

MAKING A EUROPEAN TRANSNATIONAL CONSTITUTION: SOME CENTRAL EUROPEAN PERSPECTIVES

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In the following paper, I would like to estimate reactions to European transnational constitutionalism and to the European Constitutional Treaty in the new EU Member States of Central Europe. I will try to evaluate the need for the formal European Constitution facing the enlargement. I will argue that one of the reasons for drafting the formal European Constitution was the fear of inability to continue a specific European regime of constitutional tolerance, legal pluralism and constitutional and methodological pluralism facing the enlarged Union of 25. I will try to argue whether or not this argument is justified.

I. Four reasons behind the idea of a European Constitutional Treaty according to Weiler

Weiler articulates four arguments which call, all of them incorrectly, in his opinion, for the enactment of the Constitutional Treaty. The first argument is political. It is based on the presumption that the current institutional mechanism and decision-making procedure will not function in the enlarged Union. However, this rather non-controversial thesis is doubled by the argument that therefore the whole current concept of an EU Constitution cannot work facing competing 26 constitutional orders of the Union. In other words, if one was afraid of the reactions of the constitutional court of Italy, Spain, Germany, or say, the House of Lords,¹ one can add after May 1, 2004 to this list of doubts constitutional courts of the new EU Member States. Now we should worry not only about the reaction of German or Italian justices, now we must be forever afraid also of the reactions of the justices of constitutional courts of Poland, Hungary, or say, the Czech Republic.

The second Weiler's argument is called 'procedural'. It understands constitution-making and constitution-enacting process as the possibility to generate wider

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1 Behind much more works recently Weiler, In defence of the status quo: Europe's constitutional *Sonderweg*, in: Weiler / Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge University Press 2003, 11-12.

political and constitutional discourse throughout Europe.² The Europe's constitutional moment might, in this way, help to enhance the sense of the European identity and contribute to making of European polity.

The third argument is called by Weiler a material one;³ one of the Constitutional Treaty objectives is without doubt to delineate more precise boundaries of the EU competences. I will not address this argument here; it is clear that this problem can be faced both within the current EU constitutional arrangement and the proposed new Constitutional Treaty.⁴

Finally, the "normative" rationale behind the European Convention is the attempt to fill "the disturbing absence of formal constitutional legitimization for a polity that makes heavy constitutional demands on its constituent Members."⁵ In other words, in this view having a formal written constitution is preferable to having unwritten set of constitutional doctrines the Europeans have now.

Below, I will argue to what extent these arguments are plausible facing the realities of the new Central European EU Member States.

II. *Constitution-making process enhancing public discourse?*

If we examine constitutional traditions of Central Europe, we see that public discourse on constitution-making is the phenomenon rather unknown. Before the era of communism, most Central European states were authoritarian or semi-authoritarian states with constitutions enacted without major political discourse.⁶

After the collapse of communism, Hungary amended its 1949 constitution in late 1989 as a result of round tables between the opposition and the communist government, but a new constitution has never been enacted.⁷ Both the Czech Constitution and Slovak Constitution of 1992 were drafted and enacted without public discussion whatsoever, pressed by the collapse of the Czechoslovak federation with its scheduled end on December 31, 1992. Czechoslovakia itself ceased to exist without any referendum.⁸ The Baltic nations held referenda on their

2 *Id.*, at 11.

3 *Id.*

4 Yet, to what extent this problem might be faced successfully is another story.

5 Weiler, *supra*, note 1, at 12.

6 Hungary did not have constitution at all, its constitution was based on the set of unwritten principles. See Sós, *The Constitutional Paradigm*, *Acta Juridica Hungarica* (Vol. 37), 49 – 62 (1996); Kovács, *Du droit public hongrois au droit constitutionnel socialiste hongrois*, *Acta Juridica Hungarica* (Vol. 29) 321-344 (1987).

7 Harmathy, *Constitutional Questions of the Preparation of Hungary to Accession to the European Union*, in: Kellermann, de Zwaan, Czuczai (eds.), *EU Enlargement, The Constitutional Impact at EU and National Level*, The Hague: Asser Press 2001, 315 ff.

