DOUBLECLICK. INSTALLING THE *ACQUIS* IN CENTRAL AND EASTERN EUROPE

© Kjell Engelbrekt,
Department of Political Science,
Stockholm University,
SE-116 91 Stockholm, Sweden
(kjell.engelbrekt@statsvet.su.se)

31/05/2004
Manuscript total word count: 7,790

Abstract: For the second time in recent history a virtual replacement of the 'operating system' of political and legal institutions of the Central and Eastern Europe countries (CEEC's) is underway. Not wholly unlike communism, which grafted a number of identical features onto state structures with different backgrounds and historical experiences, adaptation to the EU's main body of rules—the *acquis communautaire*—is reshaping political and legal institutions in the CEEC's. Whereas it is premature to gauge specific long-term effects, it appears justified to begin explore—across disciplinary boundaries—EU enlargement as a project capable of transforming the politico-legal culture of CEEC's. Identifying an intermediate level of abstraction and historical timeline as appropriate for empirical studies, one can outline a research agenda focusing on aspects of CEE political-legal culture that bear on administrative and judicial capacity, the rule of law and democracy. Besides assessing short-term implications of adapting to the *acquis*, the idea is to analyze the preliminary impact of EU enlargement on the politico-legal culture of the accession states.

The project is funded by the Swedish Research Council.

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

The eastward enlargement of the European Union is a project on a scale and of a quality never before attempted or achieved, especially given the limited timeline according to which it has been scheduled. The majority of countries in Central and East European countries (CEEC's) acceded to the EU 1 May 2004. By 2010 the union is likely to encompass 27 or 28 member states and roughly half a billion citizens. Already at the time of accession each candidate country has adopted practically all laws, rules and regulations associated with EU membership. Furthermore, the EU's eastern enlargement project operates under the assumption that postcommunist states will soon be in actual conformity with the *acquis communautaire* as well as with a host of other regulations and norms.

The forward-looking *Agenda 2000* document, published by the EU Commission in 1997, tended to depict the pending enlargement project as little more problematic than the replacement of a computer's operating system (EC Commission 1997). In reality, this is a tall order, indeed. As was noted at the European Council of Madrid (1995), Vienna (1998) and Seville (2002), the ability of candidate countries to transpose the *acquis* into a national legal context, to find ways of adapting them to local circumstances, and to establish and maintain the expertise necessary to evaluate and follow up on implementation, is generally weak. Many challenges are partly of a practical kind and could be overcome through sustained efforts. There are, for instance, not enough state administrators and lawyers trained in the various fields of Community law. Second, government agencies and courts have limited experience in EC regulations or the procedures that apply to them (EC Commission 2002: 10-11). Third, there is growing but still inadequate understanding of the broader institutional context of rules that originate in the EU (Emmert 2003).

But perhaps even more importantly, the *acquis* encounters obstacles of a more intangible kind. In the context of the eastern enlargement, the transfer of a standardized set of EU laws, rules and regulations represents a challenge on at least two different levels. There is in the short term a stumbling block in dealing with implicit policy prescriptions, that is, narrowly defined solutions to societal problems, incrementally developed in Western Europe. The *acquis* entails an array of detailed regulations with inherent policy prescriptions formulated against the particular political and ideological setting of postwar Western Europe. These policy prescriptions have varied over the five decades of European integration, though at any given period they tend to reflect the prevailing *Zeitgeist* and the views of influential policymakers, national governments and international organizations. For that reason, a closer analysis of any given field of EU policymaking reveals distinct 'sediments' of policy prescriptions.

At another level, that of political and legal institutions, such intangible obstacles are intimately linked to the legacy of the past decades in Central and Eastern Europe. This legacy, primarily shaped by the ideology and reality of communism, is in some respects multifaceted (Holmes 1997: 16-19). But it is apparently also reflected in a symptomatic contradiction of, on the one hand, a sense of distrust in government institutions and, on the other, a high degree of reliance on the state (Rose 1998: 141-159). In comparison, West European political and legal approached converged around programs and institutions associated with Marshall Aid, the Organization for Economic Cooperation and Development, the Council of Europe and the EU itself. By creating common conceptualizations to political, economic and social problems, based on parliamentary democracy, the rule of law and a market economy coupled with welfare endowments, EU countries managed to induce a significant level of trust in public

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

institutions.[1] Essential elements of these West European conceptualizations are present in the *acquis*, although for the most part implicitly so.

From any vantage point the EU's eastern enlargement is a staggering undertaking. With its 80,000 pages of legal text, the *acquis communautaire* is presumably the most detailed set of standards ever to have been transferred to an existing set of political and legal institutions. Given the obstacles still facing this process it would seem that a promising field of study is to explore EU enlargement as an historic project poised to transfer a wide spectrum of ideas—especially policy prescriptions and conceptualizations pertaining to political and legal organization and practice—to the CEEC's. Leaving the transfer of EU policy prescriptions aside, one intriguing objective would be to identify individual models or 'templates' of politico-legal organization and practice implicit in the *acquis*, though related to the wider objective of transforming the existing politico-legal culture. Another interesting objective would be to assess the early experience in introducing such 'templates' in the context of CEE political and legal institutions.

Previous and Ongoing Research

An obvious candidate for theorizing eastward enlargement along these lines is the body of research that was built up regarding previous enlargements of the EU. There have been three waves of expansion prior to the present, eastern enlargement. First, there was the widening in the northwest of the continent, with the accessions of Denmark, Ireland and United Kingdom (1973). In the 1980s followed the southern enlargement with Greece (1981), Spain and Portugal (1986). Finally, in the aftermath of the collapse of communism in the former USSR and Eastern Europe, three nonaligned countries chose to join, that is Austria, Finland and Sweden (1995).

