distant future.

In the noise of discussion about the constitutionalisation of EU there were some shy voices expressing hopes that Eastern European countries will be able to give a new life to European integration process including giving some input to lay down the foundations for polity legitimacy. That was rather wishful thinking. Eastern Europeans support the European Union but for totally different reasons. Some sociologists in the early 90's formulated the theses that Central-Eastern European were not ready to join the European Union since they did not go through the period of enjoyment of sovereignty. Arguably, they will find it difficult to surrender their own sovereignty to the EU, when they are only beginning to enjoy it themselves.

3.2 REGIME LEGITIMACY

This type of legitimacy relates to the type of organisation of the state. What is its institutional structure and basic principles of its operation, the constitutional structure of the state, its socio-political organisation. Regime legitimacy is a politically contested area, and in comparison with polity legitimacy is not only about high values but about values and their implementation in institutional practices.

It is interesting to make a comparison between the European Union and Central-Eastern European states from this point of view. The European Union has some problems with regime legitimacy but they are not serious problems so far. It appears that the task of the European Convention was to improve the regime legitimacy. But it is possible to say the same about each new inter-governmental conference which initiates a new political push. With eastern enlargement there will be more problems with regime legitimacy, quite apart from the normal criticism of the democracy deficit.

So far the main criticism of European Union institutional structures has focused on this deficit. If we apply dominant criteria from liberal-democratic constitutionalism, we will easily find that the European Union institutional structure does not fit in that matrix. The institutional structure does not express basic principles of a democratic polity such as one person one vote, or majority rule and also does not express basic principles of constitutionalism, such as a clear division of powers between legislature, executive and judiciary. Even the independence of the judiciary could be put in doubt since judges of the European Court of Justice and Court of First Instance are restricted to teleological interpretation of European law. That is all true, but the criticism seems to me based on a mistake. For the European Union is not a state in the traditional sense. It is not an authoritative state but rather a, not yet fully conceptualised, *new type of polity*. The new type of polity is rather similar to network organisations. From the constitutional point of view it is better to apply the so-called new constitutionalism to analyses of the operation of the institutional regime of the European Union (Weiler 1999). That approach has better explanatory power than traditional sovereignty centered traditional constitutionalism. A

late distinguished legal theoretician and former EMP, and also former member of the European Convention, calls it "*suigenericity*" (MacCormick 2003).

Notwithstanding that the European Union is not organised according to principles of democratic-liberal constitutionalism, it presented itself as a guardian of such principles at the level of member states. Incoming eastern enlargement plays an important role in this. The European Union for a long time already has possessed a functional constitution but not a formal one. It is possible to argue that in the constitutionalisation process of EU two different tendencies are present as far as governance of the Union is concerned.

1. A populist approach – which focuses on election of representatives to European offices by the mythical population of Europe. That approach is based on the presupposition that sovereignty of the states is still there and each state possesses full autonomy which is exchanged through agreement 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. That 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, and posits that the sovereign is law itself. Politics is not perceived as arena of struggle for power but as an art to achieve some aims. The crucial point in that approach is autonomy of Union institutions which decide about the rules of game. That means through law. That is why the strong states should control the lawmaking institutions.

In earlier waves of successions, before the eastern enlargement, issues of political regimes were not articulated. The criteria of accession were codified with adoption of the *aquis*. The question arises with the former communist states knocking on European Union's door. Formally the political criteria of membership were specified on the European Council meeting in Copenhagen in 1993, the 'Copenhagen criteria' later on incorporated to Lisbon Treaty. The Council pronounced what Wojciech Sadurski called the "canonical yardstick" that the applicant state, in order to be successful in the pursuit of full membership, must enjoy, inter alia, "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities". So membership becomes conditional on fulfilment of some regime criteria, passing the threshold of liberal constitutional-democracy. It is interesting that all Eastern Central-European states were already at the time, members of the Council of Europe. This meant 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 the eastern European states. Despite assurances of embracing democracy, rule of law and human rights by eastern European brothers and sisters, the EU approach was full of suspicions. Political criteria conditionality was assessed in yearly reports of each candidate country, but I doubt if they played any significant role in the process of building human rights and constitutional culture in Central-Eastern Europe. It is true that Slovakia was admitted again to the process after Meciar but in all the 8, this process was rather insignificant. It did play much bigger role in accession and post-accession of Romania and Bulgaria. We know now, that these criteria did not play an important role in the negotiation process. As a symbolic weapon they 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 from the EU point of view is that they are trying to encourage Central-Eastern European countries to develop institutions similar to those of Western Europe. A more cynical view is that the political criteria were designed to keep as a stick if there is not enough political will.

The political criteria used for Europeans B, by a boomerang effect started to be mentioned in relation to old Europe. In article 6(1) of the Treaty of Amsterdam we read "The 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 Amsterdam Treaty became an explicit precondition for European Union membership (Novak 1999, p. 689-690).

The boycott of Austria 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 in the process after collapse of the Constitutional Treaty.

Sociological polls conducted in the countries of Central-Eastern Europe show that there are great expectations connected with membership in the European Union. Those expectations are not only reducible to love of the Euro as a mighty currency. It is true that in the last 10 years it is possible to observe a shift from Eros to Euro in approach of eastern Europeans to European Union but still the perception that the EU represents a rise in status persists and exists. One important expectation is that of improvement of not only of efficiency of the government and administration but the basic structural issue of organisation of the institutions in future member states. People do believe that the Union will fix up the constitutional structure of the state. That 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 implementation of Community law and policies. That relationship between Union and member states is not based on classic federal distribution of powers but on dependency and cooperation.