8 On this see more Stein, *Czechoslovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup*. University of Michigan Press, Ann Arbor 1997.

constitutions but this was connected with a fervent process of the disintegration of the Soviet Union.⁹ Thus the most promising case seems to be Poland where the constitution was enacted in 1997 by popular vote. However, even if the Polish Constitution, a lengthy and complex document containing 243 rather detailed provisions,¹⁰ was enacted after long political bargaining and subject to referendum, many Polish scholars argue that this hardly contributed to its higher esteem.¹¹

The potential of the public discourse is further seriously hampered by two other reasons, peculiar to the new EU Member States and the EU post-communist candidate countries. There is a deep perplexity in that region on the issue of the EU. On the one hand, we might see a naïve belief that the EU is the only cure to all the problems the region of Central Europe is facing.¹² Public opinion of Central Europe welcomes new European standards implemented in their countries and EU potentials to fight corruption, inefficiency of domestic administration and other hurdles. Although this seems to be more valid for the nations which did not join the European club yet (Bulgaria, Romania), we can apply this thesis also on the new EU Member States.¹³ If we study reactions of post-communist nationals in more detail, however, their reactions seem more mixed, and naïve trust in the EU shared by some Central Europeans is opposed by fears of losing the national sovereignty and total unification of Europe as often expressed by others.¹⁴ In the latter view, the EU is not the *deus ex machina* solving all post-communist troubles, as the former group thinks, but a foreign monster able to disintegrate or even annihilate national traditions. This situation is misused and strengthened by some political forces and influential politicians of the region, who attempt to gain a large political capital out

9 Latvia in 1993 simply reinstated its old constitution of 1922. This was done to emphasize illegality of the Soviet occupation in 1940. See Taube, *Constitutionalism in Estonia, Latvia and Lithuania: a study in comparative constitutional law*. Iustus. Uppsala 2001, 46-55. Latvia's neighbor, Lithuania, was the first country to ratify the EU Constitution on November 11, 2004. This was done without referendum and without any major public debate.

10 An English translation is accessible, for instance, on the Internet page of the Polish Parliament. See <http://www.sejm.gov.pl/english/konstytucja/kon1.htm> (visited on September 11, 2004).

11 Cf. the opinions of Pawel Spiewak, "The Battle for a Constitution", *East European Constitutional Review*, Number 2 & 3, 1997, accessible on the Internet site of the East European Constitutional Review, <http://www.law.nyu.edu/eecr/>.

12 This fact has been, after all, already mentioned and explained by W. Sadurski, *Accession's Democracy Dividend: The Impact of the EU Enlargement upon Democracy in the New Member States of Central and Eastern Europe*, *European Law Journal* (Vol. 10) 371, esp. 372-373 (2004).

13 See European Commission, *European Citizens and Freedom, Security and Justice. Qualitative Survey of Citizens of the 15 Member States and the 13 Applicant Countries*. March 2003, at 36, 54, 95. Cf. also "spontaneous hopes that the European Union will remedy all these problems" [relating to improper legislation, corruption, lack of law's enforcement etc.] in Bulgaria, *id.*, at 164; similarly in Poland, *id.* at 173 etc. Cf. also data on Poland cited by Sadurski, *supra*, note 11, at 372, note 1.

14 Cf. European Commission, *European Citizens and Freedom, Security and Justice*, *supra*, note 12, at 87, being afraid of the loss of national identity etc.

of the fear of their fellow citizens relating to the uncertain future of the membership of their countries in the complex and hardly understandable Union.¹⁵ Perhaps, considering these EU-processes (either those welcomed or those feared) as automatic, beyond any chance to be influenced by political process, the citizens of the new EU states are also rather inattentive to the political processes within the European Union, as proved by recent elections to the European Parliament.¹⁶

The very nature of the Constitutional Treaty makes any wider public discourse hardly possible. Important pro-EU politicians of the region often prefer ratification of the EU Constitutional Treaty without referendum;¹⁷ the political forces who argue for more public discourse, best of all for the referendum as a condition for ratification of the Constitutional Treaty, do so for the hope that the referendum will disable ratification.