Yet for at least three different reasons it is difficult to regard this body of literature as sufficiently relevant to the pending eastern enlargement. First, the EU has in the meantime changed internally to the extent that accession today is a much more significant political act, with profound economic and constitutional ramifications. Second, the *acquis communautaire* and associated regulations have come to span an increasingly wide area of competence, now constituting—according to a gross understatement of the EU Commission—"an impressive set of principles and obligations" (EC Commission 1997: 44). Third, the current candidates in important respects represent a different category of new member states, with a specific political-economic makeup due to their communist past. To be sure, at no other time have candidate states ventured to join the EU while embracing a similarly broad reform agenda of their own (Offe 1991).

Of course, the last point in some respects provides an historic opportunity for comprehensive reform. The need to shed regulations dating from the communist era helps to explain why many candidate countries are more than willing to accept 'ready-made' solutions originating in the EU. This willingness reflects a desire to rapidly adjust to accession requirements, but also to simply save time by introducing regulations already tested and well integrated in neighboring countries. A similar reasoning applied to Spain, Portugal and Greece some twenty years ago, though mainly as a means to embolden democratic practices (Pridham 1995). Never before was such a broad reform agenda coupled to EU accession. Nor was the gap in terms of GDP per capita between member and candidate countries ever as wide.

[1] In recent years, though, individualism, neo-liberal ideology and the effects of economic globalization have rather eroded than enhanced expectations that the West European state would cater for the key needs and interests of citizens.

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

Some research, taking these differences into account, has been underway in the field of eastern enlargement of the EU for some time. A major portion of the work done EU enlargement is made up of policy studies that extrapolate on previous research developed within the field of European studies (Mayhew 1998, Redmond and Rosenthal 1998, Croft 1999, Nicolaïdes et al. 1999). The attraction of this approach is that scholars in this genre tend to be well acquainted with the history of EU procedures, policies and regulations. At the same time, intimate knowledge of European affairs is not always matched by an adequate understanding of problems and priorities in candidate countries. Furthermore, as in the past, EU policy studies on a more general level continue to suffer from being detached from broader social and political theory (Schimmelfenning and Sedelmeier 2002).

A second approach devoted eastwards enlargement can be linked to grand theory traditions within the social sciences, in particular those with a structural tinge. Looking at the potentially profound historical significance of integrating the CEEC's into the continent's key institutional arrangements, some scholars have quite predictably made associations to theories that imply long-term and far-reaching global trends and geopolitical shifts. Attempts to theorize the EU's eastward enlargement as an instance of liberal globalization, of neo-imperialism, or core-periphery exploitation are not uncommon (Waever 1997, Börösz 2001, Bieler 2002). The downside of this approach is the reverse of that in EU-oriented policy studies, namely that theory occasionally gets in the way of empirical research.

The emerging research program centered on the concept of 'Europeanization,' which highlights the unique characteristics of European integration in politics and institution building, seems more promising for the purposes of analyzing the enlargement problematic (Cowles et al. 2001, Featherstone and Radaelli 2003). Perhaps best described as mid-range theory of political processes related to European integration, the 'Europeanization' program combines policy studies with a set of questions that for the most part have been explored in the field of international relations. In a situation in which the majority of candidate countries found themselves increasingly 'Europeanized' but still operated under regular constraints of international diplomacy when it comes to exerting influence over the EU, at least until May 2004, the combination of a European studies and an international relations approach seemed especially appropriate. Moreover, 'Europeanization' research has recently begun to include policy studies conducted on the candidate countries, as well as expanding to the study of eastward enlargement *per se* (Schimmelfenning et al. 2002).

Similarly promising is recent work done in the field of comparative government, exploring reform efforts in public administration agencies and political executives in CEEC's. Some of this research is based on collaborative projects bringing together scholars from accession and long-standing member states, thus avoiding the knowledge gaps in earlier research (Goetz et al. 2001). While some work by area specialists in the past lacked theoretical ambitions, other contributions were insufficiently grounded in local developments and background.

Despite a growing interest in the legal integration of CEEC's into the present EU, it nevertheless appears that a highly relevant body of literature—comparative law—so far has been neglected in social science approaches to eastern enlargement. The traditional term for voluntary, conscious transfer or transposition of legal principles, norms and rules is 'reception.' Conceptualized from within a legal system, reception is a useful term when analyzing problems of fitting novel, 'alien' elements into national legislation, as well as for pondering the overall character of such integration. Some two thousand years ago Roman law

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

began being adopted into the 'tribal' legal systems of Central Europe through a process of 'authority reception,' whereas 17th Century shipping law evolving in the Netherlands and Britain spread east and south by way of 'utility reception' (Modéer 1997: 19-21). In the case of extending the *acquis* to Central and Eastern Europe at the turn of the 21st Century, it could be argued that both authority and utility reception come into play and reinforce each other.

A more controversial, contemporary concept is 'legal transplant.' Originally a metaphor from medicine, 'legal transplant' entered the scholarly terminology in the 1970s, serving as a focal point for contention regarding the transferability of law from one legal system, and the broader culture in which it is embedded, to another (Kahn-Freund 1974). A wide range of views still exist as to whether law primarily develops endogenously within national jurisdictions, or if most principles, norms and rules come about through borrowing or 'transplantation.' At the same time, there is among legal comparativists agreement on two points. First, there are historical examples of massive legal borrowing or transplantation that were successful in the sense that the alien elements were not 'rejected' by the existing 'body' of law, and so profoundly transformed the receiving legal system.[2] Second, many legal scholars acknowledge that political and legal institutions regardless of borrowing are keen to sustain an image of 'creative self-sufficiency' (Watson 2001: 101-102, Jori 1990: 236). In the context of transferring the entire set of European rules and regulations, it would appear that we are confronted with the most massive 'organ transplant' in legal history, destroying any illusion of CEE 'creative self-sufficiency.'

