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“Solange, chapter 3”: Constitutional Courts in  
Central Europe – Democracy – European Union

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## **Abstract**

Soon after the accession of eight post-communist States from Central and Eastern Europe to the EU, the constitutional courts of some of these countries questioned the principle of supremacy of EU law over national constitutional systems, on the basis of their being the guardians of national standards of protection of human rights and of democratic principles. In doing so, they entered into the well-known pattern of behaviour favoured by a number of constitutional courts of the “older Europe”, which is called a “Solange story” for the purposes of this article. But this resistance is ridden with paradoxes, the most important of which is a democracy paradox: while accession to the EU was supposed to be the most stable guarantee for human rights and democracy in post-communist States, how can the supremacy of EU law be now resisted on these very grounds? It is argued that the sources of these constitutional courts’ adherence to the “Solange” pattern are primarily domestic, and that it is a way of strengthening their position vis-à-vis other national political actors, especially at a time when the role and independence of those courts face serious domestic challenges.

## **Keywords**

European law; fundamental/human rights; supremacy; European law; East-Central Europe; enlargement; European Court of Justice; Hungary; Poland; Czech Republic



**“Solange, chapter 3”:  
Constitutional Courts in Central Europe – Democracy – European Union**

Wojciech Sadurski\*

## **1. Introduction**

One of the most important themes in the grand narrative of the emergence of EU law as the supreme law of EU-land, prevailing over national legal systems, is (what may be called generically) a Solange story: a story about national constitutional courts resisting a straightforward surrender of national legal sovereignties, and insisting on their own role as guardians of any further transfer of powers from the national to the European level. This resistance is based on their distrust both of the democratic legitimacy at the supra-national level, and of the EU’s ability to provide a degree of protection of the principles of the rule of law and human rights, at least equivalent to that of the most elevated standards of the relevant national communities.

The story, as developed here,<sup>1</sup> borrows of course its name from two judgments of the German Constitutional Court. Solange I, in 1974,<sup>2</sup> established that since European law had not yet reached a level of protection of fundamental rights equivalent to that provided by national constitutional law, as well as a similar level of democratic

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<sup>1</sup> I need to emphasize that the description provided is extremely stylized, and fails to record the subtleties and complexities of developments of the attitudes of various constitutional courts of the “old Europe” towards the supremacy of EC/EU law. After Solange-1 and Solange-2, mentioned in the text above, the German Federal Constitutional Court adopted a number of other extremely important decisions, which can be seen as belonging to the same tendency, with some apparently departing from the position reached in Solange-2, in particular the Maastricht Treaty Case, 89 BVerfGE 155 (1993), where the German Court established that it would control observance by Community institutions of the Treaty-based limits to their powers, and the compatibility of Community law with the fundamentals of the German Constitution. This is all very well described in the literature (see, e.g., Bruno de Witte, “Direct Effect, Supremacy, and the Nature of Legal Order”, in Paul Craig & Grainne de Burca, eds., *The Evolution of EU Law* (Oxford University Press: Oxford 1999) [hereinafter “Direct Effect”]), and such an analysis would go beyond the scope of this paper.

<sup>2</sup> Judgment of 29 May 1974, 37 Entscheidungen des Bundesverfassungsgerichts 271.

legitimacy for its law-making powers, the Court would keep reviewing secondary Community law according to the standards of the national Constitution. Solange II, in 1986,<sup>3</sup> expressed in turn a satisfaction that such a level *had* been reached by Community law, and “as long as” (*solange*) the European Communities, primarily through the case law of the European Court of Justice, kept ensuring an effective protection of fundamental rights, the Federal Constitutional Court would no longer carry out a review of secondary Community legislation, according to national-constitutional standards (though it would retain the power to review the general regime of fundamental rights protection afforded by the EC). These developments have been replicated in several other countries where a number of constitutional courts have adopted a stance not unlike that of the German Court.<sup>4</sup>

After eight post-communist, newly democratized States of Central and Eastern Europe (CEE) formally acceded to the EU in 2004, one might have expected that the constitutional courts in these States would be tempted to travel the path of their German and other Western European counterparts. In fact, it would have been strange should they *not* have:<sup>5</sup> The Solange story, initiated in Germany, Italy etc. some years ago, was almost ideally suited to be taken up in CEE, and those EU scholars who ignored this dimension of the legal aspects of enlargement would do it to their peril: they would neglect what may become a central stumbling block on the way to the consolidation of the primacy of EU law<sup>6</sup> in an enlarged EU legal-political space. The Solange story was

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<sup>3</sup> Judgment of 22 October 1986, 73 Entscheidungen des Bundesverfassungsgerichts 339.

<sup>4</sup> For instance, on several occasions, the French *Conseil Constitutionnel* reviewed the EC Treaties under the French Constitution, thus forcing France to amend its Constitution in 1992 and 1999, see its Maastricht and Amsterdam Treaties decisions, respectively, decisions of 9 April 1992, 92-308 DC and of 31 December 1997, 97-394 DC. (The analogy with Germany is weak, though, as the decisions of the French Conseil constitutionnel were more like calls for constitutional amendments than strong objections to European legal supremacy; on the other hand, they were analogous in that they reasserted the role of the Conseil as a guardian of constitutionality vis-à-vis the EC/EU). In Italy, the *Corte costituzionale* established in *Frontini* in 1973 (*Frontini v. Ministero delle Finanze*, judgment of 27 December 1973) that fundamental rights are the limits to the transfers of sovereignty to the EC. This was reasserted in the *Fragd* ruling of 1989 (*S.p.a. Fragd v. Amministrazione delle Finanze*, judgment of 21 April 1989), where the Court claimed that it could review particular rules of EC law under the fundamental standards of the Italian Constitution, and in particular its provisions on rights (though it has not exercised this power of scrutiny so far), see Bruno de Witte, “Direct Effect”, at 202 n. 111. For a discussion of similar situations in Spain and Belgium, see de Witte, *id.* at 204; for a discussion of the so-called Danish Maastricht Decision see Paul Craig and Grainne De Burca, *EU Law: Text, Cases, and Materials*, 3<sup>rd</sup> ed. (Oxford University Press: Oxford 2003) at 312-13. In a summary description by de Witte, “In most other countries too, the Constitution is still the uncontroverted summit of the pyramid of the sources of law, and Community law is reluctantly given a para-constitutional status at most”, “Direct Effect” at 204 (footnote omitted).

<sup>5</sup> For a prediction that they will, see, inter alia, Zdenek Kühn, “The Application of European Law in the New Member States: Several (Early) Predictions”, *German Law Journal* 6 (2005): 563-82 at 572 [hereinafter “Several (Early) Predictions”].

<sup>6</sup> A terminological matter should perhaps be clarified from the outset: when talking about supremacy, I will be referring at times to EC law and at times to EU law (and sometimes, generically, to “European” law, meaning EU/EC law, as will clearly be dictated by the context), but nothing special is indicated by the distinction. The use of “EC law” is at times necessitated by the historical context, as it would be nonsensical to refer to the EU before its existence. But I will avoid the controversy of whether the principle of supremacy which has been long coined by the ECJ with respect to Community law, can also apply to EU law (that is, to the second and third pillar norms) with equal

well suited to be taken up in Central and Eastern Europe after accession, for two powerful reasons. First, in nearly all post-communist European States, constitutional courts established themselves as powerful, influential, activist players, dictating the rules of the political game for other political actors, and were certainly not embarrassed with any self-doubt as to their legitimacy in striking down laws under very vague constitutional terms.<sup>7</sup> While the powers of the constitutional courts in CEE largely resemble (and often exceed) those of their Western European counterparts, the other branches of CEE States are weaker, more chaotic, disorganized and inefficient compared to those in Western Europe. The relative positions of constitutional courts are therefore probably much weightier than is the case in the “older Europe”. Accession to the EU provided these courts with yet another opportunity to reinforce their own powers – an opportunity not to be missed: they could easily (taking their cue from West European courts, and thus abiding by the “follow the well tried model” type of legitimacy)<sup>8</sup> assert a right to establish and enforce criteria of democracy, rule of law and human rights protection, which would inform the relationship between the European and national constitutional orders. Such a power would further increase their position vis-à-vis the political branches in their countries, by delineating those aspects of the supremacy of European law which they deemed unacceptable, or by dictating the need to carry out constitutional amendments if certain dimensions of supremacy were to be accepted, etc.

The second reason why the Solange story almost begged for a recurrence in CEE stemmed from the strong sovereignty concerns which were felt and expressed in CEE States prior to accession, and persisted after joining the EU. Elsewhere, I have described the situation surrounding this concern as a “sovereignty conundrum”<sup>9</sup>: the often perceived irony that almost immediately after the shaking off of the brutal dominance by the Soviet Union (with its doctrine of “limited sovereignty” of Warsaw Pact States) and the recovery of their long-missed independence, these countries should accede to a supranational community in which traditional, strict sovereignty is found to be obsolete and in which they are asked to transfer much of their sovereignty to supranational institutions. This was nicely encapsulated by Jürgen Habermas, who

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force. I will simply assume, arguendo, that it does (for a recent strong argument why this should be the case, see Koen Lenaerts and Tim Corthaut, “Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law”, *European Law Review* 31 (2006): 287-315 at 289-90), and will revisit the matter only when a particular decision discussed marginally here *may have* warranted the distinction between third-pillar rules and the norms of Community law, see below a footnote on Polish EAW decision in Part 2.3 below].

<sup>7</sup> For a general study of the emergence and development of constitutional justice in CEE after the fall of Communism, see Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer Scientific: Dordrecht 2005) [hereinafter *Rights*]; see also Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press: Chicago, 2000) and Radoslav Procházka, *Mission Accomplished: On Founding Constitutional Adjudication in Central Europe* (CEU Press: Budapest, 2002).

<sup>8</sup> On imitation as a source of legitimacy in Central European democratic transitions, see Claus Offe, “Designing Institutions in East European Transitions”, in Robert E. Goodin, ed., *The Theory of Institutional Design* (Cambridge University Press: Cambridge 1996): 199-226 at 213-14.

<sup>9</sup> Wojciech Sadurski, “The Role of the EU Charter of Rights in the Process of Enlargement”, in George A. Bermann & Katharina Pistor, eds., *Law and Governance in an Enlarged European Union* (Hart: Oxford, 2004): 61-96 at 71-75 [hereinafter “The Role of EU Charter”].



observed that “[i]n [Central and Eastern European] countries there is noticeably little enthusiasm for the transfer of the recently won rights of sovereignty to European level”.<sup>10</sup> I had described various ways in which lawyers and politicians in these countries tried to justify the preservation of the full sovereignty of their country even as a fully-fledged member of the EU, e.g. by drawing the distinction between sovereignty as such and the exercise of sovereign powers, by redefining the EU as a traditional international organization, etc.<sup>11</sup> However, while these devices were more ingenious than compelling, the fact remained that concerns centered around the preservation of sovereignty were quite strongly heard in political discourses in CEE around the time of accession to the EU.<sup>12</sup> The constitutional courts thus found themselves in a situation in which the pull towards rephrasing sovereignty-based objections against the supremacy of EU law, in terms of their role as guardians of constitutional values, was irresistible, and certainly much stronger than in the case of their West European counterparts, which could feel much more relaxed about sovereignty in the EU. Indeed, the founding members of the EU (where the original Solange phenomenon prefigured what is now going on in some of the new Member States) were not the sites of any particularly strong concerns about preserving sovereignty within a supranational polity, which they themselves had brought into being in the first place. So while the Solange process could have occurred *there*, it subsequently found all the more fertile ground in the sovereignty-starved countries of CEE, affected by the additional, possibly humiliating factor of having to join the EU on a “take it or leave it” basis, where the impossibility to meaningfully alter the existing rules of the game exacerbated their sovereignty concerns.

As is clear from the above introductory remarks, the reasons for the willingness by the constitutional courts of a number of the new Member States to replay the Solange story in their own States after accession to the EU are almost entirely related to their domestic, both political and legal, context: they have less to do with the EU and more with purely local matters. But here is a delightful (or disturbing, depending on one’s perspective) paradox. One of the main rationales for CEE States joining the EU was about consolidating democracy and the protection of human rights. With their uncertain and vulnerable pre-Communist credentials, and after several decades of an authoritarian, non-democratic and non-rights-respecting rule, CEE countries had to undergo a rebuilding of democratic, constitutional regimes through a difficult, painful process of trial-and-error, against a background of economic collapse, disaffected citizenry, and incompetent and corruption-prone public service, judiciary and politicians. Joining first the Council of Europe and subsequently the EU was seen as, among other things, the best way of making democracy irreversible and robust, with political conditionality viewed as the best democracy-learning process, and full membership as the guarantee

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<sup>10</sup> Jürgen Habermas, “So, Why Does Europe Need a Constitution?” Robert Schuman Centre Policy Papers, Series on Constitutional Reform of the EU, 2001-02, <http://www.iue.it/RSCAS/e-texts/CR200102UK.pdf> at 7

<sup>11</sup> Sadurski, “The Role of EU Charter” at 76-80; see also Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge University Press: Cambridge 2005) at 122-30.

