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Rule of Law in Central and Eastern Europe

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Frank Emmert

Abstract

Pursuant to the same logic that prevailed when Jean Monnet and Robert Schuman reached out to Germany after the end of World War II, and in keeping with the promise made in the Preamble of the founding treaty, the EU now reached out to Central and Eastern Europe after the end of the Cold War and offered integration. In recognition of the difficulties for the EU on the one side of absorbing a large number of countries without jeopardizing the functioning of the institutions, and the difficulties for the Central and Eastern European Countries ("CEECs") on the other side of transforming themselves into modern democracies with rule of law and functioning market economies, a number of pre-conditions for accession and a number of support schemes for the transformation were established. The present Article analyzes those pre-conditions that were supposed to promote the development of rule of law, as well as those schemes that were intended to support this development. It concludes that first, the concept of "rule of law," although often quoted, is poorly defined and understood and this is an obstacle for countries aspiring to build a system based on rule of law. Second, Western support for the transformation in Central and Eastern Europe was and continues to be a combination of trial and error with a lack of appreciation of historic precedent and lessons.

ARTICLES

RULE OF LAW IN CENTRAL AND EASTERN EUROPE

*Frank Emmert**

[T]he Pursuit of Justice
is itself
the pursuit of happiness
Ralph Nader¹

INTRODUCTION

The European Community for Coal and Steel (Paris, 1951), as well as the European Economic Community and the European Atomic Energy Community (Rome, 1957), were created first and foremost to secure peace and prosperity in Europe.² Western Europe, to be precise, since the Central and Eastern European Countries (“CEECs”) were already prevented from participating by the onset of the Cold War and their location in the part of Europe that Churchill had so generously ceded to Stalin in Moscow and Yalta in 1944 and 1945.³

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1. See Ralph Nader, Green Party Presidential Candidate, Wasting Your Vote, Wasting Our Democracy (Aug. 23, 2000), <http://www.ratical.org/co-globalize/RalphNader/082300.html>.

2. See TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* 157-58 (2005).

3. Churchill’s strategy of buying Russian goodwill and acquiescence of British dominance in the Eastern Mediterranean with territories in Central and South Eastern

Western European integration achieved its primary purposes rather handsomely and by the mid-1980s, the Member States of the Communities were not only experiencing an unprecedented standard of living but war between the arch-enemies Germany and France had become unthinkable.⁴ But then came the end of the Cold War and the challenge of extending peace and prosperity to all of Europe. In this respect, the brutal war that accompanied Yugoslavia's dismemberment from 1991 to 1999,⁵ right in the backyard of the European Union ("EU"),⁶ provided a horrible reminder that in Europe peace must never be taken for granted.

Pursuant to the same logic that prevailed when Jean Monnet and Robert Schuman reached out to Germany after the end of World War II,⁷ and in keeping with the promise made in the Preamble of the founding treaty,⁸ the EU now reached out to

Europe that were not his to give has been well documented. On the so-called "Percentages Agreement" see, for example, ROY JENKINS, CHURCHILL: A BIOGRAPHY 759-60 (2001); JUDT, *supra* note 2, at 101; Richard M. Ebeling, *Covering the Map of the World: The Half-Century Legacy of the Yalta Conference*, THE FUTURE OF FREEDOM FOUNDATION, <http://www.fff.org/freedom/0495b.asp>. In January 1945, before going to Yalta, Churchill supposedly said "[m]ake no mistake, all the Balkans, except Greece, are going to be Bolshevized, and there is nothing I can do to prevent it. There is nothing I can do for Poland, either." JUDT, *supra* note 2, at 100.

4. See, e.g., Desmond Dinan, *Fifty Years of European Integration: A Remarkable Achievement*, 31 FORDHAM INT'L L.J. 1118, 1118 (2008). Indeed, (Western) Europe has never before experienced a period of more than five decades without any major wars. See Cristobal Alvarez, *A Military History Timeline Of War And Conflict Across The Globe 3000 B.C. To A.D. 1999*, <http://www.warscholar.com/Timeline.html> (last visited Nov. 1, 2008) (based on GEORGE C. KOHN, *DICTIONARY OF WARS* (1999)).

5. "Between 1991 and 1999 hundreds of thousands of Bosnians, Croats, Serbs and Albanians were killed, raped or tortured by their fellow citizens; millions more were forced out of their homes and into exile . . . [there were] massacres and civil war on a scale not seen since 1945." JUDT, *supra* note 2, at 665. For the magisterial work on Yugoslavia's troubled political history see SABRINA P. RAMET, *THE THREE YUGOSLAVIAS: STATE BUILDING AND LEGITIMATION 1918-2005* (2006); for historic background see also REBECCA WEST, *BLACK LAMB AND GREY FALCON: A JOURNEY THROUGH YUGOSLAVIA* (1941).

6. Although technically not correct until the Treaty of Lisbon enters into force, the term "European Union" shall be used throughout this article instead of "European Community" for activities under the European Community Treaty ("ECT"), and the proper "European Union" activities under the Treaty on European Union ("TEU").

7. See JUDT, *supra* note 2, at 156-57.

8. The original Preamble of the 1957 ECT reads as follows:

DETERMINED to lay the foundations of an ever closer union among the peoples of Europe,

RESOLVED to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,

Central and Eastern Europe after the end of the Cold War and offered integration.⁹ In recognition of the difficulties for the EU on the one side of absorbing a large number of countries without jeopardizing the functioning of the institutions, and the difficulties for the CEECs on the other side of transforming themselves into modern democracies with rule of law and functioning market economies, a number of pre-conditions for accession and a number of support schemes for the transformation were established.

The present Article analyzes those pre-conditions that were supposed to promote the development of rule of law, as well as those schemes that were intended to support this development. It concludes that first, the concept of “rule of law,” although often quoted, is poorly defined and understood and this is an obstacle for countries aspiring to build a system based on rule of law. Second, Western support for the transformation in Central and Eastern Europe was and continues to be a combination of trial and error with a lack of appreciation of historic precedent and lessons.

I. *EVERYBODY AGREES THAT IT IS IMPORTANT
FOR CENTRAL AND EASTERN EUROPE—
BUT WHAT IS “RULE OF LAW?”*

Although everybody talks about it all the time, few people have provided and, indeed, few people seem to be able to provide a clear definition of what is meant by “rule of law.”¹⁰ There-

AFFIRMING as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples

. . . .

RESOLVED by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts.

Treaty establishing the European Economic Community pmbl., Mar. 25, 1957, 298 U.N.T.S. 11 (emphasis added).

9. As Jacques Delors, former President of the EU Commission said, “*Si nos générations ne répondent pas au devoir qui est le leur aujourd’hui, d’étendre leurs valeurs de paix et de compréhension mutuelle à l’ensemble de l’Europe, elles failliront devant l’histoire.*” Jacques Delors, *Opening Session*, in *THE EUROPEAN UNION IN A CHANGING WORLD* 15, 17 (Eur. Comm’n ed., 1998).

10. The lack of a clear understanding of “rule of law” has been widely acknowledged. See, e.g., Hague Inst. For Internationalisation of Law, *2007 Rule of Law Inventory Report* (2007), available at http://www.hiil.org/uploads/File/1-947-Rule_of_Law_Inventory_Report_2007.pdf [hereinafter *Rule of Law Inventory Report*]. The report includes a

fore, the first Part of this Article will be an attempt at a comprehensive and workable definition that should make future discussion of the subject less fuzzy and support more effective efforts at promoting “rule of law” in certain countries and parts of the world, including but not limited to Central and Eastern Europe.

What may be the first modern and systematic analysis of the concept of “rule of law” was provided by the famous English jurist A.V. Dicey in his landmark book *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* in 1885.¹¹ Dicey identifies three essential elements of “rule of law,” namely: (1) no person can be punished or “lawfully interfered with” by the public authorities unless the person is in breach of the law and that any and all such interference by the government in private affairs must be authorized by law; (2) no person is above the law and that everyone, regardless of rank and status, is subject to the full range of the ordinary laws of the land, and finally; (3) there is an essential set of rights of the person based on general principles of law, whether or not they are also expressed in the form of a bill of rights.¹² As we will see, this definition remains remarkably useful today.

Historically, the principle of rule of law evolved in opposition to arbitrary governance, either by a totalitarian ruler or king, or by the mob. Hence it expresses first and foremost the notion that nobody is above the law and that not only the people but even their government must follow predetermined and publicly available rules.¹³ The U.S. State Department, one of the big-

bibliography on “rule of law” of almost 100 pages. *Id.* at 34. “Rule of law” is not alone in this fate it seems. “Good governance” is another concept that is much used and little defined. See Friedl Weiss, *Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison*, 30 *FORDHAM INT’L L.J.* 1545, 1547 (2007).

11. See generally A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (10th ed. 1961), available at http://www.constitution.org/cmt/avd/law_con.htm (last visited Nov. 1, 2008).

12. See *id.* at 187-203.

13. For early examples see the *MAGNA CARTA* chs. 38-40, imposing certain limits on King John of England, in particular with regard to the writ of habeas corpus, and the philosophy embodied in SAMUEL RUTHERFORD, *LEX, REX, OR, THE LAW AND THE PRINCE: A DISPUTE FOR THE JUST PREROGATIVE OF KING AND PEOPLE* (1843) in which he reverses the previous paradigm of Rex Lex. Rutherford is said to have been influential on Locke and America’s founding fathers. See JOHN COFFEY, *POLITICS, RELIGION AND THE BRITISH REVOLUTIONS: THE MIND OF SAMUEL RUTHERFORD* 12 (1997). By contrast, the absolute or absolutist monarch is exemplified by Louis XIV (1638-1715), the sun king, who supposedly said of himself “*l’Etat, c’est à moi*,” “the State is me,” or “I am the State,”

gest sponsors of “rule of law” promoting projects around the world, claims that,

The rule of law suggests that if our relationships with each other (and with the state) are governed by a set of relatively impartial rules—rather than by a group of individuals—then we are less likely to become the victims of arbitrary or authoritarian rule. Note here that the political obligation implied by the rule of law applies not only to the rights and liberties of subject and citizen but also with equal claim to rulers and governors. By precluding both the individual and the state from transcending the supreme law of the land, the framers [of the Constitution] constructed a protective layer over individual rights and liberties.¹⁴

Other sources and organizations emphasize the significance of a separation of powers and a system of checks and balances between them. Equality before the law, democratic elections, and free media are also often quoted as essential elements of the rule of law, although this would seem to conflate or confuse democracy and rule of law. The following is also from the U.S. State Department:

The rule of law is a fundamental component of democratic society and is defined broadly as the principle that all members of society—both citizens and rulers—are bound by a set of clearly defined and universally accepted laws. In a democracy, the rule of law is manifested in an independent judiciary, a free press and a system of checks and balances on leaders through free elections and separation of powers among the branches of government.