Finally, one should note that quite a few studies of eastern enlargement published in English, German and French suffer from a distinctly Western bias. The majority of studies published by 2003 were written with a West European readership in mind, by West European or North American authors, and primarily considered the future problems of the existing EU structures and present member states. Nor has any significant portion of postcommunist 'area studies' yet been devoted to enlargement issues. With the leading research facilities and resources located in the western half of the continent this is perhaps hardly surprising. But still, with a literature dealing with eastern enlargement almost exclusively authored by and for 'westerners,' there is a clear danger than the concerns of citizens in candidate countries will not be given the attention they deserve (Engelbrekt 2002a).

Theorizing the Acquis

It is undoubtedly simplistic to view EU enlargement and the eastward expansion of the *acquis* in particular, as the replacement of an operating system. Drawing on the creative impetus of that same metaphor, however, enlargement can be usefully seen as a project of transforming the politico-legal culture of the CEEC's.[3] As noted above, the intended transformation applies to political institutions as well as to legal ones. The theoretical insight that political, legal and social institutions in many ways are deeply intertwined was established already through the path-breaking work of Max Weber (Weber 1980: 387-513). Also relevant in this context are Weber's views on the close relationship between institutions and culture in society at large. Whether analyzing historical or recent social practices, contemporary scholars have reaffirmed that it is virtually impossible to distinguish the culture of political institutions from that of legal institutions (Friedman 1969: 29, Nonet and Selznick 2000).

---

[2] Japan integrated large portions of the German *Bürgergesetzbuch* in the mid-19th Century, whereas Turkey arguably went even further in 'Westernizing' its legislation in 1924-1930.

[3] Philip Selznick, a founding figure of classic institutionalist theory, used the term 'operative system' in a sociological vein to denote "a combination of the formal and the informal, the designed and the organic;" Selznick 1992: 235.

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

The EU is no exception from these close ties between law and politics (and societal culture underlying both), but even a particularly striking example. The notion of a single European market is inextricably connected to the principle of supremacy of Community law, established through case law in the European Court of Justice and affirmed by the treaties (Wincott 1995). Some scholars of European law and their counterparts in political science assert that insights into both realms are necessary for a deeper understanding of developments in EU institutions (Weiler 1991, Joerges 1996). Notably, this is not to say that differences in analytical methods and theoretical frameworks between political and legal studies can—or even should—be bridged.[4]

As always in conjunction with a new round of accession to the EU, legal and political scholars are currently paying more attention to the *acquis* than at other times. The point has been made that the *acquis,* with the introduction of the term in the treaties, in the quiet acquired a much more central role in the EU political system (Ott 2002). According to Gialdino, developments in the Maastricht and Amsterdam treaties established '*acquis* of constitutional rank' as that privileged category of "fundamental principles concerning the structure of the legal order and the case law on the essential requirements of the Community" (Gialdino 1995: 1108). Also the European Court of Justice has expressed itself close to the notion of a 'constitutional core' (*Verfassungskern*) whose key values cannot be subject to modification or abrogation (Gialdino 1995: 1111-1112). Jorgensen, in a 'genealogical' political science analysis, even speaks of the *acquis* as a defining feature of post-modern European statehood (Jorgensen 1999: 6).

Be that as it may. From the legal vantage point, the term *acquis communautaire* has since the 1960s been used to denote the complete set of laws, rules and regulations that a new member would have to adopt in order to gain entry into the Community. The whole range of normative acts from treaties to case law form part of that commitment. Though after being inserted into the Maastricht Treaty, *acquis communautaire* assumed a broader meaning, namely as that body of law that governs the European Community aspects of EU affairs (the single market and the four freedoms). Since then, the simple term '*acquis'* is increasingly applied to EU legislation beyond that of Community law proper (Gialdino 1995). Nevertheless, in order to include a variety of texts of unequal legal status, the terminology has tended to loosen further. A number of consequential documents issued by the EU Commission in particular could be referred to as 'soft (law) *acquis*.'

Combining the methods of two closely related sub-disciplines, namely political and legal sociology, all of the latter categories of *acquis* may be approached as one object of study. As phenomena of 'political culture' or 'legal culture' the *acquis communautaire*, the EU *acquis* and 'soft law *acquis*' belong to the same species. In the context of accession, the same forms of *acquis* concern an intended transformation of politico-legal culture which include a number of key 'templates' of organization and practice. According to a European University Institute working group on enlargement comprising scholars as well as ranking Commission officials, the (loosely termed) *acquis* provides "a mode for the translation of the otherwise transient political commitments of sovereign European states into legally-binding supranational principles" (Krenzler et al. 1998: 9). In the same portion of the report, the working group report emphasizes that the eastwards enlargement is expected to alter the very fabric of legal and political institutions in candidate countries. It specifically states that "adoption of the

[4] This is not the place to elaborate on the different functional logics and professional identities of political scientists and lawyers, as it is a vast topic in its own right.

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

acquis must also include adaptation to the mode of legal reasoning which has evolved within the EU, as well as the institutional patterns of interaction" (Krenzler et al. 1998: 10).