<sup>12</sup> For illuminating illustrations of the persistence of the sovereignty rhetoric in Czech political life, see Jan Komarek, “European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony”, Jean Monnet Working Paper No. 10/05, available at <http://www.jeanmonnetprogram.org/papers/05/051001.html>.

of the resilience of democratic achievements.<sup>13</sup> This was, one should add, both an external and an internal perception. Externally, EU enlargement was perceived, *inter alia*, as the best form of democracy promotion within a region of weak democratic credentials, where any collapse into authoritarian, nationalistic rule could upset the peaceful balance within the entire continent. Internally, EU membership has always been viewed by the democratic and liberal forces within the candidate (and the new Member-) States as the strongest backup for democratic processes and for the protection of human rights. The case of Slovakia, under President Meciar (whose policy endangered the aspirations for a quick membership to the EU) or, more recently, that of Poland under the rule of President Lech Kaczynski, show the efficiency of the “return to Europe” rhetoric as a strategy of opposing potentially authoritarian tendencies at the domestic level. In the Polish context, for instance, the “Europe will not allow this” rhetoric became an effective and powerful argument in the struggle led by the opposition against the pull of the Polish political elite towards breaching the right of assembly, or placing the question of a restoration of the death penalty on the political agenda, and so forth. And, while much of the pro-democratic arguments could not be properly linked to EU law as such, the very fact of membership in the EU facilitated greatly the strategies available to the defenders of democratic and civil rights. The Polish Constitutional Tribunal has been at the forefront of this line of argument.<sup>14</sup>

So it would be truly ironic if the constitutional courts were now to build democracy-based arguments *against* the supremacy of EU law in new Member States. It would be perhaps even perverse if the courts of the very countries which entered the EU *inter alia* to consolidate their democracy and human rights protection were to erect barriers against a smooth integration within the EU legal framework on the basis of their uncertainty as to the outcome, both in terms of democratic- and rights- protection, of such an integration (i.e., of the supremacy of EU law over national constitutional laws). The EU is thus perceived both as a source for the promotion of democracy and as a threat to democracy (through a transfer of powers to European institutions, whose democratic legitimacy is put in doubt): here is the paradox which underlies the story developed in this article.

This paradox lies at the heart of the Solange story, chapter 3. The first two chapters of this chain novel were written within old Member States, with constitutional courts first questioning the supremacy of European law out of fundamental-rights concerns, and then affording a conditional *imprimatur* to supremacy, justified by the fact that the protection of rights at the EU level had reached standards equivalent to those required at the national level.<sup>15</sup> The third chapter is now being written in the Eastern parts of the EU. But here is an additional irony. The initial concerns put forward by the German or the Italian courts back in the 1970s (“Chapter 1” of Solange) were eventually dispelled, based on the fact that the protection of rights by the EU had reached a satisfactory level (“Chapter 2”). Thus, the CEE constitutional courts entering the scene as the subsequent

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<sup>13</sup> For further developments on this point, see Wojciech 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* 10 (2004): 371-401.

<sup>14</sup> See, *inter alia*, the decisions referred to in the concluding section of this paper.

<sup>15</sup> The metaphor of chain novel as applied to judicial decisions is Dworkin’s, see Ronald Dworkin, “‘Natural’ Law Revisited”, *University of Florida Law Review* 34 (1982): 165-88.

authors of the same serial novel, with a claim that they now have to protect their citizens from the erosion of their rights protection (an erosion resulting, as the argument goes, from the supremacy of EU law over national constitutional orders), appears like a return to Chapter 1, while we have already been through Chapter 2. This is the double irony.

And yet, despite the apparent improbability – due to the double irony just noted – of “Chapter 3”, it *is* now being written, and its co-authors are the three by far most activist and powerful constitutional courts in CEE: that of the Czech Republic, Hungary and Poland. These are respectable, eminent authors, with strong audiences and sympathetic reviewers, and they are likely to be followed by others. Their contribution to the majestic narrative of Solange is rather complex and somewhat confusing. They speak with different voices and their concerns are not exactly the same, but the cumulative effect of their respective discourses leads to the conclusion that the Solange story, begun some thirty years ago, is alive and well, and that the last chapter has not yet been written.

## **2. Solange in Central Europe: Three Decisions**

### ***2.1. Czech Republic***

In its Decision Pl. ÚS 50/04 the Czech Constitutional Court (hereinafter the CCC) dealt for the very first time with Community law: the CCC took the opportunity to express its position on the supremacy and direct applicability of Community law in the Czech Republic. These principles were accepted to a large extent, but not unconditionally. The CCC reserved its authority to have a say in cases where Community norms might conflict with the requisites and foundations of the democratic State.<sup>16</sup>

The CCC was asked by a group of deputies of the Czech Parliament to review the constitutionality of a number of provisions of Governmental Regulation “Laying Down certain Conditions for the Implementation of Measures of the Common Organization of the Markets in the Sugar Sector”. The contested provisions dealt with the way in which the allocation process of production quotas for sugar producers had been established. The CCC annulled the challenged provision of the regulation on the basis that the Government had exercised a power which had already been transferred to the European Community. According to the CCC, Community law was directly applicable and there was no legal basis for a national law transposing the Commission’s regulation into the Czech national legal order.

The importance of this decision for the theme of this paper lies in the fact that the Court engaged in an open, explicit discussion of the role of democratic principles, in the context of accession to the EU. There were two types of reference to democracy, or

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<sup>16</sup> Article 9 para 2 and 3 of the Czech Constitution.

more specifically, the constitutional principle of the “democratic law-based State”.<sup>17</sup> Firstly, it was invoked when the CCC discussed possible limitations to the acceptance of the Community law principles of direct effect and supremacy. Secondly, the CCC invoked the principle, whilst explaining the limitations of the powers of national organs in areas in which competences have been delegated to the European Communities.

Regarding the first aspect, i.e. the interpretation of the supremacy and direct effect of Community legal norms, the Court emphasized, in a distinctly “Euro-friendly” manner, that “Community law norms enjoy application precedence over the legal order of Member States of the EC”.<sup>18</sup> In this particular case, the matter belonged clearly to the competence of the Community, and the Court found itself not competent to assess the validity of such a norm: it pointed at the case law of the ECJ which clearly establishes that, when a matter is regulated solely by EU law, it takes precedence over national law, including over national constitutional law. The CCC did not contest this precedent.<sup>19</sup>

The CCC acknowledged the fact that after the accession to the European Union a “fundamental change occurred within the Czech legal order” – that is, that Community law “will have an impact on formation, application, and interpretation” of national law. The Court went on to stress the fact that European law exerts a gravitational pull on the entire legal system, including its own constitutional law:

Although the Constitutional Court’s referential framework has remained, even after 1 May 2004, the norms of the Czech Republic’s constitutional order, the Constitutional Court cannot entirely overlook the impact of Community law on the formation, application, and interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is immediately bound up with Community law. In other words, in this field the Constitutional Court interprets constitutional law taking into account the principles arising from Community law.<sup>20</sup>

So much for the Euro-friendly aspect. On the other hand, the Court added that Community legal norms cannot be

in conflict with the principle of the democratic law-based State or that the interpretation of these factors may not lead to a threat to the democratic law-based State. Such a shift would come into conflict with Art. 9 para. 2, or Art. 9 para. 3 of the Constitution of the Czech Republic<sup>21</sup>

In its reasoning, the CCC further developed its position on the relationship between national and Community law, and the CCC’s powers to assess the constitutional conformity of national legal norms that are “tied up” with Community law. As we already saw, the CCC, as a general rule, accepted the supremacy doctrine and the fact that it lacked competence to assess the validity of Community law norms. At the same

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<sup>17</sup> There is also a third aspect, which played a more marginal role in the judgment, where the Court referred to democracy, by invoking the principle of *stare decisis* (or, as the Court called it, the continuity of its own case law, see Part A3. In this Part, the Court considered whether it is bound by its earlier decision which considered the relationship between production quotas and the principle of equality, but this precedent was found not to be operative in the present case.

<sup>18</sup> Decision Pl. ÚS 50/04, Part VI.

<sup>19</sup> Part VI.

<sup>20</sup> Part VI.

<sup>21</sup> Part A-3.

time, however, referring to the practice of several high courts of other Member States,<sup>22</sup> it pointed out that Community norms have been refused precedence on certain occasions and that the Courts have “retained a certain reserve to interpret principles such as the democratic law-based State and the protection of fundamental rights”.<sup>23</sup>

Later the CCC stressed:

The Constitutional Court also considers it necessary to emphasize that the holding it now adopts in no way signifies that the Constitutional Court would abdicate its powers of constitutional review of national legal enactments which are complementary to Community law, as has been done by several courts of EC Member States.<sup>24</sup>

The second type of appeals to the principle of democracy was in a section of the decision explaining the ways in which the government exceeded its powers. By adopting the contested provisions of the government regulation, which merely paraphrased provisions of the Commission regulation, the government failed to observe that upon the accession of the Czech Republic to the EU, some of the powers of the national organs had been transferred to the supra-national organs of the EU. This transfer, the Court emphasized, “has taken place on the basis of Art. 10a of the Constitution” – i.e., the provision authorizing the transfer of powers to the EU. This statement was followed by a lengthy explanation of the nature of the delegation of powers, and it is at this point that the Court engaged in an argument that is of particular interest to us here, making a thinly veiled warning about the terms under which such a transfer of powers is to be deemed acceptable, or, on the contrary, the conditions according to which it can be withheld, as well as establishing itself (although only implicitly) as the guardian charged with assessing whether the terms of the transfer are respected. According to the CCC, the delegation of powers is conditional upon the powers being exercised in a manner that not only is compatible with the preservation of State sovereignty, but also does not pose a threat to the very essence of the law-based State.<sup>25</sup>

Should one of these conditions for the transfer of powers cease to be fulfilled, that is, should developments in the EC, or the EU, threaten the very essence of State sovereignty of the Czech Republic or the essential attributes of a democratic State governed by the rule of law, it will be

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<sup>22</sup> Here is this reference: “the Constitutional Court cannot disregard the fact that several high courts of older Member States, including founding members, such as Italy (*Frontini v. Ministero delle Finanze*, Constitutional Court, Case No. 183/73, 27 December 1973; *Fragd v. Amministrazione delle Finanze dello Stato*, Constitutional Court, Case No. 232/1989, 21 April 1989) and Germany (*Wünsche Handelsgesellschaft (Solange II)*, Federal Constitutional Court, Case No. 2 BvR 197/83, 22 October 1986; *Maastricht Treaty 1992 Constitutionality Case*, Federal Constitutional Court, Case Nos 2 BvR 2134 and 2159/92, 12 October 1993), and later acceding Member States such as Ireland (*Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, Supreme Court, 19 December 1989, and *Attorney General v. X*, 5 March 1992) and Denmark (*Carlsen and Others v. Rasmussen*, Supreme Court, Case No. I-361/1997, 6 April 1998), have never entirely acquiesced in the doctrine of the absolute precedence of Community law over the entirety of constitutional law; first and foremost, they retained a certain reserve to interpret principles such as the democratic law-based state and the protection of fundamental rights”, Part VI of the Decision.

<sup>23</sup> Part VI.

<sup>24</sup> Part VI.

<sup>25</sup> Part VI.

necessary to insist that these powers be once again taken up by the Czech Republic’s State bodies.<sup>26</sup>

This point was deemed significant enough to be repeated by the Court: should the delegated powers be exercised in a way that is ‘regressive in relation to the existing conception of the essential attributes of a democratic law-based State’,<sup>27</sup> they will be again assumed by the national organs of the Czech Republic. As this had not occurred in the present case, the Court was comfortable about invalidating the governmental regulation, clearly expressing its trust in the EU not exercising its powers in a manner “regressive” to the democracy and “law-based State” (or the rule of law). The current standard for the protection of fundamental rights and basic freedoms within the Community was, the Court assessed, perfectly satisfactory and not “of a lower quality” than in the Czech Republic. There may be one point, in the regulation under assessment, in which there may have been a slight suspicion of discrimination in the way the regulation established production quotas, even under the Court’s own case-law, but the Court refused in this instance to attach any significance to it, because it did “not consider itself authorized to assess measures which form a part of the Common Agricultural Policy in terms of their substance”.<sup>28</sup>

The following general comments on this decision are of significance to our discussion. (1) Both the reasoning and the outcome of the decision are reasonably Euro-friendly: in the outcome of its decision, the Court castigates the government for intruding on the powers of the European Community, and in its reasoning, the Court is clearly comfortable with acknowledging the supremacy and direct applicability of EU law within the Czech Republic legal system. It is significant that, *in the context of interpreting the supremacy of EU law*, the Court does not put an emphasis on national sovereignty and the supremacy of the Czech Constitution over European law. (2) The Court gives a clear signal that the transfer of powers to the EU according to the criteria of the “democratic, law-based State” is to remain continuously open to its scrutiny; and, in this context, the Court makes clear rhetorical gestures by referring to the German, Italian etc decisions, in which the Courts challenged the absolute supremacy of European law. (3) It is at this stage, i.e. at the point of linking its overseeing role to the principle of democracy and the rule of law that the Court brings State sovereignty into the picture: sovereignty and democracy are indeed intrinsically linked in the Court’s reasoning. The limits to EU law supremacy are related to democratic principles, with State sovereignty as the ultimate guarantor of the latter. And, by condemning the government for intruding on EU functions while no threat to democratic principles (hence, no breach of the conditions for the transfer of powers) had been ascertained, it establishes itself gently but surely in the role of an umpire of national-European legal relationships on the basis of its own interpretation of democracy. So there is both a warning and a sweetener in this “Sugar Quota Decision”.