That is why attempts at enhancing public discourse through making and enacting the EU Constitution will not work in the new EU Member States. While this seems to be true for most old Member States, the second set of arguments I am about to face is peculiar for post-communist legal tradition only. This issue is a peculiar nature of legal discourse in the post-communist world.

III. Legal culture and discourse of the New EU Member States

Weiler nicely illustrated a prevailing set of doctrines within the current state of European constitutional law, which he describes as “Constitutional Tolerance”:

Constitutional actors in the Member State accept the European constitutional discipline not because, as a matter of legal doctrine, as is the case in the federal state, they are subordinate to a higher sovereignty and authority attaching to norms validated by the federal people, the constitutional demos. They accept it as an autonomous act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe, to a norm which is the aggregate expression of other wills, other political identities, other political communities.¹⁸

15 Most prominently, of course, Czech President V. Klaus, who in recent years strengthened his already deep Euro-skepticism.

16 Although voting turnout decreased throughout the Old EU Member States as well, the turnout in the New EU Member States seems to be twice lower than in the old states. However, the European Parliament is in the same time twice more popular than its Czech counterpart. See public poll on the trust in European and national institutions in the Czech Republic, September 13, 2004: European Parliament is trusted by 44 percent of the Czech citizens, the lower house of the Czech Parliament only by 22 percent, European Commission by 35 percent, the Council by 33 percent and the Czech government by 25 percent. Published on <http://www.cvvm.cz/> (web page of Centrum pro výzkum veřejného mínění – Center for the research of public opinion of the Sociological Institute of the Academy of Science).

17 Cf., e.g., former Czech President V. Havel, explaining that the EU Constitution is a too complex document for the public discourse. See Havel’s interview in daily *Právo*, May 15, 2004 (in Czech on <http://www.vaclavhavel.cz/index.php?sec=4&id=6>).

18 As put by Weiler *supra*, note 1, at 21.

The current European academic constitutional discourse is really far from the ideas of a uniform constitutional order¹⁹ topped by one Kelsenian *Grundnorm*.²⁰ A plethora of new readings of constitutionalism on the European level emerged, including the concept of Multilevel Constitutionalism,²¹ Constitutionalism Pluralism²² etc.; the need for paradigm-change is often repeated.²³ Even if from the viewpoint of many guardians of the Member States' constitutions the domestic constitution is the only final norm of reference able to decide constitutionality of any rule applicable within the Member State's territory, the real behavior of constitutional courts shows that this thesis is much more about their constitutional rhetoric than about their real practice. All courts and tribunals, ultimate guardians of the supremacy of their respective basic norms, are aware that the game might be followed despite their divergent rhetoric, and that the very existence of the divergent rhetoric might bear some fruits. However, they also know that the rules of the game and joint interests of all the parties prevent this rhetoric from its manifestation in practice.²⁴

This plethora of doctrines is enabled by a substantial shift through which a Western legal culture went in the last six decades.²⁵ European law has overcome the age of extreme formalism that prevailed in the nineteenth century. This process of overcoming was gradual, but accelerated after World War II and continues to speed up in the early 21st century.

In contrast, legal culture and legal discourse of eight new Member States of Central Europe is formed by a very different sort of legal discourse which seems to

19 Cf. generally de Búrca, Scott (eds.), *Constitutional Change in the EU. From Uniformity to Flexibility?* Oxford, Hart 2000.

20 For a recent ambitious reevaluation of the application of Kelsen's basic norm and Hart's rule of recognition on community legal order cf. Bindreiter, *Why Grundnorm? A Treatise on the Implications of Kelsen's Doctrine*, Kluwer 2002.

21 See, e.g., numerous works by I. Pernice: *Europäisches und nationales Verfassungsrecht*, VVDSt (Vol. 60) 148 (2000), 163 ff.; *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?*, CMLRev. (Vol. 36) 703 (1999); *Multilevel Constitutionalism in the European Union*, ELR (Vol. 27) 511 (2002).