Part of this general process of transfer has features, such as the various policy prescriptions pertaining to specific societal problems, which may not concern us *per se*. In terms of its possible overall impact on CEE societies, the *acquis* can be said to entail three different dimensions. In its most concrete meaning, we have already mentioned that the *acquis* constitute policy prescriptions, or politically/ideologically colored 'technical solutions,' to problems encountered by any government administration in Western Europe. In this dimension the *acquis* are chiefly a big bundle of rules and regulations about how to organize the political, economic and social realms of society. The 180-page EU Commission questionnaire on eastern enlargement, sent to candidate country governments in the spring of 1996, demonstrates more forcefully than perhaps any other EU document the 'nitty-gritty' requirements of enlargement. The Commission received as many as 50,000 pages of answers in return (Nicolaïdes et al. 1999: 5-6).

At a much higher level of abstraction, a combined politico-legal sociology approach could regard the *acquis* as a dense 'cultural script' reflecting the values and ideas of our time, of 'modernity' or 'civilization' (Bauman 1998, Elias 2000). In a longer historical perspective these ideational elements pertain to notions of agency, of rationality, of science, of progress and of the state (Weber 1980). An arguably more recent development within the broader phenomenon of modernity is the strengthening of individualism, in what has been referred to as "standardization of personhood" through the diffusion of rights and the notion of science and education (Thomas, Meyer, Ramirez and Boli 1987). Another is the growing emphasis on economic rationality and the construction of means-ends chains in professional contexts (Scott and Meyer 1994).

Neither of these two dimensions appears to offer the most promising research topic. The adoption of the *acquis* in the first, concrete sense is advancing at a rapid pace. The states joining the EU in 2004—especially Hungary, Estonia and Slovenia—have since long transposed the bulk of Community law and wider EU regulations. In the second, abstract dimension of the term *acquis* it is, conversely, debatable whether EU enlargement will make a great difference to CEE societies. As pointed out by 'world society' sociologists among others, candidate countries share with Western Europe and North America most ideas and values about agency, rationality, science, progress and the state (Scott and Meyer 1994). Returning to the operating system analogy, 'the West' may possess a later version of the same 'software,' but certainly not a different one altogether.[5] Despite communism, nor did the majority of CEEC's ever truly depart from the Roman, continental tradition of legal system.[6]

However, an intermediate dimension of the loosely termed *acquis* can also be identified.[7] It is presumably this category that the EUI working group members had in mind when they concluded that the project of eastwards enlargement, in order to be truly effective, needs to be sustained for a considerable period. While not expressly mentioning the existence of a third intermediate dimension, the implicit notion of a social process by which the adoption of EU

[5] I thus believe that Sztompka, in declaring 1989 as "a major cultural and civilizational break" overstates the historical rupture when it comes to the candidate states (Sztompka 1996: 120).

[6] Georg Brunner, "Was ist sozialistisch am sozialistischen Recht?," pp. 187-215 in Paul Hofman, Ulrich Meyer-Cording and Herbert Wiedeman (eds.), *Festschrift für Klemens Pleyer zum 65. Geburtstag* (Köln: 1986).

[7] Although their conceptual usage is sometimes confusing, this line of reasoning seems compatible with the intermediate 'system level' of comparable legal cultures identified by van Hoecke and Warrington 1998: 532-536.

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

regulations transforms the existing politico-legal culture is awarded great prominence in the analysis. The report says it will require "a long term effort to ensure that an *acquis* which secures the EU's, and potentially the continent of Europe's status, as an evolving legal community, is firmly embedded within the legal, constitutional and political cultures of each CEEC" (Krenzler et al. 1998: 28). The deeper and longer-term significance of EU enlargement would thus be that it provides safeguards that help 'anchor' democracy, free markets, rule of law and civil society in the former communist states. In the vein of the same analogy, the *acquis* would constitute the actual 'chain.'

Institutional Transformation in Postcommunist Societies

Optimism and pessimism as to the prospects of embedding democracy and the rule of law in Central and Eastern Europe have waxed and waned over the past fifteen years. In the mid-1990s predictions about further democratization and transition—one increasingly spoke of 'democratic consolidation'—were typically bleak when considering dimensions related to the operation of political and legal institutions. Evidently influenced by electoral victories of excommunist political parties in the region, scholars made up lists of impediments to democratic consolidation with reference to the difficulties to transform what Tocqueville had called 'habits of the heart,' at least beyond the elite level (Jowitt 1992, Holmes 1997: 16-19). This process would require several generations to complete, it was asserted (Kornai 1993: 62). A decade later, it is equally easy to find judgments playing down this problematic or referring to them as largely technocratic or budgetary challenges (Dragneva and Millan 2002/2003: 205-207).[8]

Rarely specifying concepts like political and legal culture into fine-tuned analytical categories, in both cases commentators nevertheless tend to conflate the three dimensions of *acquis* mentioned above. In terms of policy prescriptions, the transposition of the *acquis* is already occurring at a high pace. There is little reason to anticipate that transitional difficulties in this respect will be fundamentally different than they were in the case of Spain, Portugal and Greece, countries that joined the Community at the same time as they were undergoing democratization. Because the *acquis* has accumulated exponentially, the administrative and judicial challenge is certainly greater today than a generation ago. At the same time, the annual progress evaluations performed by the Commission demonstrate that the *acquis communautaire*, as well as EU soft law, has already come a long way toward being integrated into the respective national legislations.

For reasons cited above, it also seems reasonable to concur with 'world society' sociologists that, in a more abstract sense, there is little point in categorizing the CEEC's as forming a cultural entity separate from 'the West.' The candidate states, with the possible (and then only partial) exception of Turkey, share a long experience of 'modernity' and 'civilization.' Considering notions of agency, rationality, science, progress and the state, CEE societies resemble many other parts of the world. Today modernity and Western civilization impact on all corners of the world, though presumably more directly on rich industrialized regions with mass education, on elite strata in society, and on capitalist business practices.