The sweetener is perhaps more obvious than the warning. As far as the central issue of the supremacy of European law is concerned, the CCC decision, in its actual effect (as opposed to the obiter pronouncements) did not make any inroads into the principle; if

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<sup>26</sup> Part VI.

<sup>27</sup> Part VI.

<sup>28</sup> Part VI.

anything, it strengthened the status of European law vis-à-vis the national one rather than weakened it (after all, the Court in effect castigated the government for illegitimately intruding on the province reserved to Community law!). The Solange-like themes appeared only in the obiter ruminations. Thus, the Court's decision aligned itself with the Solange story not by what it *did* but only by what it *said* (or, more precisely, by what it *said* it might be forced to *do* in the future). And this is the most important aspect of this judgment, at least for our purposes here: the Court sends a message that it will not abdicate its role as the guardian of the national Constitution against possible threats from European law, but at the same time behaves as a good European citizen and orders its own government to respect the European rules of the game, as far as the repartition of powers between the Community and the national level is concerned.

## 2.2. Hungary

Shortly after its accession to the EU, Hungary saw the first decision taken by the Hungarian Constitutional Court (HCC) concerning (albeit indirectly) the relationship between Hungarian and European law, which gave the Court an occasion to reassert its views about the rule of law, and in particular about its favourite aspect of it, namely the injunction against retroactivity. Under the Court's scrutiny was the law enacted on the 5 April 2004 by the Hungarian Parliament 'On Measures Concerning Agricultural Surplus Stocks' (hereinafter the Surplus Act) implementing two Commission Regulations on transitional measures.<sup>29</sup> The measures were aimed at preventing speculative stock accumulation in view of Hungary's accession to the European Union. They provided for the stocktaking of certain agricultural reserves and stipulated that if a speculative action were to be discovered, a prescribed sum would be imposed. These transitional measures, applying to all ten candidate countries, were not unlike similar transitional measures which had been prescribed by the Commission before the earlier enlargements, and in those earlier enlargements, they were usually approved by the ECJ, against charges of restraint of trade, discrimination, and lack of proper justification.<sup>30</sup> In Hungary, the President of the Republic, before signing the Act, submitted it to the Constitutional Court requesting a constitutional review, on the basis of alleged retroactivity. The Court agreed and invalidated several provisions of the law.

It is striking that, in the judgment, the "European" dimension of the case is somewhat hidden, since the HCC chose to treat the issues involved as concerning only the application of national Hungarian law. But the fact is that the rules which were

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<sup>29</sup> European Commission Regulation (EC) 1972/2003 of 10 November 2003 on transitional measures to be adopted in respect of trade in agricultural products on account of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, [2003] OJ L 293, as amended by Regulation (EC) 230/2004 of 11 February 2004, [2004] OJ L 39 and Regulation (EC) 735/2004 of 20 April 2004, [2004] OJ L 114; also Regulation (EC) 60/2004 of 14 January 2004 laying down transitional measures in the sugar sector by reason of the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, [2004] OJ L 9.

<sup>30</sup> See Renata Uitz, "EU Law and the Hungarian Constitutional Court: Lessons from the First Post-accession Encounter", in Wojciech Sadurski, Jacques Ziller & Karolina Zurek, eds., *Après Enlargement: Legal and Political Responses in Central and Eastern Europe* (Florence: Robert Schuman Centre 2006): 41-64 at 46 [hereinafter "EU Law"].

eventually struck down were identical to the transitional measures adopted in the Commission regulations in anticipation of the accession of Hungary and the other candidate States. It is clear then that, for the HCC, the principle of legal certainty is such a strong component of the democratic State that it prevails over Hungary’s obligations stemming from its participation to the European Union. The decision raises therefore some fascinating issues about the Court’s bid for the role of monitoring European law (even though only as reflected in national legal instruments) according to its consistency with the Court-established criteria for the “democratic State under the rule of law” (as stipulated under Art. 2(1) of the Hungarian Constitution, operative for this judgment).

The President’s submission to the Tribunal was based on the fact that, even if the President had signed the Surplus Act, the statute would not enter into force before 25 May 2004<sup>31</sup> and since the obligations introduced by the Act were to be assumed on 1 May 2004 - the date of the entry into force of the Accession Treaty and thus of Hungary becoming a Member State of the EU - the Surplus Act would be retroactive. The Court stressed that the Act did not allow ‘due time’ for the recipients to learn about the legal duties involved and, further, that it imposed legal obligations in a retroactive manner. As a consequence, the principle of legal certainty resulting from the principle of the rule of law, protected by the Hungarian Constitution (Article 2(1)) was violated. More specifically, legal certainty was found (in the President’s submission) to have been violated in two aspects of the law. First, the law provided for the possibility of taking an inventory of stocks as of 1 May 2004 despite the fact that the expected date of entry into force of the Act would not be earlier than the second half of May 2004. Secondly, it contained a presumption of intended speculation in the case of contracts signed after 1 January 2004, although there had been no rule in force at that time prohibiting the increase of stocks.<sup>32</sup> These aspects of the law gave the Court an opportunity to comment on its earlier jurisprudence on the principle of “legal certainty” and that of (as an essential part of the latter) non-retroactivity:

Legal certainty requires, among other things, the determination of citizens’ rights and obligations in statutes promulgated in a way specified in an Act of Parliament and made accessible for everyone and, in addition, statutes may not define obligations for a time period preceding their promulgation, and no lawful act may be declared illegal with retroactive effect, in order to allow the recipients to adapt their conduct to the legal provisions they have access to.<sup>33</sup>

It went on to state that

the principle of the rule of law requires the determination of the date of entry into force of a statute in a way allowing the persons concerned to become familiar with the statute, to prepare for its application, and to adapt to the new regulations. The time needed for preparation (i.e. the

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<sup>31</sup> According to Section 7 (1) of the Surplus Act: ‘[t]his Act shall enter into force on the 45th day following its promulgation’. ‘The 45 days were required because under the National Expenditure Act tax-payer obligations cannot apply before 45 days from promulgation’. András Sajó, ‘Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy’, (2004) vol.2 (3) *Zeitschrift für Staats- und Europawissenschaften* 2 (2004): 351-71 at 356 [hereinafter “Learning Co-operative Constitutionalism”].

<sup>32</sup> Decision 17/2004 (V. 25.) AB. IV. 1.

<sup>33</sup> Part IV.4.



time between the promulgation and the entry into force of the statute) is to be determined on a case-by-case basis.<sup>34</sup>

There was one other aspect of the legislation which came under a critical scrutiny of the Court: it was the fact that the law delegated to an “implementing decree” the question of identifying the recipients and the amount of the sums to be paid with regards to surplus stocks as defined under the law. These payments were found by the Court to be equivalent to taxation. By combining Article 13 (the fundamental right of property) with Article 8(2) of the Constitution (regulations pertaining to fundamental rights and duties to be issued only through statutes of Parliament), and also with Article 70 (the obligation to contribute to public revenues, characterized in the Constitution as “fundamental”, and hence lying within the scope of Art. 8(2)) the Court found a constitutional defect in the implicit authorization for a sub-statutory law to regulate the scope of a fundamental right (implicit, because as stated by the Court itself, while the Act in question did not specify the level and form of the implementing decree, in the “legislative practice” it meant a regulation below an Act of Parliament).<sup>35</sup> However, in this particular part of the decision the Court did not refer to the principle of the law-based democratic State, perhaps because (contrary to the principles of certainty and non-retroactivity), it had a textual mooring in the Constitution for its ascertainment of unconstitutionality. However, it also counted it as a violation of an important democratic principle about the separation of powers and the proper scope of the legislative power.

As already pointed out, a striking feature of the judgment is that the HCC decided to treat what was essentially the substance of a regulation of the European Commission, as a matter purely of domestic Hungarian law, thus ostensibly avoiding any need to pronounce itself on the validity or otherwise of European law, and avoiding a possible clash between European law and Hungarian constitutional principles pertaining to the rule of law and democracy. But this avoidance strategy of any head-on collision is so convoluted that it raises some serious questions about whether the Court really meant what is said when it flatly asserted that “the question about the provisions challenged in the petition concerns the constitutionality of the Hungarian legislation applied for the implementation of the EU regulations rather than the validity or the interpretation of these rules”.<sup>36</sup> This assertion is questionable, both on formal and on substantive grounds.

Regarding the formal grounds for the disconnection of the European from the Hungarian domestic aspect of the judgment, the Court provides the following reasons:

[1] [Regulation 1972/2003/EC]<sup>37</sup> and [Regulation 60/2004/EC]<sup>38</sup> specify obligations for the new Member States rather than for their citizens,

[2] the ACSS [the Act of Hungarian Parliament under scrutiny in the Decision] serves the purpose of implementing the regulations of the European Union,

[3] there are several references in the ACSS to the rules in the regulations of the Union,

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<sup>34</sup> Part IV.4.

<sup>35</sup> Part V.

<sup>36</sup> Part III.

<sup>37</sup> Official Journal L 293, 11.11.2003

<sup>38</sup> Official Journal L 9, 15.1.2004

[4] the provisions of the ACSS challenged in the petition do not qualify as a translation or publication of the regulations of the Union, as they implement the aims of the regulations by using the tools of Hungarian law.<sup>39</sup>

These are meant to be the four formal reasons substantiating the conclusion that it is the validity of Hungarian law, rather than that of the European regulations, which is at stake here. There seems, however, to be a set of odd non sequiturs. Arguments (2) and (3) seem, if anything, to support, rather than weaken, the thesis that the Court engages in the scrutiny of European law. Argument (4) states the conclusion rather than the reasoning. So only argument (1) might qualify as a real argument for the disconnection. But how convincing is it? On its face, it seems to ignore the fundamental trait of EU law, that is, that regulations have direct effect and are directly applicable within Member States. And it is clear that, in the present case, the regulations create obligations not just on Member States but also on individuals – e.g. the surplus owners.<sup>40</sup> But even if it were the case that the only obligations the regulations created were aimed at Member States, it still would be irrelevant to the question of whether the subject-matter of the judicial scrutiny in this instance was European or national law. The question of the identity of the bearer of the obligations is independent of the issue of whether European or national law is at stake. So the point about who has obligations cannot serve as a justification to invalidate a European regulation under the pretext that it has become a national statute.

So much for the formal aspect. Substantively, the disconnection thesis is even less plausible, considering that the Hungarian Act virtually mimicked the regulations in every possible respect.<sup>41</sup> According to the rules supporting the principle of supremacy of European law, the duty of the Court would have been to address a preliminary question to the ECJ rather than set aside European regulations (or what amounted in fact to European regulations). Of course, if the Court wanted to strike down only the domestic legislative input, so to speak, and leave the regulations as such intact, it could have done so and still abide by the European constitutional rules of the game. Considering that regulations leave national lawmakers a certain degree of discretion as to implementation, the Court could have carefully identified this national “extra” added to the regulations – and struck down only this “extra”. But it has done none of this. In avoiding such an exercise, and in shunning recourse to a preliminary reference to the ECJ (and that of interim measures which could be ordered in the meantime for the non-implementation of the norms in question), it failed to fulfil its duty to cooperate in good faith, as required from the Member States by Article 10 TEC.<sup>42</sup> (No need to add, it was not the first constitutional court of a Member State to do so).

So what can we make of the Court’s attitude? Offhand, there are two possible readings of the Court’s approach. The first is: the Court came across a deeply troubling defect in the law (troubling, especially, from the point of view of its earlier strong anti-retroactivity jurisprudence; this matter will be developed below) but in order not to appear un-cooperative with regards to Hungary’s accession to the EU, it preferred to characterize its scrutiny as concerning exclusively domestic issues, thus avoiding

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<sup>39</sup> Part III, numbers of paragraphs added.

<sup>40</sup> Similarly Sajó, “Learning Co-operative Constitutionalism”, at 364.

<sup>41</sup> See, similarly, Uitz, “EU Law” at 48.

<sup>42</sup> I am grateful to Bruno de Witte for discussions on this point.

making any gestures questioning the (putative) supremacy of European law over the Hungarian constitutional doctrines.<sup>43</sup> Second reading: the Court grasped the opportunity of establishing its own position as the umpire of the validity of European law, according to its own conceptions of democracy, but chose to minimize the friction and merely to send a signal according to which it will not accept any “foreign norms” which do not square with its own philosophy of the rule of law and democracy.<sup>44</sup> Both readings are plausible, and the choice of one over another can be perhaps facilitated by looking at the “path dependence” of the Hungarian Court’s judgement. This path dependence consists of two traditions in the Court’s jurisprudence, which just happened to intersect in this particular judgement: (a) a tradition in its own doctrine of the rule of law, and in particular of its firm and rather rigid insistence on non-retroactivity, and (b) a tradition of approaching European law from the perspective of Hungarian national law.

