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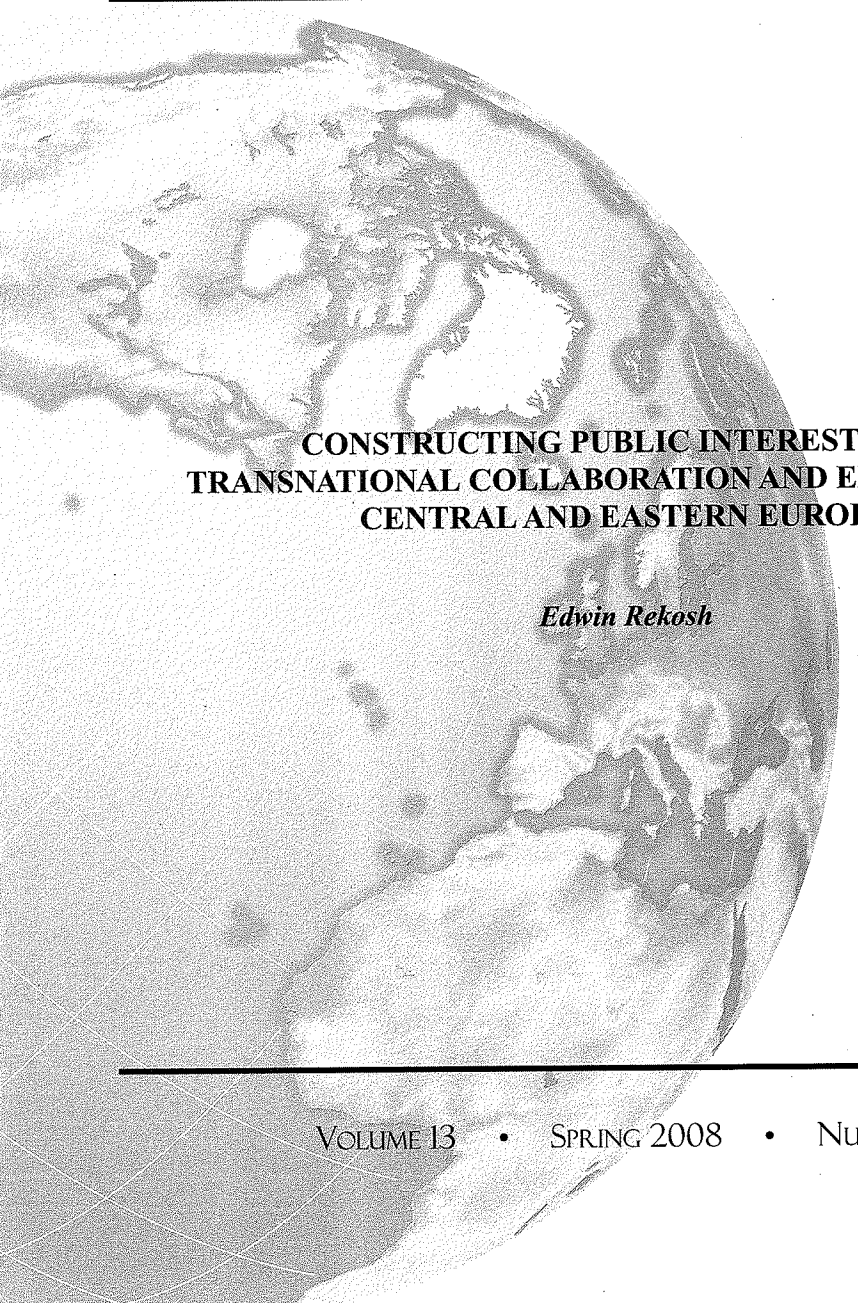

CONSTRUCTING PUBLIC INTEREST LAW: TRANSNATIONAL COLLABORATION AND EXCHANGE IN CENTRAL AND EASTERN EUROPE

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INTRODUCTION

To what extent has the pattern of foreign funding and intellectual exchange that has shaped law-based "civil society" activities in Central and Eastern Europe resulted in an adoption of American constructs?[1] This article will explore the historic origins of public interest law in Central and Eastern Europe, assess the influence of money and ideas coming from the United States, and trace the resulting evolution of public interest law activities in that region over the past fifteen years in three key areas: public interest litigation, clinical legal education and state-supported legal aid.

While many law-based activities in Central and Eastern Europe seem instantly recognizable to those looking at them through the lens of the American experience with public interest law, familiar practices and institutions have been subtly transformed through a complex process of transnational exchange and local adaptation. Still, the general nature of the activities discussed here are manifestations of a fundamentally American approach: to

[1] "Civil society" is a contested term. *See generally* JOHN EHRENBERG, CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA (New York University Press 1999); MICHAEL EDWARDS, CIVIL SOCIETY: THEMES FOR THE 21ST CENTURY (Polity Press 2004). The terms "civil society" and "civil society organizations" are being used in this paper simply as short-hand to refer to non-governmental organizations, such as associations, foundations and other non-profit organizations, sometimes referred to collectively as the "third sector" (as distinct from the government and business sectors). The focus will be on the sub-sector of civil society organizations that primarily engage in legal advocacy.

place priority on enhancing the legitimacy of democratic decision-making through forms of public participation that emphasize the roles of civil society organizations and the judiciary. Further, these efforts have co-existed with, and sometimes synergistically benefited from, the global market-driven "rule of law" reform program.[2] But they have been motivated by a different agenda, and their results may prove critical to the long-term future of progressive causes in the region.[3]

This article examines some particularly notable examples of a phenomenon dubbed by some as "the new law and development movement."[4] As such, it exists in a scholarly dialogue initiated by Trubek and Galanter, who first posed the question: to what extent does the international exchange of resources and ideas relating to law and development result in the imposition of values by the "exporting" partner in the exchange relationship? For Trubek and Galanter, writing in the aftermath of the social and political upheavals of the 1960s, such activities were irremediably polluted by the idealizing

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[2] See Julio Faundez, *The Rule of Law Enterprise: Promoting a Dialogue Between Practitioners and Academics,* 12 DEMOCRATIZATION 567, (2005) for a discussion of the link between the neo-liberal Washington Consensus and the promotion of "the rule of law" by the World Bank and others. Indeed, the Washington Consensus agenda is consistent with the relatively narrow, formal understanding of "rule of law" propounded by Joseph Raz and F.A. van Hayek. *See* Joseph Raz, *The Rule of Law and its Virtue, in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210 (Oxford University Press 1979); FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY (University of Chicago Press paperback ed. 1978); FRIEDRICH. A. HAYEK, THE ROAD TO SERFDOM (University of Chicago Press 15th anniversary ed. 1994); Joseph Raz, *The Rule of Law and its Virtue,* 93 L. Q. REV. 195 (1977). However, "rule of law" is also used in a broader sense to include substantive notions of justice. *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 11-12 (1985). In any case, contemporary efforts to develop "rule of law" can have diverse and contradictory aims, ranging from creating a stable and predictable pro-growth regulatory environment to law and order to human rights. *See* Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners,* 55 RULE OF L. SERIES (Carnegie Endowment for Int'l Peace, Democracy and the Rule of Law Project, 2005). *See generally* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., 2006) [hereinafter PROMOTING THE RULE OF LAW ABROAD].

[3] *See* 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 & Alvaro Santos eds., Cambridge University Press 2006).

[4] Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study,* 32 LAW & SOC'Y REV. 93 (1998). *See also* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006); Randall Peerenboom, *What Have We Learned About Law and Development: Describing, Predicting and Assessing Legal Reforms in China,* 27 MICH. J. INT'L L. 823 (2006).

of the U.S. legal system by U.S. scholars who then imposed their ethnocentric assumptions about how law does and should operate.[5]

Many significant changes have taken place in the world since that seminal critique was published: the Berlin Wall fell; Amnesty International became a global brand; rights-claiming "NGOs" increased in numbers around the world by several orders of magnitude (as evidenced early on, for example, by the unexpectedly large numbers participating in the NGO forum of the 1993 U.N. World Conference on Human Rights).[6] In the aftermath of September 11, 2001, so far dominated by the Bush Administration's "War on Terror," U.S. influence through "hegemonic globalization" seems never to have been more firmly in evidence; yet, at the same time, it is harder to accept a depiction of well-intentioned but naïve legal reformers promoting globally an idealized version of the American legal tradition's protection of individual rights.[7] Certainly that still happens, especially where current American geopolitical concerns are most in evidence, but in many places in the world, such as Central and Eastern Europe over the past decade or so, the empirical reality is far more complex.[8]

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[5] David M. Trubek & Marc Galenter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974). *See also* John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457, 479-81 (1977). Merryman makes the related point that law and development experts were not disciplined by the same social and political forces that would constrain them in their own countries and were effectively "gambling with someone else's money." *Id.* at 481. For more current scholarly treatment of such issues, see Noah Feldman, *Imposed Constitutionalism*, 37 CONN. L. REV. 857-89 (2005).

[6] *See* WILLIAM KOREY, NGOS AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: "A CURIOUS GRAPEVINE" 273-306 (1998), for a detailed description of the 1993 World Conference and the role played there by NGOs.

[7] *See* Boaventura de Sousa Santos & Cesar A. Rodriguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalization in* LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 11-12 (Boaventura de Sousa Santos & Cesar A. Rodriquez-Garavito eds., Cambridge University Press 2005).

[8] The author has been directly involved in many of the transnational exchanges described in this article but has strived to recount such events in a spirit of honest self-reflection. One hopes that the inevitable loss in objectivity that comes with being an actor in many of the events analyzed here is compensated for by the first-hand account provided.

I. SOME HISTORIC ORIGINS OF PUBLIC INTEREST LAW IN CENTRAL AND EASTERN EUROPE

In contemporary Central and Eastern Europe, there are many efforts that are explicitly named as public interest law activities or that outside observers might describe as such. These efforts have been at least partly shaped by intertwining narratives that are organically tied to the region itself. One thread begins with World War II, the creation of the international human rights normative framework, and the international politics of human rights during the Cold War. A second thread can be traced to the fall of the Berlin Wall and the development of civil society in Central and Eastern Europe. A third narrative thread can be outlined in the thinking of the public intellectuals of the region, originating in their dissident pasts and given shape by the philosophical positions of European figures such as Juergen Habermas, Hannah Arendt, and others.

A. The International Politics of Human Rights

International human rights as a normative framework were in large part sparked by global reaction to the post-war revelation of atrocities committed by the Nazi regime.[9] It is of course possible to speak of rights and justice in the context of Central and Eastern Europe without reference to World War II, but inevitably such discussions broach topics like international human rights and "European values," which make no sense without acknowledging the Holocaust as a collective European cultural reference point.[10]

The development of the international human rights normative framework became an important focus of the United Nations from the outset, starting with the unanimous proclamation of the Universal Declaration of Human Rights in 1948, and continuing with the drafting of two binding international "covenants" on civil and political rights and economic, social, and cultural

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[9] Andrew Moravsik, *The Origins of Human Rights Regimes: Democratic Delegation in Post-war Europe*, *in* OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 211 (Foundation Press 2005). International human rights treaties promulgated by the United Nations had their historical antecedents in the French *Declaration des Droits de l'Homme*, the U.S. Bill of Rights and international treaties and customary international law on issues such as the slave trade and the conduct of war, among others, but the first efforts to systematize international norms on human rights date from the aftermath of World War II. *See, e.g.,* LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER & DAVID W. LEEBRON, HUMAN RIGHTS 274-76 (Foundation Press 1999); HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 58-158 (3d ed. Oxford University Press 2008).

[10] *See generally* TONY JUDT, POSTWAR: A HISTORY OF EUROPE SINCE 1945 (Penguin Books 2005).

rights as well as other, more specialized treaties in subsequent decades.[11] From the beginning, Cold War politics had a formative impact on the process, leading, among other consequences, to the pragmatic ideologically-motivated division of "universal" rights into two distinct packages reflected in the two covenants.[12]

Within the Cold War context, a cardinal event in the relationship between human rights and international politics was the signing of the Helsinki Accords, which included three "baskets" of commitments in areas roughly tracking security, economic cooperation, and human rights.[13] Soon after the Helsinki Accords were adopted, a group of individuals in the Soviet Union began to organize and protest against human rights violations. Attempting to hold the Soviet government accountable to its Helsinki commitments, they formed the Moscow Helsinki Group in 1976. Helsinki Watch was established in New York soon after in order to provide international support for the Moscow Helsinki Group. This led in turn to the development of Americas Watch and other regional "Watch Committees" and paved the way for eventual consolidation into Human Rights Watch.[14] Two Helsinki Watch leaders traveled across Europe in the early 1980s, with the support of the Ford Foundation, to make contact with a few like-minded individuals and nascent committees to join together into an international network; this network became the International Helsinki Federation for Human Rights, with a secretariat in Vienna.[15] The members of that network were active across the Cold War divide, making use of geo-political forces to protect human rights in the Eastern Bloc. It was a success story that would have a long-term im-

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[11] *See, e.g.*, HENKIN ET AL., *supra* note 9, at 320-334; STEINER ET AL., *supra* note 9, at 133-38. The Convention on the Prevention and Punishment of the Crime of Genocide was also adopted in 1948. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277, *available at* http://www.unhchr.ch/html/menu3/b/p_genoci.htm (last visited Feb. 26, 2009).

