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LAW AS RULE, BARGAIN OR ASPIRATION

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## **Law as Rule, Bargain or Aspiration**

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*We should recall a characteristic of the Jewish interpretation of the law: to raise the dissent to an appropriate level and preserve it as tradition. (Niklas Luhmann)*

### The "Great Transformation" of Western and Eastern Europe

Actual debates on the notion of law in Central and Eastern European countries occur in the specific historical context of a new "Great Transformation" of Europe at large. Western Europe is as much involved in a transition process as Central and Eastern Europe. Moreover, since the early nineties the two processes have become intertwined and both have important legal aspects. The transformation is one of institutional arrangements, indeed one of building new institutions superseding the old ones. The most conspicuous features of the Western process are, on the one hand, the creation of a new set of rules regulating European societies (in particular of market actors) and, on the other, a new judiciary (the European Court of Justice) claiming authority over the citizen as well as over the pre-existing national judicial institutions. The Eastern transformation process differs from the Western in that it is geared not only towards a new set of rules, but at the introduction of the rule of law as such and setting up a new judiciary willing and capable of acting accordingly.

Yet, both undertakings are an uphill struggle against the opposition deriving from the old arrangements constituting the political and legal culture in a given state. Today these difficulties are exacerbated by the prospects of EU enlargement which are one important source for the crisis of the deepening process in the Union, while the applicant countries have simultaneously to cope with the transition from a communist to a national democratic order and the transition from this to the new supranational order. These are the conditions we have to keep in mind when talking about the notions of law as rule, bargain or aspiration in the Eastern European political context. As I will try to demonstrate in this text, these notions and the related discourses might, to a certain extent, be relevant for the construction of the EU as well.

### Western and Eastern Approaches to law and the new legal order in Europe

#### The West

The construction of the new polity called European Union is first and foremost the construction of a new legal order. Law is at the same time a fundamental agent as well as

the object of the European integration process. From the very beginning the "ever closer community of European peoples" has been conceived as a "Community of law". The driving force of this concept was the foundation of the Community by economic cooperation consolidated by legal integration in order to prevent war in Europe once and forever. As a matter of fact, in the aftermath of World War II, imagining a community of law was tantamount to a peace-keeping strategy in a devastated Europe: "Far from being market-driven, the creation of an ECSC was essentially a political response to a political problem. Law was then regarded as the central agent of integration"<sup>1</sup>. Up to this very day, most of the political will and action in the European Union has legal form which is superior to national law and which has direct effects in the member states. European law is the result of complex multi-level bargaining processes in which national governments and administrations are deeply involved. It is, indeed, a bureaucratic form of legislation in which classical democratic legislators, i.e. parliaments, play a secondary role in spite of the fact that directives have to be implemented by national parliaments enjoying certain freedoms when transforming the supranational law into a national bill and in spite of the remarkable upgrading of the European Parliament as a co-deciding legislator.

Thus, European integration is, above all, to be defined as a change of the national legal orders which affected and affects national constitutions as well as the whole set of statutory rules. As a matter of fact, this is more than any normal international covenant has ever been able to bring about. This had indeed been the very intention of at least some of the founding fathers, of Jean Monnet in particular, who conceived the Community of Coal and Steel as a supranational and less international, i.e. intergovernmental institution. Supranationalism was meant to be seminal for a European federation in which differences should be transformed into commonalities. Today, it is common knowledge among legal scholars that the success story of European legal integration as being "the gradual removal of differentiated <sup>2</sup> treatment" could not have happened without the European Court of Justice. This "unsung hero" of European integration succeeded through a variety of famous decisions in establishing the supremacy and the direct effect clauses of European law. None of the two clauses is clearly expressed in the Treaties constituting the Community, but they have been elaborated in two ground-breaking judgements of the ECJ of the early sixties. Proceeding from the "spirit of the treaty" in the case Van Gend en Loos of 1963 the ECJ states:

"The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view [...] is confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which

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<sup>1</sup> Renaud Dehousse/Joseph H.H. Weiler, *The legal dimension*, in William Wallace (ed.), *The dynamics of European integration*, London-New York: Pinter Publishers 1990, p. 243.