Although a written constitution is not a necessary component of democracy—for example, Great Britain does not have one—in the United States, the rule of law is based primarily on the U.S. Constitution and on the assurance that U.S. laws—in conjunction with the Constitution—are fair and are applied equally to all members of society.¹⁵

See Herbert H. Rowen, “*L’Etat C’est à Moi*”: *Louis XIV and the State*, 2 *FRENCH HIST. STUD.* 83, 83 (1961).

14. Greg Russell, *Constitutionalism: American and Beyond*, <http://usinfo.state.gov/products/pubs/democracy/dmpaper2.htm> (last visited Nov. 1, 2008).

15. See Alexandra Abboud, *The Rule of Law Provides Foundation for Democracy* (Jan. 18, 2006), <http://www.america.gov/st/washfile-english/2006/January/20060118165638maduobbA8.491153e-02.html>.

It is doubtful whether Washington's traditional emphasis on democracy, which can almost be summarized as "first introduce democracy and everything else will take care of itself," is indeed the best approach to the promotion of "rule of law" in other parts of the world. At the very least, this emphasis would seem to alienate the current government in an undemocratic country. Instead of working with the powers that be for gradual change and the development of "rule of law," Washington confronts undemocratic governments and labels them as the primary problem, thus denying them the opportunity to become part of the solution.¹⁶

Yet other sources and organizations target the importance of the judiciary for the rule of law. For example, the Center for the Rule of Law in Boston¹⁷ declares that

The nature of the judicial system is critical to the rule of law. Impartial judges, governed by clear legal rules, committed to enforcing the rules as written, independent of political influence are essential if law is to be a reliable guide to individuals and a constraint on those in power. The process for appointing judges to the courts needs to be removed from the realm of ordinary politics, where attention is focused excessively on a judge's supposed ideology rather than on demonstrated competence and propriety. It is necessary if legal rules are to be meaningful that judges are committed to applying laws written by others faithfully, and it is fair to ask if nominees to the courts have conducted their professional lives in a manner consistent with an expectation that they would perform the law application task assigned to our judiciary. It is not, however, proper to ask nominees to signal that they would support particular outcomes in certain cases. Judicial activism—the use of a judge's power to invent novel legal requirements that suit personal policy preferences rather than established legal commands—undermines the rule of law. So does the demand that judges barter implicit promises on future decisions for confirmation votes. In addi-

16. For further analysis see Frank Emmert, *Market Economy, Democracy, or Rule of Law? What Should Be Prioritized to Promote Development?*, in CHALLENGING BOUNDARIES: ESSAYS IN HONOR OF ROLAND BIEBER 104 (2007).

17. The Center is an independent academic research center chaired by Ronald A. Cass, the Dean Emeritus of Boston University School of Law, former Vice-Chairman of the United States International Trade Commission, and Chairman of the Federalist Society Practice Group on International Law and National Security. See Center for the Rule of Law: About Us, <http://rule-of-law.us/about/> (last visited Nov. 1, 2008).

tion to the judges, the rules governing the operation of the courts, the sorts of suits that courts will entertain, and the procedures used all affect the vitality of the rule of law.¹⁸

Again, we will have to see whether the judiciary does indeed play such a preeminent role when it comes to rule of law and, more importantly, which other elements of a legal system have to be in place to enable the judiciary to play the role assigned to it in this passage. In this respect, it will be argued that “rule of law” is first and foremost in the hands of the public administration and that the courts can only play the role of goalkeepers after the rest of the team has failed in its duties.

Then there are sources that seek to establish a necessary link between “rule of law” and good governance.¹⁹ The World Bank and the International Monetary Fund—and many others involved in law and development²⁰—have long held that without “rule of law” economic development will not and cannot be sustainable.²¹ Consequently, these organizations have introduced

18. Center for the Rule of Law: Judicial System, <http://rule-of-law.us/issues/judicial-system-international-business-trade/> (last visited Nov. 1, 2008). For an excellent discussion of the problems burdening the appointment of judges in the United States see Symposium, *Jurocracy and Distrust: Reconsidering the Federal Judicial Appointments Process*, 26 CARDOZO L. REV. 331 (2005), with contributions by over a dozen nationally recognized scholars.

19. See, e.g., Declaration of G8 Foreign Ministers on the Rule of Law, <http://www.mofa.go.jp/policy/economy/summit/2007/g8dec.pdf> (last visited Nov. 1, 2008). For academic analysis see, for example, Harry Seldadyo et al., *Governance and Growth Revisited*, 60 KYKLOS 279 (2007) (with further references).

20. On the “Law and Development Movement” of the 1960s and 1970s, see, for example, David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 74 (David M. Trubek et al. eds., 2006), available at <http://www.law.wisc.edu/facstaff/trubek/Rule-ofLaw.pdf> [hereinafter Trubek, *Development Assistance*]; Elliot M. Burg, *Law and Development: A Review of the Literature and a Critique of “Scholars in Self-Estrangement,”* 25 AM. J. COMP. L. 492 (1977); John Henry Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977); David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974); Brian Z. Tamanaha, Book Note, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT’L L. 470 (1995).

21. See generally *Rule of Law Inventory Report*, *supra* note 10; Press Release, International Monetary Fund, IMF Managing Director Rodrigo de Rato’s Statement at the Conclusion of his Visit to Chile (Sept. 2, 2004), available at <http://www.imf.org/external/np/sec/pr/2004/pr04185.htm>. These forces received a powerful boost with the fall of Communism and the beginning of reforms in Central and Eastern Europe, which led to the emphasis on “rule of law” in the transformation process and ultimately the present Article.

conditions into their financial aid packages that require adherence to key elements of “rule of law.”²²

The World Bank²³ has used different definitions for the term over time, and it is worth examining those a bit more closely. During the 1990s, while Ibrahim Shihata was General Counsel of the World Bank, “rule of law” meant that:

- a) [T]here is a set of rules which are known in advance,
- b) such rules are actually in force,
- c) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures,
- d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body, and
- e) there are known procedures for amending the rules when they no longer serve their purpose.²⁴

More recently, however, after Ko-Yung Tung became General Counsel of the World Bank in 2000, the definition of “rule of law” has shifted into the following:

- (1) the government itself is bound by the law;
- (2) every person in society is treated equally under the law;
- (3) the human dignity of each individual is recognized and protected by law; and
- (4) justice is accessible to all.

The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy.²⁵

What is immediately apparent is how Shihata’s definition is

22. See, e.g., Memorandum from The European Bank for Reconstruction and Dev., Political Aspects of the Mandate of the European Bank for Reconstruction and Development 4, <http://www.ebrd.com/pubs/insti/aspects.pdf>.

23. Barron estimates that the World Bank has spent some US\$2.9 billion on some 330 projects promoting “rule of law” around the world between 1990 and 2005. See Gordon Barron, *The World Bank & Rule of Law Reforms*, 9 (Dev. Studies Inst., London Sch. of Econ. and Political Sci., Working Paper No. 05-70, 2005), available at <http://www.lse.ac.uk/collections/DESTIN/pdf/WP70.pdf>.

24. IBRAHIM F.I. SHIHATA, *THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS* 85 (Franziska Tschofen & Antonio R. Parra eds., 1991).

25. THE WORLD BANK, LEGAL VICE PRESIDENCY, *INITIATIVES IN LEGAL AND JUDICIAL REFORM 2-3* (2004), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/03/01/000012009_20040301142827/Rendered/PDF/250820040Edition.pdf.

technical and neutral, while Tung's definition (re-)introduces a variety of values and a considerable measure of vagueness.²⁶ Some open-ended questions may illustrate the point: what is "justice?"²⁷ What are "fair laws?" What is "legitimacy?" Can a government promote "rule of law" without promoting "private sector growth?" What is the standard to be applied for "human dignity" and equality? Is this a Western standard or a universal standard? If it is universal, is the position of women in some Islamic societies compatible with it?²⁸ Finally, do we need to open these cans of worms before we can have useful and effective promotion of "rule of law?" Or do we risk overburdening the "rule of law" and turning it into the victim of its own success?

Similar to Ko-Yung Tung, yet other sources consider "rule of law" as *conditio sine qua non* for the protection of human rights and in particular the enforcement of rights.²⁹

26. In this context, Barron distinguishes *formal* definitions, which rely on objectively verifiable criteria and do not require adherence to any particular set of morals or values, from *substantive* definitions, which include the formal criteria but also insist on substantive qualities. See Barron, *supra* note 23, at 14.

27. On this point see, *inter alia*, Stathis Banakas, *A Global Concept of Justice—Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today's World*, 67 LA. L. REV. 1021 (2007).

28. Lest the reader jump to conclusions such as, "of course it is unacceptable that women are still not allowed to drive in Saudi Arabia," I shall give a more subtle example. Arab names frequently contain references to fathers, grandfathers and great grandfathers. See Patronymic—Arabic, <http://en.wikipedia.org/wiki/Patronymic#Arabic> (last visited Nov. 1, 2008). For example, the full name of an Egyptian by the name of Mohamed may well be Mohamed Ahmed Ali Mohamed, with the second, third, and fourth names referring to his male ancestors in direct line. The same rule applies to women, i.e., the full name of Mohamed's wife may well be Fatima Ismael Mohamed Ahmed, with her second, third, and fourth names referring to her male ancestors in direct line. At least in Egypt, it is not possible for either of them to include the names of their mothers, grandmothers, or great grandmothers in their name. This may seem discriminatory to readers in Western countries. However, we find a similar system of patronymic surnames in Lithuania where the daughter of Paulauskas will have the last name Paulauskaitė ("daughter of Paulauskas") until she gets married to Adamkus, at which point her last name will become Adamkienė ("wife of Adamkus"). See Lithuanian Name—Patronymic, http://en.wikipedia.org/wiki/Lithuanian_name#Patronymic (last visited Nov. 1, 2008). Similar patronymic systems of names continue to exist in Iceland and the Faroe Islands. See Icelandic Name, http://en.wikipedia.org/wiki/Icelandic_name (last visited Nov. 1, 2008). In Iceland, if Jon Stefansson ("Jon, son of Stefan") gets married to Katrin Vilhjálmsdóttir ("Katrin, daughter of Vilhjalm"), their daughter will have the last name Jónsdóttir and not Katrinsdóttir, and their son will be Jónsson and not Katrínsson. See also Ministry of Justice and Ecclesiastical Affairs, Information on Icelandic Surnames, <http://eng.domsmalaraduneyti.is/information/nr/125> (last visited Nov. 1, 2008).