The first tradition is considered clearly by the Court as one of its treasures to be cherished and cultivated with special care; in its decision on surplus stocks, the Court announces its attachment to the tradition with great solemnity: “According to the practice of the Constitutional Court followed since the very beginning of its operation, the requirement of legal certainty is an indispensable element of the principle of a democratic State under the rule of law”.<sup>45</sup> Some of the best known, and the most controversial, decisions of the Court have been based precisely on a strict and robust understanding of legal certainty (with non-retroactivity as its main factor) as the central feature of its reading of the democratic State and the rule of law. The landmark decision in which a law aiming at lifting the statutes of limitations for politically-motivated crimes committed under Communism was invalidated, was made exactly on these grounds: it was found that such an ex-post facto restoration of criminal liability for these crimes would amount to an improper retroactivity of the law.<sup>46</sup> The decision was handed down after the Parliament passed a law in 1991 (the so-called Zetenyi-Takacs Act, named after its drafters) stating that, between 1944 and 1990, limitation periods would not be considered to have run for the crimes of treason and murder, where such crimes were not prosecuted for political reasons.<sup>47</sup> The President refused to sign the law and sent it to the Constitutional Court, which then declared it to be unconstitutional. In this judgment, referred to as the Zetenyi decision (after the abbreviated name of the law that was struck down), it based its decision partly on the unacceptable vagueness of the law, arguing that ‘political reasons’ is not a term capable of one clear definition to cover a period of time spanning almost fifty years. More fundamentally, it based its

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<sup>43</sup> As Andras Sajo puts it, while the Court “apparently avoided a head on collision”, the strategy adopted “opens up the Court to criticisms of judicial hypocrisy”, Sajo, “Learning Co-operative Constitutionalism”, at 368.

<sup>44</sup> Zdenek Kühn’s reading is even harsher: the Hungarian Court’s decision exemplifies for him “a clear danger that constitutional courts might ignore EU law and pursue their task of protecting national constitutions as if nothing had happened with Accession”, Kühn, “Several (Early) Predictions” at 574.

<sup>45</sup> Part IV.

<sup>46</sup> Constitutional Court decision no. 11/1992 of 5 March 1992, reproduced in László Sólyom & Georg Brunner, eds., *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (University of Michigan Press: Ann Arbor, 2000) at 214-18.

<sup>47</sup> Law of 4 November 1991 on the “Right to Prosecute Serious Criminal Offences Committed Between 21 December 1944 and 2 May 1990 that Had Not Been Prosecuted for Political Reasons”, English translation published in *Journal of Constitutional Law in Eastern and Central Europe* 1 (1994): 129-157.

decision on its conception of the State based on the rule of law. It held that, in a constitutional State, “[n]ot only must the legal provisions and the operation of State organs comply strictly with the Constitution but the Constitution’s values and its conceptual culture must permeate the whole of society”.<sup>48</sup> Given that the transition to democracy was carried out on the basis of legality, no distinction could be made by the Court between laws enacted before and after the new Constitution; every law must therefore conform to the Constitution and every law must be reviewed in the same way. On this basis, the Court applied the principle of legal certainty – as a fundamental requirement of the rule of law – to the act suspending the statute of limitations, and found the law deficient in this regard; the law was held to be a form of retroactive legislation, and thus violating the rule of law.<sup>49</sup>

The decision was applauded by some as a case of a principled defence of constitutionalism against political imperatives, and derided by others as a formalistic insistence on continuity of certain earlier constitutional engagements, even though no substantive rationales usually produced for the “*lex retro non agit*” principle were relevant to this case.<sup>50</sup> Be that as it may, non-retroactivity became a favourite mantra (an uncharitable would say: obsession) of the Hungarian Constitutional Court, which it further extended into various non-criminal-law fields, resulting in a general doctrine according to which, when new obligations are created by statutes, there must be “enough time” given to the addressees of the rule, to prepare for its application, to adapt to the new regulations, and to adjust their conduct to the new requirements without facing negative consequences.<sup>51</sup> So it is no wonder that, when the opportunity arose to signal its proud history of a robust understanding of “legal certainty” against a European norm which could be faulted of this in this respect, the Court should jump on the opportunity, especially if it could do by avoiding an apparent challenge to European law, as opposed to national law.

But this sounds just a little too good to be true, and one cannot avoid the impression that the Court wanted to warn “Europe” that Hungarians have their own standards on the rule of law, and that if Europe does not comply with them, the Court will make sure that Hungarian standards should prevail. For there are some aspects of this particular decision which indicate that the Court’s finding of improper retroactivity was less than fully applicable in this case. For one thing, the Court itself clearly stated that the time needed for preparation by the bearers of new obligations is to be determined “on a case

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<sup>48</sup> Solyom & Brunner at 219.

<sup>49</sup> The legislature subsequently amended its initial law by suspending the statutes of limitations only with respect to crimes against humanity and war crimes. For a more detailed description of this legislative-judicial exchange, see Sadurski, *Rights*, at 251-53, and Renata Uitz, “Constitutional Courts and the Past in Democratic Transition”, in Adam Czarnota, Martin Krygier & Wojciech Sadurski, eds., *Rethinking the Rule of Law after Communism* (CEU Press: Budapest 2005): 235-62 at 244-48.

<sup>50</sup> This is my view, defended in Sadurski, *Rights* at 255-58. For an excellent comment from a point of view of the US legal scholarship see Stephen J. Schulhofer, comments in the symposium “Dilemmas of Justice”, *East Europ. Constit. Rev.* 1:2 (Summer 1992): 17-22 at 18.

<sup>51</sup> See Decision 17/2004 (V. 25.) AB. Part IV, where this case law is summarized and various citations to earlier cases are given. According to the practice of the Constitutional Court followed since the very beginning of its operation, the requirement of legal certainty is an indispensable element of the principle of a democratic State under the rule of law.

by case basis”<sup>52</sup> and no reasons specific to the particular issue of the agricultural surplus stock are produced by the Court to the effect that the time given by the Hungarian statute was insufficient. Secondly, the regulations of the Commission (which were to become the substance of the Hungarian law) were published, respectively, on the 11<sup>th</sup> of November 2003 and the 15<sup>th</sup> of January 2004, and anyone in the agricultural business could very well have been aware that Hungary would have to comply with the transitional measures right at the start of its membership in the EU. It is hard to imagine that the relevant businesses would ignore the Commission regulations merely on the grounds that, prior to accession, they had no direct legal relevance for Hungarian recipients. Further, on 23 March 2004, four Hungarian ministers (respectively of Agriculture, Economy and Transport, Finance and Foreign Affairs) published a joint communication, in the *Official Gazette*, on the substance of the agricultural stock rules, which were eventually to become Hungarian law, and annexed the text of both EC regulations to this communication. The Court duly reports this fact in its Judgement, only to sternly announce that the publication of this communication “is irrelevant” to the constitutionality of the act under scrutiny.<sup>53</sup> This is surprising because if the yardstick is about having “sufficient time” to prepare to new rules, then what should matter is a de facto announcement stating what rules will eventually be in place, and this requirement seems to have been fully met with the communication published by the ministers. Naturally one may debate about how much time is “sufficient”, what form of publication is formal or public enough to put all the stakeholders on notice and so forth, but no discussion of these points is carried out by the Court in this judgement. The fact that the Commission had published its regulations prior to their entry into force, as had the ministers with the publication of their communication, and that of the regulations as an annex, was flatly dismissed by the Court as “irrelevant”. The conclusion of unconstitutionality is, under these circumstances, less than convincing.

The second thread of “path dependence” which paved the way to this decision concerns the Court’s case law on the relationship between European and Hungarian law prior to accession. Various Constitutional Courts in the pre-accession countries of Central and Eastern Europe have had numerous opportunities to pronounce themselves on the relevance, or otherwise, of EU legal rules as regards their domestic legal systems. This was a result, among other things, of the obligation for a gradual harmonization with EU law resting upon the candidate States. Some courts proved more “Euro-friendly” than others. For example, back in 2001, the Czech Constitutional Court established the relevance of Community law to the interpretation of Czech law (three years prior to formal accession!) by asserting, in an admirably Euro-friendly manner, that Community law has as its sources general legal principles which are based on European constitutional traditions and general European legal culture.<sup>54</sup> The Court, well before accession, thus went as far as to say that “Primary Community Law is not foreign law for the Constitutional Court, but to a wide degree it penetrates into the Court’s decision making – particularly in the form of general principles of European law”.<sup>55</sup> Importantly, also “ordinary” courts in some of these countries, have shown their eagerness to abide

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<sup>52</sup> Part IV of the Decision.

<sup>53</sup> Part IV.3 of the Decision.

<sup>54</sup> Milk Quota Case, Decision No. 410/2001, discussed by Zdenek Kühn, “Several (Early) Predictions”, at 567-8.

<sup>55</sup> Quoted id. at 568.

by the rules of European law even prior to formal accession, especially when interpreting domestic law in the light of EU law. A Czech legal scholar, Zdenek Kühn, gives an example of the ‘Euro-friendly approach’ of a Czech court of general jurisdiction - the High Court in Olomouc - which back in 1996 proclaimed that it was not a mistake for public authorities to interpret Czech antitrust law consistently with the case law of the ECJ and with European Commission’s decisions.<sup>56</sup> Similar cases can be found among ‘ordinary’ courts of other CEE States.<sup>57</sup> While this paper is concerned with constitutional courts, the practice adopted by the “regular” judiciary must undoubtedly have exerted some gravitational pull on constitutional courts as well.

Going back to the Hungarian Constitutional Court, it had just one – but significant – occasion to announce its position. In a decision of the 25<sup>th</sup> of June 1998, the Court found unconstitutional a rule of the Hungarian law implementing the Europe Agreement. In its decision, the Hungarian Court held that the *acquis* had no direct effect before accession, and in effect, it urged the need for constitutional amendments prior to accession.<sup>58</sup> And while one has to be careful in attaching any significance to this old decision today (after all, it explicitly referred to the pre-accession legal situation), it is worth noting that at least one Hungarian legal scholar commenting on that decision has argued, perhaps presciently, that the Hungarian Court may well continue to imitate the German Constitutional Court, and ‘thereby develop a conflictual relationship with the Community legal system after accession’.<sup>59</sup>

Can one read the old, 1998 decision, as prefiguring the recent, 2004 judgment? According to Renata Uitz, both decisions display the same formalistic logic of drawing a clear line between the pre- and post-accession legal situations: in the 2004 judgment, the Court could have characterized the matter as belonging to the domestic legal system as, prior to accession, the European Commission’s regulation could not have direct effect, and be directly applicable in Hungary.<sup>60</sup> This pre-accession aspect was underlined, with great seriousness and emphasis, in the 1998 decision: the Court then characterized the main issue as revolving around the question of “whether it is possible to enforce, before the Hungarian competition authority, the internal norms of another subject of international law and of an independent public law system, which are meant to regulate legal relations under public law, without making these norms of public law become part of Hungarian law”.<sup>61</sup> And to such a question, the Court could, by

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<sup>56</sup> Id. at 566–67.

<sup>57</sup> On the other hand, as Kühn has shown elsewhere, both in the Czech Republic and in Slovakia, EU law had been rarely ‘brought into play’ as an ‘interpretational tool’, and on balance, an ‘anti-European approach’ had prevailed prior to accession, Zdenek Kühn, ‘Application of European Law in Central European Candidate Countries’, *European Law Review* (2003) 28/4, at 554..

<sup>58</sup> Decision 30/1998 (VI.25) 25 June 1998 III.I, discussed in Janos Volkai, ‘The Application of the Europe Agreement and European Law in Hungary: The Judgment of an Activist Constitutional Court on Activist Notions’, *Harvard Jean Monnet Working Paper* (1999) 8, p. 9, available on-line at: <http://www.JeanMonnetProgram.org/papers/99/990801.html>; Andras Sajó, “Accession’s Impact on Constitutionalism in the New Member States”, in George A. Bermann & Katharina Pistor, eds., *Law and Governance in an Enlarged European Union* (Hart: Oxford, 2004): 415-36 at 429 [hereinafter “Accession’s Impact”].

<sup>59</sup> Volkai at 31.

<sup>60</sup> Uitz, “EU Law” at 49.