<sup>2</sup> Ibid.

affects Member states and also their citizens. [...] The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals."<sup>3</sup>

And this is reiterated in the case *Costa v. ENEL* of 1964 the object of which was the infringement by the Italian State of an EEC regulation having direct effect according to Article 189 of the Treaty:

"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply. [...] The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on the basis of reciprocity. [...] It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not [...] be overridden by domestic legal provisions, however framed, without being deprived of its character of Community law and without the legal basis of the Community itself being called into question."<sup>4</sup>

Other important decisions could be quoted, e.g. the *Van Duyn v. Home Office* case of 1974 or *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* case of 1978, to demonstrate how the ECJ engaged in what has been dubbed "the making of a constitution for Europe"<sup>5</sup>. This could only happen because on the basis of Article 177 of the EEC Treaty national courts have time and again been asking for preliminary rulings on the interpretation of the treaty and the compatibility of national with supranational laws. However, the ECJ's ambitions continuously to expand the reach of supranational law encountered resistance in particular from high national courts, the latest and most important one being that of the German Constitutional Court in its celebrated decision on Maastricht. In this decision the German Court introduced the entirely new notion of a "cooperative relationship" with the ECJ, thus claiming equal rights as the latter when deciding on fundamental human rights issues.

This story, though very roughly told, illustrates the dimension of change which had unfolded in Western Europe since the creation of the Communities and later of the Union and which is far from being concluded. It is a story of stops and goes, of concessions made by national High and Supreme Courts which sometimes have been contradicted by

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<sup>3</sup> Quoted in Paul Craig/Gráinne de Búrca, *EU Law. Text, Cases and Materials*, second edition, Oxford:OUP 1998, p. 165.

<sup>4</sup> *Ibid.*, 258.

<sup>5</sup> Federico Mancini, *The Making of a Constitution for Europe*, in Robert O.Keohane/Stanley Hoffmann (eds.), *The New European Community. Decision-making and Institutional Change*, Boulder-San Francisco-Oxford: Westview Press, 1991, pp. 177-194.

later decisions of the same courts. In particular the High and Constitutional Courts of Germany, Italy and France have repeatedly tried to invert the hierarchy between them and the ECJ. On the other hand, some recent scholarly interpretations of the relationship between the two levels of the judiciary tend to circumvent the problem of hierarchy by proposing the notion of "interacting legal systems" and of "pluralism" as against "monism"<sup>6</sup>. However, such an interpretation might utterly contradict the legal tradition of member states as it is the case e.g. with Austria where the problems resulting from this contradiction are not openly addressed by legal actors - be they theorists or practitioners - but rather masked by delaying decisions. This might entail quite important uncertainties for the citizens engaged in legal proceedings. Legal uncertainties also have other sources, such as unclear implementation acts carried out by national legislators or the non-compliance of judges and lawyers with European primary and in particular secondary law. This might occur out of ignorance or of sheer unwillingness to take the supranational legal system into consideration. As to the implementation of EC-directives by national legislators one might say that often the supranational law is not considered as a strict rule but as a starting point for bargains between interest groups lobbying in national parliaments for their particularistic interests. Last but not least, differences in terminology might be a source for hazy wording by the legislator which then could lead to problems of interpretations by the judiciary.

It is important to keep this story in mind when talking about the aspirations of Central and Eastern European states at EU-membership which implies their willingness and capability to change their legal systems accordingly. As a matter of fact, the transposition of the *acquis communautaire* into their national legal order is one necessary precondition for being accepted in the Western club. However, the implementation of EC-law in Central and Eastern Europe might be easier and more difficult at the same time. Easier because much of the law engendering e.g. the single market as envisaged by the Project 1992 would not collide with pre-existing consolidated national rules and legal cultures. More difficult though because of the lack or the inexperience of judicial institutions designed to implement the new rules.