22 La Torre, *Legal Pluralism as Evolutionary Achievement of Community Law*, Ratio Juris (Vol. 12) 182 (1999).

23 See, e.g. Böckenförde, *Staat, Nation, Europa*, Frankfurt am Main 1999, at 8.

24 The German doctrine as outlined by the famous, or for some, infamous Maastricht ruling, in this sense carries the role of nuclear weapons during the Cold War. All relevant parties know about the power they claim, while in the same time they know that their real strength lies not in their actual use, but merely in their potential to be used. This comparison is formulated by Slaughter, Sweet, Weiler, *The European Court and National Courts – Doctrine and Jurisprudence*, Oxford: 1998, at x or Weiler, Haltern, *Constitutional or International? The Foundations of the Community Legal Order and the Question of Judicial Kompetenz-Kompetenz*, *ibid.*, at 362.

25 Hesselink, *The New European Legal Culture*, Kluwer-Deventer 2001, 12.

be the mixture of the old authoritarian communist legal culture²⁶ and an early modern European legal culture.²⁷ While Western European legal systems face the problems of how to make their legal culture more open and substantive,²⁸ and contribute in this way to the ongoing process of making ‘an ever-larger Union’, the post-communist judicial methodology is much closer to the narratives of the European legal culture that prevailed in the nineteenth century, before the first wave of the European anti-formalist movements. Many methodological problems of post-communist legal reasoning are closer to those common in Europe in the nineteenth century than in Western Europe after the end of the Cold War.²⁹

From the most general point of view, I would identify three items, which might present a problem for the proper application of European law in the New Member States.

First, while pluralist conceptions of the interactions between European and national legal orders prevail in Western Europe, post-communist Europe came back to the Kelsenian concept of the legal system as a pyramid quite recently. In communist Europe the very paradigm of continental legal thinking, a classical

26 Cf. S. Rodin, who calls this discourse authoritarian. This discourse, in Rodin's view, “is proclamation and imposition of one truth as universal and final. Such discourse was authoritarian since it purported to have a social monopoly of determining meaning of legal and political language on the political top and of communicating it towards the bottom. It was, nevertheless, a discourse, since communication of meaning defined in authoritarian way was indispensable to support claim of universal acceptance, maintenance of which is a condition of integrity of the system. Certainly, while authority generated in rational discourse is necessarily inductive and inclusive, making creation of new categories possible, the model of authoritarian discourse is deductive, based on definitions that may or may not correspond to reality, and transmits them to the lower levels of social or professional hierarchy.” Rodin, *Discourse, Authority and Making of the Constitution of Europe*, at 7, unpublished paper, on file with the author, forthcoming in the *Croatian Yearbook of European Law and Policy* (2005).

27 This was rarely claimed openly by communist lawyers, with remarkable exception of a famous Hungarian comparatist and legal theorist I. Szabó. In the early 1970's, he discussed the allegation that socialist devotion to statutory law is inherited from Continental culture and that socialist methodology is similar to Continental style in this way: “If we can speak of any similarity in this field, we might say rather that Socialist legal systems have returned – although in different social conditions – to the views on the sources of law professed in Continental states at the outset of Bourgeois legal development.” Szabó, *The Socialist Conception of Law*. In: *International Encyclopedia of Comparative Law, Volume II, The Legal Systems of the World. Their Comparison and Unification*. Chapter 1, *The Different Conceptions of the Law*, Mouton, The Hague, J.C.B. Mohr, Tübingen 1975, 49, at 73 (in addition emphasizing that “even in appearance there is only outer similarity, because the social reasons for Socialist solutions are not identical with those reasons which once set legislative activity in opposition to the arbitrary practices of feudalism making it not merely the main, but the exclusive source of law.”).

28 On this, generally, Hesselink, *supra*, note 25.

29 See Kühn, *Worlds Apart. Western and Central European Judicial Culture at the Onset of the European Enlargement*. 53 *Am.J.Comp.L.* (2005), forthcoming.

hierarchy of legal sources, in fact disappeared; the single legal order composed of the enumerated sources of law remained on paper only and was replaced by an enormous number of directives and decrees of very different character, some of them even not promulgated in the official gazettes. The decisive role of the statute, typical for the region, was abandoned. Most important questions were contained in the by-laws, ministerial decrees and the government regulations.³⁰ The acts of the parliament were losing their normativity, consisting more of abstract principles and policies than of rules.³¹ The lawyers were driven out of the law-making, their role was much more the one of mere “service personnel”.³² When the Polish Constitutional Tribunal was established in the then communist Poland in 1986, one of the first problems it faced was an unconstitutional chaos in the Polish system of sources of law.³³ It is also the reason why the Polish Constitution of 1997 covers a detailed chapter on sources of law³⁴ and it is also the reason why the post-communist lawyers of the new Member States stick so much to the classical Kelsenian paradigm of the legal system.³⁵