29. For a good overview, see Randall Peerenboom, *Human Rights and Rule of Law:*

Most recently, a number of different organizations from different parts of the world have pooled their resources into the World Justice Project, “a multinational, multidisciplinary initiative to strengthen the rule of law worldwide.”³⁰ One of the activities of the World Justice Project is the compilation of a worldwide “Rule of Law Index” in which the organizers hope to include one hundred countries in the next three years.³¹ The Index is supposedly going to be “the first index that examines the rule of law comprehensively [while o]ther indices cover only aspects of the rule of law, such as human rights, commercial law, and corruption.”³² The following elements will be evaluated:

- The government and its officials and agents are accountable under the law.
- The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property.
- The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
- The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.³³

Given the broad range of organizations and individuals from different disciplinary backgrounds, the broad range of the criteria to be taken into consideration is hardly surprising. The question that needs to be asked, and hopefully answered, is whether this is not getting unnecessarily comprehensive and complicated. Arguably, the criteria are not only hard to measure but the organizers may well find numerous shortcomings even in the most developed countries and may end up with results that show that although some countries have more problems than others, nobody is perfect. This in turn may actually provide excuses for some of the worst of the perpetrators along the logic “if

What's the Relationship?, 36 *GEO. J. INT'L L.* 809 (2005); see also JEREMY MATAM FARRALL, *UNITED NATIONS SANCTIONS AND THE RULE OF LAW* (2007).

30. About the World Justice Project, <http://www.abanet.org/wjp/about.html> (last visited Nov. 1, 2008).

31. See The World Justice Project, Rule of Law Index, <http://www.worldjusticeproject.org/rule-of-law-index> (last visited Nov. 1, 2008).

32. *Id.*

33. *Id.*

even the United States does not do this or that, how can we possibly be expected to do so?"

Last but not least, the "rule of law" has also been made responsible for the proper functioning of a market economy.³⁴ In this context we can identify an important movement that emphasizes private property rights as a key component for the development of a market economy and links effective protection of such private property rights with "rule of law."³⁵

If the "rule of law" is a bit of everything to everyone, this would seem to explain at the same time its popularity as a slogan,³⁶ as well as the fact that the concept is increasingly in danger of becoming so vague as to become useless.³⁷ This raises the

34. This can be traced as far back as Max Weber. See Trubek, *Development Assistance*, *supra* note 20, at 74; see generally MAX WEBER, *MAX WEBER ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., Edward Shils & Max Rheinstein, trans., 1954).

35. Interesting work in this direction has been initiated by Professor Robin P. Malloy, Director of the Center on Property, Citizenship, and Social Entrepreneurism at Syracuse University College of Law. See Center on Property, Citizenship, and Social Entrepreneurism, <http://www.law.syr.edu/academics/centers/clbe/pcse.aspx> (last visited Nov. 1, 2008). The link is also supported by the so-called theory of "New Institutional Economics," which has identified poor protection of private property rights as one of the most important factors hampering development and growth. See, e.g., Douglass C. North, *The New Institutional Economics and Development* (Economics Working Paper Archive ("EconWPA"), Working Paper No. 9309002, 1993), available at <http://129.3.20.41/eps/eh/papers/9309/9309002.pdf>.

36. Brian Tamanaha, in his landmark study, *On the Rule of Law*, concludes that governments around the world can agree on very little these days, possibly less than ever before. Certainly there is no agreement about essential elements of democracy outside of Western democratic states, and any and all attempts at a universal catalog of human rights have either failed or resulted only in rather vague and non-binding declarations. Yet there seems to be one thing that everybody is able to endorse, namely that "rule of law" is a good thing and that it benefits everyone. See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 1* (2004). For a good overview of the literature on "rule of law" see generally *Rule of Law Inventory Report*, *supra* note 10. An equally good overview of organizations and projects around the world promoting "rule of law" is provided in The Secretary-General, *Report of the Secretary-General on the Rule of Law at the National and International Levels, delivered to the General Assembly*, U.N. Doc. A/63/64 (Mar. 12, 2008), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/63/64.

37. Barron wrote that

[T]he [rule of law] is put forward as the solution for an astonishingly wide range of problems: it poses as the link between fledgling and consolidated democracy; it promises to entrench human rights; it promises an end to violence and corruption; and it is a *sine qua non* for the foundations of a market economy. But with meanings as diverse as these, one could be forgiven for thinking that the [rule of law], in the end, means nothing at all.

Barron, *supra* note 23, at 2-3. The reader should note a difference in diction. While Barron uses active language, i.e., the rule of law *promises* this or that, I have used passive

question whether there is a way—or whether there are ways—of defining “rule of law” in more tangible and useful ways without falling into the trap of allowing—or even encouraging—the instrumentalization of “rule of law” by particular interests,³⁸ converting “rule of law” into “rule by law.”³⁹

First, we need to recall the important distinction between horizontal relations of private individuals or entities among each other, and vertical relations of private individuals or entities with the public administration or state authorities. “Rule of law” is really about the latter, protecting the individual in her relations with the authorities and demanding that all levels of government always respect the law. More than anything, “rule of law” is therefore about administrative law. A further step at conceptual analysis is provided by Paul Craig, who emphasizes “the distinction between *formal* and *substantive* meanings of the rule of law.”⁴⁰ In essence, he concludes as follows:

Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person, in a properly authorised manner, etc.); the clarity of the ensuing norm (was it sufficiently clear to guide an individual’s conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm (was it prospective or retrospective, etc.). Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met.⁴¹

Subsequently, Craig discusses substantive standards “based

language, i.e., the rule of law is *expected* to deliver this or that, indicating that I see the rule of law more as a victim of unrealistic expectations than a con artist.

38. As Brian Tamanaha has pointed out, “[l]acking its own internal values or goals, law will become an instrument of those who control and set the goals of the state.” Tamanaha, *supra* note 20, at 474. For an even more scathing indictment of certain abuses by the West of the promotion of “rule of law” see generally UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* (2008).

39. On the latter, see the very interesting study in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (Tom Ginsburg & Tamir Moustafa eds., 2008).

40. Paul P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467, 467 (1997). See also the attempt at developing a “rule of law” “framework” in Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 653-68 (2008).

41. Craig, *supra* note 40, at 467.

on, or derived from, the rule of law"⁴² that can be used to analyze whether a law is indeed good or bad. Pursuant to Craig, the formalists, like Joseph Raz, reject substantive value criteria because they would merely restate the obvious, namely that good laws are better than bad ones.⁴³ Consequently, Raz emphasizes a distinction between rule of law and *other* values, such as "democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man."⁴⁴ By contrast, proponents of a substantive approach to "rule of law," such as Ronald Dworkin, demand that "rule of law" must include these essential values, that there cannot be "rule of law" without widespread respect for and enforcement of these values.⁴⁵ Although Craig's analysis of the two approaches to "rule of law" may bring some structure to the discussion, it is also clear that it does not introduce any new elements but mainly launches a debate whether the coin has one or two sides.

In my view, the formal approach to "rule of law" is as under-inclusive as the substantive approach is over-inclusive. In other words, the formal approach is not sufficiently ambitious and could get more out of "rule of law" than just formal legitimacy. At the same time, the substantive approach is overly ambitious and burdens "rule of law" with everything that comes in the broadest sense under democracy, justice, human rights, and good governance, with the inevitable result of premeditated failure. A "middle way" discussed by Craig tries to avoid the shortfalls of either approach, and indeed brings us somewhat closer to a clearer, more effective, and thus more useful definition of "rule of law." Here is another quote from Craig's seminal article:

[In a more recent book by Joseph] Raz the core idea is the "principled faithful application of the law." The major fea-

42. *Id.*

43. *See id.* at 468. See also the discussion by Craig of Dicey's concept of "rule of law" in *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework* at 470-74 and the critical approach taken by Roberto Mangabeira Unger at 474-77. Craig counts both of these, together with Raz, as representatives of the formal approach to "rule of law." *See id.* at 468, 470, 474.

44. Joseph Raz, *The Rule of Law and its Virtue*, 93 *LAW Q. REV.* 195, 196 (1977).

45. Craig cites Ronald Dworkin, in particular RONALD DWORCKIN, *LAW'S EMPIRE* (1986), and RONALD DWORCKIN, *A MATTER OF PRINCIPLE* (1985), as a representative of the substantive approach to "rule of law." *See* Craig, *supra* note 40, at 477-79. Supporting the latter are also Sir John Laws and Trevor Allan. *See id.* at 479-84.

tures are “its insistence on an open, public administration of justice, with reasoned decisions by an independent judiciary, based on publicly promulgated, prospective, principled legislation.” The principle of the rule of law is addressed to the courts, legislature, and also other bodies such as the police and administrative authorities.⁴⁶

This definition opens a new way of looking at “rule of law” that is not a traditional part of the Anglo-American discourse and instead can be traced back, *inter alia*, to Hans Kelsen.⁴⁷ It finds its modern day manifestations in the administrative law traditions of France and Germany.⁴⁸ It rests on three pillars:⁴⁹ first, any level of public administration, from the head of state and government, legislature, and constitutional or supreme court, to the lowest level of civil servant, requires a legal basis for any decision, decree, ruling, or action that actually or potentially affects the interests of any party outside of the public administration and/or uses public resources (“*Vorbehalt des Gesetzes*,” liberally translated as “requirement of legal basis”).⁵⁰ Second, every decision, decree, ruling, or action, as well as every legal basis, has to be in conformity with every higher norm in the respective legal system (“*Vorrang des Gesetzes*,” liberally translated as “requirement of legality”).⁵¹ Third, every decision, decree, or action of the executive that directly affects the interests of any party outside of the public administration must be reviewable by an independent

46. Craig, *supra* note 40, at 484 (quoting JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS ON THE MORALITY OF LAW AND POLITICS* 373-74 (1994)).

47. See HANS KELSEN, *PURE THEORY OF LAW* 221-319 (Max Knight trans., 1978). It is not surprising that Joseph Raz should be influenced by Kelsen. In his doctoral thesis he dealt at length with Kelsen’s theory of legal system and also a comparison between Kelsen and Jeremy Bentham. See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* 44-120 (1970); see also R.C. VAN CAENEGEM, *LEGAL HISTORY: A EUROPEAN PERSPECTIVE* 185-200 (1991).

48. See generally Arie Jansse Bok, *Judicial Review of Administrative Decisions by the Dutch Administrative Courts: Recours Objectif or Recours Subjectif? A Survey Including French and German Law*, in *JUDICIAL LAWMAKING AND ADMINISTRATIVE LAW* 153 (F. Stroink & E. van der Linden eds., 2005); L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* (5th ed. 1998); MAHENDRA P. SINGH, *GERMAN ADMINISTRATIVE LAW: IN COMMON LAW PERSPECTIVE* (1985).

49. In an earlier study, I added “sufficient transparency of the political process” and “free and investigative media” as a fourth pillar. See Emmert, *supra* note 16, at 116. However, I do not consider these elements as central to “rule of law.” Instead, they are part of a larger concept of *Rechtsstaat* because they protect the functioning of the political rather than the legal system.

50. See *id.*

51. See *id.*

judiciary for conformity with the first and second principles in a procedure that follows minimum standards of due process and results in a reasoned and published decision (“*Rechtsschutzprinzip*,” liberally translated as “requirement of judicial review” or “access to justice”).⁵² I shall argue that if these three principles are observed, there is “rule of law” and there is no need for more specific or comprehensive criteria. However, the three principles need to be explained and illustrated in turn.