[12] STEINER ET AL., *supra* note 9, at 136.

[13] Conference on Security and Cooperation in Europe, Final Act (Helsinki 1975).

[14] *See* JERI LABER, THE COURAGE OF STRANGERS: COMING OF AGE WITH THE HUMAN RIGHTS MOVEMENT 93-98 (Public Affairs 2002); ARYEH NEIER, TAKING LIBERTIES: FOUR DECADES IN THE STRUGGLE FOR RIGHTS 149-73 (Public Affairs 2003).

[15] International Helsinki Federation for Human Rights, About IHF: History, http://www.ihf-hr.org/cms/cms.php?sec_id=1&pag_id=2 (last visited Feb. 26, 2009). The two were Jeri Laber, the founding Executive Director of Helsinki Watch, and Aryeh Neier, former Executive Director of the ACLU and soon-to-be Executive Director of Americas Watch, then the Executive Director of the consolidated Human Rights Watch and now President of Open Society Institute. LABER, *supra* note 14, at 174-83. NEIER, *supra* note 14, at 157-60.

pact on the region's collective consciousness, especially its understanding of human rights.

In the meantime, however, human rights transcended Cold War politics in the rest of Europe. The setting up of the Council of Europe led to mainstream acceptance of international human rights and the emergence of supranational bodies for their enforcement within the post-World War II integration project, resulting in European countries ceding a substantial portion of national sovereignty to a new European layer of sovereignty. As a result, international human rights are highly formalized in Europe-wide institutions, including a judicial body with supranational effect: the European Court of Human Rights.[16] Domestic legal orders in Europe have thus accommodated extra-national rule-making procedures and interpretive bodies.[17] These features–historical, political and normative–make contemporary Europe hard to compare with the United States, where international human rights is taking on new significance in the strategies and tactics of public interest lawyers.[18] There is nothing novel in this in the European context, and reliance on international human rights norms and mechanisms of course continues to be a mainstay of progressive activists, even as they experiment with tactics and strategies drawn from public interest law models in the United States and elsewhere.

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[16] This is the most famous but not the only human rights institution with supranational effect in Europe. The Council of Europe, based in Strasbourg, France, is responsible for operating the European Court of Human Rights, but also includes bodies responsible for implementing a Convention Against Torture, a National Framework Convention on National Minorities and other human rights legal instruments. It also includes a Committee of Ministers making "recommendations" that member states are supposed to take into account in their legislation as well as a large bureaucratic infrastructure devoted to human rights and legal affairs. In addition, the European Union has adopted a number of normative instruments touching on human rights with even more domestic force, as overseen by the European Court of Justice in Luxembourg as well as the newly renamed and expanded EU Agency for Fundamental Rights in Vienna. Although an EU project to promulgate a European Constitution hit a major roadblock when France and the Netherlands rejected it in national referenda, the chapter which would have provided the equivalent of a bill of rights had already been adopted in a separate legal instrument called the European Charter of Fundamental Rights. *See* Francis G. Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice: The Impact of European Accession to the European Convention on Human Rights*, *in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE (Ingolf Pernice, Juliane Kokott & Cheryl Saunders eds., 2005).

[17] Frank Hoffmeister, *Germany: Status of European Convention on Human Rights in Domestic Law*, 4 INT. J. CONST. L. 722, 726-28 (2006).

[18] *See generally* Scott L. Cummings, *The Internationalization of Public Interest Law, 57* DUKE L. J. 891 (2008) (explaining the influence of global change on U.S. public interest law).

B. *The Fall of the Berlin Wall and the Development of Civil Society*

In the wake of the wide-scale political changes associated with the fall of the Berlin Wall in 1989, civil society organizations formed in the newly open environment, some through a process of organizing above ground previously underground networks, and others set up by new actors inspired by the political moment.[19] Before the fall of the Berlin Wall, law and legal procedures were not tools available to the anti-communist dissidents engaged in illegal political activities, nor were other forms of open political mobilization and advocacy feasible on any significant scale. Yet the social networks of dissidents working underground outside formal structures in the 1980s immediately organized themselves into formal civil society organizations as soon as it became possible to do so. And, perhaps inevitably, they found themselves increasingly confronting matters of law.

By the time "roundtable talks" in Poland led to the communist party peacefully giving up power in 1989, the Helsinki Committee in Poland, a group of intellectual dissidents, faced some fundamental questions of tactics and strategy as the political system it opposed unraveled and its members were elected to parliament and joined the government.[20] The Committee decided to expand its voluntary citizen initiative into a fully staffed nonprofit organization.[21] The resulting Helsinki Foundation for Human Rights proved itself well-suited to the changing Polish context. It has emerged as one of the strongest human rights groups in the post-communist period, becoming an influential actor not only in Poland but in some former Soviet countries as well. Many of the human rights groups in Central and Eastern Europe have suffered the same identity crisis, though usually manifesting itself in subtler and less obvious ways.

Given the benefits that the "human rights" banner had provided to individuals organizing as Helsinki Committees or otherwise engaged in dissident activities during the Cold War, it is not surprising that many of the above-

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[19] *See generally* VLADIMIR TISMANEANU, REINVENTING POLITICS: EASTERN EUROPE FROM STALIN TO HAVEL (1992) (examining the impact of civil societies on the reinvention of politics outside the matrix of power in Eastern Europe).

[20] Precisely half of the members of the Helsinki Committee became Members of Parliament after the 1989 elections and were suspended from the Committee. Helsinki Foundation for Human Rights, The Helsinki Committee in Poland, http://www.hfhrpol.waw.pl/program-2-en.html (last visited Feb. 26, 2009). The *de facto* chair of the Committee, Stefan Starczawski, became a Minister. E-mail from Marek Antoni Nowicki, Spokesperson for the Helsinki Committee during the early 1990s, a former Executive Director of the Helsinki Foundation for Human Rights, and a current member of the Council of the Helsinki Foundation for Human Rights (Sep. 29, 2008) (on file with author).

[21] *Id.*

ground civil society organizations they established after the political changes of 1989 took on the promotion and protection of human rights as their primary mission. Further, once they were operating in the framework of formal organizations, it was a natural development for them to engage with their countries' newly emerging constitutional orders and the legal systems these orders spawned.

Yet in 1995 almost no one doing human rights work in Central and Eastern Europe considered their activities to relate to public interest law. Indeed, the term was virtually unknown at that time in either English–widely spoken by educated elites in the region–or in the relevant national languages.[22] In general, there was little awareness of the American public interest law field; the most prominent exemplars of Western civil society organizations were Human Rights Watch and Amnesty International because of their prior involvement in the region.[23] The International Helsinki Federation for Human Rights was also well known despite its small size, particularly to the national Helsinki committees comprising the membership of the Federation.[24]

There are some exceptions to this general lack of awareness about U.S. public interest law. For example, the Hungarian Civil Liberties Union consciously modeled itself after the American Civil Liberties Union ("ACLU")

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[22] Edwin Rekosh, *Promoting Public Interest Law in Eastern Europe and Russia: A Concept Paper*, prepared for the Ford Foundation (Dec. 1995) (unpublished paper at 3, on file with author) ("The field of public interest law is well understood in the context of the North American legal and political culture. Public interest law is less familiar to Europeans, however, and to Eastern Europeans, the term is largely meaningless. Indeed, the nature of public interest law is inextricably linked to legal and political culture, and the field will undoubtedly take on a form in Eastern Europe that is unique to that region. The process of defining what public interest law means in Eastern Europe should be one of *self-definition*. If East Europeans [*sic*] activists are to embrace the field, they will have to be intimately involved in defining what it is."). *See also* Public Interest Law Initiative, Symposium on Public Interest Law in Eastern Europe and Russia at Columbia Law School (1997) [hereinafter Public Interest Law Initiative 1997].

[23] There were other, smaller organizations that also became fairly well known to human rights activists in Central and Eastern Europe, such as Article 19 and INTERIGHTS in the UK, the International Commission of Jurists in Geneva, Federation International des Droits de L'Homme in France, and the International Human Rights Law Group in Washington, D.C. The author worked for the International Human Rights Law Group from 1991 to 1995; he was based in Bucharest, Romania between 1992 and 1995 assisting the development of Romanian human rights groups with support from the German Marshall Fund of the United States.

[24] The International Helsinki Federation for Human Rights was dissolved in November 2007. *See* IHF Forced to Close Down, http://ihf-hr.org/Statement.07December2007.pdf (last visited Feb. 26, 2009).

in the early 1990s, and received early financial support to do so from the Ford and Soros Foundations. In that case, the initiative to look to U.S. public interest organizations for inspiration came from the Hungarian founders, with little more than polite encouragement coming from the ACLU.[25] The leaders of these new groups were trying to solve a common, related problem: how best to seize the opportunities created by the changed political environment to strengthen the protection of human rights, a subject that had been relegated mostly to discussions around the kitchen table in the freshly recent past. As soon as even a nominal democracy was established, new opportunities arose to hold the government accountable to international human rights standards. In essence, the changing political environment allowed these individuals to begin having their kitchen table discussions in public. Within five years, they began growing into their civil society roles, professionalizing their activities, and using all the new tools of a deliberative democracy, including engaging in public debate, petitioning authorities, mobilizing popular sentiment and initiating legal proceedings.[26]

In many cases, there were strong personal relationships between the leaders of the new civil society organizations and the newly forming political elite. The ties in the early 1990s among former Solidarity[27] colleagues in Poland such as Lech Walesa (President), Adam Michnik (editor of the country's largest daily newspaper), and Marek Nowicki (leader of the Helsinki Foundation for Human Rights) provide one example. Another prominent example can be seen in the career path of Martin Palous, a signatory of the dissident manifesto Charter 77 in Czechoslovakia, who became Deputy Foreign Minister in the first government following the 1989 "velvet revolution," was Chair of the Czech Helsinki Committee through most of the 1990s, and

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[25] E-mail from Balazs Denes, Executive Director, Hungarian Civil Liberties Union (Sep. 29, 2008) (on file with author). The organization was established by Judit Fridli, who is married to Janos Kis, a political scientist and leading public intellectual who helped establish the liberal wing of the anticommunist movement formed in the late 1980s. *Id.*

[26] The evolution of the prominent dissident group Charter 77 in Czechoslovakia into a registered non-profit human rights organization provides one example. *See* Martin Palous, *Evolution of Human Rights Group [sic]: From Dissidence to Public Interest Law*, Symposium on Public Interest Law in Eastern Europe and Russia (*infra* note 68) (unpublished paper at 8, on file with the author) ("Loose and vague forms of cooperation and a reliance on individual initiative, typical features of Charter 77's working style, have had to be replaced with far more organized and transparent relationships between professionals and volunteers.").

[27] Solidarity is an independent federation of Polish trade unions formed during the Gdansk shipyard labor protests of 1980. It sparked a broad-based dissident movement that eventually negotiated the holding of semi-free elections in Poland in 1989. TISMANEANU, *supra* note 19, at 191-96.

later Czech Ambassador to the United States. Ferenc Koszeg, a dissident publisher who founded the Hungarian Helsinki Committee in 1989, was also a Member of the Hungarian Parliament from 1989 to 1998.

Despite these relationships, an inevitable cleavage developed between the politicians, who were inevitably drawn to political compromise, and the civil society actors, who had organized around principle. The power imbalance between the two groups and increasing differences between their respective policy positions created the need for strategies and tactics designed to shift power to the civil society actors.

Further, social issues that had been suppressed under communist rule–ethnic difference, prejudice, inequality, etc.–became an issue. In response, some of the new civil society groups began migrating from the priority of protecting civil and political freedoms connected to democratic politics (expression, association, assembly) to an emphasis on combating discrimination against the marginalized Roma (Gypsy) minority, upholding women's rights, or working on other identity-based issues.

C. *The Public Intellectual and the Public Sphere*

While the politics of international human rights and the development of civil society set the stage for the adoption of public interest law strategies and techniques, another key ingredient was the strategic thinking of a handful of influential public intellectuals coming out of former dissident circles. Through these intellectual activists, public interest law entered Eastern European consciousness in filtered form. For example, one of the first discussions about "public interest law" in human rights activist circles in Central and Eastern Europe took place between the author and Dimitrina Petrova in late 1995.[28] Petrova taught philosophy at the University of Sofia, became involved in the Bulgarian dissident movement Eco-Glasnost in the late 1980s, was a member in the first post-communist Parliament in Bulgaria, and founded both the Roma rights advocacy group Human Rights Project in Sofia in 1992, and the European Roma Rights Center in Budapest in 1997.