Second, the very nature of the judicial activity in post-communist countries is centralized. By centralization I mean concentration of most important issues in a single judicial body, situated – with the exception of Estonia – outside the judiciary proper. In post-communist division of the work, the ordinary judiciary – ‘the judiciary proper’ – is entrusted with applying simple laws (*Einfaches Recht*) in a rather textualist way, whereas constitutional courts (situated outside the judiciary proper) are the only bodies which got the power to deal with abstract principles, human rights, constitutional law, and international law. Though the level of this centralization varies - the most extreme example seems to be Slovakia, the least visible Poland, the general perception of ordinary judges as those who shall apply the (domestic) law in a textualist fashion is yet another obstacle for the application

30 See Wronkowska, *The Sources of Law in the Constitution of the Republic of Poland of 2 April 1997*, *Droit Polonais Contemporain, Revue trimestrielle / Polish Contemporary Law, Quarterly Review*, No. 1-4 (1998), 59-70. On the similar problems in the former Soviet Union see Saidov, *Comparative Law* (Butler transl.), Wildy, Simmonds & Hill, London 2003 (Russian original in 2000), at 202.

31 Kulcsár, *The role of law-making in the modernization process*, *Acta Juridica Hungarica* (Vol. 25) at 19 (1983).

32 Schmidt, *Konstitutions- und rechtswissenschaftliche Probleme des Systems der Quellen des Rechts* [The constitutional law problems of the Hungarian system of the sources of law], *Acta Juridica Hungarica* (Vol. 27) at 155 (1985).

33 See *Constitutional Tribunal: A Selection of the Polish Constitutional Tribunal's Jurisprudence from 1986 to 1999*, compiled by Oniszczyk, Warszawa 1999, at 35.

34 Wronkowska, *supra*, note 30.

35 Similarly, Sajó, *Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy*, *Zeitschrift für Staats- und Europawissenschaften (ZSE)*, Jahrgang II (Heft 3), 351-371 (esp. 361).

of European law, which is, as one of the European constitutional requirement says, by its very nature decentralized.³⁶

Third, the European legal reasoning is increasingly pragmatic. Why, for instance, the European Court of Justice never demanded that the principle of primacy must be justified by its European genesis also in the national courts? Because the dogmatic constructions do not matter – what matters is the outcome, not dogmatic analysis. In contrast, post-communist legal discourse still lives in the age of the paradise of legal dogmatic, trying to find von Jhering's 'heaven of legal concepts', able to resolve any case at stake by the strength of analytical logic.

It is necessary to be aware of these problems, as they might explain shortcomings which are likely to occur in the application and enforcement of European law in the new EU Members after the Enlargement. Incidentally, the Chief Justice of the Czech Supreme Court concluded for the daily that it is necessary to change the judicial philosophy of law and this will be done through the EU influence:

This is a matter of legal culture. Education in it should start at university during the education of new lawyers. I believe that when we join the EU, a great pressure will start. [The EU] will not allow formalism and positivism to continue to exist in the Czech judiciary.³⁷

IV. Are Central European Judiciaries Able to Pursue a European Constitutional Discourse under the Current Constitutional Framework?

In this part, my main argument is that one of the drives behind a new formal European Constitution might be skepticism relating to the abilities of the new EU Member States to pursue the rules of the game and not to endanger "an ever closer union among the peoples of Europe."