## The East

Eastern approaches to legal theory and practice are to be considered in terms of emancipation from a decades-long history of authoritarian rule in which law was of rather limited importance. In spite of the existence of constitutional as well as statutory laws, arbitrariness was a dominant feature of political rule. Elite attitudes were reflected by attitudes of the population. Informal relations have been prevalent in most spheres of society. Thus, the return to the rule of law or perhaps the first establishment of it is to be seen against this background. On the other hand, Central and Eastern European countries should not only be viewed in the tradition of the last fifty years. If history is at all important, their pre-communist legal order - this implies at same time legal theory and practice - should be analysed as well in order to gain an appropriate understanding of

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<sup>6</sup> Neil MacCormick, *The Maastricht-Urteil: Sovereignty Now*, in Paul Craig/Gráinne de Búrca, *EU Law. Text, Cases and Materials*, second edition, Oxford:OUP 1998, pp. 292-293.

continuities and discontinuities of the past and of the potential lying therein. Similarly in the West, legal theory and practice in post-war Germany, Austria or Italy could never be only considered in view of the fascist or national socialist past. Nevertheless there might be important differences between the various Central and Eastern European states due to the fact that they hardly had been modern sovereign states based on laws a national legislator had agreed upon. But it would be interesting to investigate at least in some cases the marks the Austrian legal tradition might have left.

Moreover, and much more importantly, after 1989 Central and Eastern European countries adopted West European models of legality including new institutions of the judiciary. The "return to Europe" as the transition process was pompously called, to many East Europeans meant above all the return to democracy and the rule of law. But it is still difficult for an outside observer to assess whether and how far progress has been made. Furthermore, it is a daunting task to compare the achievements of the different countries and to judge the stability of the new institutional arrangements. The "velvet revolutions" and even the struggle for new constitutional arrangements appear an easy task when compared with the difficult process of changing the political and legal culture in detail and preserving the achievements.

To start with it is important to note that changes have been initiated not only according to the will of the new ruling elites in post-communist countries but also under the open or latent pressure of the international community, in particular of the European Union. The declarations of several European Council summits regarding the will of the Union to accept new members of the former Eastern bloc contained a number of conditions which should compel the applicants to adapt to new legal thinking and practice. Indeed, some scholars consider the international dimension as being "a principal component of the democratisation process in Eastern Europe. It is turning out to be a crucial condition for its success"<sup>7</sup>. As a matter of fact, a similar statement could be made about the transition from authoritarian rule to democracy and the rule of law in Greece, Spain and Portugal in the seventies.

However, more comprehensive in-depth studies have to be carried out repeatedly and over longer periods of time in order to make appropriate assessments of the quality and stability of the change. In a special feature about "Citizen and Law after Communism" of the East European Constitutional Review<sup>8</sup> the contributions covering Russia, Ukraine, Poland, and Romania have been summarised as follows:

"First, post-communist citizens, while living under generally stressful conditions, are being asked to adapt their behaviour to a complex and highly novel body of rules. They have naturally done so only incompletely. This deviation of their actual behaviour from

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<sup>7</sup> Quoted in Mette Skak, *Stability of Democracy and Institutions and the Rule of Law*, in Peter-Christian Müller-Graff (ed.), *East Central Europe and the European Union: From Europe Agreements to a Member Status*, Baden-Baden: Nomos (ECSA-Series, Vol.5) 1997, pp.301-326, here p.303.

<sup>8</sup> Vol. 7, Number 1, Winter 1998.

what the law demands has many sources. For one thing, a great deal of currently valid law is of quite recent vintage. This means that public officials (including judges) do not always understand what the law on the books implies in practice. In a few cases, they are not even aware that the law exists. Moreover, the new rapidly drafted codes and statutes are full of gaps, ambiguities, and internal inconsistencies. They continue to be amended in a piecemeal fashion. High-court rulings of unconstitutionality are occasionally disregarded by executive-branch officials. Little effort has been made at public education. Administrative officials charged with applying the law still retain so much interpretative discretion, and judicial remedy for abuse at the hands of such officials is so unlikely, that the rule of law sometimes degenerates into the rule of petty bureaucrats [who moreover] seem to have perfected the art of responsibility-avoidance. Getting a single required signature on a document, for instance, can easily turn into a legal ordeal."<sup>9</sup>

It is apparently an "historical law" that to be successful the construction of a new legal order must go hand in hand with the (re-)education of the personnel or even with a gradual replacement of the old actors in the judicial branch by a new class eager to introduce novel values. This is all the more true when the transition occurs from authoritarianism to democracy. In fact, the formal adoption of new constitutions and of new legal bodies is only one part and maybe the easier part of the story. To fill these arrangements with real life is a much more cumbersome enterprise. If it is, as we have seen above, difficult to convince lawyers and judges in EU-members states to adapt themselves to the new body of supranational laws, how much greater must the opposition of a judicial branch be whose personnel has been educated in the communist world.