Petrova was hearing the term "public interest law" for the first time, but she quickly saw it as a way to promote the kinds of civic engagement that she, her colleagues, and a growing network of other individuals and organizations were synthesizing out of prior dissident experiences and the opportunities presented by new democratic orders. In her view, the anti-

[28] *See* The Equal Rights Trust: Executive Director – Dr Dimitrina Petrova, http://www.equalrightstrust.org/dimitrina_petrova/index.htm (last visited on February 13, 2009). In an ironic sign of other globalizations, the meeting took place—at Petrova's suggestion—at a Pizza Hut restaurant in the center of Budapest.

communist associations of human rights in Central and Eastern Europe created trunks full of intellectual baggage that weighed down efforts to employ new strategies and tactics in protecting the rights of Roma, a cause Petrova had pioneered as part of what she saw as the new progressive agenda.[29] Indeed, the European Roma Rights Center soon began describing itself as an "international public interest law organization," and Petrova wrote one of the first articles analyzing the potential for "public interest law" in Central and Eastern Europe.[30]

These reactions were indicative of a broader phenomenon. In the post-communist period, formerly dissident activists had a particular understanding of human rights. Because of the legacy of the recent past, the concept of human rights was most powerfully invoked in the context of political freedom, either by anti-communists still battling former political elites (notably exemplified by the lustration process in the Czech Republic in the early 1990s), or by the proponents of free-ranging public discourse in political debate and in the newly independent media.[31] Human rights also had particular force in the context of constraining the policing powers of the state, exercised until recently through an all-powerful police force with a political function, including an extensive secret service apparatus devoted to domestic

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[29] The intuitive judgment behind this assessment is in keeping with David Kennedy's critique of human rights. *See* DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 8 (Princeton University Press 2004). As Kennedy points out, it may be advisable for progressives to assess the terminology of human rights as much on grounds of pragmatic usefulness as on grounds of intellectual coherence and consistency.

[30] Dimitrina Petrova, *Political and Legal Limitations to the Development of Public Interest Law in Post-Communist Societies*, 3 PARKER SCH. J. E. EUR. L. 541, 541(1996) ("My perspective is that of a participant in the process of transplanting Western public interest law into Eastern European soil. It may be too early to say whether 'transplant' is the correct term to describe this process. It may turn out that what we are engaged in is something quite different: perhaps a hybrid of an activity which will only later be adequately termed. Western public interest law is a source of numerous lessons in this experiment. However, public interest law is Eastern Europe is conditioned by the region's communist past and its post-communist present. Thus, for public interest law to be effective in Eastern Europe, it must reflect the region's unique circumstances, needs, and challenges.").

[31] In the case of Romania, where the society was almost evenly divided in the early 1990s between the former communist elite and their supporters still holding onto power and the newly formed and open anti-communist opposition, this interest had partially instrumental origins in the effort to bring about more definitive political change. In other countries in the region, where the political change was already decisive, a strong part of the motivation came from the value placed on stating a viewpoint for the sake of the expressive value of the gesture. *See* Vaclav Havel, *The Power of the Powerless*, *in* THE POWER OF THE POWERLESS 23 (John Keane ed., M.E. Sharpe, Inc. 1985), a touchstone for the human rights activists of the era.

targets.[32] For similar reasons, human rights had particular resonance in the context of prisons and other "closed institutions," another key element of the communist regimes' infrastructure of political control.

But in many of the countries of Central and Eastern Europe, the first rounds in these battles–meeting scant resistances–were fought and, at least nominally, won early on.[33] As a result, the remaining value of human rights language derived mostly from its association with the protection of human rights elsewhere, a legacy of the Cold War politics surrounding the initial popularization of the term.[34] In the Hungary of the early 1990s, for example, an activist Constitutional Court began to realize liberal ideals, but there were few rights-based civil society organizations and little concern with human rights per se.[35] Liberal Hungarians in the early 1990s generally understood that human rights was no longer an issue in Hungary because of the political changes and the new legal infrastructure. Human rights had resonance for Hungarians at the time primarily with respect to the "minority rights" of

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[32] *See* The Ford Foundation, Symposium on Public Interest Law in Eastern Europe and Russia: Report (1996) (unpublished report at 28, on file with author) ("Despite the transition to democracy in many countries, throughout the region the role of coercive agencies (the police, security services, and the military) remain a major concern for human rights and public interest law advocates. Though these agencies are no longer instruments of repression as they were under communism, they remain in significant respects non-transparent and beyond civic or independent scrutiny.").

[33] This is not to say that the battles have gone away. Lustration gained political momentum much later in countries other than the Czech Republic, becoming a matter of current political and legal significance in Poland and Romania, for example. *See* Cynthia Horne, *Late Lustration in Poland and Romania: Better Late than Never?* (paper presented at the annual meeting of the American Political Science Association) (Aug 30, 2007, Chicago, IL). Challenges to freedom of expression also continue, and public accountability of the police, proper judicial supervision over closed institutions, and other related issues continue to have great significance as well. *See* ANDRAS KADAR, PRESUMPTION OF GUILT: INJURIOUS TREATMENT AND THE ACTIVITY OF DEFENSE COUNSELS IN CRIMINAL PROCEEDINGS AGAINST PRE-TRIAL DETAINEES (Hungarian Helsinki Committee, Budapest, 2005).

[34] This was far more true in countries like Czech Republic, Hungary, and Poland, which experienced relatively smooth political transformations after 1989, than in Romania, Bulgaria, and for a period Slovakia, where political development took a much bumpier path, democratic governance has been less functional, and the post-dissident generation of human rights activists has had plenty to worry about domestically. *See* Valerie Bunce, *The Political Economy of Postsocialism*, 58 Slavic Review 756, 774 (1999).

[35] The Hungarian Helsinki Committee was essentially dormant in the first part of the 1990s, though it later grew into a significant civil society organization. The Hungarian Civil Liberties Union also took on far greater significance later on, especially after 2000. *See* ANDRÁS MINK, THE DEFENDANT: THE STATE: THE STORY OF THE HUNGARIAN HELSINKI COMMITTEE 116-119 (2005).

their fellow ethnic Hungarians who were "stranded" in neighboring countries (present-day Romania, Serbia, and Slovakia) as a result of the fall of the Austro-Hungarian Empire and the two world wars which followed.

The power of human rights as a moral concept and as an organizing principle in post-1989 Central and Eastern Europe should not be underestimated, but the association with a specific context constrained its utility in other contexts. For example, in the early 1990s, human rights had only limited political force in the area of discrimination or other identity-based issues, and it was even more rarely invoked in the context of social and economic claims. The growing environmental movement did not intersect much with human rights activism either, despite some common dissident roots.

Further, on a strategic and tactical level, the great force of human rights came from a methodology of "naming and shaming," which made famously effective use of the treaty norms and the infrastructure of international relations from which human rights terminology sprang forth. Naming and shaming continued to be useful in the early 1990s, especially in countries like Romania or Bulgaria where there was less alignment between the post-dissident human rights activists and the political forces in power; civil society organizations increasingly were looking for new approaches, but their experience with human rights activism offered little guidance. It is on these tactical and strategic questions that progressive activists started to turn to public interest models.

The phrase "public interest" conjured up positive associations correlating with the critical project of building new approaches to governance in the wake of a rejected political system. In the languages of the region, there was scarcely a distinction between "state" and "public," and the concept of "public interest" offered the prospect of legitimizing the role of civil society in governance itself.[36] The combination of "public interest" with "law" seemed to simply capture the intuitively recognized importance of the role that law and legal procedures were beginning to play in the post-1989 constitutional orders.[37]

A principal point of reference was the potential for public interest law to serve as a corrective to a debilitated Habermasian public sphere in the

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[36] *See* Petrova, *supra* note 30, at 544-45.

[37] The seemingly arbitrary nature of this process is not unique. The phenomenon of how legal vocabulary can take on idiosyncratic meanings in the U.S. context has been well documented. *See generally* ROBERT FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE (Harvard University Press 1984).

formerly communist countries.[38] Indeed, the philosophical work of Habermas provides a conceptual framework within which one can comfortably place the activities, values, and beliefs of a large number of Central and Eastern European activist intellectuals and their followers.[39] When hearing a description of what "public interest law" means in the United States for the first time, Martin Palous–then Chair of the Czech Helsinki Committee and a professor of political philosophy–immediately jumped to the ideas of Juergen Habermas and Hannah Arendt.[40] Further, it is at least plausible that this understanding of public interest law may have more universal appeal, especially in countries that have an authoritarian past.[41]

As a normative framework, however, human rights continues to receive strong support among progressive civil society organizations in Central and Eastern Europe, most of whom still use the term to describe their goals and activities. But as an expression of the strategy and tactics employed, and as a means to address the constraints produced by problems of political development and democratic governance, the term "human rights" has been less helpful, or at least confusing. Given the difficulty of resisting the slippage of these two semantic frames, normative and strategic/tactical, it became useful to coin a new term, public interest law, to refer to the strategies and tactics used to protect human rights and to pursue other elements of a progressive agenda within the developing structures of governance.[42]

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[38] *See* Jürgen Habermas, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., The MIT Press 1996).

[39] Edwin Rekosh, *Who Defines the Public Interest? Public Interest Law Strategies in Central and Eastern Europe*, 2 SUR - INT'L J. HUM RTS. 166, 172-76 (2005); *see also* Petrova, *supra* note 30.

[40] Conversation with the author in early 1996.

[41] There may well be an even more universal application of this understanding of public interest law, as exemplified by the following interview with an Iranian dissident intellectual:

> Momeni respected the work of reformist philosophers who sought to reconcile Islam with liberalism. But he told me that he was inspired, above all, by the German philosopher Jürgen Habermas, who has written about the importance of creating a "public sphere" for open debate. "No revolution will happen, not by force," Momeni told me. "We know that a government that comes by force must use force in order to survive. We don't want such a government here anymore." Instead, like Mirebrahimi, he supported building strong human-rights groups and democracy organizations outside the government.

Laura Secor, *Fugitives: Young Iranians Confront the Collapse of the Reform Movement*, THE NEW YORKER 62, 69 (Nov. 21, 2005).

[42] Indeed, this was a central strategy behind the setting up of the Public Interest Law Initiative in Transitional Societies at Columbia University (now Public Interest Law Institute) in 1997. The author is the founder of PILI, which grew out of his consultancy with the Ford Founda-

These three interrelated narrative threads—the political origins of human rights discourse in Europe, the development of civil society in the aftermath of communism and European intellectual and ideological traditions —describe some of the more organic conditions that led to an experimentalist approach with public interest law ideas and models from the United States and elsewhere. The early adopters of public interest law in Central and Eastern Europe were "constructing" something, but in a sense that reflects the full ambiguity of the term. The project of promoting public interest law in Central and Eastern Europe has been at least as much about construing first principles of what public interest law stands for within a particular context as it has been about building with bricks and mortar according to a foreign blueprint.

In the context of the new geographic routes of intellectual and experiential exchange that immediately burgeoned across the metaphorical breach represented by the fall of the Berlin Wall, the construction process involved a great deal of transnational borrowing and collaboration. Certainly not all exchanges like those described herein were characterized by mutual respect and understanding. Indeed, the stereotypical exchange between U.S.-funded law reformers and their "target-country" counterparts has been one of heavy-handed and patronizing "assistance" offered to disingenuously willing "recipients."[43] Still, the exchange relationships among progressive activists, legal professionals, and others from Central and Eastern Europe and elsewhere have been characterized, in many cases at least, more by a collaborative and pragmatic search for new solutions to local problems than by the export of foreign models.

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tion between 1995 and 1997 to help develop a foundation-administered project to explore public interest law in Eastern Europe and Russia. *See* Public Interest Law Institute, Homepage, http://www.pili.org (last visited Feb. 26, 2009). Considering the "usefulness" of public interest law as a semantic rubric is consistent with the spirit of David Kennedy's critique of human rights. ("Let's say the human rights vocabulary, institutional apparatus, even the soul of the human rights advocate are riddled with contradictions which would not stand up to logical scrutiny for a minute. Knowing only this does not move us any closer to an understanding of whether they are part of the problem or the solution. Perhaps ambivalent porosity is their secret strength—to the extent human rights is useful, we should be grateful for the contradictions. Perhaps incoherence is a fatal weakness, but if human rights creates more problems than it solves [sic], this would be all to the good."). KENNEDY, *supra* note 29, at 8.

[43] András Sajó, *Universal Rights, Missionaries, Converts, and "Local Savages"*, 6 E. EUR. CONST. REV. 44, 49 (1997).

II. A NOTE ABOUT FUNDING

A. Sources of Funding

The civil society organizations that started springing up all over Central and Eastern Europe in 1989 and 1990 were supported by donors rushing to assist the "democratic changes." The principle actors were private American foundations, national governments, and European regional institutions.

Key American actors included the Ford Foundation, C.S. Mott Foundation, Rockefeller Brothers Fund, the German Marshall Fund, and an individual philanthropist named George Soros, whose extensive engagement in Central and Eastern Europe has been highly personal and institutionalized in a wide variety of forms centered around the Open Society Institute.[44] Along with the private American foundations came American government support, through USAID, although initial U.S. support focused more on political development and legal infrastructure than on the development of civil society.[45]

But the United States was by no means the only source of financial support. The governments of the Netherlands and the Nordic countries, in particular, provided critical early support to nascent human rights organizations in the early 1990s.[46] And the European Commission, the executive arm of the European Union ("EU"), which started with relatively modest amounts of funding for individual human rights groups, has increased its giving over the years as the U.S. sources have dwindled.

Initially, the principal mechanism for EU assistance to the countries of Central and Eastern Europe was the PHARE program, which placed a strong emphasis on human rights.[47] The emphasis was a reflection of the oft-cited

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[44] The first Soros Foundation was set up in Hungary, George Soros's country of origin, in 1984, followed by the creation of foundations in each country of Central and Eastern Europe as well as other selected countries around the world. Each of the "national foundations," as they are called within the Soros network, has a local Board of Directors, though in most cases George Soros is the principal source of financial support. The Open Society Institute in New York, which has evolved into the main umbrella for George Soros' philanthropy, did not begin to take on the character of a centrally managed foundation until Aryeh Neier was hired to be its first President in 1993. *See* Aryeh Neier, http://www.soros.org/about/bios/b_neier (last visited January 27, 2009).