Unlike majority of the old EU Member States, many constitutions of the new Member States incorporated the explicit reference not only to the possibility of

36 Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II)*, [1978] E.C.R. 629. Cf. Comella, *The European model of constitutional review of legislation: Toward decentralization?* *International Journal of Constitutional Law* (Vol. 2) 461 (2004), who claims that the centralized model of constitutional review seems to be in crisis, facing both internal (delays in deciding constitutional issues in centralized way before the constitutional tribunal; the difficulty to say whether or not a particular statute is constitutional without being tested in individual real life cases; a little distinction between the interpretation consistent with the constitution - which often substantially modifies the statute – on the one hand, and setting aside the statute, on the other; inefficiency of the system which demands its judges to refer similar issues to the constitutional tribunal even if it is clear from the previous case law of the constitutional tribunal that the statute would be proclaimed unconstitutional by that tribunal) and external reasons (reasoning of the ECJ, e.g. *Simmenthal*; primacy of international treaty law over domestic legislation).

37 Cihlářová, Kadeřávková, *Vizitka české justice – 400 000 otevřených případů* [A message of the Czech judiciary – 400,000 unfinished cases]. *Právo*, December 30, 2002, page 3 (quoting the Chief Justice Iva Brožová).

joining supranational organization, but also to direct effect and limited supremacy of EU law. For instance, the 1997 Polish Constitution in its rather complex and detailed style deals with European law, when it gives its own normative basis for the application and priority of European law in Poland: if an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws (Art. 91 para. 3).³⁸ In contrast, the Czech and the Hungarian³⁹ constitutions do not contain similar clause, which is caused by the fear of domestic political parties that proclaiming the principle of primacy of European law explicitly in their constitutions would undermine the supreme character of their basic laws.

Although the new EU Member States can be hardly described as based on firmly entrenched idea of constitutional patriotism with the leading role of the constitutional court, which settles for politicians questions they are for any reason unwilling to settle themselves,⁴⁰ most new Member States have powerful constitutional courts whose role in political process is more or less respected.⁴¹ In this line of reasoning, one might conclude that whether or not the New Member States are able to keep the current multilevel constitutional reasoning without endangering European process rests on their constitutional courts.

Judiciaries of the new EU Member States and their abilities to effectively enforce community rights are observed with suspicion.⁴² However, considering the nature of the post-communist judiciaries, open hostility and refusal of the acceptance of the position exercised by the ECJ is unlikely. The real problem of these courts seems to be ignorance and lack of ability, not the open defiance. This will not be changed by any sort of European constitutional arrangement.

38 On problems with the Polish provisions see Barcz, Membership of Poland in the European Union in the Light of the Constitution of 2 April 1997. Constitutional Act on Integration. Polish Yearbook of International Law (Vol. 23) 32 (1997-1998). Cf. similarly Art. 7 para. 2 of the Slovak Constitution.

39 Cf. Sajó, *supra*, note 35, at 353.

40 This is the case of Germany, which transformed its legal and political system after World War II from the emphasis on the German nation to the emphasis on the crucial unifying role of the constitution, and consequently of the constitutional court – see on this, e.g., Sternberger, *Verfassungspatriotismus*, Frankfurt am Main 1990.

41 Thus, when the Czech Parliament faced the first time an explicit issue of a possible conflict between a European rule and the national constitution, the prevailing consensus of the speakers and the outcome of the vote seems to support the result that not the Parliament but the Constitutional Court is the proper forum to resolve the issue. See the record of the proceedings of the Czech Senate of April 14, 2004, accessible (in Czech) on <http://www.senat.cz>.

42 Zirk-Sadowski, Transformation and Integration of Legal Cultures and Discourses – Poland, a paper at the conference “Implications of Enlargement for the rule of law and constitutionalism in post-communist legal orders”, European University Institute, Florence, 28-29 November 2003, quoted according to <http://www.iue.it>; Kühn, *Worlds Apart. Western and Central European Judicial Culture at the Onset of the European Enlargement*. *Am.J.Comp.L.* (2005), forthcoming.

