Debate


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Wojciech Sadurski is one of the primary scholars of East European constitutionalism. He has authored a number of key monographs, the major one of which is his magisterial study of constitutional courts in Eastern Europe (Sadurski 2005). He has also edited numerous volumes comprising the work of students of law and society in the region. Sadurski is a staunch defender of the thesis that Eastern European new member states in the EU have developed viable and sophisticated constitutional systems. What is more, he has convincingly argued that East European constitutionalism is not a simple copycat exercise, a transplantation of Western models, but has distinctive traits of its own and makes a valuable contribution to constitutional debates in the contemporary world.

In the reviewed book, *Constitutionalism and the Enlargement of Europe* (Sadurski 2012), the author takes this argument further to show how enlargement has impacted European constitutionalism. His main thesis is that there have been various positive synergies between the enlargement of the Council of Europe and the EU on the one hand, and their constitutionalisation on the other. The two processes, in his view, have reinforced each other. Thus, in terms of causal relationship, enlargement is one of the factors that has helped supra-national constitutionalisation, while constitutionalisation, for its part, has also helped improve the integration of East European states into the Council of Europe and the EU.
Sadurski rightly points out that there are two types of literature on the topic, which nevertheless do not communicate with each other well. One type is produced by scholars of constitutionalism and the EU, and the other by experts on enlargement and post-communist transitions. Sadurski’s book therefore attempts to bridge the gap between the two scholarly discourses, and from this perspective it is a success.

Sadurski’s argument unfolds in four stages. First, he focuses on the enlargement of the Council of Europe shortly after the fall of the communist regimes. The expansion of this organisation to forty-seven members has undoubtedly raised its profile and importance dramatically. The ECHR has become de facto a pan-European constitutional court, and the soft law produced by the Venice Commission – an advisory body of the CE – has gained considerable importance. Sadurski points out, however, that the Strasbourg court is perceived differently in the East and West, as its authority and legitimacy are more pronounced in the new member states, and especially those of Central Europe. Not surprisingly, one of the most ‘constitutional’ in their nature as instruments of the ECtHR – the so-called pilot judgements – has been developed to tackle problems mainly in the Eastern European states. The first chapter concludes with the finding that both the ECHR and the ECtHR are now ‘more constitutional’ in their nature than they used to be before the enlargement. Sadurski relies here on Raz’s definition of a ‘thick sense’ of constitution and examines whether the normative frame of the CE meets these criteria, including stability, superiority to other law, common ideology, etc. Although the fit is not perfect, and although the ECtHR does not have the power to strike down legislation (a mark of constitutional courts), there is still a strong argument in favour of a causal link between enlargement and a stronger sense of constitutionalisation in the case of the Council of Europe.

From Chapter 2 onwards Sadurski focuses on the EU and explores the impact of enlargement on three elements of EU constitutionalism: fundamental rights, the dialogue between national constitutional courts and Luxemburg, and, finally, the strengthening of constitutional democracy within the new member states from Eastern Europe.

Here the argument is more complex and less obvious in comparison to the case of the Council of Europe. First, indeed, there is some parallelism between the codification of fundamental rights in a legally binding Charter, and the enlargement of the EU. The Charter did play an important role in the framing of conditionality vis-à-vis Eastern applicant countries. Also, some specific safeguarding mechanisms, such as Article 7, were introduced in the EU legal set-up, motivated by fears that post-communist countries may become violators of rights and principles in the manner that Austria threatened to do with a