The “requirement of legal basis” rests on the assumption that all power inherently belongs to the people and any authority in a state or society draws its powers from the people. This means that by default, all powers are with the people, the governed, unless they have been explicitly transferred by the people to their government.⁵³ In addition to the basic transfer of powers to the government as laid down by the people in their constitutions,⁵⁴ in modern states such a transfer is usually done in the formal ways of representative democracy, i.e., the people vote for their elected representatives and the parliament then adopts the respective legal bases for administrative and other acts. Without such a transfer, however, there is no power of the government and any binding decision, decree, ruling, or action of the government that does not rest on a direct or indirect transfer of power from the people in the form of a legal basis is *ultra vires*.⁵⁵ If the legal basis of an act is an administrative decision or circular or any other delegated authority below the level of a law of

52. *See id.*

53. Interestingly, this idea is by no means limited to Western, let alone Judeo-Christian societies and constitutions. On the basis of many passages in the Qur’an, for example the 159th verse of the third surah and the 38th verse of the 42nd surah, many Islamic scholars have concluded that “government by consent and council, must be regarded as one of the fundamental clauses of all Qur’anic legislation relating to statecraft.” *THE MESSAGE OF THE QUR’AN* 92 n.122 (Muhammad Asad ed., 1980); *see also* MUHAMMAD ASAD, *THE PRINCIPLES OF STATE AND GOVERNMENT IN ISLAM* 44-47 (1961).

54. *See* U.S. CONST. pmb. (“We the People of the United States”); GRUNDGESETZ [GG] [Constitution] pmb. (F.R.G) (“the German people, in the exercise of their constituent power, have adopted this Basic Law”).

55. By contrast to the present author, the majority of German commentators seem to limit the “requirement of legal basis” to important acts of the public administration, in particular those that interfere with fundamental rights of individuals, which require a legislative basis, while unimportant acts do not have to be based on an act of parliament. *See* Jost Pietzcker, *Vorrang und Vorbehalt des Gesetzes*, *JURISTISCHE SCHULUNG* 710 (1979); Christoph Gusy, *Der Vorrang des Gesetzes*, *JURISTISCHE SCHULUNG* 189 (1983). There is no contradiction, however, since the concept of legal basis is wider than the concept of legislative basis.

parliament, this legal basis itself has to be traceable to its own legal basis and ultimately to a legislative basis. This means that not every legal basis has to be a legislative basis but every legal basis ultimately has to be grounded or based on a legislative basis, which in turn rests on a constitutional basis.

The “requirement of legality” is simply the “idea that the administration must be compelled to observe the law”⁵⁶ where “the law” means any norm that is binding and applicable in a given case. This introduces the concept of the hierarchy of norms. In this hierarchy, the individual and specific administrative act or decision has the lowest rank.⁵⁷ On the next higher level is the organizational or institutional rule on which the individual administrative act was based.⁵⁸ For example, the police officer demanding entry into a private residence for purposes of search and seizure (an individual and specific administrative act) performs her duties pursuant to an order given by a commanding officer or prosecutor. The commanding order is usually based on a ruling by an independent judge or a court order, which in turn is given in implementation of a more general legislative act that permits forcible entry for purposes of search and seizure in a number of strictly defined cases.⁵⁹ The legislative act itself has to be in conformity with the constitution, however, and in particular the provisions on privacy and the protection of private property and family life that will be found more or less clearly defined in the respective bill of rights.⁶⁰ Finally, the constitutional guarantees, as worded in general and interpreted in specific cases, must conform to whatever norms of international law are applicable to the situation at hand, whether by nature of ratification by the respective state of an international agreement such as the European Convention on Human Rights and Fundamental Freedoms, or because that state is bound by other norms of international law, in particular those derived from customary international law.⁶¹ The hierarchy of norms and the “strictly le-

56. BROWN & BELL, *supra* note 48, at 213.

57. See Peter L. Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice-Versa*, 12 COLUM. J. EUR. L. 645, 648 (2006).

58. See *id.*

59. See *id.*

60. See *id.*

61. See, e.g., Gerrit Belam & André Nollkaemper, *Giving Effect to Public International Law and European Community Law Before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation*, 14 EUR. J. INT'L L. 569 (2003); Eric Stein, *International*

gal pedigree,"⁶² i.e., the unbroken chain of legality, leads to two specific obligations: first, the administrative officer has to actually apply the specific laws applicable to a case at hand; second, she is prohibited from breaching the specific law or any of the applicable higher laws or norms.

The "requirement of judicial review" by an independent judiciary is an emanation of the separation of powers and the idea of checks and balances. The doctrine that every act of every state authority that directly affects the rights and/or obligations of third parties must be open to judicial review pursuant to a general principle of law ("*le respect de la légalité*") was established by the French Conseil d'Etat in 1950.⁶³ In Germany, Article 19(4) of the Basic Law of 1949 provides as follows: "Should any person's rights be violated by public authority, he may have recourse to the courts."⁶⁴ This provision has consistently been broadly interpreted by the German Constitutional Court.⁶⁵ A very clear illustration can also be found in the case law of the European Court of Justice.⁶⁶ Although the European Parliament had not been mentioned as a possible applicant or defendant in the respective procedural provision, the Court held that

[T]he European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. [The respective articles of] the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of [any] measures adopted by

Law in Internal Law: Toward Internalization of Central-Eastern European Constitutions?, 88 AM. J. INT'L L. 427 (1994).

62. See WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 20 (8th ed. 2000).

63. Conseil d'Etat (CE) [Highest Administrative Court] Feb. 17, 1950, 86949 (Fr.), available at http://www.lexinter.net/JPTXT2/arret_ministre_de_l'agriculture_c_dame_lamotte.htm.

64. GRUNDGESETZ [GG] art. 19 § 4 (F.R.G.).

65. See, e.g., Entscheidungen des Bundesverwaltungsgerichts [BVerfGE] [Federal Constitutional Court] 35, 263 (F.R.G); *id.* 41, 23, *id.* 60, 253.

66. For an early analysis see W. Paul Gormley, *The Significant Role of French Administrative Jurisprudence as Presently Applied by the Court of the European Communities, with Emphasis on the Administrative Law Remedies Available to Private Litigants*, 8 S.D. L. REV. 32, 32-36 (1963).

the institutions.⁶⁷

Several conditions have to be fulfilled in order to make this judicial review effective. It is widely understood that judicial review cannot function unless certain minimum standards of due process and transparency are guaranteed.⁶⁸ However, I am arguing that the traditional standards like independence of the judiciary, competent and impartial judges, and equality of arms before the courts are not as central as commonly presented. The primary function of the courts in administrative law is the enforcement of the first and second pillars of "rule of law." First, the administration has to provide and the courts have to review the legal basis of the act in order to verify that the administration was empowered to act in a given case. If the administration does not or cannot provide a legal basis, the act is null and void according to the requirement of legal basis. The same is true if there is a legal basis but it does not support the act in question. Second, the courts must verify whether the contested act is in conformity not only with its legal basis but with all applicable rules of law. Unless there is an unbroken chain of legality, all the way up to constitutional and international guarantees of human rights and fundamental freedoms, the act is illegal and has to be undone or compensated. To enforce the requirement of legal basis and the requirement of legality, the courts merely have to properly subsume the facts of the case under all applicable rules of law. And this in turn can be secured via two formal conditions: access to the courts has to be guaranteed to any individual with a *prima facie* claim; and any decision of the courts has to be fully reasoned and published for review by the parties, any appellate level jurisdiction, and the interested public, in particular the media as well as any academic commentators. Last but not least, a corollary of the "principle of judicial review" is the principle of administrative liability, i.e., the obligation of the administration to end a violation of individual rights or interests

67. Parti écologiste "Les Verts" (Fr.) v. European Parliament, Case 294/83, [1986] E.C.R. 1339 ¶ 23. This principle would be violated, for example, if the Bush administration could successfully claim that its activities outside of U.S. territory, whether in Iraq or in Guantanamo Bay, are not subject to judicial review by U.S. courts.

68. See, e.g., Claudia Tobler, Note, *The Standard of Judicial Review of Administrative Agencies in the U.S. and EU: Accountability and Reasonable Agency Action*, 22 B.C. INT'L & COMP. L. REV. 213, 215-19 (1999).

found by a court in a judgment that becomes *res judicata* and to make good any damages unlawfully inflicted.

It is my conviction that these relatively few and simple pre-conditions are enough to develop “rule of law” not only in CEECs seeking or having recently obtained EU membership, but in any country around the world, with the sole exception of failing states where there is neither rule nor law but only chaos. This conviction is based on the assumption that systems meeting these pre-conditions or criteria become self-regulating or auto-poietic.⁶⁹ In other words, rather than looking for foolproof systems, as seems to be the goal of the World Justice Project, I am advocating systems that acknowledge their inherent faults, in particular human faults such as the occasional biased or corrupted judge, and provide mechanisms to correct these faults. Constitutions are usually beautiful documents that promulgate respect for human rights, justice, and equality even in otherwise quite undeveloped countries.⁷⁰ And even where they have gaps or ambiguities, international law can often supplement the necessary guidance. Therefore, if the public administration cannot act without a constitutional legal basis and all acts must be strictly legal in light of the constitution and any applicable norms of international law, gradual evolution of “rule of law” depends only on effective legal remedies. And if the courts have to grant access and have to explain what they are doing to enforce the “rule of law,” national and international public opinion will over time lead to better and better decisions. This process may be slow and it may not protect every injured party but even the bad examples will still serve a purpose.

In the next Part, we shall examine to what extent the pre-conditions of “rule of law” as here presented were part of the conditions of accession for the candidate countries and to what extent—if any—the EU supported this kind of development of “rule of law.”

69. On the concept of autopoietic social systems see NIKLAS LUHMANN, *ESSAYS ON SELF-REFERENCE* 1-20 (1990). The application of Luhmann to law has been accomplished by Gunther Teubner. See GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (Zenon Bankowski ed., Anne Bankowska et al. trans., 1993).

70. A fine example is the modern and democratic 1973 Constitution of Pakistan. See generally *PAKISTAN CONST.*, available at <http://www.pakistani.org/pakistan/constitution> (last visited Nov. 1, 2008).