The only forum when the form of constitutional arrangement does matter, is thus adjudication by constitutional courts. Yet, at least some constitutional courts of the EU Member States have a good record in dealing with community law, that is why the competence to face the current European constitutional framework. Even before the 2004 Enlargement the Central European constitutional tribunals repeatedly adjudicated in a Euro-friendly way. Already in 1997, the Polish Constitutional Tribunal stated this Euro-friendly general rule of construction of domestic law:

Of course, EU law has no binding force in Poland. The Constitutional Tribunal wishes, however, to emphasize the provisions of Article 68 and Article 69 of the [Polish Association Agreement] ... Poland is thereby obliged to use 'its best endeavors to ensure that future legislation is compatible with Community legislations' ... The Constitutional Tribunal holds that the obligation to ensure compatibility of legislation (borne, above all, by the parliament and government) results also in *the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility*.⁴³

Similarly, the Czech Constitutional Court emphasized in the late 1990's that both the Treaty of Rome and the EU Treaty are based on the same set of values and principles as the Czech constitutional law, therefore the interpretation of European law by the European authorities is valuable for the interpretation of the corresponding Czech rules.⁴⁴

The Czech Constitutional Court has put emphasis on the value of this Euro-friendly approach above all in the review of constitutionality of laws. The Court emphasized the existence of general principles of law, common to all EU Member States. The content of these principles is formed by the common European values; the general principles fill the abstract concept of the rule of law including human rights. The Constitutional Court must apply these principles and follow European legal culture and its constitutional traditions. "Primary law of the EU is not foreign to the Constitutional Court; it radiates, mainly through the general principles of European law, to a large extent into this Court's adjudication," reasoned the Court.⁴⁵

Out of the four post-communist Central European constitutional courts, only the Slovak Constitutional Court so far did not touch the issue. And only the Hungarian Constitutional Court has a problematic record in dealing with European community law. Deciding the issue of the rules on competition, the Hungarian Constitutional Court already in the late 1990's showed its willingness to play the role of the

43 The Gender Equality in Civil Service Case. In Polish the decision K. 15/97, OTK [Orzecznictwo Trybunału Konstytucyjnego, the collection of decisions of the Constitutional Tribunal], nr. 19/1997, at 380; English translation 5 East European Case Reporter of Constitutional Law 271, at 284 (1998) (emphasis added).

44 *Re Skoda Auto*, Collection of decisions of the Constitutional Court, vol. 8, p. 149.

45 *Milk Quota Case*, published as 410/2001 Sb. [Official Gazette].

guardian of the national constitution against community law.⁴⁶ This decision, however, have been severely criticized for its alleged complete ignorance and misunderstanding of international and community law.⁴⁷ Yet, despite a new composition of the Hungarian Constitutional Court after the late 1990's its May 25, 2004 judgment (the first Hungarian ruling on the EU law after the 2004 Enlargement) again questioned the Court's ability to participate in the European project of constitutional pluralism.⁴⁸

I described that at least some Central European constitutional courts are quite open to European law. It does not mean, however, that the constitutional courts of the New EU Member States will subdue themselves and their constitution to the one European "basic norm." In this, a German example, archetype for new Central European constitutional culture, is too strong to be disregarded. That is why one can expect that these constitutional courts, viewing themselves primarily as guardians of national constitutions, will pursue their national judicial politics, show themselves as ultimate guardians of national sovereignty and delineate the limits of the ECJ's competences in the way the German Federal Constitutional Court did in its *Solange II*⁴⁹ and *Maastricht*⁵⁰ decisions. This, however, if exercised in a German manner, will not affect the daily application of European community law.

The first decision of the Polish Constitutional Tribunal after the EU Enlargement shows a good example to its post-communist counterparts. The Polish Constitutional Tribunal decided on May 31, 2004 an important decision in which unconstitutionality of the law on elections to the European Parliament was claimed. According to Art. 19 EC Treaty every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and stand as a candidate in municipal elections and elections to the European Parliament. The petitioners argued that participation of foreign nationals was in conflict with the principle of sovereignty of Polish people as laid down in Art. 4 of the Constitution, as well as with the clauses which give the right to vote in Poland only to Polish

46 See the decision 30/1998 (VI.25) AB of June 25, 1998, as described by Volkai, The Application of the Europe Agreement and European Law In Hungary: The Judgment Of An Activist Constitutional Court On Activist Notions, In: Harvard Jean Monnet Working Paper 8/99, Harvard Law School (2000).

47 Vörös, The legal doctrine and legal policy aspects of the EU-Accession, Acta Juridica Hungarica (Vol. 44) 141 (2003), especially 149-151. I cannot judge to what extent is this critique substantiated, ignorant of further information on Hungarian law in that matter.