Yet since communism exerted long-term influence over the functioning of politico-legal organization and practice, we should at least temporarily expect significant incompatibilities between pre-integration political and legal institutions and those implicit in the *acquis* presently introduced to the CEEC's (Schalast 2001: 270, Cameron 2004). The inconsistencies

---

[8] I may be slightly overstating the optimism of Dragneva and Millan, who have conducted research in the field of Hungarian and Polish accounting law and practices, as they also identify serious transitional problems.

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

ought to persist in constitutional law, in judicial principles related to the rule of law, as well as in administrative practices associated with democratic governance. Judging from the available scholarship on institutional change, entrenched features of organization and practice in this sphere are enduring and amenable to change only over time. Similarly drawing on literatures on political and legal culture, 'habits of the heart' are unlikely to be superseded by those associated with the *acquis* (in the wide sense) soon after actual EU accession.

In any specific context, however, the actual degree of 'stickiness' of past habits remains to be demonstrated. In order to be able to rigorously analyze elements of culture, it is first of all necessary to specify a set of concepts that delimit the subject and focus the investigation (Jepperson and Swidler 1994). In my own view, empirical research on the transfer of the *acquis* would do well in focusing on the intermediate dimension of politico-legal culture. As becomes clear from the argument above, this is an outline of a study of law and politics by means of a sociological methodology. It suggests that the otherwise deep divide between the disciplines of law and politics may be provisionally bridged through the concept of culture, in a sociological vein frequently applied in the study of political or legal institutions.

In traditional social science terminology, the independent variable would consist of 'EU templates of organization and practices' to which CEE societies are required to adapt.[9] This variable suits the purpose of a narrow concept that captures cultural elements precisely at the third, intermediate level of abstraction and historical timeline. In the field of construction, the word template has two meanings relevant to this intermediate role. First, a template can be a gauge, pattern or mold used as a guide to the form of a piece being made. Second, it can be a short piece or block placed horizontally in a wall under a beam to distribute its weight or pressure, for instance over a window or a door.

Drawing on comparative law as well as comparative politics research, the dependent variable would be the 'politico-legal culture' of CEE societies. Modifying a definition of legal culture advanced by Lawrence Friedman—by adding a political dimension and expanding its reach beyond public opinion—a politico-legal culture will refer to

> ideas, values, expectations and attitudes towards politics, law and politico-legal institutions, which agents and clients of such institutions hold

(original definition in Friedman 1997: 34)

Mediating (or intervening) between the independent and dependent variables would be the existing political and legal institutions of the CEEC's. Encompassing formal organization and informal constraints, institutions that undergo dynamic transformation constitute the crucial theoretical, methodological and empirical pivot of the project. Moreover, since there is little prospect that empirical research can establish an unambiguously clear link between the independent and dependent variables, the argument will need to unfold in two stages. In either stage a connection between one variable and the (mediating) political and legal institutions of CEEC's will be established.

A Research Agenda

We have thus defined politico-legal culture as consisting of "ideas, values, expectations and attitudes towards politics, law and politico-legal institutions, which agents and clients of such institutions hold." In the context of the eastward enlargement of the EU, templates are

[9] This seems to be in line with the basic typology suggested by Grabbe 2001: 1022-1023.

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

simultaneously molds and supporting blocks, linking abstract notions of modernity with concrete policy prescriptions. Templates are cultural elements that often directly pertain to the institutions of democracy, the market economy and the rule of law. For the most part, these templates possess legal force through the *acquis communautaire* or the broader 'EU *acquis*.' But a strict Weberian delimitation between sociological 'conventions' and law, or between soft and hard *acquis*, seems inappropriate in the context of EU enlargement. In CEEC's both are often seen as part of the package, as 'external criteria of worth' that need to be internalized, and are thus perceived as non-negotiable (Meyer and Rowan 1991, Papadimitriou 2002: 7).

Furthermore, EU templates implicitly harbor a number of so-called general principles of law. Derived from a variety of sources but above all from the Community Treaties and the legal systems of the member states, the general principles of law became known as such through the jurisprudence of the European Court of Justice, either attributing broader application to specific Community provisions or deducing general principles from the shared acceptance by the legal systems of most member states. Hartley enumerates human rights, legal certainty, proportionality, equality, the right to a hearing and legal professional privilege as belonging to the most important general principles of law relevant to Community law (Hartley 2003: 133-158). In the treaties proper, there are at this stage merely vague references to the general principles of law.

Even if we now have managed to narrow down a vast politico-legal cultural realm to a more limited theme, specific topics and research questions remain to be formulated. For my own purposes, I choose to focus on what can be conceived of as the most consequential building blocks of institutional culture in CEEC's. Given the communist legacy in law and politics, three templates of politico-legal organization and practice are considered worthy of particular attention in the accession states. These three templates represent the relationships between different institutional *spheres*, between institutional *subjects*, as well as between institutional *agents* and *clients*.

By institutional *spheres* I mean those of politics, economics and law. Claus Offe speaks of the importance of 'horizontal differentiation' in regard to the purpose of consolidating democracy in transition societies. Simply put, the autonomy and integrity of institutions within different spheres need to be bolstered. A measure of successful differentiation, according to Offe, is "the degree of insulation of institutional spheres from each other and the limited convertibility of status attributes from one sphere to another" (Elster at al 1998: 31).

The problem of maintaining boundaries between institutional spheres is of course not restricted to Central and Eastern Europe. Pressures exerted by political decisionmakers on magistrates, or by lobbyists—acting on the part of major corporations—who try to subvert the legislative process, belong to the classic problems of democratic government. Due to their specific legacy, though, there are reasons to expect such demarcations to present a bigger challenge to postcommunist countries. For half a century, the communist party was at the core of government in Central and Eastern Europe, and its influence permeated practically all other institutions. Higher officials in the civil service, in the economic sector, in the judiciary, in sciences and even in the arts, were typically held by communist party members. Few if anybody was appointed to higher office without at least the implicit consent of the party. The communist party reached almost everywhere except into tightly knit social units such as families and circles of close friends, dissident groups and certain religious institutions.