II. EU SUPPORT FOR THE TRANSFORMATION IN CEEC'S AS SUPPORT FOR "RULE OF LAW?"

During the Cold War, the European Union had very limited relations with the countries in Central and Eastern Europe. For a long time, the EU in Western Europe and the Comecon⁷¹ in Central and Eastern Europe did not even recognize each other, leaving bilateral relations to the level of the Member States.⁷² Only after the accession of Mikhail Gorbachev to the leadership of the Communist Party of the Soviet Union in March 1985, did relations between the two economic organizations begin to normalize and direct negotiations were initiated.⁷³ As the reform process in the Soviet Union gained momentum and the CEECs gradually regained their full sovereignty, these countries rapidly sought closer relations with the EU and with the Member States of the EU.⁷⁴ The communist leadership in Hungary, seeking to appease pressure for reform, began negotiations with democratic reform movements and started with the removal of its fortifications along the border with Austria in May 1989.⁷⁵ The trickle of East Germans escaping via Hungary to the West grew rapidly.⁷⁶ Against the background of economic decline and striking workers, a weakened communist leadership in Poland accepted round-table talks with representatives of the Solidarity labor union as early as February 1989 and after the elections in June 1989 the first non-communist government in the region

71. "Comecon" stands for Council for Mutual Economic Assistance, also abbreviated as CMEA. For more information on this Soviet-dominated counterpart to the European Economic Community ("EEC"). See Comecon, <http://en.wikipedia.org/wiki/Comecon> (last visited Nov. 1, 2008).

72. See generally Barbara Lippert, *EC-CMEA Relations: Normalisation and Beyond*, in EUROPE'S GLOBAL LINKS: THE EUROPEAN COMMUNITY AND INTER-REGIONAL COOPERATION 119 (Geoffrey Edwards et al. eds., 1990).

73. Official relations were established in June 1988. See Legislative Resolution embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a decision on the conclusion of the Joint Declaration on the establishment of official relations between the European Economic Community and the Council for Mutual Economic Assistance ("CMEA"), O.J. C 187/148 (1988).

74. See generally Lippert, *supra* note 72.

75. See JUDT, *supra* note 2, at 609-10, 612. Hungary had ratified the UN Convention on Refugees in March 1989. See Status of Ratifications for Convention relating to the Status of Refugees (Feb. 5, 2002), http://www.unhchr.ch/html/menu3/b/treaty2_ref.htm.

76. See JUDT, *supra* note 2, at 612.

came to power in Poland in September 1989.⁷⁷ During the same month, some 30,000 East Germans managed to escape via Hungary and via West German embassies in Prague and Warsaw, putting enormous pressure on the communist governments in Czechoslovakia and in East Berlin.⁷⁸ This exodus only grew in October and the communist leadership in East Germany finally resigned as the Berlin Wall was broken down in November.⁷⁹ More than anything, this event marked the fall of the iron curtain and the reunification of Europe.⁸⁰

The EU did its share to bring about and support the early reform movements in Central and Eastern Europe.⁸¹ At the Rhodes European Council in December 1988, the heads of state and government of the twelve Member States took a strategic decision to develop economic cooperation and to provide economic aid to those CEECs who were embarking on a reform course.⁸² This approach was reinforced at the Strasbourg summit in April 1989, when the heads of state and government decided to coordinate their national strategies for the development of relations with CEECs and to speak with one voice in this regard.⁸³ In June 1989, the Vice President of the European Commission, Frans Andriessen, declared in Moscow that the EU would use all policy instruments available to it to promote the reforms in CEECs and this invitation was accepted by Gorbachev, who spoke of a new Europe from the Atlantic to the Urals at a speech before the Council of Europe in Strasbourg in July of

77. *See id.* at 606-07. Solidarity had won all 161 contested seats in the Parliament (Sejm) and 99 out of 100 seats in the Senate. *See id.* at 607; *see also* PUSHING BACK THE BOUNDARIES: THE EUROPEAN UNION AND CENTRAL AND EASTERN EUROPE 328-30 (Mike Mannin ed., 1999) (delineating events in timeline format).

78. *See* JUDT, *supra* note 2, at 612-13.

79. *See id.* at 610-16. Other important events include the installation of the first non-communist government in Prague in December 1989 and the violent overthrow of communist dictator Ceausescu in Romania during the same month. *See id.* at 616-26.

80. For an excellent analysis of the period, see TIMOTHY GARTON ASH, IN EUROPE'S NAME: GERMANY AND THE DIVIDED CONTINENT 343-56 (1993) and JUDT, *supra* note 2, at 585-633.

81. For a good overview see, for example, Antoaneta Dimitrova, *The Role of the EU in the Process of Democratic Transition and Consolidation in Central and Eastern Europe*, in THE EUROPEAN UNION IN A CHANGING WORLD, *supra* note 9, at 315.

82. *See* European Council, Rhodes, 2 and 3 December, 21 E.C. BULL., no. 12 at 8-13 (1988), available at http://aei.pitt.edu/1483/01/rhodes_june_1988.pdf.

83. *See* European Council, Strasbourg, 8 and 9 December, 22 E.C. BULL., no. 12 at 8-18 (1988), available at http://aei.pitt.edu/1395/01/Strasbourg_1989.pdf.

that same year.⁸⁴ The heads of state and government of the Group of Seven ("G7") then decided to set up economic support programs for Hungary and Poland and the European Commission launched its famous Poland and Hungary: Assistance for Restructuring their Economies ("PHARE") program.⁸⁵ In parallel, the first bilateral agreements on trade cooperation between the EU on the one side and Poland and Hungary on the other side, were signed in late 1989 and 1992 respectively.⁸⁶ From there, it was a short way to the first association agreements with CEECs that, unlike earlier agreements of association with other countries,⁸⁷ explicitly stipulated the goal of eventual member-

84. See Money, Business Roundup, *Soviet-EC Talks Planned*, WASH. TIMES, June 9, 1989, at C1. Gorbachev actually used the words "We are thinking of an all-European home as a community rooted in law." Mikhail Gorbachev, Address given to the Council of Europe (July 6, 1989), available at <http://www.ena.lu/mce.swf?doc=11160&lang=2>.

85. See Council Regulation No. 3906/89, O.J. L 375/11 (1989), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989R3906:EN:HTML>. PHARE stands for "Poland and Hungary: Assistance for Restructuring their Economies." See The Phare Programme And The Enlargement Of The European Union, EUR. PARL. DOC. (PE 167.944) 4 (1998), available at http://www.europarl.europa.eu/enlargement/briefings/pdf/33a1_en.pdf. For the first year, 1990, financial aid of 300 million Euro was approved. This program was subsequently expanded to cover all ten CEECs that have since become members of the EU and was updated annually. See *id.* Albania, Bosnia-Herzegovina, and Macedonia at one point also benefited from PHARE aid, but have since, together with the other successor states of the former Republic of Yugoslavia, received their own program, "Community Assistance for Reconstruction, Development and Stability in the Balkans" ("CARDS"). See Council Regulation No. 2666/2000, O.J. L 306/1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:306:0001:0006:EN:PDF>; Marc Maresceau, *Pre-accession*, in THE ENLARGEMENT OF THE EUROPEAN UNION 9, 35 (Marise Cremona ed., 2003).

86. See Agreement between the European Economic Community and the Polish People's Republic on Trade and Commercial and Economic Cooperation, O.J. L 339/2 (1989), available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21989A1122\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21989A1122(01):EN:HTML); Interim Agreement between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Hungary, of the other part, on trade and trade-related matters, O.J. L 116/2 (1992), available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21992A0430\(03\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21992A0430(03):EN:HTML); Commission Decision of 27 February 1992 concerning the conclusion on behalf of the European Coal and Steel Community of the Interim Agreement between the European Economic Community and the European Coal and Steel Community, of the one part, and the Republic of Hungary, of the other part, on trade and trade-related matters, O.J. L 151/25 (1992), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992D0289:EN:HTML>.

87. The only earlier association agreement that stipulated the goal of membership, albeit only after a lengthy transitional period, was the 1964 Agreement establishing an Association between the European Economic Community and Turkey, O.J. 217/3687 at art. 28 (1964), available at http://www.cfcu.gov.tr/files/Ankara_Anlasmasi.doc.

ship in the EU.⁸⁸ At the European Council in Copenhagen in June 1993, the heads of state or government of the EU Member States “agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union,”⁸⁹ an invitation that was received with enthusiasm in the CEECs. Multiple applications for membership in the EU followed suit.⁹⁰

At the time when the CEECs applied for membership in the EU it was quite clear that both the candidate countries themselves and the institutional structure of the EU would need substantial reforms before the enlargement could be completed.⁹¹ Without these reforms or with incomplete preparation, an enlargement to the East could have done more damage than good. Already the Copenhagen European Council in 1993, therefore, formulated a number of conditions to be achieved before accession:

88. See, for example, the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, O.J. L 347/271 (1993), available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21993A1231\(17\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21993A1231(17):EN:HTML). This agreement was signed on December 16, 1991 and, after ratification by the twelve Member States of the EU and by Hungary, entered into force on February 1, 1994. See EUR-Lex Database, Dates, <http://eur-lex.europa.eu/Notice.do?val=195678:cs&lang=en> (last visited Nov. 1, 2008).

89. See *European Council in Copenhagen: Conclusions of the Presidency*, SN 180/1/93 REV 1, at 13 (1993), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/72921.pdf [hereinafter *European Council in Copenhagen*].

90. Hungary was first to apply in March 1994, followed by Poland in April 1994. Romania and Slovakia applied in June 1995, Latvia in October 1995, Estonia in November 1995 and Bulgaria and Lithuania in December 1995. Finally, the Czech Republic applied in January 1996 and Slovenia in June 1996. See JOHN O'BRENNAN, *THE EASTERN ENLARGEMENT OF THE EUROPEAN UNION* 190 n.7 (2006).

91. To get an idea about the institutional problems of enlargement, with regard to issues such as translation and interpretation to and from the new languages, buildings, etc., see Commission of the European Communities, Administrative Preparations for Enlargement: Objectives and Practical Arrangements: Working Paper from the Commission Staff, SEC (2001) 1319 Final (July 2001), available at http://aei.pitt.edu/4399/01/001826_1.pdf; Guido Podesta, Preparing for the Parliament of the Enlarged European Union, PE 305.269/BUR/fin (Sept. 10, 2001); John Peterson, *Enlargement, Reform and the European Commission: Weathering a Perfect Storm?*, 15 J. EUR. PUB. POL'Y 761 (2008). Regarding the institutional capacity and issues of decision-making see, for example, Ingolf Pernice, *Institutional Settlements for an Enlarged European Union*, in *LAW AND GOVERNANCE IN AN ENLARGED EUROPEAN UNION* 3 (George A. Bermann & Katharina Pistor eds., 2004); Eric Philippart and Monika Sie Dhian Ho, *Peddling Against the Wind: Strategies to Strengthen the EU's Capacity to Act in the Context of Enlargement* (Scientific Council for Gov't Policy, Working Paper No. 115, 2001), available at <http://www.wrr.nl/english/content.jsp?objectid=3205>.