48 For the detailed analysis of this decision see Sajó, *supra*, note 35 (the paper includes a lot of hypotheses that seem to apply, in my opinion, to all constitutional courts of the new EU Member States).

49 See BVerfGE 73, 339 (1986), *Solange II*. Sadurski remarked that it would be ironic, "at today's stage of the development of EU law," if the constitutional courts "replicate" *Solange I* doctrine, now of course outdated. See Sadurski, *supra*, note 12, at 392. Yet, the first Polish decision after the accession of Poland to the EU, discussed below, is rather encouraging in this point.

50 See BVerfGE 89, 155 (1993), *Maastricht*.

citizens. The Constitutional Tribunal refused this argumentation.⁵¹ First, the Tribunal refused that what was at stake was the question of supremacy of either European or national constitutional law. Instead, it emphasized that the Polish Constitution is the supreme act establishing the legal basis for the existence of the Polish State, regulating the principles of exercising public authority on its territory and the modes of establishing constitutional State organs, together with the functioning and competences thereof.

Yet, the Constitution may not be “directly applied to structures other than the Polish State, through which the Republic realizes its interests.” That is why the Constitution may not be used as a reference to review constitutionality of the political decision-making on the EU level. Reasoning pragmatically (“It is the function of law in a society to resolve conflicts and not to exacerbate them”), the Tribunal refused the argument that the mere fact that the Polish statute had come in force before the EU law became applicable in Poland is the reason for this statute’s unconstitutionality. And most importantly, the Tribunal reemphasized the importance of the constitutional principle of Euro-friendly construction of national law:

Whilst interpreting legislation in force, account should be taken of the *constitutional* principle of favourable predisposition towards the process of European integration and the cooperation between States.⁵²

The Polish example is important. It shows that at least some constitutional courts in the New Member States are aware of their responsibilities and the need to cooperate with the ECJ, not to merely resist encroachments of EU law and defend national sovereignty as is often demanded by Euro-sceptics.

V. *Some Preliminary Conclusions*

Even if the ratification process of EU Constitutional Treaty succeeds, nothing substantial will change. To what extent formal designation of an international treaty as “constitutional” will matter, remains doubtful. However, it will resolve neither the potential problems of the application of EU law nor the problems faced by European Constitutionalism. The problems of European Constitutionalism are the problems of

51 See the decision of May 31, 2004, K 15/04, quoted according to the English summary at www.trybunal.gov.pl/Eng/. I would like to thank Jan Kudrna of the Charles University Law School in Prague for providing me with the full Polish text of the decision which I used in my analysis.

52 *Id.* (emphasis added).

constitutionalism in general, not necessarily some peculiar problems of the current EU transnational constitutionalism.⁵³

Moreover, there is enough support in the final version of the European Constitutional Treaty to argue that the current constitutional framework, based on competing legitimizations and the concept of constitutional pluralism, in which national constitutional systems accept European rules not because they are *subordinate* to a higher sovereignty of the Union, will not be altered by a new formal constitutional framework. The idea of constitutional pluralism, one might plausibly argue, is constitutionally codified on the EU level; “primacy” and not supremacy⁵⁴ of European law over the law of the Member States (Art. 10) might be viewed either as an unconditional rule or as a principle, subject to balancing.⁵⁵ If the latter, primacy of European law must be balanced, for instance, against the duty of the Union to respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional (Art. 5). The idea of constitutional pluralism must continue to exist for a foreseeable time to come. We will see whether the concept of constitutional pluralism is a long-lasting phenomenon or only a disguised idea making path to further (dis)integration.

53 As nicely discussed by Maduro, Europe and the constitution: what if this is as good as it gets? In: Weiler / Wind (eds.), *European Constitutionalism Beyond the State*, Cambridge University Press 2003, esp. 101-102.

54 The English version of Art. 10 para. 1 talks about “primacy”, not “supremacy”. Similarly, German versions talks about “Vorrang” (primacy or “priority”, not supremacy), French version about “la primauté”.

55 Von Bogdandy A., *Doctrine of Principles*, Jean Monnet Working Paper 9/03 (available on <http://www.jeanmonnetprogram.org>).