[45] MARINA OTTAWAY & THOMAS CAROTHERS, FUNDING VIRTUE: CIVIL SOCIETY AID AND DEMOCRACY PROMOTION (Carnegie Endowment for International Peace 2000).

[46] In large part, this aid came through the pre-existing relationships formed among national Helsinki Committees. *See* text surrounding note 15.

[47] The Phare programme was originally established in 1989 to assist economic and political transition in Poland and Hungary. Phare Programme Home Page, http://europa.eu/scadplus/

"European values" that also pervaded EU policy discussions on external relations. Indeed, institutionalizing "democracy, the rule of law, human rights, and respect for and protection of minorities" became a central precondition for the process of enlarging the European Union, which began in earnest in the late 1990s.[48] Through this process, ten countries of Central and Eastern Europe have become "new members" of the European Union, with Romania and Bulgaria the most recent to "accede" in 2007.[49] A great deal of EU development assistance was targeted at helping those countries ready themselves for accession.[50]

EU enlargement was both presaged and informed by the expansion in the 1990s of the Council of Europe, the regional body responsible for most European human rights treaties, including the touchstone European Convention on Human Rights (the "Convention"), and the judicial infrastructure for enforcing them.[51] Central and Eastern European countries acceding to the Council of Europe in the early 1990s were required to ratify the Convention

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leg/en/lvb/e50004.htm (last visited Feb. 26, 2009). It especially focused on human rights and the development of democratic institutions, including civil society, in Central and Eastern European countries; the Phare programme later shifted focus to supporting the EU's pre-accession strategy for those countries. Briefing No. 33: The Phare Programme and the enlargement of the European Union, *available at* http://www.europarl.europa.eu/enlargement/briefings/33a2_en.htm#3 (last visited Feb. 26, 2009). A priority on human rights development assistance continues through the European Instrument for Democracy and Human Rights. Europe's Commitment to Universal Values, European Commission's External Cooperation Programmes Home Page, http://ec.europa.eu/europeaid/where/worldwide/eidhr/details_en.htm.

[48] Accession of new member states was conditioned on the "Copenhagen criteria," which included a political criterion (namely "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities"), an economic criterion ("functioning market economy"), and the adoption of the "*acquis*" ("the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union"). EUROPEAN UNION, EUROPA GLOSSARY, ACESSION CRITERIA (COPENHAGEN CRITERIA), http://europa.eu/scadplus/glossary/accession_criteria_copenhague_en.htm (last visited Jan. 10, 2009).

[49] The first eight countries to join were Czech Republic, Hungary, Poland, and Slovakia, plus the three Baltic countries (Estonia, Latvia, and Lithuania) and Slovenia, which had avoided most of the fighting and subsequent unrest associated with the break-up of Yugoslavia. Malta and Cyprus acceded to the European Union at the same time. For now at least, that leaves most of the former Yugoslavia (except Slovenia), Albania, Turkey, and the former Soviet Union (except the Baltic states) outside the new EU borders. *See* Europa, The History of the European Union, http://europa.eu/abc/history/index_en.htm (last visited Jan. 5, 2009).

[50] *See supra* note 47.

[51] European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, ETS 5, 213 U.N.T.S. 221.

and accept the jurisdiction of the European Court of Human Rights.[52] All the countries of Central and Eastern Europe became members of the Council of Europe, which administered modest development assistance programs of its own to help new member states comply with the requirements of the Convention and other Council of Europe standards.[53]

The many European donors active in Central and Eastern Europe have arguably had at least as decisive an impact on the development of human rights advocacy and public interest law strategies as the American donors. In the past fifteen years, the European Commission, the Council of Europe, and European governments, particularly in the Netherlands and the Nordic countries, have spent hundreds of millions of euros on the development of human rights organizations and the support of civil society human rights activities.[54]

B. *The Funding of Transnational Collaboration: A Tale of Two Conferences*

Private American donors have played a particularly important role in fostering collaborative learning and exchange among experienced public interest lawyers, especially from the United States, and counterparts in Central and Eastern Europe. The approach of private donors in Central and Eastern Europe has been highly consultative; they have generally looked for initiatives to support rather than create new institutions. Certainly their priorities have had some impact on the choices made by grant-seekers, but it would be hard to distinguish cause and effect in the complex interplay of donor-grantee relations.[55]

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[52] *See* STEINER ET AL, *supra* note 9, at 936-37.

[53] Similar activities are now carried out by the Council of Europe's Directorate of Co-Operation of the Directorate General of Human Rights and Legal Affairs. COE Directorate of Co-operation Home Page, http://www.coe.int/t/dghl/cooperation/default_en.asp (last visited Feb. 26, 2009).

[54] A priority on human rights funding continues. In 2006, the European Commission provided $153 million in development assistance targeting "human rights" in all developing countries combined, compared to $194 million provided by the United States. When bilateral assistance from individual European countries is added, the total European contribution in 2006 comes to $556 million. International Development Statistics ("IDS") online, Organisation for Economic Cooperation and Development, Paris, *available at* http://www.oecd.org/dac/stats/idsonline (last visited Feb. 26, 2009).

[55] *See, e.g.*, Stephen Ellmann, *Cause Lawyering in the Third World*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 357 (Austin Sarat & Stuart Scheingold eds., Oxford University Press 1998) ("In addition, these concerns overlook the extent to which First World grantors and NGOs are actually working in tandem rather than in relationships of domination. . . . Grantors and grantees often share philosophies, or at any rate have views that overlap enough for the two sides broadly to concur on what needs to be done.

In contrast, USAID has a tendency to support new institutions of its own design, primarily reflecting its own priorities. This approach stems partly from concerns over the close scrutiny it receives from the U.S. Congress and the sense that it is ultimately accountable to U.S. taxpayers whose support for foreign aid is ambivalent at best.[56] For example, in the field of public interest law, USAID supported the setting up of a network of American-style Environmental Public Advocacy Centers ("EPACs") across Central and Eastern Europe in the mid-1990s through the American Bar Association's Central and Eastern European Law Initiative ("CEELI").[57] The effort built on a successful 1994 collaboration with the civil society organization Eco-Pravo-Lviv in Ukraine, but the application of the "EPAC" template in other countries had mixed results.[58] A plan to develop a region-wide network of such centers simply faded away.[59]

Governmental donors in Europe can also have a tendency to promote their own national solutions and priorities,[60] but the tendency is significantly moderated by an ingrained comparativist instinct that has developed inside these regional European institutions. European donors, and the project im-

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. . . Moreover, grantors *learn from* their grantees, and may come to applaud activities they might once have shied away from." (emphasis in the original)). *See also* Stephen Golub, *Democratizing Justice: Philippine Developmental Legal Services and the Patrimonial State*, ASSOCIATION OF ASIAN STUDIES ANNUAL MEETING (Mar. 24-27, 1994) (on file with author) ("[The donors] primarily view [the grantees] as respected colleagues.").

[56] THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 348 (Carnegie Endowment for International Peace 1999).

[57] CEELI, now merged with other ABA overseas programs into the Rule of Law Initiative, was a technical legal assistance program founded by the ABA in 1990 with the support of USAID. ABA, Rule of Law Initiative Home Page, http://www.abanet.org/rol/europe_and_eurasia/ (last visited Jan. 4, 2009).

[58] EcoPravo-Lviv was founded in March 1994 and opened an Environmental Public Advocacy Center as a collaborative project with CEELI later that year. Svitlana Kravchenko, *Citizen Enforcement of Environmental Law in Eastern Europe*, 10 WIDENER L. REV. 475, 477 (2004).

[59] Stephen Stec, *CEELI Law Report,* THE BULLETIN (Reg'l Envtl. Ctr. For Cent. and E. Eur.), vol. 4, no. 4, Winter 1994, *available at* http://greenhorizon.rec.org/bulletin/Bull44/CEELI.html (last visited Oct. 20, 2008) ("The Environmental Public Advocacy Center Project has begun establishing a network of legal professionals interested in environmental protection in Central and Eastern Europe and the Newly Independent States. The network will facilitate exchanges of practical legal experience aimed at: (1) identifying obstacles to public interest advocacy in the region, and (2) promoting solutions that will lead to more effective public participation. A key element of the project is the establishment of Environmental Public Advocacy Centers (EPACs) as network nodes in each country."). *See also* Kravchenko, *supra* note 58. EPACs currently functioning, in Moldova for example, are notable exceptions.

[60] *See* Thomas Carothers, *The Rule of Law Revival in* PROMOTING THE RULE OF LAW ABROAD, *supra* note 2, at 11.

plementers they fund, tend to be less vigorous in advocating national models since they are keenly aware of the national differences that sometimes bog down political compromise within European institutions.[61]

Two private donors, the Ford Foundation and the Open Society Institute, have had a particularly marked impact on the spread of public interest law in Central and Eastern Europe. Each donor organized an international conference (held in two different cities coincidentally over the same weekend in November 1995), marking the beginning of a heavy investment in promoting a set of activities that look, at least at first glance, a lot like U.S.-style public interest law. The Open Society Institute organized "Legal Services Workshop: Strategies in Support of Human Rights" in Budapest, Hungary,[62] and the Helsinki Foundation for Human Rights hosted the Ford Foundation's conference on "Public Interest Law Actions" in Warsaw, Poland.[63] In each case, the conferences were invitation-only events bringing together the leaders of civil society organizations that were experimenting with legal approaches to their advocacy.

Although public interest law was largely an unknown concept in Central and Eastern Europe at the time, the organizing of the two conferences was a reflection of a growing trend in the region to use litigation and other law-based tools to promote and protect human rights. They were each experimental efforts: major foundations testing the civil society waters to see

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[61] There is even a well-developed and oft-cited legal doctrine, the "margin of appreciation," which reconciles the competing imperatives of achieving common European standards while tolerating a variety of means for implementing them at the national level based on notions of sovereignty. *See* R. St. J. Macdonald, *The Margin of Appreciation*, *in* THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 83-85 (R. St. J. Macdonald, F. Matscher & H. Petzold eds., 1993).

[62] More specifically, the workshop was organized by a program of the Open Society Institute called the Constitutional and Legislative Policy Institute ("COLPI"). Founded in 1992, it later changed its name to the Constitutional and Legal Policy Institute, and in 2002 it was formally shut down, with many of its activities and staff folded into a successor program called the Open Society Justice Initiative. The workshop was co-sponsored by the International Helsinki Federation for Human Rights, the PHARE and TACIS programmes of the European Commission and the International Human Rights Law Group (now Global Rights). Materials from the *Legal Services Workshop: Strategies in Support of Human Rights* (on file with the author).

[63] It is not geographic happenstance that the conferences were located respectively in Budapest and Warsaw. Hungary, by this time, had already become a regional base of operations for the Open Society Institute, and among the Ford Foundation's grantees in the region, the Helsinki Foundation for Human Rights in Poland was considered to be in the best position to provide "thought leadership" for a new region-wide initiative. E-mail from Joseph Schull, then Deputy Director of the International Affairs Program of the Ford Foundation (Jan. 3, 2008) (on file with author).

what forms of legal advocacy might make sense to support. They also represent the beginning of a collaborative exploration of public interest law topics.

In undertaking its initiative, the Ford Foundation had in mind its several decade-long history of supporting the development of public interest law in the United States, South Africa, and elsewhere.[64] In the United States during the 1960s and 1970s, that effort was heavily focused on pioneering a new form of law reform litigation that came to be known as public interest litigation.[65] In South Africa, in the 1980s, the Foundation had been equally focused on litigation, particularly on a strategy of using the well-developed apartheid legal order against itself.[66] In contrast, the Helsinki Foundation for Human Rights was not particularly litigation-oriented at the time, and its leader, Marek Nowicki, was well known for his Solidarity-era dissident tactics and the priority he placed on strategies emphasizing human rights education. Nowicki appreciated the meaning of "public interest" as a term encompassing civil society engagement on issues of governance, but found "public interest law" to be confusing when translated into Polish and "public interest litigation" too limiting. For those reasons, Nowicki attempted to coin the term "public interest law actions," which he interpreted to cover a wider range of advocacy activities going beyond the courtroom, including (or even emphasizing) public protest, human rights monitoring, and media campaigning.[67]

The Budapest and Warsaw conferences were good examples of the ways in which the priorities of these private donors and their grantees interacted. The Budapest conference may have had the U.S. legal services model initially in mind, but the presentations were made primarily by representatives of recently formed civil society organizations from the region and focused attention on their early experiences with legal strategies. In the case of the Polish conference, the agenda itself was controlled by a Polish grantee,

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[64] *Id.*

[65] See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L.REV. 1281, 1291 (1976) for an early contemporaneous view. See generally Helen Hershkoff & David Hollander, *Rights into Action: Public Interest Litigation in the United States*, *in* MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD 89 (Mary McClymont & Stephen Golub eds., 2000) [hereinafter MANY ROADS TO JUSTICE], for a description of the Ford Foundation's role in supporting its development.

[66] *See* Stephen Golub, *Battling Apartheid: Building a New South Africa*, *in* MANY ROADS TO JUSTICE, *supra* note 65, at 19, 27.