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

The Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.⁹²

It would be beyond the scope of the present Article to analyze all of the conditions in any kind of detail.⁹³ Instead, the focus shall be on democracy, rule of law, and "the ability to take on the obligations of membership." The latter, in particular, has been interpreted as the ability to apply the *acquis communautaire*, i.e., the rights and obligations enshrined in the general principles of law, the founding treaties, the regulations, directives and decisions forming the secondary legislation in force, as well as the international agreements, and the case law of the European Court of Justice, that together constitute the body of law that we commonly call "EU law."⁹⁴ This means in addition to various political and economic reforms,⁹⁵ the CEECs had to undergo a process of institutional and legal reform encompassing five cen-

92. See *European Council in Copenhagen*, *supra* note 89, at 13.

93. It would also be quite unnecessary, as there are many good publications on the subject. See, e.g., *HANDBOOK ON EUROPEAN ENLARGEMENT: A COMMENTARY ON THE ENLARGEMENT PROCESS* (Andrea Ott & Kirstyn Inglis eds., 2002); Tibor Palánkai, *From Europe Agreements to Membership: What Criteria Should be met and the Prospects of Meeting Them*, in *THE EUROPEAN UNION IN A CHANGING WORLD*, *supra* note 9, at 339; Roger J. Goebel, *Joining the European Union: The Accession Procedure for the Central European and Mediterranean States*, 1 *LOY. U. CHI. INT'L L. REV.* 15 (2003-04).

94. See Frank Emmert, *Introducing EU Competition Law and Policy in Central and Eastern Europe: Requirements in Theory and Problems in Practice*, 27 *FORDHAM INT'L L.J.* 642, 642 n.1 (2004).

95. The literature on economic reforms in CEECs is vast. See, e.g., JIM ROLLO, *Economic Aspects of EU Enlargement to the East*, in *ENLARGING THE EUROPEAN UNION: RELATIONS BETWEEN THE EU AND CENTRAL AND EASTERN EUROPE* 252 (Marc Maresceau ed., 1997); Roland Sturm, Markus M. Müller & Jürgen Dieringer, *Economic Transformation in Central and Eastern Europe: Towards a New Regulatory Regime?*, 7 *J. EUR. PUB. POL'Y* 650, 650-62 (2000).

tral elements: (1) constitutional reform;⁹⁶ (2) legislative reform; (3) court reform; (4) administrative reform; as well as (5) reform of legal education.⁹⁷ We shall now examine by what means the European Union supported the candidate countries in these reforms and to what extent the support actually encouraged the development of “rule of law.”

As pointed out, the first expression of admission criteria beyond the laconic language in the Treaties came out of the Copenhagen European Council in 1993. However, it did not go beyond generalizations such as “stability of institutions guaranteeing democracy, the rule of law [and] human rights” as well as “the candidate’s ability to take on the obligations of membership.”⁹⁸ The same is true for the Essen European Council of 1994, which at least instructed the Commission to come up with a White Paper on enlargement.⁹⁹ In the same tradition of being vague and general, in December 1995, the Madrid European Council concluded that the “the pre-accession strategy . . . will have to be intensified in order to create the conditions for the gradual, harmonious integration of those States, particularly through the development of the market economy [and] the adjustment of their administrative structures”¹⁰⁰ Similar declarations followed in six month intervals at every European Council as sure as one season follows after another.¹⁰¹

96. See CONSTITUTIONAL REFORM AND INTERNATIONAL LAW IN CENTRAL AND EASTERN EUROPE (Rein Müllerson et al. eds., 1998); WOJCIECH SADURSKI, *Transitional Constitutionalism: Simplistic and Fancy Theories*, in RETHINKING THE RULE OF LAW AFTER COMMUNISM 9 (Adam Czarnota et al. eds., 2005); Istvan Pogany, *Constitutional Reform in Central and Eastern Europe: Hungary’s Transition to Democracy*, 42 INT’L & COMP. L.Q. 332 (1993); Eric Stein, *Post-Communist Constitution-Making: Confessions of a Comparatist (Part I)*, 1 NEW EUR. L. REV. 421 (1993).

97. See generally Goebel, *supra* note 93.

98. See generally European Council in Copenhagen, *supra* note 89.

99. See European Council, Essen, 9 and 10 December, 27 E.C. BULL., no. 12 at 22 (1994), available at http://aei.pitt.edu/1447/01/Essen_Dec_1994.pdf.

100. European Council, Madrid, 15 and 16 December, 28 E.C. BULL., no. 12, at 18 (1995) (emphasis added), available at http://aei.pitt.edu/1452/01/madrid_dec_1995.pdf. For a detailed history of the European Council meetings and other steps in the pre-accession phase see PHEDON NICOLAIDES, ENLARGEMENT OF THE EUROPEAN UNION AND EFFECTIVE IMPLEMENTATION OF ITS RULES: WITH A CASE STUDY ON TELECOMMUNICATIONS (2000).

101. For details see, for example, DEREK BEACH, THE DYNAMICS OF EUROPEAN INTEGRATION: WHY AND WHEN EU INSTITUTIONS MATTER 214-44 (2005); DESMOND DINAN, EUROPE RECAST: A HISTORY OF EUROPEAN UNION 271-79 (2004); Phedon Nicolaides, *Preparing for Accession to the European Union: How to Establish Capacity for Effective and*

The 1995 Commission's White Paper¹⁰² was the first attempt at a more comprehensive "pre-accession strategy." As the name suggests, the focus of the strategy was on preparations for participation in the internal market with its free flow of goods, services, people, and capital. The White Paper also acknowledged, however, that

[A] merely formal transposition of legislation will not be enough to achieve the desired economic impact or to ensure that the internal market functions effectively after further enlargement. Accordingly, equal importance is attached to the establishment of adequate structures for implementation and enforcement, which may be the more difficult task.¹⁰³

However, when going through the White Paper with a fine comb, we find precious little that would deal with administrative and other structures. Instead, the focus is on the adoption of legislation in the different sectors relevant to the internal market and some advice on sequencing of that legislative revolution. This means the EU approached the CEECs as it would have approached just another Western candidate country, largely assuming that once the good Western laws are in place everything else will soon follow.¹⁰⁴

Specific elements in the pre-accession strategy were the Europe Agreements for association of the CEECs, and the so-called "structured relationship" of the candidate country governments with the institutions of the EU.¹⁰⁵ The focus of the Europe

Credible Application of EU Rules, in THE ENLARGEMENT OF THE EUROPEAN UNION, *supra* note 85, at 43, 45-46.

102. See Commission of the European Communities, Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union: White Paper from the Commission to the European Council, COM (95) 163 Final (March 1995) [hereinafter White Paper], available at http://aei.pitt.edu/1120/01/east_enlarg_wp_COM_95_163.pdf; see also O'BRENNAN, *supra* note 90, at 28; Enlargement of the European Union: Summary of the White Paper from the Commission to the European Council, available at http://www.europarl.europa.eu/enlargement/index_en.htm.

103. See White Paper, *supra* note 102, at 2.

104. In subpoints 4.27 to 4.34, on exactly two pages, the White Paper laments the difficulties experienced by CEECs in creating the necessary administrative structures for the implementation and enforcement of EU law. *Id.* at 29-31. The bottom line is clearly that everything will be achieved gradually as the resources for hiring and training of qualified staff become available. For further analysis see, for example, MARC-ANDRÉ GAUDISSERT & ADINDA SINNAEVE, *The Role of the White Paper in the Preparation of the Eastern Enlargement*, in ENLARGING THE EUROPEAN UNION, *supra* note 95, at 41.

105. See Goebel, *supra* note 93, at 21-25; see, e.g., Europe Agreement establishing

Agreements was again on the development of market access, i.e., the expansion of the fundamental freedoms in the EU internal market plus supporting policies such as competition policy to the CEECs via reform of substantive law, and not on the development of the legal cultures of the candidate countries.¹⁰⁶ Via the “structured relationship” and the chapters in the Europe Agreements about political dialogue and the creation of Association Councils some headway was made toward the integration of the highest level of government in the CEECs into the institutional and decision-making process in the EU.¹⁰⁷ But this also did not suggest, let alone require, any specific changes of administrative law or culture in the candidate countries.¹⁰⁸

The negotiations for membership were opened for the first five countries in 1998 and with the remaining candidates in 1999.¹⁰⁹ The different areas to be covered in the negotiations were divided into thirty-one chapters,¹¹⁰ roughly parallel to the structure of the EC Treaty.¹¹¹ The CEEC governments then organized their national pre-accession strategies along the same outline and the Commission documented the progress of the negotiations in annual progress reports.¹¹² Whenever a country

an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part, O.J. L 68/3 (1998), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:068:0003:0187:EN:PDF>.

106. See Goebel, *supra* note 93, at 21-25.

107. See *id.*

108. A comprehensive and critical analysis of the problems can be found in Frank Emmert, *Administrative and Court Reform in Central and Eastern Europe*, 9 EUR. L. J. 288 (2003) [hereinafter Emmert, *Administrative and Court Reform*]. Various problems of effective application of (European Union) law in CEECs are also discussed in Emmert, *supra* note 94.

109. See Goebel, *supra* note 93, at 30.

110. See European Commission Directorate-General Enlargement, *Enlargement of the European Union—Guide to the Negotiations Chapter by Chapter* (2003), available at http://ec.europa.eu/enlargement/archives/pdf/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/negotiationsguide_en.pdf.

111. See generally Consolidated Version of the Treaty Establishing the European Community, O.J. C 325/33 (2002), as amended by the Treaty of Nice, Mar. 10, 2001, O.J. C 80/1 (2001), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:325:0001:0184:EN:PDF>.

112. See, e.g., Commission of the European Communities, Composite Paper: Reports on Progress Towards Accession by Each of the Candidate Countries (1999) [hereinafter Reports on Progress], available at http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/composite_en.pdf; Commission of the European Communities, Making a Success of Enlargement: Strategy Paper and Report on the Progress

had either accepted to apply all parts of the *acquis communautaire* covered by a specific chapter as of day one of membership in the EU or had obtained agreement by the Commission on selected transitional periods, the negotiations in that chapter were closed for that country.¹¹³ Most of the time, several but not all thirty-one chapters were negotiated simultaneously.¹¹⁴ In October 2002, this screening and negotiating process was largely completed and the Commission recommended to the Council that accession agreements should be signed with eight of the ten CEECs with the goal of completing ratifications and actual accession before the elections to the European Parliament in June 2004.¹¹⁵ Bulgaria and Romania were recommended for membership in 2007.¹¹⁶

During the negotiations it became increasingly clear that the CEECs had difficulties reforming their courts and public administrations. This led to complaints by the Commission in the annual progress reports and the adoption of an Action Plan for Administrative and Judicial Capacity.¹¹⁷ In addition to the financial support provided via PHARE,¹¹⁸ the EU developed Acces-

Towards Accession by Each of the Candidate Countries (2001), available at http://ec.europa.eu/enlargement/archives/pdf/key_documents/2001/strategy_en.pdf.

113. See Reports on Progress, *supra* note 112, at 32.

114. See *id.* at 41-48.

115. See Commission of the European Communities, Commission Opinion of 19 February 2003 on the applications for accession to the European Union by the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic, O.J. L 236/3 (2003), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:236:0003:0004:EN:PDF>. For the individual country reports, see Documents concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union, O.J. L 236/1 (2003), available at <http://eur-lex.europa.eu/JOHtml.do?textfield2=236&year=2003&Submit=Search&serie=L>.