<sup>61</sup> Decision 30/1998 (VI. 25.).

emphasizing State sovereignty, the strict and clear dualism between international and national law, as well as the “foreign law” nature of EU law, at least in the pre-accession stage, easily answer that:

Any provision ordering the direct applicability of internal public law norms of the Community in the Hungarian legal system, and in legal relations of a public law nature between the Hungarian state and the subjects of law under its sovereignty, violates Article 2 paras (1) and (2) of the Constitution.<sup>62</sup>

According to this reasoning, the answer was certainly unimpeachable. However, it also set a certain climate of sovereignty-assertion in the Court’s doctrine, which was eventually asserted in its 2004 decision, and may be reiterated in the near future again. What is, however, even more important for our purposes here is that, back in 1998, the Court had used the opportunity to strictly link this assertion of sovereignty with the principle of democratic legitimacy: “It is a constitutional requirement based on the principles of popular sovereignty and the democratic rule of law that in the Hungarian Republic, public authority may only be exercised on the basis of democratic legitimacy”.<sup>63</sup> It is this sovereignty-democracy link that established the Court’s mandate to act as a guardian of the limits of any future transfers of power to European institutions: if the democratic legitimacy is a yardstick, then any failure by European institutions to draw sufficient legitimacy from democratic procedures, or any failure to display sufficient sensitivity to the principles of democracy and the rule of law, as understood by the Hungarian Court, will serve as a reason to halt the transfers of powers, or to limit the domestic applicability of European law in Hungary. The Court had not, of course, said this in so many words, but it is the lesson which can be read into the, older, 1998 decision. And the reasoning in this decision paved the way for the constitutional amendment dealing with accession.<sup>64</sup> In the justification produced officially by the Minister of Justice when sending the draft of Article 2A to the Parliament,<sup>65</sup> it was clearly stated, inter alia, that the Treaties establishing the EU would be applied in Hungary on the basis of the Constitution – hence the primacy of the Hungarian Constitution over Hungarian law was clearly asserted already then.

But this all goes back to the 1998 decision: what about the lessons of the 2004 decision? My suggestion is, it should be read as reflecting the intersection of the two traditions recounted earlier, with the line of cases on non-retroactivity as the emblematic virtue of the rule of law, Hungarian style, and the precedent on the relationship between

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<sup>62</sup> Concluding section of the Decision 30/1998. Article 2 provides, inter alia: “(1) The Republic of Hungary is an independent, democratic constitutional state. (2) In the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives”.

<sup>63</sup> Concluding section of the Decision 30/1998.

<sup>64</sup> This constitutional amendment, adopted in 2002, provided for the participation as a Member State of the EU by virtue of an international agreement (to be ratified by two thirds of the Parliament) and for “exercising certain constitutional powers jointly with other Member States”. It is significant, for the argument in the main text, that the constitutional drafters carefully and deliberately avoided the language of “transfer” or “surrender” of constitutional competencies. As Andras Sajó observed, the text of the amendment “indicate[s] a desire to emphasize nationhood to the fullest extent possible”, see Sajó, “Accession’s Impact” at 419-20.

<sup>65</sup> See Attila Harmathy, “The Presentation of Hungarian Experiences”, in “Position of Constitutional Courts Following Integration into the European Union”, International Conference 30 September – 2 October 2004, Bled, Slovenia, [http://www.us-rs.si/pcceu/index.php?sv\\_path=589](http://www.us-rs.si/pcceu/index.php?sv_path=589).

Hungarian and European law. The outcome of these two vectors is precisely this decision, taken a few weeks after formal accession, in which the Hungarian Court insisted on characterizing the EC regulation-influenced rule as one of a purely Hungarian nature, and striking it down using a standard of the rule of law (and legal certainty) of its own making. So, which of the two interpretations, suggested earlier, is more plausible, in light of these two threads of the case law, which have affected the decision? Is it a case of a careful avoidance of any collision between Hungarian (constitutional) and European rules, even though a scandalous (according to the Court) breach of the rule of law had been committed? Or is it rather a shrewd way of warning European institutions that the Hungarian Court will not tolerate any intrusions on the most cherished constitutional patrimony of newly democratized Hungary? The old cliché: “Only time will tell”, is probably unavoidable in this instance, in so far as both readings seem to be equally plausible, and only future decisions of the Court (when a “judicial comfort-seeking”<sup>66</sup> from the pre-accession context will no longer be available) will reveal which of these interpretations was more accurate.

For now, however, it is clear that the Court has avoided a head-on assault on the principle of supremacy of European law, but left itself enough room to do so in the future, when European regulations, directly applicable in Hungary, might be faulted as not satisfying the Court’s standards of the rule of law. It was also a warning aimed at the European law-makers, about how seriously it takes its own understanding of legal certainty. But since it attacked a proxy (the Hungarian authorities), rather than the genuine sources of the norm at stake, it carefully avoided the need to pronounce itself on the limits of the supremacy of European law over the national constitutional order. The emphasis on national sovereignty is unmistakable, though: even a Hungarian legal scholar who prefers to read this decision as not hostile to European supremacy, but as avoiding tackling the status of EU law altogether, notes “an odd emphasis on national sovereignty, temporal frameworks and an equally formalistic approach to retroactivity”<sup>67</sup> displayed in the decision of the Hungarian Court.

### **2.3. Poland**

Exactly ten days after the formal accession of Poland, its Constitutional Tribunal issued a decision on the constitutionality of the Accession Treaty,<sup>68</sup> which was signed in Athens on 16 April 2003, and approved by a national referendum in Poland on the 7<sup>th</sup> and the 8<sup>th</sup> of June 2003, in which 77.4 per cent of participating citizens voted in favour of the ratification. The decision of the 11<sup>th</sup> of May 2004 was triggered by a petition submitted by three groups of deputies of the Sejm (the lower house of the Polish Parliament) who opposed Poland’s membership of the EU arguing that some of the provisions of the Accession Treaty were in breach with the Polish Constitution, and in particular the constitutional principles of sovereignty and the supremacy of the Polish Constitution within the domestic legal system.

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<sup>66</sup> Uitz, “EU Law” at 49.

<sup>67</sup> Uitz, “EU Law” at 52, footnote omitted.

<sup>68</sup> Decision K 18/04.



In its judgment the Tribunal was primarily concerned with delivering its account of the relationship between national law and the Community legal order. However, importantly from our point of view here, in discussing Poland's membership of the European Union it also referred to democracy and human rights. The Tribunal did not share the convictions of the deputies and found Poland's membership of the EU and the Accession Act constitutional under each of very numerous challenges. What is interesting, however, is that while issuing what can be seen as an essentially EU-friendly ruling, the Tribunal employed a rather harsh, "sovereignist" rhetoric.<sup>69</sup> The Tribunal took the opportunity to express its views on the relationship between domestic and Community law, and it stated unambiguously that "the Constitution enjoys precedence of binding force and precedence of application within the territory of the Republic of Poland" and that this remained unaffected by Poland entering the EU.

The starting point for the argument was a characterization of the European Community and European Union as "international organizations", understood in a very traditional way. The Tribunal flatly rejected any possible categorization of the EU as a "*supranational* organization", observing that neither the Polish Constitution nor the Accession Treaty use such a term. Consequently, upon accession, "[t]he Member States remain sovereign entities – parties to the founding treaties of the Communities and the European Union".<sup>70</sup> This was linked to the observation according to which the Polish Constitution puts a clear limit on the transfer of sovereignty: Article 90 (1)<sup>71</sup> which served as the basis for accession to the EU

authorises the delegation of competences of State organs only 'in relation to certain matters'. This implies a prohibition on the delegation of all competences of a State authority organ or competences determining its substantial scope of activity, or concerning the entirety of matters within a certain field.<sup>72</sup>

It is at this point that the link between national sovereignty and democracy is established: Polish constitutional provisions, as emphasized by the Tribunal, "do not authorise the delegation of competences to such an extent that it would signify the inability of the Republic of Poland to continue functioning as a sovereign and democratic State".<sup>73</sup> This paves the way, naturally, for a reassertion of the primacy of Polish constitutional law over any norms issued by "international organizations", by virtue of the link between democracy and sovereignty, the latter being the guarantee for the former. The Tribunal does not need to state it in so many words but it is clear that, in response to the petitioners, the Tribunal reassures anyone fearing the possible threats to democracy and sovereignty, seen as an indivisible aggregate, that it will stand as a guarantor of constitutional rights as enshrined in the Polish constitution.

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<sup>69</sup> As one Polish commentator observed, the Tribunal's reasoning was "based on fears" of "losing sovereignty, or not retaining 'enough' of it", Krystyna Kowalik-Bańczyk, "Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law", *German Law Review* 6 (2005): 1355-66 at 1365.

<sup>70</sup> Part 6.

<sup>71</sup> 'The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters'.

<sup>72</sup> Part 7.

<sup>73</sup> Part 8.

Then there is the thorny issue of the putative supremacy of European Community law over the domestic system; this supremacy is all the more likely as it is mandated not only by the doctrine developed within European law itself, but also because it has its mooring in the Polish Constitution: article 91 (3) provides that “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”. Yes, the Tribunal concedes, but this “precedence” applies only to sub-constitutional laws, not to the Constitution itself (and, by implication, to the interpretation of the Constitution as given by the Constitutional Tribunal):

Given its supreme legal force (Article 8(1)), the Constitution enjoys precedence of binding force and precedence of application within the territory of the Republic of Poland. The precedence over statutes of the application of international agreements which were ratified on the basis of a statutory authorization or consent granted (in accordance with Article 90(3)) via the procedure of a nationwide referendum, as guaranteed by Article 91(2) of the Constitution, in no way signifies an analogous precedence of these agreements over the Constitution.<sup>74</sup>

So at this point, the position expressed within the national Constitution and that of the Constitutional Tribunal as its authorized oracle are quite firmly established, and their role as defenders of democracy (through the defence of sovereignty) asserted. But to further amplify this point, the Tribunal (uninvited, in this particular judgment) takes up the issue of the principle of “Euro-friendly interpretation” of domestic law, and sternly announces that such an interpretation “has its limits”.<sup>75</sup> What are they?

In no event may [a Euro-friendly interpretation] lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realized by the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions.<sup>76</sup>

Why would the Tribunal establish such an obiter, and hence, strictly speaking, unnecessary, warning? The only plausible reason is that it wanted, right at the outset of its functioning within the EU system, establish a Solange-like principle, defining its guardianship of the national-European law relationship, as an element of the fundamental rights standards of the national constitutional system it had itself set forth.

Answering further the objections of the petitioners concerning the compatibility of the composition of the Council of Ministers of the EU and its legislative competences with the constitutional principle of the democratic State, the Tribunal stated that:

The principle of the democratic State governed by the rule of law (as expressed in Article 2 of the Constitution) refers to the functioning of States and not necessarily to international organizations. This concerns, in particular, the concept of separation and balance of powers: the legislature, executive and judiciary (Article 10 of the Constitution), constituting an element of the aforementioned principle. Accordingly, the Constitutional Tribunal may not treat these principles as adequate bases of review for institutional solutions within the Communities and European Union, including the composition and legislative competences of the Council.<sup>77</sup>

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<sup>74</sup> Part 11.

<sup>75</sup> Part 14.

<sup>76</sup> Part 14.

<sup>77</sup> Judgment of 11 May 2005, K 18/04, Principal Reasons for the Ruling, point 20.

Discussing the issue of granting foreign EU citizens the right to vote and to stand as candidates in local elections (yet another basis of the petitioners' complaint) the Tribunal stated that this did not contradict any provision of the Polish Constitution.<sup>78</sup> Supporting its line of reasoning, the Tribunal referred to international and national fundamental legal rules that prohibit discrimination, amongst others, on the basis of nationality. Elaborating on international obligations concerning fundamental rights, the Tribunal stated that:

The Republic of Poland is obliged to observe this prohibition given its membership of the United Nations and the Council of Europe, including, in particular, ratification of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.<sup>79</sup>

Thus, as has been similarly stated by other constitutional courts from the region,<sup>80</sup> international obligations concerning the protection of fundamental rights are deemed to derive primarily from membership of the United Nations and the Council of Europe. It seems that the Tribunal did not perceive the European Union as a source of standards and obligations in the field of fundamental rights. The EC Treaty is cited only with respect to prohibitions against discrimination,<sup>81</sup> and only to show that they do not introduce "a normative novelty", as compared with the prohibitions against discrimination that are stated within the Polish Constitution. So, ultimately, it is Polish constitutional law which serves as a yardstick for the level of rights-protection. Indeed, according to the Tribunal, it is in the area of the protection of fundamental rights and freedoms that the supremacy of the Polish Constitution is the most needed, an indisputable implication being that European norms can constitute a threat to the standards established by the national constitution.

There is one tempting way of reading the decision, beyond the Solange-kind of interpretation which I have just suggested. There is a striking contrast between the *tone* and the *outcome* of the judgment. The outcome is unambiguously "Euro-friendly": all the complaints of the petitioners, a group of right-wing and nationalistic MPs, were rebutted, as constitutionally groundless. The complaints amounted to an all-out challenge to the political decision to join the EU; they were not about any particular legal subtlety pertaining to the primacy of European law or its direct applicability. There were no fewer than fourteen grounds for the constitutional challenge, with references to the Accession Treaty, the EC Treaty, the EU Treaty, and ... the Charter of Fundamental Rights, and they ranged from the very fundamental principle of national sovereignty<sup>82</sup> to the, arguably idiotic, charge that "Europe" might impose same-sex marriages in Poland.<sup>83</sup> Nothing, in the long list of fears and paranoia of the Polish nationalist right, was too big or too small to escape the long catalogue of constitutional challenges inserted in the petition. The Court struck down each of the complaints, one by one. By doing so, it rescued, on the constitutional front, the historic choice made by

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<sup>78</sup> Id., point 27.