[67] Various conversations in 1996 between the author, then consultant for Ford Foundation, and Marek Nowicki, then Executive Director of the Helsinki Foundation for Human Rights.

rather than by the Foundation. Both efforts could be seen as synthetic exercises rather than as vehicles for exporting ideas, let alone imposing values.[68]

Seen in this light, the decisions of two key donors to fund new initiatives to more effectively utilize legal tools for protecting and promoting human rights in Central and Eastern Europe look much less like the external execution of a plan hatched in the United States. As the newly formed civil society organizations began to develop and as they began to outgrow dissident tactics, they inevitably started to look for alternative ways to protect human rights within their newly reconfigured political systems. Certainly, it

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[68] The author assisted the Ford Foundation in organizing two Symposia on Public Interest Law in Eastern Europe and Russia building on both of these events, but on a larger scale, with each event lasting a full week. The first symposium, held in Oxford, England in 1996, brought together several private foundations, including representatives of the Open Society Institute and the President of the Mott Foundation. Participants included key figures in the post-communist development of civil society and a handful of experts on public interest law models in the U.S., U.K., South Africa, and India. The agenda covered a variety of public interest law activities, including litigation, lobbying, and the use of international law, explored primarily through case studies presented by Central and Eastern European lawyers and activists, followed by working groups devoted to developing new strategies to further the collective goals of the participants. The Ford Foundation, *supra* note 32, at 63-71. The atmosphere of the weeklong event was one of intellectual openness and exploration with little sense that power relationships were influencing the outcome of the discussion in any significant way ("'Public Interest Law' as a concept, and as a family of activities, is applicable to Russia and Eastern Europe, and indeed all or most activities conventionally associated with public interest law elsewhere are already occurring in this region, though they may be described in other ways . . . . It is less clear whether this is likely to become a term which practitioners actually use to characterize their work; some may feel it does not have a clear resonance for them, is easily confused with a particular body of law, etc. Some felt that other terms ('law in the public interest,' or promoting the rule of law) better characterize the interests shared by participants at the meeting. To a large degree this is of little consequence—more important was that there seemed to be a growing comfort with the term as the week progressed and a stronger sense that it related to 'what we do.'"). *Id.* at 17. The follow-up symposium, held in Durban, South Africa in 1997, involved many of the same participants, highlighted the South African experience in greater detail, and generated discussion around some particular priorities, including public education, clinical legal education, women's rights and violence against women, strategic litigation in the areas of police abuse and environmental protection, public interest campaigning, international advocacy, and access to justice. *See* Public Interest Law Initiative 1997, *supra* note 22. Similar efforts have not always had the desired effect. *See, e.g.,* Ellmann, *supra* note 55, at 357. ("It might be thought, in light of all this, that Western funders, acting in tandem with Western NGO activists, have bent Third World activists to their will and shaped a cause-lawyering movement of their own devising. . . . Similarly, at the 1991 [International Public Interest Law] Symposium, organized by the NAACP Legal Defense Fund and the Ford Foundation, a proposal for an international public interest law clearinghouse triggered sharp reactions from some Third World delegates, who saw this proposal, essentially, as another instance of what might be called human rights imperialism.").

was attractive to look toward the well-respected example of the United States, and there was a great deal of openness as a result toward comparisons with the methods used by U.S. public interest lawyers. However, they were equally subject to other, European influences, to their own historical points of reference, and to the particularities of their own environments.

III. GLOBAL PATTERNS OF DIFFUSION

The global patterns of diffusion of ideas, practices, and institutional models relating to public interest law are complex, multi-directional, and contested. These patterns can be traced to Central and Eastern Europe for at least several distinct areas of public interest law activity: public interest litigation, clinical legal education, and state-supported legal aid.

The field of public interest law is conventionally considered to have been firmly established in the United States in the 1950s, 1960s, and 1970s, on the basis of antecedents such as the early work of the NAACP-LDF and the concept of the "people's lawyer" popularized by Louis Brandeis in the early twentieth century.[69] But many of the activities considered in the United States to be essential components of the field have significant European roots as well.

The United States nonetheless has one of the world's most highly developed and influential public interest law systems, and many of the donors that promote the development of public interest law activities around the world are based in the United States.[70] These donors may be particularly mindful of the U.S. experience, but in their exchanges with local actors in Central and Eastern Europe, they have been confronted by contrasting experiential perspectives, which in many cases counterbalance their preconceived notions and biases with ideas having more organic sources of origin.

Further, in some cases, models which were most intensively developed in the United States have arrived on European shores after being mediated through a process of adaptation to other contexts. In turn, the local adaptations in Central and Eastern Europe have influenced each other, and in some cases, have started to carry influence beyond the region.[71] These complex

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[69] Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 13-14(2004); *see also* Rekosh, *supra* note 39, at 168.

[70] *See* Cummings, *supra* note 18, at 4.

[71] A similar type of diffusion pattern has been well documented in relation to criminal procedure reform in Latin America and dubbed "diffusion from the periphery." Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 15 AM. J. COMP. L. 617, 670 (2007).

pathways have resulted in a process of adapting foreign experiences that, when successful, has been extremely collaborative in nature and has taken into account both the collective historical points of reference of local actors and the environment in which they work. The following sections trace some of the diffusion patterns.[72]

A. Public Interest Litigation

The use of law in the courts during the communist period in Central and Eastern Europe was heavily oriented to the criminal sphere, with the procurator's office taking a dominant role in the legal system, superior in some ways even to the judiciary.[73] Criminal procedures (or sometimes civil proceedings brought by the procurator) comprised the vast majority of the courts' litigation dockets, and independent civil proceedings brought by private parties were rare.[74] There were constitutions, but they were hortatory in nature, and there were no courts with competence to interpret them.[75]

Along with the transformation of the procuracy that followed the fall of the communist regimes in Central and Eastern Europe came large quantities of new private civil law, new tiers of the judiciary, including constitutional courts to interpret the new constitutions, and a reorganization of the legal profession, reclaiming its pre-war history as a liberal profession.[76] The nascent civil society organizations that sprang up in the early 1990s did not tend to have many law graduates among their members. To the extent there were

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[72] In the following analysis, unless otherwise specified, references to Central and Eastern Europe refer primarily to Albania, Bulgaria, Czech Republic, Hungary, Poland, Romania, and Slovakia. The countries of former Yugoslavia took a very different trajectory as a result of the Balkan Wars of the 1990s, and the countries of the former Soviet Union also followed a divergent path. In those countries, many of the same generalizations apply, though with distinctive features and differing chronologies. In any case, each of the countries lumped together as "Central and Eastern Europe" have their own specific features, which are impossible to synthesize with complete accuracy. In much of the following analysis, the author relies on personal experiences and information from selected sources over the years, inevitably lending a certain arbitrariness to the generalizations, many of which are more true for some of the countries than for others.

[73] JOHN N. HAZARD, THE SOVIET SYSTEM OF GOVERNMENT 208-09 (University of Chicago Press 1980).

[74] *Id.* Civil claims were often joined with criminal proceedings. JOHN N. HAZARD, WILLIAM E. BUTLER & PETER B. MAGGS, THE SOVIET LEGAL SYSTEM: THE LAW OF THE 1980'S 79 (1984).

[75] The Constitution's theoretical position at the top of the hierarchy of law did have significance, but only as a basis for arguments addressed to state officials. HAZARD ET AL., *supra* note 74, at 32-33.

[76] *See, e.g.*, STANISLAW FRANKOWSKI & PAUL B. STEPHENS III, LEGAL REFORM IN POST-COMMUNIST EUROPE: THE VIEW FROM WITHIN (1995).

law graduates involved, they were likely to have academic profiles.[77] As a result, at the beginning of their activities, civil society organizations had little capacity to make use of the new legal instruments and procedures, or even to assess them.[78]

In the early 1990s, the structures and practices of the national legal system were still in a formative stage, but the most important source of legal authority for the new human rights groups came from outside the region: the Council of Europe, with its European Convention on Human Rights, and the European Commission and Court of Human Rights.[79] Indeed, so strong was the moral authority and prestige of the Council of Europe, its treaty standards, and its institutions, that individual citizens "wrote to Strasbourg" with their human rights claims as if the shortest path to a legal remedy were to follow the model of dissidents who previously smuggled out letters to the West. These individuals were wholly unfamiliar with the particulars of the Council of Europe adjudication procedures; the impetus sprang instead from a fundamental mistrust of their own legal systems.[80]

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[77] An example of the latter is Andrzej Rzeplinski, a law professor at Warsaw University who joined the Helsinki Foundation for Human Rights soon after it was established, becoming a prominent commentator on law and human rights in the post-communist period. Rzeplinski became a member of the Constitutional Tribunal of Poland in 2007. On the appointment of Andrzej Rzeplinski, see the webpage of the Constitutional Tribunal of Poland, http://www.trybunal.gov.pl/eng/index.htm (last visited Feb. 26, 2009).

[78] An exception was the Romanian Helsinki Committee, whose dissident founder, Gabriel Andreescu, brought in lawyer Renate Weber early on, around 1991. Weber, a bar advocate by profession, soon became Executive Director of the Helsinki Committee, and helped it to become increasingly proficient in legal analysis and strategic use of the courts. She is now a Member of the European Parliament. *See* Renate Weber, http://www.renateweber.eu/en (last visited Feb. 26, 2009).

[79] The European Commission of Human Rights and the European Court of Human Rights were later consolidated into a single institution by Protocol 11 of the European Convention on Human Rights in order to streamline the procedure for international judicial review of claims under the convention, partly in response to the enormously increased caseload coming out of Central and Eastern Europe. *See* ROBERT BLACKBURN & DR JÖRG POLAKIEWICZ, FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000 14 (2001).

[80] *See, e.g.*, Jacek Kurczewski, *The Politics of Human Rights in Post-Communist Poland*, *in* HUMAN RIGHTS IN EASTERN EUROPE 133 (Istvan Pogany ed., 1995) ("For the Communist societies the existence of the CSCE process and the Helsinki agreements that established the recognised standards of human rights against which the performance of the Communists were judged were of major importance. Similarly, for the post-Communist democracies the existence of supra-national structures to which they aspire or to which they belong, which may monitor them, are of extreme value.").

In this context, as human rights groups acquired more legal expertise in order to begin engaging with their rapidly developing legal systems, their foundational point of reference, too, was the European Convention on Human Rights. Local activists, influenced by the recent dissident past, were already predisposed to taking their cues from the international human rights framework. As they became more conversant with the particulars of the public international law of human rights, they quickly grasped the instrumental advantages of the Council of Europe human rights system, with its binding norms of "hard" law and its well-developed infrastructure for adjudication and enforcement.

By the time the human rights groups were ready to make use of the new legal institutions available to them, their countries had also ratified the European Convention on Human Rights and accepted the jurisdiction of the European Court of Human Rights. Concurrently in the early 1990s, there were some sporadic efforts to introduce U.S.-style impact litigation, especially in the environmental field,[81] but for most civil society advocacy organizations working in the field of human rights, it made little sense to talk about litigation outside the context of the Convention.

Over time, in latter phases of development (around the time of the international conferences described in the previous section), U.S. experiences became more relevant. The Council of Europe's prerequisite to "exhaust domestic remedies" gradually became more than a *pro forma* exercise, and civil society organizations began to make more effective use of domestic means of adjudication. But by the time local activists were ready to consider the utility of impact litigation, test cases, and other tactics familiar from the

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[81] But see the earlier discussion of USAID/CEELI's efforts to promote the development of Environmental Public Advocacy Centers, *supra* notes 58-59 and accompanying text. In addition to the U.S. government-supported effort to promote public interest litigation in the environmental area, there were also some private initiatives. One quite successful example was the result of a collaboration among a group of Hungarians and American Fulbright Scholar Peter Kellner in establishing the Environmental Management and Law Association ("EMLA") in 1992. The idea for the organization was hatched during discussions that Hungarian professor of environmental law Gyula Bandi had at the Environmental Law Institute ("ELI") in Washington, D.C. during a visit in 1991. E-mail from Sandor Fulop, the founding Executive Director of EMLA through 2008 and now Parliamentary Ombudsman of the Future Generations in Hungary (Sep. 29, 2008) (on file with author). Another example was the establishment in 1993 of the Center for Environmental Public Advocacy ("CEPA") in Slovakia, now known as the Via Iuris Center for Public Advocacy. Both ELI and the Environmental Law Alliance Worldwide ("ELAW") in Eugene, Oregon, provided critical guidance early on. E-mail from Pavol Zilincik, Executive Director of Via Iuris (Sep. 29, 2008) (on file with author). The development of both organizations was underwritten primarily by private U.S. foundations, such as the Rockefeller Brothers Fund and the Ford Foundation. *Id.*

U.S. experience, they already understood that their ultimate tactical weapon in any piece of litigation was to use the threat or reality of a supportive decision at the European Court of Human Rights.

With this background in mind, it made more sense for the promoters of public interest law in Central and Eastern Europe to talk about "strategic litigation" than about public interest litigation. Using the instrumentality of the European Court of Human Rights effectively required a strategic approach. Not all human rights cases were likely to receive a favorable ruling; a negative ruling could produce more damage to the human rights cause than no ruling at all. The European Court had a rich case law that could provide clues to how a future case might be decided, and there were procedural aspects, such as the requirement to exhaust domestic remedies, to consider.