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

Clearly, the pervasive influence of the communist party and its most prominent representatives is hardly a background conducive to the autonomy and integrity of the three major institutional spheres. Widespread corruption, clientilism, systematic violation of economic legislation or exploitation of the ineffective regulation has affected all transition societies (Sajó 2002, Malovà and Haugton 2002). New chains of command, financial dependencies and political relationships are being forged, unsettling life within each of the three institutional spheres mentioned. Because of the many lingering uncertainties as to establishing and upholding the precise demarcation between them, 'horizontal differentiation' is only slowly attained. In the meantime, the power and social status associated with political office easily translates into influence over business transactions or court cases. Similarly, corporate executives are in a position to influence parliamentarians and local government officials, whereas high magistrates may be tempted to compromise their judicial powers in exchange for political or economic gain.

By institutional *subjects* I mean key units of the political system. Whereas the relationships between institutional subjects mainly are regulated by national legislation over which the *acquis communautaire* has no direct influence, such as the constitution, there are at least two exceptions which implicate the EU and sub-state regional levels. It is quite clear that 'supremacy' and 'direct effect' by virtue of the EU association agreements have become directly relevant for important areas of public and civil law (Evans 1996, Hartley 2003: 197-242) of the CEEC's even before actual accession. The second exception relates to the principle of 'subsidiarity,' laid down in the Maastricht Treaty of 1992. Although the implications of subsidiarity in many respects remain unclear to candidate and member states alike, it is already affecting relationships between certain categories of institutional subjects. As a result, subsidiarity and the legal standing of central government toward regions and municipalities represent, politically as well as legally, a complex field in the makeup of candidate states (Hughes et al. 2002, Innes 2002).

Aside from the *acquis communautaire* proper, however, general principles of law pertaining to the division of powers, hierarchy of rules, and scope of mandate can be regarded as implicit in the wide conception of the *acquis*. Vertical and horizontal friction between key institutional units exists in every politico-legal landscape, but a newly established system is arguably more vulnerable to political turbulence and legal challenge. While typically not siding with any particular institutional subject or interest, prominent representatives of EU bodies or individual governments have on occasion urged antagonists in a certain conflict to consider reconstructing the organizational setup to reduce the likelihood of such confrontation. In terms of so-called 'soft *acquis*,' some recommendations which indirectly might clarify the relationships between institutional subjects have also been made available. In particular, a significant portion of the enhanced pre-accession aid disbursed in recent years was used to bolster the judiciary by a variety of means, such as training programs, technical assistance, and development of modern civil service legislation.

By institutional *agents* I mean administrative and legal branches of government, whose activities are primarily regulated by national legislation. Institutional *clients* refer to citizens, businesses and other legal persons who need the collaboration of institutional agents in order to operate effectively. An analysis of the relationship between institutional agents and clients inevitably shifts the focus to implementation of legal and public administration reform and to the interface between government and the citizenry. Given our ambitions to discern changes in politico-legal culture beyond elite perceptions, this template is of considerable importance.

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

Under communism, the operation of the judiciary and public administration suffered from a number of deficiencies in terms of rule of law, democracy and efficiency. The hard *acquis* includes a few sweeping requirements in this respect, for instance through the Amsterdam Treaty amendments introducing a suspension of membership rights procedure. There are also relevant presuppositions in the justice and home affairs chapter of the *acquis*, and in the overall obligation to transpose and implement European legislation. A number of principles integrated into the *acquis* govern specific areas, such as competition law. Perhaps equally importantly, though, a number of soft law documents entail fairly precise criteria for assessing progress in this field.[10] Among the objectives of assistance extended in this field are the improvement of legal-procedural qualities, such as proportionality and legitimate expectations in administrative practice (Schalast 2001). Other qualities, like transparency and accountability of government, are tied to democratic values (Meyer-Sahling 2002, Papadimitriou 2002).

Supposedly, these three templates represent major building-blocks in the establishment of a judicial and administrative capacity, of the rule of law, and of democracy at a level comparable to that of the EU member states. The process is well underway, and in terms of transposition of laws and other prerequisites it had by May 2004 made considerable progress in each candidate state. It is quite likely, however, that the debate about actual implementation and realization of the subtler qualities of democratic governance and legality merely has begun (Cameron 2004).

I would therefore like to conclude by mentioning three areas in which such research might make a contribution. First, I believe it is overwhelmingly obvious that social scientists and legal scholars need to develop theories about contemporary phenomena of considerable importance. In the coming years on the European continent, few challenges are greater than that of the EU's eastern enlargement. The success or failure of enlargement can arguably make or break the European project as a whole. But also beyond the question of enlargement, questions about the culture of political and legal institutions are of consequence for other projects on the EU's present agenda. They may affect the prospects of enhanced cooperation in home and justice affairs, further implementation of the ambitious Schengen agreement, the feasibility of forging workable agreements with non-member neighbors, and other commitments.

Second, within the confines of political science theorizing, we will benefit from bridging the gap between policy studies and grand theory in European studies. As noted above, there are only few research programs with a mid-range theoretical ambition, and fewer still devoted to the issues of enlargement. Similarly, it is still very unusual that research projects cross the boundary between law and politics in European studies. I believe that the proposed focus on 'politico-legal culture' allows for such transdisciplinary work.