<sup>79</sup> Id., point 28.

<sup>80</sup> See the Decision 18/2004 (V. 25.) AB. of the Hungarian Constitutional Court discussed in Part 3 of this paper below.

<sup>81</sup> Articles 12 and 13 of the EC Treaty, referred to in part 18 of the decision K 18/04.

<sup>82</sup> See the challenges discussed in points 1-11 of the Judgment.

<sup>83</sup> See the challenge discussed in point 29 of the Judgment.

the Polish people and by the centre-left political elite ruling at the time, to make Poland join the European Union.

This was the *outcome* of the judgment. The *tone*, however, was singularly “Europe-unfriendly”. The European Union characterized as a standard international organization; transfers of powers to the EU viewed as an exercise of national sovereignty and only insofar as the essence of sovereignty remains untouched; unquestionable supremacy of the Polish constitution over European laws; limits to a “Euro-friendly” interpretation of the law determined by the concern for fundamental rights; sovereignty viewed as required for the protection of democracy; a contrast drawn between the regulative principles underlying the structure of a democratic State and, on the other hand, the structures of “international organisations” such as the EU: all these are cumulative components of a rationale, which in effect establishes the grounds for a strong sovereignty-based resistance to possible intrusions “from the outside” in the Polish democracy and rights-protection.<sup>84</sup>

This tension between the outcome and the tone of the judgment need not be seen as incoherence, though; to the contrary, their concomitance in the same judgment may be perfectly understandable. It may be viewed through the prism of what I have described elsewhere in some detail as the “strategy of reassurance” employed by a court, and which can be detected when there is a contrast between the argument and the outcome of a judicial decision.<sup>85</sup> Courts speak to several audiences at the same time, and they need to build, and maintain, their legitimacy by placating those who will be disappointed by the outcome of their decision (as some groups will necessarily be). They can do so in various ways: for instance, by sending a signal to the disappointed part of the audience that the decision is very narrow, or that at least that there are some aspects of the judgment which may raise hopes as to the decision going in a different direction in the future. By doing so, a Court can minimize the costs of creating “winners” and “losers”, and establish a high degree of legitimacy for itself. Hence the sense of imbalance between the justification (the reasoning) and the outcome. In this particular case, the tension between the tone of the argument and the outcome may be seen as placating, in advance, the political forces behind the petitioners; those upset by what they saw as the “surrender of sovereignty” resulting from accession to the EU.

This interpretation is all the more tempting since, around the time the Polish Constitutional Tribunal issued its Accession Treaty Judgment, it had also issued another, equally well publicized and hotly anticipated, EU-related judgment, namely the decision on the European Arrest Warrant (EAW).<sup>86</sup> From the point of view of the

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<sup>84</sup> A similar analysis, pointing to the tension between the reasoning and the outcome, could be carried out also with respect to another decision of the Constitutional Tribunal taken soon after accession, namely the one concerning the compatibility of the elections to the European Parliament with the Polish Constitution, Decision K 15/04 of the 31<sup>st</sup> of May 2004. The Tribunal found nothing unconstitutional about granting voting rights for the EP elections organized in Poland to EU citizens who were not Polish citizens, but on the road to this conclusion, it emphasized, inter alia, the very limited role of the European Parliament (Part III.2 and III.3 of the Decision) and the fact that the constituency of the EP is an aggregate body composed of the nations of the Member States (Part III.3).

<sup>85</sup> Wojciech Sadurski, “‘It All Comes Out In the End’: Judicial Rhetorics and the Strategy of Reassurance”, *Oxford Journal of Legal Studies* 7 (1987): 258-78.

<sup>86</sup> Decision P 1/05, of 27 April 2005.

“strategy of reassurance” rhetoric described earlier, the EAW decision may be seen as a mirror image of the Accession Treaty decision. The applicability of the EAW in Poland was invalidated as unconstitutional,<sup>87</sup> but this “Europe-unfriendly” result was reached through a rationale which displayed a great sensitivity as regards the duties of Poland towards its new partners in the EU and the principle of supremacy of EU law over national legal orders.<sup>88</sup> In fact, none of the harsh assertions for national sovereignty and of the primacy of the Polish constitution over European law, so strikingly present in the Accession Treaty judgment, can be found in the judgment on the EAW.<sup>89</sup> The Tribunal even maintained the validity of the extradition procedures for the maximum period possible (18 months) thus enabling the legislator to cope with the situation, and more importantly, hinting at the need to remove the constitutional prohibition on extradition – which was eventually done by constitutional amendment on the 8 of September 2006. In addition, it stated explicitly that the implementation of the EAW would be beneficial to Poland as it would contribute to the “strengthening of its internal security”.<sup>90</sup> So the overall tenor of the EAW Decision is: “We really hate what we are doing but we have no choice”.<sup>91</sup> Taken together, these two decisions seem to provide perfect evidence for

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<sup>87</sup> The decision was triggered by a “legal question” from a regional court as to whether the provision of the code of criminal procedure, implementing the European Arrest Warrant (EAW) Framework Decision was consistent with the express constitutional prohibition against the “extradition” of Polish nationals. The Tribunal stated that while the Polish legislator has a constitutional duty to implement framework decisions, this duty does not preclude constitutional scrutiny of the conformity of European secondary law with the Polish Constitution. In this case, the “surrender” under the EAW rules was found by the Tribunal to be equivalent to the concept of “extradition” as used in the Constitution, and so the explicit constitutional ban on extradition prevailed over the statutory implementation of the EAW Framework Decision. At the same time, the Tribunal suspended the effects of its decision for 18 months in order to give the legislator enough time to sort out the conflict, for instance by amending the Constitution.

<sup>88</sup> A Polish commentator expressed an opinion that in this decision the Tribunal “implicitly accepted the supremacy of EU law over constitutional norms”, Kowalik-Bańczyk, at 1361. For an analysis of the “Euro-friendliness” of this judgment by a Czech legal scholar, see Komarek at 10.

<sup>89</sup> An additional distinguishing feature between the two decisions was that the decision on the EAW was made with reference to a rule of the “third pillar”. The Court could therefore have treated it as part of an ordinary international law treaty, without the special features of supremacy and direct effect, which concern (as the argument goes) only Community law (first pillar). In EU legal scholarship the distinctiveness of the status of third pillar rules is a contested issue (see De Witte, in *Developments*, at 184 n. 24); for a position in favor of absolute supremacy applicable to all three pillars with equal stringency see, recently, Koen Lenaerts and Tim Corthaut, “Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law”, *European Law Review* 31 (2006): 287-315 at 289-90; but in any event the Tribunal did not exclude the supremacy of third pillar acts, but stated that it would not change anything since the operation of the principle of supremacy of European norms (of whatever pillar) is limited by the principle of protection of fundamental rights, see Part III.3.4 of the Decision.

<sup>90</sup> Point 5.9 of the EAW Decision.

<sup>91</sup> As always, the judicial rhetoric about an alleged impossibility of any other decision due to plain textual meaning of the constitutional provision has to be taken with a grain of salt. There were various options available to the Tribunal in order to distinguish constitutional “extradition” from surrender, as defined by the EAW; for example under the constitutionally mandated limits on constitutional rights based on the necessity to protect democracy, public security or public order (such an argument *had actually* been submitted to the Tribunal during the proceedings, see Point 4.1 of the Decision P 1/05), or as I would suggest (though I could find no traces of such an interpretation produced by anyone before the proceedings), on the basis of a purposive interpretation of the constitutional ban on extradition, namely that it was motivated by the fear that the extradition of Polish citizens could be used as a political weapon against the ‘undesirables’, but that when no such danger occurs, the reluctance to surrender Polish citizens to another country is unfounded. Whether such an

the “strategy of reassurance” interpretation, with the Court managing to be nice to everyone, on both sides of the barricade.

Be that as it may, what is important for us here is not merely *why* the Court said what it said, but primarily, *what* it did say. And clearly it has aligned itself, in the Accession Treaty judgement, with the Solange story. It stated, first, that there are clear limits to the transfer of legal powers to the EU level; secondly, that these limits are defined by the standards set by the Polish constitution, and in particular its requirements concerning democracy and human rights, and thirdly, implicit but obvious, that the Court will be the guardian charged with assessing whether these limits have, or not, been breached. This is precisely what Solange was all about.

The view according to which the national constitution is above EU law and that the Constitutional Court is a guardian of this primacy seems to be firmly set in the minds of Polish constitutional judges. This comes across not only in their judgments but also in the extra-judicial pronouncements. A few months after the Tribunal handed down its Accession Treaty judgment, the judge who had authored the judgment, Marian Grzybowski, a prominent constitutional-law scholar, presented a paper at an international conference, where he made assertions precisely to that effect: a “constitutional regulation” is “superior” to EU law, and the constitutional court is a guarantor of this superiority.<sup>92</sup> Addressing the question of how this relates to the principle of supremacy of European law, Professor Grzybowski in fact “downgrades” the latter: the putative principle of supremacy of European law has no moorings in constitutional (national) provisions or even in the European treaties but merely in the interpretation of the treaties carried out by the ECJ. And yet, according to him, the ECJ’s competence “is lacking of strict, precise and recognized constitutional justification”. He explains: “according to national legal criteria, a kind of written constitutional competence is mandatory for any activities of a given important public organ. The ‘purely jurisdictional’ justification does not fit to the constitutional standards of legality”.<sup>93</sup> So the conclusion is clear: between a strict, textual principle of supremacy of national constitutional law and a purely case-law based assertion of primacy of EU law, the former must prevail.

So perhaps the judges of the Constitutional Tribunal of Poland indeed had no choice but to assert the supremacy of the national Constitution over EU law on the basis of the clear textual affirmation of such supremacy in the Constitution itself (article 8 which affirms that the Constitution is the supreme law in Poland)? There are two problems with such a proposition: first, such a view would exaggerate the determinacy of this textual provision, and secondly, it mistakenly identifies the force of the rules with their textual content. As to the first point, the Tribunal could have, theoretically at least, considered the supremacy clause (art. 8) jointly with the clause concerning the transfer

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interpretation is convincing is besides the point here; all that matters is that the Tribunal, as always, faced a *choice* rather than being forced to pronounce the “right answer” allegedly predetermined by the text of the Constitution.

<sup>92</sup> Marian Grzybowski, “The Competence of the Constitutional Tribunal and the 2003 Treaty of Accession”, in “Position of Constitutional Courts Following Integration into the European Union”, International Conference 30 September – 2 October 2004, Bled, Slovenia, [http://www.us-rs.si/pcceu/index.php?sv\\_path=589](http://www.us-rs.si/pcceu/index.php?sv_path=589).

<sup>93</sup> Id.

of certain competencies “of state authorities” to “international organizations” (Art. 90), and on the basis of this joint consideration established that supremacy does not apply to the powers transferred to the EU.<sup>94</sup> It could have also distinguished between the notion of “extradition” within the Polish Constitution and that of “surrender” in the statutory rules implementing the EAW, thus avoiding the conflict between the two.<sup>95</sup> As to the second point, the force of a provision must be seen as something external to the actual contents of this provision: it would be incoherent to believe that a particular provision of an act can authoritatively determine how important this act will be vis-à-vis other legal sources, because we would then run into an infinite regress: there must be some external criterion to assess the importance of a given law vis-à-vis other laws. So the Constitutional Tribunal had to decide about how to position the legal status of the national constitution vis-à-vis other legal orders, and while the choice that it made is an understandable one, it cannot be seen as the only one available to it.

### 3. The other side of the coin

A Hungarian scholar noted recently with a certain resignation that “except for a few constitutional court decisions which are notorious for purportedly putting obstacles in the way of European integration and EU-driven constitutional transformation, constitutional courts go almost unnoticed in EU matters”.<sup>96</sup> At first glance, this observation, especially if combined with the account, earlier in this article, of the CEE constitutional courts writing “chapter 3” of Solange, may give only a one-sided account of the phenomenon captured by the triangle “CEE constitutional courts – EU law – democracy”. For while it is true that a strong insistence on the courts’ right to enforce constitutionally driven limits against the supremacy of EU law brings to the forefront the spectre of the paradox highlighted in the introduction (namely, that the courts place democracy-justified limits on an integration, which had been justified, inter alia, by the need to consolidate democracy), on the other hand those same courts appeal sometimes to democratic and rights-related standards of the EU (not to mention the Council of Europe) in order to reinforce their arguments about democratic consolidation in their own countries. True, they do not normally do so in contexts in which the issues of the supremacy and direct effect of EU law are raised, but the full picture of EU-related resources used by constitutional courts in their rulings on democracy must include also this part of the story.