Nevertheless, the first main concern of the post-communist rulers has been the set up of the judiciary as an institution independent of other government powers. This was no easy task if we are to believe the results of an investigation on "Judicial Systems in a Period of Transition" published by the Council of Europe in 1997, and it has been accomplished in different ways. Indeed, the most difficult part has been the recruitment of personnel who were at same time professionally qualified and capable of keeping the judiciary independent and subordinated exclusively to the law. Hence, in Bulgaria controversies about these requirements were resolved by a clause of the "Transitional and Concluding Provisions" of the Bulgarian Constitution which states, that "justices, prosecutors, and investigating magistrates shall become unsubstitutable, if within three months of its formation, the Supreme Judicial Council does not rule that they lack the necessary professional merits."<sup>10</sup> "Seemingly, political appointments had priority over professional qualifications. However, where professional qualification is deemed to be more important, as in the Czech Republic, the selection criteria favours those who "can boast

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<sup>9</sup> Stephen Holmes, *Citizen and Law after Communism*. Introduction, in *East European Constitutional Review* Vol.7, Number 1, Winter 1998, Feature.

<sup>10</sup> Quoted in Sergio Bartole, *Organizing the Judiciary in Central and Eastern Europe*, in *East European Constitutional Review* Vol.7, Number 1, Winter 1998.

of experience acquired during the communist era"<sup>11</sup>. In Poland provisions have been created to authorise the dismissal of judges with a compromising past. This threatens the independence of the judges in that they would throughout their career be uncertain of remaining in office. Another danger to independence is the possibility of blackmailing the judges. In Hungary possibilities for the executive to intervene in the management of the judiciary have been created in order to regulate such problems, albeit this power has been subsequently reduced.

As to the management of the judiciary in most countries a mixed system between self-management (moulded on West European models) and confirmation by either the Parliament (e.g. Latvia, Slovenia, Romania) or by the minister of justice and/or the president (e.g. Czech Republic, Bulgaria, Poland, Lithuania) has been chosen, Hungary representing clearest model of self-management. In Russia, Belarus and Ukraine the power of the president to appoint judges is by far the greatest. Beyond the appointment the problem of continuous supervision of the judiciary has to be tackled as well. Some states, such as Bulgaria and Romania, where it was deemed dangerous to entrust the independence of judges solely to an equilibrium of political forces either in national assemblies or among the highest constitutional bodies, this task has been assigned to judicial councils as neutral bodies. But this raises the question "quis custodiet ipsos custodes?" This question has been haunting all West European countries which in one way or another have adopted the model of self-management of the judiciary, Italy being an important case in point.<sup>12</sup>

However the following comment of Sergio Bartole holds true for all newly established judicial systems, albeit it might be exacerbated in the case of transition processes like those in Central and Eastern Europe: "Only with time and with more practical experience, will it be possible to draw conclusions regarding the appropriateness of the solutions adopted".

The reforms of the judiciary have been given priority in this text because the quality of a legal system is largely dependent on the quality of the implementation of laws by the magistrates. When looking at the laws themselves in particular to laws re-arranging the economic system of the Central and Eastern European countries it is obvious that enormous efforts have been made in adapting the old legal body to new requirements. Thus, studies conducted under the auspices of the European Community show that "despite all the differences the respective Eastern European countries tried to establish legal rules, institutions and methods well known within and compatible to the legal order of the European Communities, such as concepts of corporation law and competition law as well as competition offices with a parallel to the relevant General Directorate IV of the Commission or to national institutions like the German Bundeskartellamt".<sup>13</sup> The

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<sup>11</sup> Ibid.

<sup>12</sup> Cf. *ibid.*

<sup>13</sup> Peter-Christian Müller-Graff, *East Central Europe and the European Union: From Europe Agreements to a Member State – General Report* -, in Peter-Christian Müller-Graf (ed.), *op.cit.*, p. 15.