116. See Commission of the European Communities, Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, COM (2006) 549 Final (Sept. 2006), available at http://ec.europa.eu/enlargement/pdf/key_documents/2006/sept/report_bg_ro_2006_en.pdf.

117. See Commission of the European Communities, Communication from the Commission on the Action Plan for administrative and judicial capacity, and the monitoring of commitments made by the negotiating countries in the accession negotiations, COM(2002) 256 Final (June 2002), [hereinafter *Action Plan for administrative and judicial capacity*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0256:FIN:EN:PDF>.

118. See *supra* note 85 and accompanying text. Financial support for agriculture

sion Partnerships with the candidate countries, provided more and more money for re-development of physical facilities and training of staff of the public administrations, and encouraged bi-national twinning programs.¹¹⁹

These measures have been summarized by Phedon Nicolaides as “M&M solutions,”¹²⁰ where the abbreviation stands for “money & men.” In short, the EU works on the assumption that all it takes for the effective application of EU law in the new Member States is the appointment of sufficiently large numbers of sufficiently qualified staff and whatever resources they need. In contrast to the “official” emphasis on *knowledge and ability*, Nicolaides suggests a focus on the *willingness* of the people in the new Member States, from the top officials via the average administrators and judges, to the population in general, to comply with EU law and “rule of law.”¹²¹ Roland Bieber has done some good but little noticed work on this matter.¹²² He seems more optimistic than me. As one of the participants on both sides of the room, I have criticized the various training and twinning programs before and won’t repeat myself here.¹²³ And why would I, the reader may ask. After all, the ten CEECs have all joined the EU in the meantime, the world has not come to an end, and isn’t all’s well that ends well?

Well, apparently not. At least if the rapidly growing literature about different legal and administrative cultures in Eastern and Western Europe and the resulting compliance problems¹²⁴

was provided under the Special accession programme for agriculture and rural development (“SAPARD”) scheme and the structural funds were opened to the CEECs in the framework of the Pre-Accession Structural Instrument (“ISPA”) scheme. See Council Regulation No. 1266/99, O.J. L 161/68 (1999), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:161:0068:0072:EN:PDF>.

119. See *Action Plan for administrative and judicial capacity*, *supra* note 117, at 6.

120. See Nicolaides, *supra* note 101, at 44.

121. See *id.*; see also Dionysia Tamvaki, *The Copenhagen Criteria and the Evolution of Popular Consent to EU Norms: From Legality to Normative Justifiability in Poland and the Czech Republic*, in *SPREADING DEMOCRACY AND THE RULE OF LAW? THE IMPACT OF EU ENLARGEMENT ON THE RULE OF LAW, DEMOCRACY AND CONSTITUTIONALISM IN POST-COMMUNIST LEGAL ORDERS* 149 (Wojciech Sadurski et al. eds., 2006) [hereinafter *SPREADING DEMOCRACY*].

122. See Roland Bieber & Micaela Vaerini, *Implementation and Compliance: Stimulus for New Governance Structures in the Accession Countries*, in *LAW AND GOVERNANCE IN AN ENLARGED EUROPEAN UNION*, *supra* note 91, at 387.

123. See Emmert, *Administrative and Court Reform*, *supra* note 108, at 305-06.

124. See, e.g., Miroslav Beblavy, *Management of Civil Service Reform in Central Europe*, in *MASTERING DECENTRALIZATION AND PUBLIC ADMINISTRATION REFORMS IN CENTRAL AND*

and the equally rapidly growing literature complaining about the courts in CEECs¹²⁵ are any indicators, then “rule of law” is still wanting in this part of the world.¹²⁶ And if this is indeed true, then it should be reason for reflection in Brussels why all the money that was spent over fifteen years on M&Ms has appar-

EASTERN EUROPE 55 (Gábor Péteri ed., 2002); Adam Czarnota, *Barbarians ante portas or the Post-Communist Rule of Law in Post-Democratic European Union*, in SPREADING DEMOCRACY, *supra* note 121, at 283; Michal Bobek, *A New Legal Order, or a Non-Existent One? Some (Early) Experiences in the Application of EU Law in Central Europe*, 2 CROATIAN Y.B. EUR. L. & POL'Y 265, 269 (2006); Klaus H. Goetz, *Making Sense of Post-Communist Central Administration: Modernization, Europeanization or Latinization?*, 8 J. EUR. PUB. POL'Y 1032, 1035 (2001); Klaus H. Goetz & Hellmut Wollmann, *Governmentalizing Central Executives in Post-Communist Europe: A Four-Country Comparison*, 8 J. EUR. PUB. POL'Y 864, 865 (2001); Heather Grabbe, *How Does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity*, 8 J. EUR. PUB. POL'Y 1013, 1014-15 (2001); Joel Hellman, *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea*, 7 E. EUR. CONST. REV. 71, 72 (1998); Wade Jacoby, *The Reality Behind the Potemkin Harmonization: Priest and Penitent—The European Union as a Force in Domestic Politics of Eastern Europe*, 8 E. EUR. CONST. REV. 63, 63-64 (1999); Zdeněk Kühn, *Application of European Law in Central European Candidate Countries*, 28 EUR. L. REV. 551, 553 (2003); Barbara Lippert, Gaby Umbach & Wolfgang Wessels, *Europeanization of CEE Executives: EU Membership Negotiations as a Shaping Power*, 8 J. EUR. PUB. POL'Y 980, 991 (2001); Siniša Rodin, *Discourse and Authority in European and Post-Communist Legal Culture*, 1 CROATIAN Y.B. EUR. L. & POL'Y 1, 6-7 (2005); Ulrich Sedelmeier, *After Conditionality: Post-Accession Compliance with EU Law in East Central Europe*, 15 J. EUR. PUB. POL'Y 806 (2008); Martina Spornbauer, *Benchmarking, Safeguard Clauses and Verification Mechanisms—What's in a Name? Recent Developments in Pre- and Post-accession Conditionality and Compliance with EU Law*, 3 CROATIAN Y.B. EUR. L. & POL'Y 273, 297-302 (2007); Dimiter Toshkov, *In Search of the Worlds of Compliance: Culture and Transposition Performance in the European Union*, 14 J. EUR. PUB. POL'Y 933 (2007).

125. See, e.g., Zdeněk Kühn, *The Instrumental Use of Basic Rights by the Stalinist Judiciary*, in ABUSE: THE DARK SIDE OF FUNDAMENTAL RIGHTS 99 (András Sajó ed., 2006); Daniel Smilov, *EU Enlargement and the Constitutional Principle of Judicial Independence*, in SPREADING DEMOCRACY, *supra* note 121, at 313; Sergio Bartole, *Alternative Models of Judicial Independence: Organizing the Judiciary in Central and Eastern Europe*, 7 E. EUR. CONST. REV. 62, 63 (1998); Tamara Eapeta, *Courts, Legal Cultures and EU Enlargement*, 1 CROATIAN Y.B. EUR. L. & POL'Y 23, 23-24 (2005); Zdeněk Kühn, *European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central European Candidate Countries*, 1 CROATIAN Y.B. EUR. L. & POL'Y 55, 56 (2005); Zdeněk Kühn, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, 52 AM. J. COMP. L. 531 (2004); Open Soc'y Inst., *Monitoring the EU Accession Process: Judicial Independence* (2001), <http://www.eumap.org/reports/2001/judicial>.

126. For an interesting study on how corruption is blamed for everything that is not working properly in CEEC courts and administrations see Ivan Krastev, *Corruption, Anti-Corruption Sentiments, and the Rule of Law*, in RETHINKING THE RULE OF LAW AFTER COMMUNISM, *supra* note 96, at 323. My own reflections on the incompetence of some judges in CEECs that is widely misunderstood as corruption can be found in Frank Emmert, *The Independence of Judges: A Concept Often Misunderstood in Central and Eastern Europe*, 3 EUR. J. L. REFORM 405, 406 (2001).

ently not bought us all that much. Last but not least, if the EU would have to acknowledge that the strategies so far pursued (alone) did not achieve the desired results, it should ask itself two equally important questions: (1) what could be done in those countries that have already achieved membership in the EU to support development of “rule of law” and (2) how should the support strategies for current and future candidates, as well as neighbors,¹²⁷ be amended in light of these findings?

127. Although European integration should per se be open to any European country, the EU has recently begun to divide the remaining European countries into “candidates” and “potential candidates.” See European Commission on Enlargement: Potential Candidate Countries, http://ec.europa.eu/enlargement/potential-candidate-countries/index_en.htm (last visited Nov. 1, 2008). The actual and potential candidates are now benefitting from the new Instrument for Pre-Accession Assistance (“IPA”). See Council Regulation No. 1085/2006/EC, O.J. L 210/82 (2006), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:210:0082:0093:EN:PDF>. Pursuant to this document, there are three candidates (Croatia, Macedonia, Turkey) and four potential candidates (Albania, Bosnia, Montenegro, Serbia including Kosovo). The European Neighborhood Policy, by contrast, covers a number of European countries (Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine) and a number of non-European neighbors (Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria, and Tunisia). See Commission of the European Communities, European Neighborhood Policy: Strategy Paper from the Commission to the European Council, COM (2004) 373 Final (May 2004) available at http://ec.europa.eu/world/enp/pdf/strategy/strategy_paper_en.pdf. Support under the Technical Assistance and Information Exchange (“TAIEX”) program is available to the potential candidates, the neighbors, and to the Turkish Cypriot Community and Russia. See About TAIEX, <http://taix.ec.europa.eu/abouttaix.asp?lang=en> (last visited Nov. 1, 2008). TAIEX typically provides Western experts to address challenges in the partner countries related to adoption and implementation of modern legislation that is compatible with EU goals and laws. See *id.* The bulk of the activities is done in the format of seminars, expert reports, and study visits. Very few if any of the activities specifically address the issues discussed in this Article. See EUROPEAN COMMUNITIES, TAIEX ACTIVITY REPORT (2007), <http://taix.ec.europa.eu/Library/ActRep2007/TAIEXActivityReportEN.pdf>; see also Commission of the European Communities, Opinion of the European Economic and Social Committee on a ‘Wider Europe—Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours,’ COM (2003) 104 Final, ¶ 4.7.2 (Mar. 2004) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:080:0148:0155:EN:PDF>; Commission of the European Communities, European Neighbourhood Policy: Strategy Paper from the Commission to the European Council, COM (2004) 373 Final, 25 (May 2004), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0373:FIN:EN:PDF>. For scientific analysis of the neighborhood policy see, for example, Youri Borko, *Russia and the EU in the 21st Century: Four Possible Scenarios of Relations*, in *THE EUROPEAN UNION IN A CHANGING WORLD*, *supra* note 9, at 297; Sandra Lavenex, *A Governance Perspective on the European Neighbourhood Policy: Integration Beyond Conditionality?*, 15 J. EUR. PUB. POL’Y 938 (2008); Dmitrijs Nemirovskis, *Small But Precious: The Actual and Potential Direct Effect of the Partnership and Cooperation Agreement Between the European Communities and the Russian Federation*, 9 EUR. J. L. REFORM 553 (2007); Stephen White, Ian McAllister & Margot Light, *Enlargement*

III. OUTLOOK AND SUGGESTIONS

The EU is not only a “Community based on the rule of law,”¹²⁸ it is a Community based *only* or at least primarily on “rule of law.” The EU neither has a network of EU or federal courts across the Member States like we find in the United States, nor its own administrative agencies and officials. With very narrow exceptions in competition law and anti-dumping, the EU relies on national legislatures and administrations to implement its law and it relies on national courts to oversee that implementation.¹²⁹ The EU Commission and the Court of Justice can only perform very limited services as overseers of that national implementation. I would go as far as to say that without adequate implementation and enforcement of EU law by the national authorities, there is not only a problem, there is no longer an EU. Without adequate implementation and enforcement on the national level, European Union becomes European disunion and then European history. Consequently, the EU needs “rule of law” a lot more than it needs, for example, an internal market. The European Union can exist without an internal market but it cannot and does not exist without “rule of law.” Therefore, the European Commission, instead of or at least in addition to the 1995 White Paper “Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union”¹³⁰ should have adopted a strategy and White Paper “Preparation for Participation of the CEECs in a Community Based on Rule of Law.” Such a Paper and strategy are now thirteen years overdue. The closing paragraphs of the present Article shall be devoted to some suggestions—more as bullet points than elaborated arguments—for such a strategy.