One significant example of the way in which a constitutional court explicitly treats the EU as a source of democratic standards in order to shape national legal developments is a 2004 decision of the Hungarian Constitutional Court, in which it reviewed the constitutionality of a bill adopted by the Parliament in December 2003, introducing a

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<sup>94</sup> A possibility of such interpretation is hinted at (though not necessarily endorsed) by an eminent Polish scholar, Stanislaw Biernat, in his critical comment on this judgment, Stanislaw Biernat, “Glosa nr 2”, *Kwartalnik Prawa Publicznego*, vol. 5, no. 4/2005, 185-206 at 205.

<sup>95</sup> Some Polish scholars and observers suggested such a distinction, see e.g. Dorota Leczykiewicz, Case Note, *Common Market Law Review* 43 (2006): 1181-91 at 1187.

<sup>96</sup> Uitz, “EU Law” at 57.

stricter criminalisation of hate speech. The HCC shared the opinion of the petitioner (the President of the Republic) according to which the bill was unconstitutional since it introduced undue limitations on freedom of expression. In its reasoning, the HCC stressed that freedom of expression is one of the crucial components of democracy and a democratic State. Justifying its decision, the HCC referred to relevant international legal sources: that of the United Nations, the Council of Europe and the European Union.

In its reasoning, the Court, while acknowledging that ‘the tragic historical experiences of our century prove that views preaching racial, ethnic, national or religious inferiority or superiority, the dissemination of ideas of hatred, contempt and exclusion endanger the values of human civilization’,<sup>97</sup> stressed that, in the present case, it was mainly concerned with the issue of ‘whether freedom of expression may be constitutionally restricted to the extent the legislature intends to criminalise ... expressions of extreme opinions’.<sup>98</sup> The Court referred to Article 61 of the Constitution which enshrines freedom of expression. The Court stressed that there is a link between freedom of expression and democracy – the former facilitates ‘well-founded participation in social and political processes’, since ‘political debates involving the confrontation of different views, positions and ideas are part of democracy’.<sup>99</sup> In other words, according to the Court,

[t]he state of free expression is a clear indicator of the level of democracy. The fewer obstacles are placed in the way of opinions formed and expressed, the more stable is constitutional democracy. In a really free society, the expression of extreme views does not cause disturbances, but it rather contributes to the development of public peace and order as well as to the improvement of people’s level of tolerance.<sup>100</sup>

In its judgment, the Court found fault in two aspects of the proposed amendment to the Criminal Code: first, that it replaced the older “incitement to hatred” with the “provoking hatred” standard, and secondly, that it included “disparagement” as a punishable offence.<sup>101</sup> As to the first formula, “provoking hatred”, the Court found that it “lowers the threshold of culpability” as compared to the earlier, “incitement to hatred” formula, because it may be found even when there is no direct “whipping up of intense emotions” leading to a disturbance of peace; further, “provoking” engages the hearer’s mind while “incitement” acts on instincts and emotions.<sup>102</sup> As to the second point, the Court found that, while “disparagement” is indeed a violation of human dignity, it does not require recourse to criminal sanctions, and therefore that

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<sup>97</sup> Decision 18/2004 (V. 25.) AB., Part II, Paragraph 1

<sup>98</sup> Id., paragraph 1.

<sup>99</sup> Id., Part II, 1.1.

<sup>100</sup> Id., Part II.1.1.

<sup>101</sup> The challenged amendments provided: “Section 269 (1) Anyone who in front of a large public gathering *provokes hatred* or calls for committing a forcible act against any nation or any national, ethnic, racial or religious group, or against any group among the population, commits a felony and is to be punished by imprisonment for a period of up to three years. 2) Anyone who hurts human dignity in front of a large public gathering by *disparaging* or humiliating others on the basis of national, ethnic, racial or religious identity commits a misdemeanour and is to be punished by imprisonment for a period of up to two years” (emphases added). The italicized words were challenged by the President, and eventually found unconstitutional by the Court.

<sup>102</sup> Part III.3 of the judgment.



criminalization is a disproportionate restriction on freedom of expression.<sup>103</sup> Overall, it is a highly civil-libertarian judgment, even reasserting *verbatim* the famous formula, developed in the US 1<sup>st</sup> Amendment jurisprudence, of “clear and present danger” as a test for punishable crimes of offensive expression.<sup>104</sup>

To support its position, the Court referred to provisions of international human rights acts such as Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the European Human Rights Convention, and Chapter II Article 11 of the Charter of Fundamental Rights of the European Union. The Court acknowledged that the international human rights documents allow certain restrictions on the right to freedom of speech. The Court also invoked acts of the Council of Europe<sup>105</sup> and the European Union. As regards the latter, the Court referred to the draft of the Framework Decision on combating racism and xenophobia proposed by the Commission of the European Union.

The Court devotes the following paragraph to this matter:

It is the aim of the draft framework decision on action against racism and xenophobia proposed by the Commission of the European Union to enhance the efficiency of the Member States' legislation on combating racism, although at the session of the European Union's Justice and Home Affairs Council, where the draft framework decision was put forward, several Member States expressed reservations that resulted in the presidency proposing the amendment of the text of the draft framework decision. Accordingly, a reference is to be made in the text to Article 6 of the Treaty on the European Union and the framework decision should guarantee the maintenance of the Member States' constitutional principles and values.<sup>106</sup>

This reference to the draft framework decision can be read both as taking inspiration from EU emerging law on the matter as well as an attempt to influence developments on this issue at the EU level.<sup>107</sup> After all, the matter of hate speech is one of the most contested issues concerning the limits of freedom of expression, and when the Court handed down its own decision on the Hungarian law, the framework decision had not yet been agreed upon. In fact, as this paper was being written (October 2006), no agreement had been reached. But the proposal is interesting, and it resonated well with the concerns of the Hungarian legislators.

The aim of the proposed Framework Decision was to approximate laws and regulations in all Member States in order to ensure that racist and xenophobic offences are punishable “by effective, proportionate and dissuasive criminal penalties, which can give rise to extradition or surrender”.<sup>108</sup> Further, the draft Framework Decision sought to improve and encourage judicial cooperation in combating racist and xenophobic offences. It was stressed that the Framework Decision only provided for a minimum

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<sup>103</sup> Part V.2 of the judgment.

<sup>104</sup> Part V.2.3 of the judgment.

<sup>105</sup> Recommendation No R (97) 20 of the committee of Ministers of the Council of Europe

<sup>106</sup> Decision 18/2004, Part II.

<sup>107</sup> A Hungarian legal scholar suggested that the opinion of the Court in this decision may serve as a source of inspiration for the Hungarian delegation's position in the debates within the EU concerning the Framework Decision, see Uitz, “EU Law” at 62.

<sup>108</sup> *Proposal for a Council Framework Decision on Combating Racism and Xenophobia*, Commission of the European Communities, 28.11.2001, 2001/0270 (CNS), 6.

level of approximation; and the Member States were encouraged to go further. The Framework Decision expanded the list of offences contained in the Joint Action of 1996.<sup>109</sup> It also made it obligatory for Member States to punish those forms of conduct as criminal offences.<sup>110</sup> Further, the draft Framework Decision provided common definitions<sup>111</sup> and penalties.<sup>112</sup> The proposal also included other measures aimed at approximating the laws of the Member States, such as provisions on jurisdiction,<sup>113</sup> extradition and prosecution,<sup>114</sup> and exchange of information.<sup>115</sup>

If we consider now the substance of the proposed Framework Decision, we see that in some aspects it supports the stance taken by the Hungarian Court, and in others it would go beyond it. While the Framework Decision would require Member States to criminalize “public incitement to violence or hatred for xenophobic purpose”,<sup>116</sup> it supports the Hungarian Court’s insistence on “incitement” rather than a vaguer “provocation” as the test. However, when it would tend to further criminalize “public insults ... towards individuals or groups for a racist or xenophobic purpose”,<sup>117</sup> it comes very close to what the Hungarian Court found an unconstitutional crime, that of group disparagement – especially since no effect of disturbance of public peace (or other criminal effect) is mentioned in the Framework Decision as a criterion for criminal liability. Much of course depends on the interpretation of the Framework Decision’s definition of “public insult of a group”,<sup>118</sup> but it is clear that the Hungarian Court would position itself at the libertarian pole of the interpretative space, expressing its *prima facie* hostility towards criminalization of publicly offensive expressions aimed at groups, racial or otherwise.

The Constitutional Court’s integrity in pushing this line is reinforced by the fact that this decision emerges as a final step in a long line of cases on hateful speech. Each time it tackled the issue, it kept moving the boundaries between freedom of expression and restrictions on hate speech towards a more and more expansive interpretation of freedom of expression.<sup>119</sup> Beginning in 1992, with a decision that (the then) Chief Justice Laszlo Solyom dubbed as one that “opened the ‘Hungarian First Amendment jurisdiction [*sic*]’”,<sup>120</sup> the Court successively struck down from the criminal code the offence of “denigration of the Hungarian nation”,<sup>121</sup> found unconstitutional “offending

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<sup>109</sup> On 15 July 1996, the Council adopted a Joint Action concerning action to combat racism and xenophobia. OJ L 185, 24.7.1996,

<sup>110</sup> The Joint Action leaves the Member States choice whether to incriminate these forms of conduct or to derogate from the principle of dual criminality.

<sup>111</sup> Articles 3, 4 and 5.

<sup>112</sup> Article 6.

<sup>113</sup> Article 12.

<sup>114</sup> Article 13.

<sup>115</sup> Article 15.

<sup>116</sup> Article 4 (a).

<sup>117</sup> Article 4 (b), emphasis added.

<sup>118</sup> And the Explanatory Memorandum of the Council does not provide any further comment on this article, see Proposal for a Council Framework Decision on combating racism and xenophobia, COM/2001/0664 final – CNS 2001/0270, OJ C 75E, 26 March 2002, pp. 269-73.

<sup>119</sup> For an account of these developments, see Sadurski, *Rights*, at 161-63.

<sup>120</sup> Solyom & Brunner at 229.

<sup>121</sup> Decision no. 30/1992 (V.18) AB, of 18 May 1992, reprinted in *E.Europ. Const. Case Rep* 2 (1995): 8-26

the honour of an official person”,<sup>122</sup> invalidated a penalty for the act of merely triggering incitement to hatred,<sup>123</sup> and invalidated the offence of “scare-mongering” (spreading a rumour that can potentially disturb public peace).<sup>124</sup> In the spectrum of the various approaches adopted within democratic States on the question of hate speech, the Hungarian Court comes close to the extreme libertarian position not unlike the US Supreme Court’s First Amendment jurisprudence, where nothing short of “clear and present danger” of imminent unlawful action can justify an interference in the exercise of the right to freedom of speech. This is, obviously, not a widely shared approach in Europe,<sup>125</sup> and the Hungarian Court’s decision, taken right in the middle of the process of debating on the EU framework decision, may be seen as a contribution to this debate.

To conclude: in this decision, the participation of Hungary in European structures and, consequently, Hungary’s obligations resulting from membership, were used as arguments supporting a construction of the right to freedom of expression that is broader than what was intended by the legislator. In other words, the European Union, along with the United Nations and the Council of Europe, was perceived as a source of democratic standards; and the reference to legal developments carried out in the framework of the EU was used in order to strengthen democracy in Hungary. At the same time, with the deliberations about the proper restrictions on hate speech continuing at the European level, this decision can be seen as an “important guidance to the Hungarian government when participating in the debates in Brussels on the framework decision”.<sup>126</sup>

#### 4. Conclusions

As all EU law scholars know, the principle of supremacy of EC/EU law has two faces.<sup>127</sup> Viewed from the perspective of the evolving case law of the ECJ, the supremacy of Community law is full and absolute, whatever the status of the national legal act: when the latter (even if it is of constitutional rank) conflicts with Community law, Community law must prevail, and it is the duty of national courts to set the conflicting national norm aside. On the other hand, from the perspective of Member States, and in particular of national constitutional courts, the perception is quite different, and the mandate of the ECJ to establish its own supremacy over the

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<sup>122</sup> Decision 36/1994 (VI. 24) AB.

<sup>123</sup> Decision 12/1999 (V.21) AB.

<sup>124</sup> Decision 18/2000 (VI. 6) AB.

<sup>125</sup> For an excellent analysis, comparing the US and European approaches on restrictions of hate speech, see Sionaidh Douglas-Scot, “The Hatefulness of Protected Speech: A Comparison of the American and European Approaches”, *William & Mary Bill of Rights Journal* 7 (1999): 305-46. Douglas-Scot observes that “controls on free speech long have been permitted in many European countries to curb incitement to race hatred and other undesirable motivations”, *id.* at 309 (footnote omitted).

<sup>126</sup> Uitz, “EU Law” at 62.