Furthermore, the core lesson from the U.S. experience for local activists was how courts could be used effectively as a tool for civil society engagement in governance. The result was a shift in the thinking of activist lawyers. Lawyers who already intuitively thought in terms of "litigation strategy" had to become comfortable with the alien idea of "strategic litigation." They had to do more than meet their professional responsibilities; they, and the civil society organizations with which they worked, had to be strategic in their selection of legal issues and clients. The adoption of this approach has added to the success of an impressive amount of public interest litigation on a wide variety of issues.[82]

Other aspects of U.S.-style public interest litigation have had only limited impact on the development process. There has been some experimentation with certain specific U.S. tactics, such as using "testers" to provide evidence of discrimination.[83] The dominant influence on litigation by human rights groups in Central and Eastern Europe, however, has undoubtedly come from the European Court of Human Rights, whose authority is unquestioned in Central and Eastern Europe (in contrast to some of the "Euro-skeptic" circles in the U.K. and elsewhere in Western Europe). The result has been a synthesis of European practices together with a core U.S.-

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[82] *See* James A. Goldston, *Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges*, 28:2 HUM. RTS. Q. 492-527 (2006).

[83] *Id* at 506. A workshop organized for European judges by the European Roma Rights Centre in Budapest, Hungary from February 28 – March 1, 2003 is one among many examples of how American-style "tester" techniques have been disseminated in a European context. *See Training Workshop for Judges in the Implementation and Enforcement of the EU Race Equality Directive*, ROMA RTS. 1-2 (2003), *available at* http://www.errc.org/cikk.php?cikk=1402 (last visited Feb. 26, 2009).

influenced approach of using litigation as a strategic law reform instrument.[84]

To complicate the picture further, the European Court of Human Rights, and its precedent-based practice of judicial review, is a prime example of the convergence between common law and civil law.[85] Arguably, the heavy influence of the European Court of Human Rights on the litigation practice of civil society organizations in Central and Eastern Europe partly reflects an earlier U.S. influence during the height of the law reform litigation era in the United States.[86]

B. Clinical Legal Education

Concurrent with the introduction of public interest litigation concepts into activist circles in Central and Eastern Europe, clinical legal education also emerged as a widespread enterprise that was fueled especially by funding available from the Ford Foundation, the Open Society Institute, and the U.S. government. Clinical legal education is widely viewed as an American

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[84] The U.K. provides an interesting comparison. With its common law, precedent-based system and its own public interest law tradition it might be considered more important an influence than the U.S. in this regard, and indeed U.K.-based groups like INTERIGHTS and others have been important influences and supporters of the strategic use of the European Court of Human Rights. But public interest litigation is not as prevalent in the U.K. *See* Carol Harlow, *Public Interest Litigation in England: The State of the Art*, *in* PUBLIC INTEREST LAW 90-137 (Jeremy Cooper & Rajeev Dhavan eds., Basil Blackwell 1986). As a result, the U.S. influence has been important.

[85] JOHN H. MERRYMAN, THE LONELINESS OF THE COMPARATIVE LAWYER 19 (1999) (noting that civil law and common law are converging more than they are diverging); John H. Barton & Barry E. Carter, *International Law and Institutions for a New Age*, 81 GEO. L. J. 535, 546 (1993) ("Judicial review, an American invention, has largely taken over in Europe, even in France, which had historically looked to a popularly-elected legislature as a defense against aristocratic judges."). The need to accommodate the common law system of the U.K. in an institution serving primarily civil law jurisdictions is an obvious contributing cause to this development.

[86] This argument, however, provides a good example of the ways in which the patterns of diffusion are wholly interlaced, especially, though not exclusively, in the Euro-Atlantic space. One could also argue that the U.S. Supreme Court would never have taken its present shape without its English common law heritage. Indeed, according to mainstream theory on legal transplants, "most of the private law of all the modern legal systems of the Western World (and also of some non-Western countries), apart from the Scandinavian, derives more or less directly from either Roman Civil Law or English Common Law." ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 22 (2d ed., 1993). From this reasoning, one might identify just four unique European families of law (English, French, German and Scandinavian). Daniel Berkowitz, Katharina Pisto & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163, 170-74 (2003).

invention. Yet the earliest trace of clinical legal education in U.S. academic literature, in the early twentieth century, leads to Copenhagen.[87] There is an even earlier trace of the idea in German literature describing the *pandekten-praktikum* established in Rostock in 1847, a model which was adapted in Kazan, Russia, around the same time.[88] In contrast, the first successful at-

[87] William Rowe published an article in 1917 based on a memorandum he had written several years earlier for Columbia University and New York State urging the creation of a university-based legal clinic in New York City. William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 591 (1917). Rowe had by then succeeded in convincing the New York State Bar Association to adopt a 1916 resolution providing, in part, "every law school shall make earnest clinical work, through legal aid societies or other agencies, a part of its curriculum for its full course." *Id.* at 595. Rowe based his proposal in large part on a model described by a past president of the New York Legal Aid Society after observing it on a visit to Copenhagen. Arthur v. Briesen, *The Copenhagen Legal Aid Society*, 5 THE LEGAL AID REV. 4, 25 (1907).

[88] The clinic was established by Professor Rudolf von Jhering. Christian Helfer, *Rudolf von Jhering über das Rechtsstudium*, 21 JURISTENZEITUNG 506, 509 (1966). Professor von Jhering was clearly an innovator in his time. A contemporaneous American observer, who had been his student, observed:

> In the intercourse between the student and professor, unless they meet each other outside of college affairs, there does not exist the same intimacy and close relationship as is mostly the case in America. They have no opportunity to learn each other's character, and the professor hardly ever knows the names of his hearers. They read their lectures, and the students write, but not a word passes between them. The only exception to this rule with which I have met was in the lecture room of Prof. v. Jhering, of Gottingen, the most celebrated professor of Roman law in Germany. It was his custom to question the students on the different points of law that arose in the lecture, and even these were not directed to any one person, but could be answered by any one who had a desire to reply.

Id. at 507 (quoting C.G. Tiedemann, 5 CHARLESTON J. COM. 662 (1878)). At the same time, Charles Eliot and Christopher Columbus Langdell, the inventors at Harvard of the modern American law school, had been inspired by the influential model of the German University. WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4 (Jossey-Bass 2007). Ironically, the reaction of this 19th century American observer to a notable exception to the perceived shortcomings of German legal education could stand in for the opinions of countless late 20th and early 21st century American or American-influenced observers witnessing legal education in Poland, Hungary or elsewhere in Central and Eastern Europe. *See, e.g.*, William Burnham, *Legal Education in NIS Countries: Too Theoretical, Too Passive, Too Authoritarian*, at 17 (panelist abstract for *What Role for the West? Promoting Legal Reform in the former Soviet Union*, a conference at Yale Law School, Apr. 23–24, 1999) (on file with author) (referring to such practices in similar post-Soviet education as "the method by which the teacher's notes become the students' notes without passing through the minds of either"); The Kazan clinic was established by Professor Dmitrij Mejer. MARTIN AVENARIUS, REZEPTION DES RÖMISCHEN RECHTS IN RUßLAND: DMITRIJ MEJER, NIKOLAJ DJUVERNA AND

tempt to create a university-based legal clinic did not take place in the United States until 1928, with the model becoming popularized in an oft-cited article by Jerome Frank writing in the 1930s, long before the methodology was adopted on any significant scale in the United States.[89]

Nevertheless, the wave of development of clinical programs at American law schools during the late 1960s and 1970s, sparked by the activities of the Ford Foundation-supported Council on Legal Education for Professional Responsibility ("CLEPR"), was without precedent.[90] What began as experi-

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IOSIF POKROVSKIJ, 24 (Okko Behrends & Wolfgang Sellert eds., Wallstein Verlag Goettingen 2004). *See also* A. Lyublinsky, *О юридических клиниках ("About Legal Clinics")* ЖУРНАЛ МИНИСТЕРСТВА ЮСТИЦИИ 175-181 (JOURNAL OF MINISTRY OF JUSTICE [RUSSIA]) (1901).

[89] The first antecedents of clinical legal education in the United States were volunteer, non-credit "legal dispensaries" organized by law students in the 1890's and early 1900's at a number of law schools. *See* Margaret Martin Barry, John C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 6 (2000) (citing various sources). The first attempt to incorporate a legal clinic into the law school curriculum was a six-week clinical course established by John Bradway in 1928 at the University of Southern California; after Bradway moved to Duke University, he established the first full-fledged university-based clinical program in 1931. The second university-based legal clinic was established at the University of Tennessee School of Law in 1947. *Id.* at 8. The most prominent early promoter of the idea was Jerome Frank, a lawyer and judge closely associated with the development of "legal realism." *See* Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933) (suggesting that law schools should adopt the clinical model used by medical schools). The global circuits of transmission were apparently operating at this stage as well. An article by Czesław Znamierowski suggesting that Polish law schools should adopt an institution analogous to university medical clinics appeared in *Gazeta Polska* in 1936 and was reprinted as Czesław Znamierowski, *Poradnie Prawnicze* [*Legal Clinic*] *in* O NAPRAWIE STUDJÓW PRAWNICZYCH [ABOUT THE REPAIR OF LEGAL STUDIES] 95 (F. Hoesicka 1938), *translated in* THE LEGAL CLINICS FOUND., THE LEGAL CLINIC: THE IDEA, ORGANIZATION, METHODOLOGY 31-32 (Dariusz Łomowski ed., C.H. Beck 2005) [hereinafter THE LEGAL CLINIC: THE IDEA, ORGANIZATION, METHODOLOGY], *available at* http://www.fupp.org.pl/down/legal_clinic.pdf. Interestingly, unlike Frank, Znamierowski placed greater emphasis on the imperative of meeting unmet legal needs than on the teaching benefits of the clinical method ("The democratic equality before the law is threatened by the very fact that legal assistance may be purchase [sic] at a market price only . . . . There is a truly comical and at the same time sad analogy between a lawsuit and an illness. They are similar in that they befall not exclusively on those who can effortlessly afford help. This very analogy draws our attention to legal clinics and outpatients' clinics as a model for organizing inexpensive and gratuitous legal assistance. A legal clinic associated with a university law faculty may play a role similar to that of a medical clinic.").

[90] *See* Michael Meltsner and Philip G. Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581, 581-632 (1976). The Ford Foundation saw the value of clinical legal education and began funding legal clinics as early as 1959, institutionalizing its support by launching CLEPR in 1965. When CLEPR ceased its activities in 1978, the U.S. Government picked up

mentation with new forms of legal education developed rapidly with a donor-led intervention and eventually became mainstreamed as an integral part of higher legal education.[91]

The Ford Foundation repeated the experiment in South Africa, with successful results.[92] The American model of clinical legal education has also migrated to Latin America with more mixed results, and on a relatively small scale to more developed countries, such as the United Kingdom, Australia, Norway, and the Netherlands.[93]

The South African experience with clinical legal education has had a decisive impact on the development of clinical legal education in Central and Eastern Europe.[94] It is quite possible that without the South African experience as a model, clinical legal education would not have taken hold at all in Central and Eastern Europe.[95] There are significant ways in which the South

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the funding of clinics through grants administered by the Department of Education until it, too, was dismantled in 1997. Barry et al., *supra* note 89, at 18-20.

[91] *See* AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 207-21 (1992) (known as "The MacCrate Report").

[92] *See generally* Aubrey McCutcheon, *University Legal Aid Clinics: A Growing International Presence with Manifold Benefits*, *in* MANY ROADS TO JUSTICE, *supra* note 65, at 267.

[93] Latin American clinics, which date from the first wave of law and development programs in the 1950s and 1960s, have been characterized as lacking in quality because they are largely unsupervised by either teachers or practitioners. *See* Richard J. Wilson, *Three Law School Clinics in Chile, 1970 – 2000: Innovation, Resistance and Conformity in the Global South*, 8 CLINICAL L. REV. 515 (2002). A new effort emerged in the 1990s, with the support of the Ford Foundation, to develop law clinics that focus on public interest litigation strategies with more substantial faculty involvement, providing for more deliberate and thorough work by students. McCutcheon, *supra* note 92, at 279. Indeed, reforms producing a new legal aid system in the Netherlands in the 1970s originated in a governmental effort to take over student-initiated "Law Shoppes" in Dutch universities. Richard L. Abel, *Law without Politics: Legal Aid under Advanced Capitalism*, 32 UCLA L. REV. 474, 499-500 (1985). This circuit of transmission seems particularly circular given how one of the early inspirations for U.S. clinical legal education came from observing student externships at the Copenhagen legal aid society in the early 20th century. Briesen, *supra* note 87.

[94] *See, e.g.*, Public Interest Law Initiative 1997, *supra* note 22, at 32-34.

[95] One of the most important reasons for holding the Ford Foundation's second Symposium on Public Interest Law in Eastern Europe and Russia in Durban, South Africa was the inspiration afforded by the ideas and encouragement of Professor David McQuoid-Mason of the University of Natal during the first symposium in Oxford in 1996. *See supra* note 68. The second symposium in 1997 included an entire workshop devoted to the topic of clinical legal education in the South African context, and participants came away with the sense that clinics in South Africa played an important role during the larger societal transformation, and that

African approach to clinical legal education differs from the American one, having adapted to conform to the differing context. One particular difference is the priority placed on the provision of legal aid over educational objectives; teacher-to-student ratios are far higher than the one-to-eight ratio that has become standard in the United States.[96] This model is more appealing, too, in the context of Central and Eastern Europe where resources available for legal aid are in similarly short supply.