(1) On the level of constitutional reform of the CEECs, the

and the *New Outsiders*, 40 J. COMMON MARKET STUD. 135 (2002); as well as a special issue of the *European Journal of Law Reform* dedicated to the topic of Approximation of Laws by non-EU Countries to the EU Acquis, Special Issue Approximation to EU Law, 9 EUR. J. L. REFORM 357 (2007).

128. See *supra*, notes 63-67 and accompanying text.

129. See Tanja A. Börzel, *Guarding the Treaty: The Compliance Strategies of the European Commission*, in 6 THE STATE OF THE EUROPEAN UNION: LAW, POLITICS, AND SOCIETY 197 (Tanja A. Börzel et al. eds., 2003).

130. See Commission of the European Communities, *Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union: White Paper from the Commission to the European Council*, COM (95) 163 Final (May 1995).

EU should provide model clauses for the reform countries to be integrated into their constitutions. One article should clearly spell out the supremacy of EU law over national law,¹³¹ and another should promulgate the three and a half essential principles of “rule of law,” namely the requirement of legal basis, the requirement of legality, the requirement of effective judicial review and the principle of administrative liability. Such a constitutional amendment would solve the problem currently faced by a number of constitutional courts in the region which must often set aside unclear constitutional provisions to secure supremacy of EU law.¹³² And it would provide the ultimate endorsement of “rule of law” over rule of anybody or anything else.

(2) On the level of legislative reform of the CEECs, a number of model clauses should be suggested for the law on the courts and the law on administrative procedure. The essential principles of “rule of law,” as outlined in the preceding paragraph, should be incorporated and fleshed out in both of these national laws. The law on the courts should also include provisions about equality of arms of the parties before the courts but, more importantly, about adequate reasons to be provided for every judgment. The best way of making such a requirement operational is to provide for the automatic overruling and return for new examination and decision of any judgment that is not logically supported by its reasoning. Last but not least, all judgments must be published and accessible for critical review by the media and the interested public. The latter principle is as important as the requirement that hearings should normally be public, which we take rather for granted. The law on administrative procedure, furthermore, should ideally provide for an internal review procedure for administrative decisions analogous to the very successful German *Widerspruchsverfahren*.¹³³ Under this

131. And whilst we are at it, why not suggest also a clause that clarifies the relationship between international law, in particular the European Convention on Human Rights and Fundamental Freedoms, with national law.

132. See Anneli Albi, *Selected Judgments by CEE Constitutional Courts: Lessons on How (Not) to Amend Constitutions?*, 3 CROATIAN Y.B. EUR. L. & POL'Y 39 (2007).

133. The German *Widerspruchsverfahren* has its legal basis in Verwaltungsgerichtsordnung [VwGO] [Code of Administrative Procedure] Jan. 21, 1960, at §§ 68-73 (F.R.G.), available at <http://www.gesetze-im-internet.de/bundesrecht/vwgo/gesamt.pdf>. For further information see NIGEL G. FOSTER, *GERMAN LEGAL SYSTEM & LAWS* 174-75 (2d ed. 1996); FRIEDHELM HUFEN, *VERWALTUNGSPROZESSRECHT* (7th ed. 2008); HENNING JÄDE, *VERWALTUNGSVERFAHREN, WIDERSPRUCHSVERFAHREN, VERWALTUNGSPROZESS*

procedure, anybody who is dissatisfied with an administrative decision or the unresponsiveness of the administration to a request or application has to pass through an internal administrative review before being able to bring the matter before the courts.¹³⁴ For best results, the review should be done by the next higher level inside the administration and a time limit should be provided for that authority to provide a reasoned decision to the applicant either rejecting or accepting the complaint.¹³⁵ Many administrative mistakes can be rectified quickly and inexpensively with such a procedure.¹³⁶ At the very least, even if the applicant does not receive satisfaction, she receives a reasoned opinion on the basis of which she can now decide whether or not to take the matter to the courts.¹³⁷ Along a similar vein, the countries which have not done so yet should be strongly encouraged to create ombuds-person positions and review procedures for complaints of arbitrary or inefficient behavior of administrative officials, including corrupt and similar improper conduct.

(3) and (4) On the level of administrative and court reform in CEECs, the EU and its various training and facility improvement programs have achieved much in practical terms. Unfortunately, the mindset of the administrators and judges is sometimes still lagging behind the modernization of their offices and computers. I have written in detail about the practical problems of retraining officials who have worked for decades under the former Communist systems and may simply not be able to change the way they work.¹³⁸ Although it may be difficult to change some of these officials, it would be easy enough to improve the training methods and to provide added incentives for the participants not only to attend but to obtain measurable and demonstrated qualifications via exams and diplomas.

(5) Last but not least, on the level of legal education reform in CEECs, the EU has done virtually nothing to help and the

(4th ed. 2006); WOLF-RÜDIGER SCHENKE, *VERWALTUNGSPROZESSRECHT* 213-37 (11th ed. 2007); WOLF-RÜDIGER SCHENKE & FERDINAND O. KOPP, *VwGO KOMMENTAR* (15th ed. 2007).

134. See FOSTER, *supra* note 133, at 174-75.

135. See *id.*

136. See *id.*

137. See *id.*

138. See Emmert, *Administrative and Court Reform*, *supra* note 108, at 305-06.

results are accordingly very mixed. “Reproducing Incompetence” is a slogan that has been used with regard to one of the most venerable institutions in Central Europe, the Faculty of Law of Charles University in Prague.¹³⁹ This neglect by the West and trial and error approach in the East is particularly disheartening because it means that we continue to graduate lawyers in many places who carry in themselves, like an indelible genetic code, the methodological incompetence of the Communist era. Although it is true that the Member States have not conferred any powers on the EU to adopt binding legislation in the area of education, there should be no problem with the EU promoting a set of best practice criteria to support the CEECs in their reform efforts. And indeed the models for promotion of excellence in higher education are not hard to find. The reader needs to look no further than to the United States and the United Kingdom where strict evaluation and accreditation procedures administered by external peers and professional organizations are constantly forcing the universities and (law) schools to not only abide by the letter of the applicable laws but to pursue excellence via meritocratic hiring and promotion procedures, constant improvement of work and study conditions, administrations at the service of the students and the faculty, and many other efforts.¹⁴⁰ The finest example for adaptation of such a system in the CEECs can be found in Lithuania where today three successful law schools are competing with three rather different philosophies and approaches to higher education after having passed through a rigorous accreditation procedure relying heavily on international experts and expertise.¹⁴¹ This is not

139. See Aviezer Tucker, *Reproducing Incompetence: The Constitution of Czech Higher Education*, 9 E. EUR. CONST. R. 94, 94 (2000); see also Edi Spaho, *Dire Straits: Albanian Legal Education*, 9 E. EUR. CONST. R. 90 (2000) (discussing problems with the Albanian legal system in its post-communist era).

140. U.S. law schools must be accredited by the American Bar Association (“ABA”). See American Bar Association, Accreditation Process, <http://www.abanet.org/legaled/accreditation/acinfo.html> (last visited Nov. 1, 2008). Lawyers practicing in the United Kingdom must belong to one of four professional organizations called “inns of court” which also set educational requirements. See Lincoln Inn’s History, <http://www.lincolnsinn.org.uk/inns.asp> (last visited Nov. 1, 2008); see, e.g., Gray’s Inn, http://www.graysinn.info/index.php?option=com_content&task=section&id=38&Itemid=858 (last visited Nov. 1, 2008).

141. See Globalex, A Guide to the Lithuanian Legal System, http://www.nyulaw-global.org/Globalex/Lithuania.htm#_10_Legal_Education (last visited Nov. 1, 2008). For more information on the Lithuanian system of evaluation and accreditation of insti-

rocket science but in light of the fact that higher education in the EU, or rather on the European continent, has long given up its claim to global leadership,¹⁴² it should probably not surprise that we cannot seem to get it right. Jean Monnet supposedly said, “[i]f I were starting over, I would begin with culture.”¹⁴³ I guess today he might well say he should have started with (legal) education

Finally, if the approach suggested here should bear some useful fruit in Central and Eastern Europe, it may well be worth trying in other parts of the world, including but not limited to the old and new neighbors of the EU.

tutions of higher education see Lithuanian Centre for Quality Assessment in Higher Education, Rules of Quality Assessment for Institutions of Research and Higher Education, <http://www.skvc.lt/old/wwwskvc/en/rules.htm> (last visited Nov. 1, 2008).

142. Reference is made to the well known *London Times* World University Rankings. For the most recent edition see THE TIMES HIGHER EDUC. SUPPLEMENT & QUACQUARELLI SYMONDS, WORLD UNIVERSITY RANKINGS 4 (Nov. 9, 2007), available at <http://www.timeshighereducation.co.uk/Magazines/THES/graphics/WorldRankings2007.pdf>. Among the 200 top universities in the world, we find no less than fifty-seven U.S. and thirty-two U.K. universities, including twenty of the world's top twenty-five universities, whereas not a single continental European institution even made it into the top twenty-five. *Id.*

143. “*Si c’était à refaire, je commencerais par la culture.*” Both the French original and the English translation are here taken from JUDT, *supra* note 2, at 701. Professor Henri Rieben, the founder and long term director of the Jean Monnet Foundation for Europe and hence in a way the top curator of the personal archives of Jean Monnet and Robert Schuman, once told me that the quote is probably apocryphal. However, as our Italian friends would say, *si non è vero, è ben trovato* (if it’s not true, it’s well invented).