Third, issues linked to the culture of political and legal institutions are often sensitive and contested, and therefore warrant independent and probing research. Borders between 'European' and 'non-European' cultures are often perceived as highly stable if not absolute. Several former and present European statesmen have made remarks to the effect that one or the other of the candidate states in terms of 'culture' is incompatible with, or at least ill-equipped to join, the EU.[11]

[10] One example is the 2001 SIGMA report on good governance (OECD 2001).

[11] For example, Helmut Schmidt, Social Democratic Chancellor of the Federal Republic of Germany in the 1970s, in a recent book describes European political culture as related to "religion, philosophy, science,

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

Rather than such macro-level conceptualizations, a mid-range approach—albeit coupled to abstract and concrete levels—would treat institutional culture in a sense more immediately relevant to enlargement and European integration. One can also utilize an accumulating literature, not yet systematized, on developments within individual countries. Indeed, it can also provide an independent 'check' on the EU Commission's own assessments of the candidate countries' progress in integrating the *acquis* and in creating 'administrative capacity' to implement them.

--Bauman, Zygmunt, *Globalization: The Human Consequences* (London: Polity, 1998).
--Bieler, Andreas, "The Struggle over EU Enlargement: A Historical Materialist Analysis of European Integration," in *Journal of European Public Policy*, vol. 9, no. 4 2002, special issue on European Union Enlargement—Theoretical and Comparative Approaches.
--Böröcz, József, Paper presented at the ASN Sixth Annual World Convention, Columbia University (April 5-7, 2001).
--Cameron, David R., "The Tough Trials Ahead for the EU's Eastern Expansion," pp. 119-126 in *Current History*, vol. 103, issue 671, March 2004.
--Cowles, Maria et al., *Transforming Europe: Europeanization and Domestic Change* (Ithaca: Cornell University Press, 2001).
--Croft, Stuart, *The Enlargement of Europe* (Manchester: Manchester University Press, 1999).
--EC Commission, "Agenda 2000—For a Stronger and Wider Union," *Bulletin of the European Union*, supplement 5/97.
--EC Commission, *Towards an Enlarged Union—Strategy Paper and Report of the European Commission on the progress of each of the candidate countries towards accession*, COM (2002) 700 final, 9 October, accessed at http://www.europa.eu.int/comm/enlargement/report2002/strategy_en.pdf.
--Elias, Norbert, *The Civilizing Process* (London: Blackwell, 2000 [1939]).
--Elster, Jon, et al., *Institutional Design in Post-Communist Societies* (Cambridge: Cambridge University Press, 1998).
--Emmert, Frank, "Administrative and Court Reform in Central and Eastern Europe," pp. 288-315 in *European Law Journal*, vol. 9, no. 3, July 2003.
--a)Engelbrekt, Kjell, "Multiple Asymmetries: The European Union's Neo-Byzantine Approach to Eastern Enlargement," in *International Politics*, vol. 39, March 2002.
-- b)Engelbrekt, Kjell, *Security Policy Reorientation in Peripheral Europe: A Comparative-Perspectivist Approach* (Aldershot: Ashgate, 2002).
--Evans, Andrew, *The Integration of the European Community and Third States in Europe. A Legal Analysis* (Oxford: Clarendon Press, 1996).
--Friedman, Lawrence M., "The Concept of Legal Culture: A Reply," pp. 33-40 in David Nelken (ed.), *Comparing Legal Cultures* (Aldershot: Dartmouth, 1997).
--Gialdino, Carlo Curti, "Some Reflections on the *Acquis Communautaire*," pp. 1089-1121 in *Common Market Law Review*, vol. 32, no. 5, 1995.
--Goetz, Klaus H. et al. in *Journal of European Public Policy*, vol. 8, no. 6 2001, special issue on Executive Governance in Central and Eastern Europe.
--Hartley, T.C., *The Foundations of European Community Law* (Oxford: Oxford University Press, 2003), 5th edition.
--Holmes, Leslie, *Post-Communism: An Introduction* (Oxford: Polity, 1997).
--Hughes, James, Gwendolyn Sasse and Claire Gordon, "The Ambivalence of Conditionality: Europeanization and Regionalization in Central and Eastern Europe," paper presented at the ECPR Joint Sessions 2002, Workshop 4.
--Innes, Abby, "The Changing Power of the State in Eastern Europe," paper presented at the ECPR Joint Sessions 2002, Workshop 4.
--Joerges, Christian, "Das Recht im Prozess der europäischen Integration," pp. 73-108 in Markus Jachtenfuchs and Beate Kohler-Koch (eds.), *Europäische Integration* (Opladen: Leske and Budrich, 1996).
--Jorgensen, Knud Erik, "The Social Construction of the Acquis Communautaire: A Cornerstone of the European Edifice," *European Integration online Papers (EIoP),* vol. 3, no. 5, 1999, accessed at http://eiop.or.at/eiop/texte/1999-005.htm.
--Jori, Mario, "Paradigms of Legal Science," pp. 230-254 in *Rivista del filosofia del diritti*, vol. 67, no. 2, 1990.
--Jowitt, Kenneth, *New World Disorder: The Leninist Extinction* (Berkeley, California: University of Californa, 1992).
--Kahn-Freund, Otto, "On Uses and Misuses of Comparative Law," pp. 1-27 in *Modern Law Review*, vol. 37, January 1974.
--Krenzler, Horst Günther and Michelle Everson, "Preparing for the *Acquis Communautaire*," Report of the Working Group on the Eastward Enlargement of the European Union (Fiesole: European University Institute, 1998).
--Malovà, Darina and Tim Haughton, "Making Institutions in Central and Eastern Europe, and the Impact of Europe," *West European Politics,* special issue on The Enlarged European Union, vol. 35, 2002.