In the post-communist countries of Central and Eastern Europe, initial interest in the methodology sprang from traditional academic exchange.[97] Donors and their partners certainly helped along early in the process by investing money and know-how that included more focused exchange experiences.[98] Many of the resulting encounters between would-be American

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they were feasible to operate in universities less well-resourced than those in the United States. *See* Public Interest Law Initiative 1997, *supra* note 22, at 32-34.

[96] *Id. See generally* David McQuoid-Mason, *Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa Pre-1970 until 1990: Part I*, 29 J. JURIDICAL SCI. 28 (2004). This alteration of the U.S. model stems directly from differences in needs and resources between South Africa and the United States.

[97] Many of the initial adopters of clinical legal education in Central and Eastern Europe first became inspired to experiment with creating clinics, or indeed using other interactive methods of instruction, while residing as visiting scholars or visiting professors in the United States. *See* Richard J. Wilson, *Training for Justice: The Global Reach of Clinical Legal Education*, 22 Penn St. Int'l L. Rev. 421 (2003-2004).

[98] The first "live-client" clinic in Central Europe was established in Olomouc, Czech Republic a sister school partnership between Palacky University and Hofstra University supported by a Ford Foundation grant from 1995 to 1997. E-mail from Stefan Krieger, Hofstra University (Mar. 16, 2004) (on file with author). A simulation-only clinic was established at University of Skopje in Macedonia in the mid-1990s with the assistance of USAID-funded ABA CEELI. The first clinic in Russia was established in 1996 though a sister school partnership between the University of Vermont and Petrozavodsk State University as part of the USAID-supported Vermont-Karelia Sister State Program. The Petrozavodsk clinic continues to exist; the Skopje clinic transformed into a "live-client" clinic with support from the Soros network of foundations starting in 1999 and continues to exist. The Olomouc clinic was one of the initial failures in Central Europe. *See* THE LEGAL CLINIC: THE IDEA, ORGANIZATION, METHODOLOGY, *supra* note 89, at 44. Meanwhile, the first public discussion in Poland on clinical legal education took place at a conference organized by Polish ELSA ("European Law Students Association") and Jagiellonian University in Krakow with the support of the U.S. Consulate in Krakow and the OSCE's Office for Democratic Institutions and Human Rights in December 1996. A clinical program began operating at Jagiellonian University in fall 1997 and at Warsaw University in 1998. Both programs were well-funded by Ford Foundation for a period of time, and continue to thrive without Ford Foundation support. A tax advice clinic at Bialystok University began operating in 1997 and developed into a larger clinical program without significant support from Ford Foundation or other foreign donors. Correspondence with Izabela Gajewska-Krasnicka, Bialystok University (Feb. 23, 2004) (on file with author).

exporters and their counterparts in Central and Eastern Europe were less than fruitful.[99] Yet other collaborations were quite effective.[100] The key distinguishing feature of successful collaborations was mutual trust and respect, with appropriate value placed on both the usefulness of the foreign experience and the relevance of distinct local features that enables a fluid flow of communication from the two perspectives.

By the late 1990s, clinical legal education in Central and Eastern Europe was receiving a great deal of outside financial support. The Ford Foundation was somewhat selective in its approach, concentrating particularly on Poland and Russia, with the Soros network of foundations quickly developing into a region-wide sponsor of clinical projects. ABA CEELI was another important source of support, with funding from USAID.[101]

By the middle of the following decade, however, most of the foreign funding had decreased. Once the outside financial support diminished, many of the efforts to build legal clinics in the law schools of Central and Eastern proved unsuccessful. Arguably, those instances of failure were caused by some of the phenomena implicit in the pure export model; they were not sufficiently adapted to local conditions by locally-based champions working

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[99] *See, e.g.,* Rodney J. Uphoff, "Why In-House Live Client Clinics Won't Work in Romania: Confessions of a Clinician Educator," 6 CLINICAL L. REV. 315 (1999); Lawrence M. Grosberg, *Clinical Education in Russia: "Da and Nyet"* 7 CLINICAL L. REV. 469 (2001).

[100] The relationship that developed between professors at Catholic University of America and Jagiellonian University in Poland is an excellent example of the most productive form of transnational collaboration. *See generally* Leah Wortham, *Aiding Clinical Education Abroad: What Can Be Gained and the Learning Curve on How To Do So Effectively*, 12 CLINICAL L. REV. 615-85 (Spring 2006). For a good analysis of how cross-cultural collaboration in the clinical sphere can avoid the pitfalls of the original law and development movement, see Jane Schukoske, *Meaningful Exchange: Collaboration Among Clinicians and Law Teachers in India and the United States,* in EDUCATING FOR JUSTICE AROUND THE WORLD: LEGAL EDUCATION, LEGAL PRACTICE AND THE COMMUNITY 237-38 (Louise G. Trubek & Jeremy Cooper eds., Ashgate 1999) (citing Rose, *supra* note 4, at 230). A strategic partnership between the Constitutional and Legal Policy Institute ("COLPI") of the Soros network of foundations and PILI that lasted from 1998 through 2002 produced a great number of success stories like the ones described by Wortham, as well as less successful experiences reflecting some of the problems identified by Uphoff and Grossberg. *See supra* note 99. *See also* Colloquium, *The Third Annual Colloquium on Clinical Legal Education in Central and Eastern Europe, Russia, and Central Asia,* Public Interest Law Initiative and the Constitutional and Legal Policy Institute (June 25-30, 2000 Sofia & Varna, Bulgaria).

[101] Collectively, the clinical programs supported by these three donors numbered well over one hundred in the roughly 25 post-communist countries. The Soros network alone supported the development of 75 university-based clinics in Central and Eastern Europe and the former Soviet Union between 1997 and 2002. Open Society Justice Initiative Home Page, http://www.justiceinitiative.org/activities/lcd/cle (last visited Feb. 26, 2009).

(when helpful) in long-term collaborative relationships with foreign partners.[102]

In the successful cases, clinical legal education does not look like the American variant; a number of adaptations were required out of practical necessity. For example, the career track of law school professors is identical to the career track for other university professors in the humanities and social sciences. In most cases, it has not been possible therefore to establish full-time teaching positions for practitioners; many clinical supervisors are engaged in the usual mixture of teaching and scholarly work, with outside assistance sometimes provided by bar advocates hired by the clinical programs on a consultancy basis. In addition, while many law schools have started to provide academic and teaching credit to the students and professors participating in clinics, the clinical courses are most directly analogous to seminars with some interactive exercises added to the syllabus. Even where law school administrators appreciate the intensive supervision demands of a clinic, and the pedagogical value associated with it, they generally do not have the resources or are not willing or able to fight the necessary political battles to decrease other demands on the time of the professors involved. As a result, clinics remain a partially "voluntary" activity for both professors and students.

More importantly, the goals of clinical legal education differ significantly from the U.S. paradigm in at least three respects.[103] First, as in South

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[102] Certainly, this was the case with the initial experiment at Palacky University in the Czech Republic supported by the Ford Foundation. The initial local champion of the project, who had been dean of the law school at the time, passed away. The clinic director that his successor had appointed to run the project, a local bar advocate, treated her position supervising the students in the "live-client" clinic as an ordinary job and had no vision for or interest in what the clinic might become (The author met with the unenthusiastic clinic director in 1996 during a visit as a consultant to the Ford Foundation.). The foreign partner in the project interpreted the deficiencies of the start-up initiative as stemming from a lack of commitment by the local partner to core public interest values. No doubt many of the initial clinical projects supported by foreign donors were seen even more cynically by local actors as vehicles for bringing in much needed financing to resource-strapped state universities. This potential trend was already evident to the Ford Foundation in Russia by 2000: "If, within the space of a couple years, every law faculty in Russia has its clinical program, the great majority of these will exist only on paper; existing courses will be renamed 'clinical education,' and poorly trained students will be offering bad advice to citizens who deserve something better. Neither the population, nor the legal profession will benefit." Memorandum from Mary McAuley (Ford Foundation – Moscow Office), Support for Clinical Legal Education in Russia (Feb. 2000) (on file with author).

[103] As with many such comparisons, similar phenomena can be identified in both places, but their relative degree and importance are fundamentally different.

Africa, many of the clinical projects were at least initially driven more by the desire to help fill yawning gaps in legal assistance to the needy than by educational objectives. Second, unlike the United States, where legal education has centered on the problem-solving approach of the case method, legal education in Central and Eastern Europe has continued the European tradition of rote recitation and theoretical exposition.[104] As a result, European students receive much less exposure to legal reasoning skills. Finally, the especially doctrinaire nature of teaching methods inherited from the communist era, coupled with rapid and on-going legal transformation, created a huge and ever-widening gap between theory and practice. Traditional instruction in core principles of the civil code, for example, provides little guidance for applying the law to the complex transactions of a modern commercial society. It becomes an even more challenging enterprise when the code has undergone several extensive revisions over the past fifteen years, barely allowing time to digest the changes.

The first factor–a priority on legal aid–has caused some clinics to deemphasize teaching altogether. That tendency threatens the long-term viability of the enterprise because the law school as a whole does not fulfill its natural role and because students are not necessarily getting the supervision sufficient to ensure that clients are responsibly assisted. The second factor–an absence of instruction in legal reasoning–has helped clinics to find their place by filling an important gap in pedagogy. The third factor–the widening gap between theory and practice–has led some clinics to see themselves more like laboratories than clinics, where the real world of legal implementation can be examined under the microscope to identify how law really operates in order to produce better and more accurate scholarship. Taken together, the need for instruction in legal reasoning and the widening gap between theory and practice lead to hopes that the goals of the clinics and professors will continue to align in the longer term.

Some of the most successful early adapters of clinical legal education in Central and Eastern Europe continue to do well, but it is too soon to predict their long-term prospects. The biggest success story so far has been the development of clinical legal education in Poland. Although the two strongest clinical programs in Central and Eastern Europe (at Jagiellonian University in Krakow and Warsaw University) received substantial financial support from the Ford Foundation, it is not at all clear how much the financial support was the cause or the result of success. Other critical factors in their success included: the prestige of the Polish professors who first championed the

[104] *See supra* note 88.

clinics; the fact that there were two strong programs at schools often seen as rivals for top honors; the involvement from the outset of a wide range of stakeholders, including foreign or international organizations like the Ford Foundation, the U.S. Consulate, the Organization for Security and Cooperation in Europe, and the UNHCR (which supported legal clinics for asylum-seekers), as well as Polish institutions such as the Polish section of the European Law Students Association, the Ombudsman's office, and civil society organizations; a priority placed on maintaining long-term personal relationships with peers in the United States and other countries; and the rapid spread of a positive image for the clinical programs throughout the Polish legal elite. With the assistance of the Open Society Institute and other foreign supporters, several Polish law schools with clinical programs established a Legal Clinics Foundation whose mission is to strengthen and sustain clinical legal education in Poland.[105] Twenty-three university-based clinics

[105] The Legal Clinics Foundation (*Fundacja Uniwersyteckich Poradni Prawnych*, or "FUPP" in Polish) was founded in 2002 in order to promote the development of clinical legal education in Poland and to ensure its financial sustainability. Statute of the Legal Clinics Foundation, *available at* http://www.fupp.org.pl/index_eng.php?id=statute (last visited Jan. 4, 2009). The history behind the establishing of FUPP is a good example of both effective transnational collaboration and the diverse diffusion pathways of clinical legal education. The initiative for setting up the foundation came from Filip Czernicki, who had been the president of the Polish section of ELSA when that student-run organization had helped with the initial promotional effort behind the development of clinical legal education in Poland. Discussions with the author led to a strategy of adapting the experience of South African clinics which had benefited from a trust established with funds from the Ford Foundation as part of latter's exit strategy from supporting them. The South African Association of University Legal Aid Institutions ("AULAI"), founded in 1982, and the AULAI Trust, which was set up in 1998 to fund legal clinics, were undoubtedly influenced by U.S. models such as the Clinical Legal Education Association and the clinical section of the AALS. *See* Schalk Meyer, President, AULAI, Address at the First All African Clinical Legal Education Colloquium (June 23-27, 2003), *available at* http://snap.archivum.ws/dspace/bitstream/10039/6560/12/Schalk_Meyer+Legal+Service+Delivery.pdf. The South African context, however, offered far more useful lessons for Poland, such as how to make efficient use of a small amount of funding available for financially supporting member clinics and the necessary priority on organizing capacity-building assistance especially targeting the weaker clinics. With a grant from the Soros network, the author traveled to South Africa with Czernicki and three young, entrepreneurial academics from Jagiellonian, Warsaw, and Bialystok universities for a week-long series of meetings with the organizers of AULAI and the AULAI Trust. The four Poles proceeded to bring in a much wider group of stakeholders, including mentors from their home institutions, and successfully set up FUPP. The Ford Foundation unexpectedly pulled out of Poland and other countries in its "Eastern Europe" portfolio before it could be convinced to support the plan, but FUPP nonetheless continues to pursue its mission with other sources of support. *See* History and Activity of the Legal Clinics in Poland, *available at* http://www.fupp.org.pl/index_eng.php?id=history (last visited Jan 4, 2009).

now cooperate with the Foundation, including at all 19 state university law schools.[106]

The Polish "model" is itself beginning to become a source of diffusion for clinical legal education, but in its own uniquely altered form. A delegation of Chinese legal educators visiting Poland in 2006 with Ford Foundation support noted that the model of legal clinic they observed in Poland differed significantly from the U.S. models with which they were already familiar.[107] The success of Polish clinics has potential to influence Western Europe as well.[108] Indeed, German and French authors have noted the changes taking place in legal education in Central and Eastern Europe and posed the question of whether other European countries should consider new approaches along the same lines.[109]

C. *Legal Aid*[110]

In the United States, decades of experience with legal aid programs predated the rise of public interest law as a field of activity. Legal aid in the civil sphere in the United States has its origin in groups like the New York Legal Aid Society, a private self-help initiative of the German immigrant community in New York. Like the development of clinical legal education,

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[106] E-mail from Filip Czernicki, President of FUPP (Sep. 26, 2008).