That leads me to one of the crucial issues – namely Rule of Law in post-communist countries and its relation to enlargement. One of the crucial problems which undermine legitimacy of regimes in Central-Eastern Europe has to do with problems with law and order and delay in the implementation of justice. The first problem is partly connected with the nearly permanent crisis of public finances and the second also with constitutional and institutional decisions. The majority of cases from Central-Eastern Europe before the European Court of Human Rights in Strasbourg are for delay of justice. One problem is with inefficiently of the court systems, which has an impact on operation of the market. Implementation of the Communities law in member states was mainly through direct application of that law by state courts starting from the lowest magistrate level. Two basic principles of the Community law: superiority of Community law over the member state law and direct applicability were realised by active support given by the member state courts. That requires competent judges, competent in Community law not only their own legal system. The main legal device which works in implementation of Community law was the preliminary ruling which enables local judges to ask legal question of the judges in

the European court of Justice and Court of First Instance. I am not sure that judges in Central-eastern European countries are ready to use that legal device. I am not confident that they are sufficiently familiar with Community law. One of the indications in the Polish case could be direct use of the Polish Constitution by ordinary courts. In recent years judges are able to do it but they are rather afraid of using that clause. Years of training in a positivistic perception of law and "judicial dependence" in thinking left the courts not well prepared to embark on becoming part of the European legal space.

The very centralised system of courts does not support efficient harmonisation of domestic law with the *aquis communataire*. Harmonisation cannot be left only to national legislatures but can and should be done by activities of the courts. During the candidacy period that was not the case since the method of harmonisation by courts was control by the highest domestic judicial bodies[1].

3.2 PERFORMANCE LEGITIMACY

This type of legitimacy sometime is called "output legitimacy". This concerns the capacity of the state to produce effective and efficient performance according to chosen criteria that are important from the point of view of the particular political community. It focuses on 'delivering the goods' understood not only in a purely economic sense.

This type of legitimacy is closely connected with regime legitimacy and sometimes it is difficult to separate it analytically.

Performances, ability to deliver goods, deliver what was promised during election campaigns - expectations in Central-Eastern Europe are the main problem. In all 8 countries there is a problem with efficiency of the government, with inefficient administration, corruption and all the ills connected with "political capitalism" in which public position is translated to extract economic rents. The blurred border between the public sphere and the private, connected with the extraction of public funds to private pockets is one of the obstacles to efficiency of the economy from the point of view of citizens. The phenomenon was described by one sociologist as a "recombined property system" or "hybrid type of property" (Starks and Brus 1998, Staniszkis 2001). There are also organised markets with restricted entry depending on political decisions.

Citizens of central-eastern European countries have the expectation that, with membership in the European Union, problems with inefficient and corrupt administration will be solved by Brussels or rather the Commission. The surprisingly high turnout in referenda on the association treaty shows that the expectations are pretty high. The choice made by those who vote for it was a civilisational one. They voted for efficiency and economic well-being. They believe that the European Union will provide proper infrastructure for "life with dignity". That of course cannot be fully done by the European Union. After financial crisis in Europe there are more clouds over the expected enjoyment of full membership by the new member states. It looks as though they will not be able to use all the funds committed in the budget due to inefficiency of domestic administration and lack of matching funds in the state budget. The level of corruption as the example of Bulgaria shows plays also important role.

[1] See Kuhn (2003). On the overview on the problem with the system of the administration of justice in post-communist states see Priban et al. (2003).

In the discussion about the European Union budget there were sign 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 want 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 USA in so-called frontier technologies is also not expressing the interests of new member states.

In other words new member states economies before their full convergence, which will take a generation, require soft standards in 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-Eastern European markets.

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

One of the specialities of central-eastern Europe is informal operations due to the distrust of authorities[2]. That phenomenon was independently discovered in two different parts of the region in the beginning of the twentieth century by Leon Petrazycki who called it intuitive law and Eugen Ehrlich who gave it the name living law. Informality present in new states became a noticeable phenomenon in the European Union. According to legal sociologists, such informal practices have a corrupting 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-Eastern Europe? There is no clear answer to that question. One of the ways to address the question is to show tendencies present in the European Union and then speculate upon their impact on the rule of law in central-eastern Europe.

Within 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 concern. 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. INSTEAD OF A SUMMARY: *INFRANATIONALISM* AND POST-COMMUNIST RULE OF LAW

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

> ... based on realisation that increasingly large sectors of Community norm creation are done at the meso-level of governance. The actors involved are

[2] See for instance Galligan and Kurkchiyan (2003).

> middle-range officials of the Community and the member States in combination with a variety of private and semi-public bodies players. 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, around 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 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 (Weiler 1999, p. 98-99).

If Weiler is right, and I believe he is, then post-communist Central-Eastern European countries with their own networks and façade type of rule of law are well prepared to become part of *infranational* European Union (See Los and Zybertowicz 2000). In that sense post-communist rule of law will join a post-democratic European Union. But then that marriage will be at the expense of average citizens on both sides of the Elbe River.

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