---

literature, music, architecture, painting." On that basis, Schmidt recommends taking Turkey, Russia, Ukraine, Belarus, Bulgaria and Romania off the list of countries compatible with mainstream European political culture (Schmidt 2000).

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone

--Maresceau, Marc (ed.), *Enlarging the European Union: Relations between the EU and Central and Eastern Europe* (Harlow: Longman, 1997).
--Mayhew, Alan, *Recreating Europe: the European Union's Policy towards Central and Eastern Europe* (Cambridge: Cambridge University Press, 1998).
--Meyer, John W. and W. R. Scott, "International Organizations: Formal Structures as Myth and Ritual," pp. 39-62 in DiMaggio and Powell, *The New Institutionalism in Organizational Analysis* (Chicago: University Of Chicago Press, 1991).
--Meyer-Sahling, Jan-Hinrik, "Personnel Policy Regimes, Political Discretion and Civil Service Reform in Central and Eastern Europe," paper presented at the ECPR Joint Sessions 2002, Workshop 4.
--Nicolaïdes, Phedon et al., *A Guide to the Enlargement of the European Union: A Review of the Process, Negotiations, Policy Reforms and Enforcement Capacity* (Maastricht: European Institute of Public Administration, 1999).
--Nonet, Philippe, and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New Brunswick, NJ: Transactions Publishers, 2000).
--OECD, "Improving Policy Instruments through Impact Assessment", *SIGMA Paper No. 31*, 17 May 2001, accessed at http://www.oecd.org/dataoecd/19/23/2412402.pdf.
--Offe, Claus, "Capitalism by Democratic Design: Democratic Theory Facing the Triple Transition in East Central Europe, pp. 865-892 in *Social Research*, vol. 58, no. 4, 1991.
--Ott, Andrea, "Fundamental and Basic Principles," pp. 13-28 in Andrea Ott and Kirstyn Inglis (eds.), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (T.M.C. Asser Press, 2002).
--Papadimitriou, Dimitris G., "Exporting Europeanisation: EU Enlargement, the Twinning Exercise, and Administrative Reform in Eastern Europe," paper presented at ECPR Joint Sessions 2002, Workshop 4.
--Pridham, Geoffrey, "The International Context of Democratic Consolidation: Southern Europe in Comparative Perspective," pp. 166-203 in Richard Gunther et al. (eds.), *The Politics of Democratic Consolidation: Southern Europe in Comparative Perspective* (Baltimore: The John Hopkins University Press, 1995).
--Radaelli, Claudio, "The Europeanization of Public Policy: Theory, Methods, and the Challenges of Empirical Research," in Kevin Featherstone and Claudio Radelli, *The Politics of Europeanisation* (Oxford: Oxford University Press, 2003).
--Rose, Richard et al., *Democracy and Its Alternatives: Understanding Post-Communist Societies* (Baltimore Md.: Johns Hopkins University Press, 1998).
--Sajó, András, "Clientilism and Extortion: Corruption in Transition," pp. 1-22 in Stephen Kotkin and András Sajó (eds.), *Political Corruption in Transition: A Skeptic's Handbook* (Budapest: Central European University Press, 2002).
--Schalast, Christoph, "Erfahrungen der Entwicklungszusammenarbeit bei der Unterstützung der Rechtsreform in den Transformationsländer Mittel und Osteuropas und der GUS," pp. 263-273 in *Osteuropa Recht*, vol. 47, no. 4, (August) 2001.
-- Schimmelfenning, Frank, and Ulrich Sedelmeier, "Theorizing EU Enlargement: Research Focus, Hypotheses, and the State of Research," in *Journal of European Public Policy*, vol. 9, no. 4 2002, special issue on European Union Enlargement—Theoretical and Comparative Approaches.
--Schimmelfenning, Frank, and Ulrich Sedelmeier et al., ECPR Joint Sessions Workshop 4, "Enlargement and European Governance," accessed at http://www.essex.ac.uk/ecpr/jointsessions/turin/workshops.htm.
--Schmidt, Helmut, "Wer nicht zu Europa gehört," *Die Zeit*, no. 41, 2000, Internet edition accessed at http://www.zeit.de/2000/41/Politik/200041_selbstbehauptung.html.
--Scott, W. Richard and John W. Meyer, *Institutional Environments and Organizations: Structural Complexity and Individualism* (London: Sage, 1994).
--Sztompka, Piotr, "Looking Back: The Year 1989 as a Cultural and Civilizational Break," pp. 115-129 in *Communist and Post-Communist Studies*, vol. 29, no. 2, 1996.
--Thomas, George M., John W. Meyer, Francisco Ramirez and John Boli (eds.), *Institutional Structure: Constituting State, Society and the Individual* (Newbury Park: Sage, 1989).
--van Hoecke, Mark, and Mark Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law?," pp. 495-536 in *International and Comparative Law Quarterly*, vol. 47, no. 3, July 1998.
--Waever, Ole, *Concepts of Security* (Copenhagen: University Institute of Political Science, 1997).
--Watson, Alan, *Legal History and a Common Law for Europe* (Stockholm: Arne Löfgren Offset, 2001).
--Weber, Max, *Wirtschaft und Gesellschaft* (Tübingen: J.C.B. Mohr, 1980 [1921]), 5th revised edition.
--Weiler, Joseph H. H., *The Transformation of Europe* (Princeton, NJ: Yale University Press, 1991).
--Wincott, Daniel, "The Role of Law or the Rule of the Court of Justice? Judicial Politics in the European Community," pp. 597-609 in *Journal of European Public Policy*, vol. 2, no. 4, 1995.

epsNet accepts no responsiblity for the views expressed in this paper, which are the author's alone