Europe Agreements between the European Union and Central and Eastern European states and the White Paper of the Commission on the Preparation of the Associated Countries definitely constituted an important incentive for institutional reforms. The main idea of the White Paper is a pre-accession strategy for the applicant states to guide them in their attempts to fulfil the general market requirements for accession and those conducing to the approximation of the internal law of these states towards the Community legislation concerning the single market. But as we know, the pure approximation of the law does not per se create a competitive market.

First assessments, as they have been made for single countries show, for instance in the case of the Czech Republic, that "extensive transplanted of policies and regulations from EC competition law (with some elements taken from US regulations) into Czech legal environment seems to be - five years after their introduction - fruitful"<sup>14</sup>. This statement is true when related to the pure figures: In 1991-1992 the Czech Office for Economic Competition established by an Act of 1991, though building on legal experiences of the thirties, dealt with 181 cases involving abuse of dominant or monopolistic position, 39 cases involving mergers and 29 cases involving cartel agreements. In 1994 the first two figures had doubled, the third one tripled<sup>15</sup>. However, simple quantitative assessments remains insufficient. One major problem seems to arise from the fact that the Act on competition, being largely moulded on the EC Treaty and therefore drawn up for a functioning market economy, only partly serves the constraints of an economy in transition. Moreover, the Office for Economic Competition, although it has been created to focus on competition issues has as a by-product and in absence of other authorities, is occupied with the protection of other public interests such as price and more general economic analyses<sup>16</sup>. However, some progress has been made since 1991. The Office for Protection of Economic Competition is an autonomous body acting independently of the government and the Competence Act has been amended in 1996 and 1997 in order to meet the requirements for EU-membership.

Competition laws are mainly addressed to enterprises and therefore perhaps easier to implement as acts on state aid which have been part and parcel of the liberal market concept of the European Union since its very beginning. Regulations of state aid have been a permanent point of conflict between the EU and the Member States. Although the European Commission had been entrusted with the right to control state aids already in the Treaty of Rome (1957, Articles 92-94), the control remained of a rather symbolic nature until the eighties. First of all, the Commission was not given the resources to supervise the activities of governments and could act only in case of third party complaints. Second, the anti-state-aid policy could never be defined by ignoring the economic development: In times of recession or structural crises in specific sectors, the

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<sup>14</sup> <sup>14</sup> Jirí Zemánek, *Czech Competition Law Facing the EU Challenge*, in Marc Marescau (ed.), *Enlarging the European Union. Relations between the EU and Central and Eastern Europe*, London-New York: Longman 1997, pp. 108-115, here p. 111.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, p. 112.

power of the Commission<sup>17</sup> in implementing the Treaty provisions was reduced to the task of coordinating national aid policies. Up to the single market project of 1992 there was no real progress in this area, in spite of ground-breaking rulings by the European Court of Justice such as the Philip Morris decision of 1981. But even after 1992 only a fraction (3-7 p.a.) of the cases notified (about 500 p.a. in the years 1992-1994) were qualified as illegal by the Commission. Thus David Allen comments: "[...] the Commission continues to approve most of aids of which it is notified, while doubling its efforts to discover those of which it has not been notified"<sup>18</sup>. One must expect a similar and possibly exacerbated relation between the Commission and the new applicant states in which state enterprises have been the economic hegemony for a long period of time and where still large parts of the economy are dominated by them. Moreover problems in this context may be aggravated by the fact that the courts in Central and Eastern European countries lack the possibility of seeking the guidance of the ECJ under the Article 177 of the EC Treaty procedure.<sup>19</sup>

## Concluding Remarks: Law and Legitimacy

Changing a legal order is tantamount to changing a whole political culture. This can only succeed if there is a consensus among the ruling elites about the need for change and about the ways of change. This holds true for all political systems. Hence, in a way the transformation of the Western member states of the Union can be compared to the transition process of the Central and Eastern European states aspiring for membership. However, the elite consensus must be backed by an active or at least a permissive consensus of the people who will have to bear the costs of transformation. While, in the West as well as in the East, there has been and still is an impressive consensus on the need for an ever growing cooperation in Europe and perhaps even for an ever greater fusion of politico-administrative institutions, the real consequences of cooperation and fusion are covered by a veil of ignorance. This is caused by the intransparency of the institutions and the complexity of procedures as well as by the crucial lack of intermediary powers that would link the rulers and the ruled. Indeed, political parties being the classical linkage entrepreneurs are no longer fulfilling these functions in the West and they have hardly started to do so in the East.