[107] The study tour was organized by PILI. One of the study tour participants later said of the originators of the Polish clinics: "They have done it according to their own legal system. It seems to have worked well . . . . Of course, we have our own Chinese characteristics, and we need to develop our clinics according to them as well." Interview with Professor Liu Qin, Yunnan, P.R.C. (Mar. 14, 2007).

[108] *See* Lusine Hovhannisian, *Clinical Legal Education and the Bologna Process*, PILI PAPERS, no. 2 (2006), *available at* http://www.pili.org/en/dmdocuments/pili_papers_2_3.pdf.

[109] *See* Andreas Bücker & William A. Woodruff, *The Bologna Process and German Legal Education: Developing Professional Competence through Clinical Experiences*, 9 GERMAN L. J. 575, 616 (2008), *available at* http://www.germanlawjournal.com ("The recent development in Central and Eastern Europe shows that the concept of clinical legal education matches well the objectives of the European higher education reforms . . . . clinical legal education can be easily adapted to different jurisdictions and the concept is well in line with the goals of the Bologna Process and the strategy of the European Commission."). *See also* Norbert Olszak, *La professionnalisation des études de droit*, 18 RECUEIL DALLOZ 1172 (2005).

[110] Although "legal aid" is used in the U.S. to refer to a particular form of civil legal assistance, as distinct from government-funded legal services in the civil sphere and public defenders' offices or assigned counsel schemes in the criminal sphere, it is used more generally in other countries. *See, e.g.*, THE TRANSFORMATION OF LEGAL AID: COMPARATIVE AND HISTORICAL STUDIES (Francis Regan, Alan Paterson, Tamara Goriely & Don Fleming eds., Oxford University Press 1999) [hereinafter THE TRANSFORMATION OF LEGAL AID]; ACCESS TO CRIMINAL JUSTICE: LEGAL AID, LAWYERS & THE DEFENCE OF LIBERTY (Richard Young & David Wall eds., 1996).

the appearance of civil legal aid programs in the United States seems to have derived from reform efforts with European origins.[111] Yet unlike Europe, despite the creation of the OEO Legal Services Program in 1965 and the Legal Services Corporation in the 1970s, civil legal aid has remained largely a private initiative in the United States. Though there has been significant financial support from federal and state government, it has been shrinking dramatically since the 1970s.[112] In sharp contrast, the United Kingdom provides extensive state resources for civil legal aid (though this support has also been shrinking somewhat as of late as well).[113] While no other country comes close to the U.K. in the amount of funds per capita provided for legal aid by the government, many European countries provide significant state funding for civil legal aid, especially compared to the United States.[114]

In the criminal sphere in the United States, it was not until the Supreme Court case of *Gideon v. Wainwright* that legal aid, or public defense, as

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[111] *See generally* REGINALD HEBERT SMITH, JUSTICE AND THE POOR (Carnegie Foundation 1919). The first organized legal aid program in the U.S. was the New York Legal Aid Society, established as the German Legal Aid Society in 1876 by a group of lawyers seeking to assist the burgeoning German immigrant community. *Id.* at 134-38. Its development paralleled, and was undoubtedly influenced by, the "peace of law" movement, which saw the rapid increase of legal aid programs in Germany initiated by trade unions and other public and private bodies. Earlier antecedents in Europe included codifications of "poor man's law," which provided a limited right to legal assistance for the extreme poor. *See generally* Erhard Blankenburg, *The Lawyers' Lobby and the Welfare State: The Political Economy of Legal Aid*, *in* THE TRANSFORMATION OF LEGAL AID, *supra* note 110, at 115-18. In parallel with the development of the Legal Aid Society's predecessor organization, and without any knowledge of its existence, a legal aid program called Whittier House Settlement was established in New Jersey in 1894, following the model of Mansfield Settlement House in London. *See* SMITH, *supra*, at 137. *See also* Briesen, *supra* note 87 (demonstrating the early transatlantic links of the legal aid movement by describing a study visit by the author, a past president and critical driving force of the New York Legal Aid Society, to a sister organization in Copenhagen). Those initiatives, along with parallel efforts in Chicago, were the first legal aid organizations in the U.S. *See* SMITH, *supra*, at 139-43. The New York Legal Aid Society, in particular, became a model widely imitated in the following couple of decades. *Id.*

[112] Cummings, *supra* note 69, at 21-23. See EARL JOHNSON, JR., *Justice and Reform: A Quarter Century Later*, *in* THE TRANSFORMATION OF LEGAL AID, *supra* note 110, for a detailed discussion of the politics surrounding the decline of the OEO Legal Services Program. See John Kilwein, *The Decline of the Legal Services Corporation: "It's ideological, stupid!"* *in* THE TRANSFORMATION OF LEGAL AID, *supra* note 110, for a discussion of the politics around the Legal Services Corporation.

[113] Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. S83, S94-98 (2000). *See generally* Blankenburg, *supra* note 111.

[114] Johnson, *supra* note 113.

criminal legal aid is known in the United States, was provided as a matter of right.[115] On the other hand, criminal procedures coming from the French and German families of law have long based the very legitimacy of the criminal process on the mandatory representation of the accused when the accused is either particularly vulnerable or there is a heavy penalty at stake. If an accused does not have legal representation, the court or bar must appoint a lawyer in order for the judgment of the court to have legal stability.[116] At least theoretically, if the accused is convicted and has sufficient assets, he or she must reimburse the legal system for the cost.[117]

The development of legal systems in Europe split along the geopolitical divide of the Cold War. As a result, the period of legal aid reform experienced by Western Europe in the 1970s did not have any counterpart in Eastern Europe.[118] Instead, the pre-existing civil law system of legal aid remained fundamentally unchanged within the socialist legal system. In the early 1990s, justice sector reform concentrated on the more obvious structural changes required by the transition to a democratic political system and a market economy, as noted earlier.

Meanwhile, scant attention was focused on legal aid needs. Yet there were significant defects in the inherited legal aid systems, which had not benefited from the wave of reforms elsewhere in Europe during the 1970s, and were further eroded by economic dislocations associated with the transition to a market economy. This situation was first brought to light by an individual activist, Ina Zoon, while working on behalf of Roma in the Czech Republic who were caught up in legal entanglements stemming from the splitting up of Czechoslovakia.[119] Zoon's observations about the difficulty of finding qualified legal assistance for individuals with extremely limited means inspired a concerted effort by a small transnational network of legal activists that began forming during a Ford Foundation-sponsored conference

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[115] Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963).

[116] *See* Michael P. Scharf & Christopher M. Rassi, *Do Former Leaders Have an International Right to Self-Representation in War Crimes Trials*, 20 OHIO ST. J. ON DISP. RESOL. 13-14 (2005) (citing authority in several European jurisdictions indicating circumstances in which a defense attorney is mandatory even if the defendant prefers to represent him or herself).

[117] Public Interest Law Initiative 1997, *supra* note 22.

[118] *See* ACCESS TO JUSTICE: A WORLD SURVEY 23-24 (Mauro Cappelletti & Bryant Garth eds., Dott A Giuffre 1978); Blankenburg, *supra* note 111, at 118-19.

[119] Zoon had moved with her Dutch journalist husband to Prague after spending the early 1990s as a human rights activist in her native Romania, first on behalf of the League for the Defense of Human Rights ("LADO") and later for the Romanian Helsinki Committee ("APADOR-CH"). Email from Ina Zoon (February 13, 2009) (on file with the author).

in South Africa.[120] As a result, this multi-national group of individuals, and the organizations they represented, undertook a series of activities that exposed the reform gap, sparked civil society-led reform efforts in Lithuania, Bulgaria, and Poland, and inspired the European Commission to include the provision of legal aid in its checklist of reforms monitored during the process of enlarging the European Union.[121] By the beginning of the twenty-first century, legal aid reform had become a priority in a large number of Central and Eastern European countries, for the most part funded by the European Commission or European bilateral development agencies in the U.K., Netherlands, and Sweden.[122]

The legal aid system of the Netherlands has been an especially influential model for the reforms in Central and Eastern Europe, far more so than U.S. models.[123] During the reforms of the 1970s, the Netherlands adopted a "hybrid" combining the traditional continental system of providing legal aid by private practitioners reimbursed by the state (sometimes called the "judicare" model in the U.S.), with the U.S. tendency to rely on independently managed legal aid centers (primarily relying on staff lawyers in the U.S. variant).[124] This hybrid model has been attractive to Central and Eastern

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[120] The event was the second Symposium on Public Interest Law in Eastern Europe and Russia. *See supra* note 32. Key participants of this exceedingly transnational network included: Ina Zoon; the author, who was then a U.S.-based consultant to the Ford Foundation; James Goldston, a U.S. national then legal director of the Budapest-based European Roma Rights Centre; Borislav Petranov, a Bulgarian national then legal officer at the London-based INTERIGHTS; and Zaza Namoradze, a Georgian national then deputy director of a legal program at the Budapest-based Open Society Institute.

[121] *See generally Access to Legal Aid for Indigent Criminal Defendants in Central and Eastern Europe*, 5 PARKER SCH. J. E. EUR. L. (1998); *See also* PUBLIC INTEREST LAW INITIATIVE, BULGARIAN HELSINKI COMMITTEE, POLISH HELSINKI FOUNDATION & INTERIGHTS, ACCESS TO JUSTICE IN CENTRAL AND EASTERN EUROPE: A SOURCE BOOK (2003), *available at* http://www.pili.org/en/content/view/55/53/.

[122] See Public Interest Law Institute, MAKING LEGAL AID A REALITY (forthcoming, on file with author), for an overview of legislative reforms in the area of legal aid that have been adopted in Bulgaria, Czech Republic, Hungary, Lithuania, Romania and elsewhere in Central and Eastern Europe since the turn of the 21st century.

[123] The Finnish model, which resembles the Netherlands' variant in many respects, has been influential in Russia. The Netherlands is also showing signs of influence in Russia through a Netherlands government-funded collaboration of the Leiden-based Center for International Legal Cooperation and PILI. Center for International Legal Cooperation, ANNUAL REPORT 2007 18-19 (2007). *available at* http://www.cilc.nl/Annual%20Report%202007.pdf.

[124] *See* Nick Huls, *The 'Gap' in Legal Aid in the Netherlands is Not a Problem of the Bar Anymore, but of the Bench: Reflections on the Future of Legal Aid Bureaus and ADR in the Netherlands*, *in* LEGAL AID: HOW MUCH JUSTICE CAN WE AFFORD? CONFERENCE PAPERS (Edinburgh, June 18-21, 1997). *See also* Frans Ohm, *Reforming Primary Legal Aid in the*

European governments contemplating their own reforms. Some projects, especially those funded by the Open Society Institute or USAID, have also promoted the advantages of a "public defender" staff attorney model, but in practice these pilot initiatives have taken on a shape closer to the Netherlands model, maintaining a sizable role for private practitioners in a state-organized legal aid system.[125]

CONCLUSION

The development of public interest law in Central and Eastern Europe bears the indelible mark of the American experience. To put such great emphasis on civil society and on courts is a particularly American approach; one that stands in fairly stark contrast to the more statist traditions of continental Europe.[126] But to conclude that this approach reflects primarily American initiative, or an imposition of American values, would be to undervalue the agency of legions of activists, the organic roots of their efforts, and the will of the current political mainstream in Central and Eastern Europe.

Certainly there have been numerous instances of ethnocentric exercise of power reminiscent of the original U.S.-centric law and development movement of the 1970s in the innumerable transnational exchanges that have taken place since the fall of the Berlin Wall. But to a significant degree, the most enduring and valuable results have come from highly collaborative efforts to construct public interest law anew and to keep it owned and operated by dedicated and effective local actors.

Netherlands, *in* MAKING LEGAL AID A REALITY, *supra* note 122, *available at* http://www.justiceinitiative.org/db/resource2?res_id=102839.

[125] *See* Zaza Namoradze, *Why Public Defenders: Reflections on Recent Experiences in Eastern Europe*, INT'L LEGAL AID GROUP CONF. (June 6-8, 2007 Antwerp), *available at* http://dev.justiceinitiative.org:8080/osji/silva_01/db/resource2?res_id=103874. The pilot models developed by the Open Society Institute have been as influenced by the Israeli Public Defender's Office, created in 1995, as by the U.S. model directly. *Id.* at 13.

[126] See FERGUSON, *supra* note 37, for an analysis of the historic roots of this American cultural bias.