In Central and Eastern Europe EU membership is mainly perceived as an opportunity for access to prosperity, not as a starting point for a quite deep change of the whole political

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<sup>17</sup> Sonja Puntcher Riekman, *Die kommissarische Neuordnung Europas. Das Dispositiv der Integration*, Wien-New York 1998, pp.104-108.

<sup>18</sup> David Allen, *Competition Policy*, in Helen Wallace/William Wallace, *Policy-Making in the European Union*, Oxford: OUP 1996, pp-157-183, p.178.

<sup>19</sup> Piet Jan Slot, *The Application of Rules on State Aids and Rules Relating to Public Undertakings*, in Marc Marescau (ed.), *Enlarging the European Union. Relations between the EU and Central and Eastern Europe*, London-New York: Longman 1997, pp.116-130, here p.130.

system encompassing the newly acquired sovereignty. However, to a certain extent this was also true for Western Europeans, who over decades of integration professed a permissive consensus and then suddenly became critical towards the deepening provisions of the Treaty of Maastricht. EMU has changed the perceptions of the "ever closer union" in the eyes of the European peoples. Suddenly, integration of the law and through the law was no longer seen as automatically legitimate. Questions about who decides in the legislative process and for which purpose became an object of litigation. The hidden "state-building" dynamics of European integration became a controversial topic within and without academia. Anti-European parties came to the fore and were successful in national elections. Institutional reforms were at least rhetorically linked to the question of more democracy, albeit the Intergovernmental Conference of Amsterdam in 1997 was unable to tackle the problem in an appropriate way. Thus, the whole issue was postponed, until after the next enlargement. The crisis of the Santer Commission endorsed the critics of the centralisation process. The answers offered by the governments in Amsterdam and thereafter were mainly re-affirming their own role as final "arbiters of the treaties", thus resorting to the traditional model of legitimation through the Council of Ministers.

However, European law is largely the product of national and supranational bureaucracies. The ministers are mainly the signing partners (80% of the acts are signed by the councils of ministers without further much ado, only 20% are object of discussion and negotiation within a given council), while the members of European Parliament have no right of initiative (which belongs to the Commission) and are not involved in the agenda setting of the Commission and its "underworld of committees" (J.Weiler). Thus, one could ask whether this Western reality of bureaucratic politics does not suit Eastern traditions of powerful state bureaucracies rather well. If this were true, the future of compliance with European law by Eastern authorities might be rather bright. On the other hand, the supranational model of technocracy has so far been quite successful because its goals were defined in terms of modernisation and its output has been perceived as satisfactory. Thus, Eastern administrations could become unquestioned partners of the European technocracy only in the case they would define themselves as agents of modernisation which is deemed to enhance the improvement of social life for the largest possible number of citizens. Moreover, European technocracy is much more than the Commission and its administration. It is a rather arcane compound of internal and external experts, academics and lobbyists. Hence, building similar networks in Central and Eastern European countries would be crucial for their administrations to become modern technocracies.

Yet, technocracies however successful in their output are the major challenge for democratic rule. In spite of Max Weber's diagnosis of an ever more powerful bureaucracy as the concomitant of modern democracy born out of the desire of the demos to enjoy and distribute the wealth of a nation, democratic political systems cannot prevail in times of economic or other crises when output might be low and dissatisfaction of a critical mass of the people be the inevitable consequence. Thus, a balance must be found between legitimation through output and legitimation through

input. Input rests on opportunities of access to the political institutions through defined procedures, hence on chances to be heard and have influence.

Loyalty can only be secured if the ruled or at least a significant part of them are granted a voice in the system. If the system is based on representation, the representatives must be willing and able to function as links between the top and the bottom. At the end of this century, these very basic notions of democracy seem to lose importance. This might have implications also for the loyalty towards the new legal order in Europe the most striking deficit of which lies in the fact that the Union still lacks direct coercive powers to ensure compliance. Implementation of European law is largely dependent on the good will of national actors, while the production of law is mainly a top down enterprise. In order to intensify and ensure the loyalty of European citizens towards the new polity and legal order, the top down model should be balanced by bottom up procedures. This holds true for the West as much as for the East.