<sup>127</sup> Maduro writes about “the two different narratives on the question of ultimate authority developed by the European Court of Justice and national constitutional courts”, Miguel Poiaras Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, in Neil Walker, ed., *Sovereignty in Transition* (Hart: Oxford 2003): 501-37 at 502.

authoritative doctrines governing the relationship between the law of the EU and that of the Member-States is question-begging: “to put it bluntly, the ECJ can say whatever it wants, the real question is why anyone should heed it”.<sup>128</sup> This question has become equivalent to an answer, and indeed the proposition that Community law “has absolute primacy, even over national constitutional provisions, is generally not accepted by national supreme courts”.<sup>129</sup>

Constitutional courts of CEE join their Western counterparts in taking this view, and thus consolidate the “national” perspective in that untidy architecture of European constitutional relations. So, if we adopted a purely mechanical calculus, we would have to conclude that the overall balance in the national/European legal equilibrium in Europe has shifted even further towards the national side because a number of new entrants have added their weight to the claims of the courts in older Europe according to which supremacy cannot mean trumping national constitutional rules and principles. But it would be preposterous to approach this legal (dis-)equilibrium in this way: it is not a matter of counting heads but of understanding the nature of the adduced arguments so as to account for what is going on in the European common constitutional space. And the arguments are not pointing firmly towards a single direction; rather, they reflect the uncertainty, hesitations and genuine lack of confidence, on the part of constitutional judges of the new Member States, as to how to cope with the new situation.

The three main decisions discussed above (in Part 2) are reflections of these uncertainties and doubts, only partly prefigured by the Solange story, depicted at the beginning of this paper. The Czech decision in its effect rebuked the Czech government for improperly intruding on the space reserved for Community law – and only as a second thought (though a lengthy and portentous second thought) did it assert the Court’s own role as an arbiter of the limits to the primacy of EU law. The Hungarian decision effectively struck down a Community regulation but very carefully packaged it as a scrutiny of national law, and avoided facing head-on the question of supremacy, all the while reasserting the non-negotiable character of Hungarian constitutional principles. The Polish Tribunal upheld the Accession Treaty against multiple challenges but affirmed the supremacy of the Polish Constitution over EU/EC law, and set strong, rights-related limits to possible further transfers of sovereign powers to the EU level. Overall, this is not a picture of an audacious judicial defiance in the face of Europe. But nor is it a picture of a timid deference towards the ECJ’s doctrine of supremacy (which could be soon transformed into a constitutional principle of supremacy, if a Constitutional Treaty enters into force, in its current or in a transformed version),<sup>130</sup> and it certainly has the capacity to upset the smooth evolutions carried out by the ECJ on the relationship between national and Community law.<sup>131</sup>

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<sup>128</sup> K. J. Alter, “The European Court’s Political Power”, *West European Politics* 19 (1996): 458 at 459, quoted by De Witte, “Direct Effect” at 193.

<sup>129</sup> De Witte, “Direct Effect”, at 201.

<sup>130</sup> Art. I-6 of the proposed Treaty Establishing a Constitution for Europe provides: “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States”.

<sup>131</sup> Perhaps at this point I should state that, in this paper, I have deliberately put to the side the issue of whether constitutional courts see themselves as “courts” under Art. 234 of the EC Treaty, for the purpose of referring preliminary questions to the ECJ. While this question – notoriously contested in

There are, inevitably, two ways of making sense of this. One would be to take the perspective of the European constitutional architecture into account, and a natural reaction would therefore be: *nihil novi sub sole* - we've been there, done that. Why should the constitutional courts of new Member States *not* follow the sequence tried earlier by their Western counterparts? After all, the principle of supremacy of EU law is a contested principle, and the formula of supremacy is a deceptively simple shorthand for a host of legal and political problems, related in complex and subtle ways to the ongoing debates about the limits of political and legal integration in Europe. These controversies do not disappear with the Court in Luxembourg pronouncing itself on the absolute supremacy of European Community law over that of the Member States. EU law scholars know it well, and various theories aim at overcoming a simple alternative - either the European or the national law prevails - thus reflecting the urge to give effect to the complexities of constitutional relationships within the EU. Hence the theories of constitutional pluralism which attempt to transcend the unpalatable choice between the authoritative doctrines of the ECJ on the one hand and of the national constitutional courts on the other, and to abandon the futile search for the "ultimate authority" in Europe.<sup>132</sup>

This is not to say that the entry of CEE constitutional courts onto the constitutional European stage and their alignment with the Solange approach produces no problems to a smooth legal integration of twenty-five Member States. But, in a way, this is nothing new, and EU law has developed a certain resilience in the face of various turnarounds in the approaches adopted by the highest courts of the Member States towards the principle of supremacy of EU law. And if the past is to be a guide, after the early defiance and protest there, a reconciliation is likely to come, born of the reassurance that EU law is no threat to the fundamental rights of citizens of Member States. In any event, it is a process which is dependent not just on national courts but also on the evolution of the EU itself. After all, much of the early resistance to European supremacy has been traditionally based on a legitimate mistrust in the authority of the executive bodies at the EU level to properly affect the fundamental rights of Europeans. The more the EU evolves towards enhancing the powers of its supreme representative body, the European Parliament, and the more it endows itself with entrenched rights catalogues (the Charter of Rights, to be incorporated into the Constitution), the less there will be a reason to legitimately fear the intrusion of the European executives into the life of European citizens.<sup>133</sup>

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the theory and practice of Western European constitutional courts, is an important one, so far CEE constitutional courts have left this question unanswered: the prevailing answer seems to be a tentative "yes", but no practical consequences have followed from it at this point. See various papers by constitutional court judges at the conference "Position of Constitutional Courts Following Integration into the European Union", International Conference 30 September – 2 October 2004, Bled, Slovenia, [http://www.us-rs.si/pcceu/index.php?sv\\_path=589](http://www.us-rs.si/pcceu/index.php?sv_path=589), remarks by Jiri Mucha (Czech Constitutional Court), Jan Mazak (Slovakia), Mirjam Skrk (Slovenia); in turn Marian Grzybowski (Poland) was much more sceptical about the Constitutional Tribunal's duties under Art. 234, while the judges of other CEE constitutional courts did not tackle this issue at all.

<sup>132</sup> See e.g. Maduro, "Contrapuntual Law"; Neil Walker, "Late Sovereignty in the European Union", in Walker, *Sovereignty in Transition*; 3-32; Neil MacCormick, *Questioning Sovereignty* (Oxford University Press: Oxford 1999); Mathias Kumm, "The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty", *ELJ* 11 (2005): 262-307.

<sup>133</sup> See, similarly, Kumm at 294.

But then there is a second possible take on the developments discussed in this paper, and (while both perspectives are mutually compatible), this second way of making sense of the phenomenon of “Solange, chapter 3” seems to me to be more illuminating and to account better for the approaches adopted by constitutional courts in the region.<sup>134</sup> This second perspective focuses primarily on the institutional position of CEE constitutional courts within the legal-political structures of their respective countries, and views the question of European-national legal relations as a God-send opportunity for institutional self-aggrandizement, in the face of increasing challenges to the inflated (as some might think) position of these courts.

It is clear that, from the point of view of the strength and scope of these courts’ authority, the choice of a proper balance in the relationship between national and European law is not a neutral matter: a strong national supremacy principle strengthens the role of constitutional courts while the acceptance of the absolute European supremacy rule weakens it. By accepting the supremacy of EU law, national courts effectively cede their authority as the guardians of constitutionality to the ECJ within the domain where supremacy reigns. This much is obvious.<sup>135</sup> What is perhaps less obvious is that this insistence on the national supremacy rule strengthens the Courts’ position on *two* fronts: vis-à-vis the European Court of Justice, *and also* vis-à-vis the other national institutions, including the legislature and the executive. By reaffirming their own role in the guardianship of European-national relations, national constitutional courts reinforce their own position vis-à-vis the parliament (for example, by directing it to adopt a constitutional amendment, with the decision of the Polish Tribunal on the EAW as a case in point) or vis-à-vis the government (by determining how far it can go in the fields covered by European competence: the Czech decision on sugar quotas is an example here). Both are very important prerogatives. The power to determine that a particular matter requires a constitutional amendment gives the Courts a role which was described once by Louis Favoreu as that of a “pointsmen” (*l’aiguilleur*):<sup>136</sup> according to this theory, a judgment of unconstitutionality “merely” amounts to finding a lack of competence of the ordinary legislator and a directive to follow a constitutional path because the matter belongs to the competences of a *pouvoir constituant* rather than a *pouvoir constitué*. This is a formidable role, that of the guardianship of when the constitutional track needs to be taken to adopt a decision on a particular matter. Constitutional procedure is of course costly and often risky, especially in circumstances (as in the three case studies discussed in this paper: Czech Republic, Hungary and Poland) in which a governing majority cannot muster a constitutional-change majority, and so embarking on the avenue of constitutional change (even of a very limited scope) opens the risk of the opposition exploiting the vulnerability of the governing coalition. In effect, the prerogative provides the Courts with an ability to shift political resources from the majority to the parliamentary opposition. The second prerogative (to rebuke the administration for overstepping its competences) consolidates the Court’s position as the main guardian of the separation of powers, and as a regulator of the actions taken by the executive. In terms of a purely domestic power

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<sup>134</sup> My preference for the second approach may have purely auto-biographical sources: I am no EU law expert, while I have been researching constitutional developments within CEE post-communist States, with a particular focus on constitutional courts, see Sadurski, *Rights*.

<sup>135</sup> See, similarly, Kumm at 281.

<sup>136</sup> Louis Favoreu, *La politique saisie par le droit* (Paris: Economica, 1998) at 30.

game, deciding on the status of the European supremacy rule is therefore a valuable and effective asset for Constitutional Courts to enhance their position vis-à-vis other domestic political actors.

So if we accept the general, coldly realistic view that every institution aims at self-aggrandizement, or minimally, at least at a consolidation of its power, the enthusiastic embrace of the Solange story by CEE constitutional courts is more than understandable, and indeed it would have been *un*-understandable had they surrendered this possibility to enhance their powers. After all, these are very powerful and skilled political actors, used to playing a strong role in the political and legislative game. Here is not the place to explain and describe the reasons for the startlingly strong position of the constitutional courts in CEE – I have offered a book-length analysis of this phenomenon elsewhere.<sup>137</sup> Suffice to mention three sources of their de-facto legitimacy within the political systems of the post-communist States of the CEE: (1) the legitimating force of “following the example” set by some powerful constitutional courts in Western Europe, and in particular of the German BVerfG; (2) the general disenchantment of the public with the political – legislative and executive – branches of the government, largely due to the Communist legacy (and thus brand-new institutions such as constitutional courts or Ombudsman offices have avoided the opprobrium); (3) the widespread view according to which, due to the weakness of legislatures, democratic representation is of a lesser value than that of the principles of constitutionalism and the rule of law, best protected by constitutional courts capable of facing up to parliaments. In the institutional self-interest of the Courts it is important to exploit these sources of legitimacy as much as possible, and to use any asset they can acquire as much as possible, because their democratic legitimacy is always open to questioning and challenges. And the Courts are at their most vulnerable when they conduct the least court-like review, that is an abstract review of parliamentary laws, either *ex ante* or right after the law has been passed, and on instigation of the disgruntled minority. While they like to present themselves as “courts” and as part of the “judicial” branch, the legitimacy problem of these courts consists in that when they take on a quasi-legislative role, they can count very little on the force of legitimating arguments deriving from the imagery of a judicial, impartial umpire resolving specific conflicts between two parties.<sup>138</sup>

Indeed, the exalted position of constitutional courts within domestic political systems is not particularly stable and cannot be comfortably taken for granted: partly for the right reasons (such as a concern for the democratic legitimacy of essentially non-representative bodies), and partly for the wrong reasons (such as the displeasure felt by politicians at seeing their authoritarian tendencies curbed by independent constitutional courts), these courts have seen their position and independence occasionally reduced and assaulted. At least two of the three Courts whose decisions were discussed in this paper are a case in point. The Polish Constitutional Tribunal was almost explicitly defined by the new governing elite which came to power after the double elections of 2005 (presidential and parliamentary) as an enemy, and as an obstacle to the allegedly pressing reforms that the new elite intends to pass. Indeed, after the 2005 political changeover, the Tribunal took several decisions which went clearly against the plans

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<sup>137</sup> See Sadurski, *Rights*.

<sup>138</sup> More about it in Sadurski, *Rights*, at 27-40.

and preferences of the new President and government: it invalidated the amendment of a law on the broadcasting council, which enabled the new government to appoint its own protégé as the chairperson of the council;<sup>139</sup> it invalidated the provision on the law on public assembly according to which local authorities (including Lech Kaczynski, when he was still President of Warsaw) could refuse permission for gay parades to take place;<sup>140</sup> it struck down some crucial provisions of the so called “lustration” law on access to archives of the ex-secret police;<sup>141</sup> it struck down a pet project of the new Minister of Justice concerning the reduction of the bar association’s control over access to the legal profession,<sup>142</sup> etc. All these decisions (and there were more) put the Tribunal on a collision course with the new President, the parliamentary majority and the government, and the main political actors soon made it public that they were not amused, and that they considered changes in the system of appointment of judges (in particular, of the Tribunal’s President) in order to discipline the Tribunal. The newly coined term “impossibilism” was meant to describe the doctrine of the Tribunal, meaning that the necessary (in the eyes of the new majority) reforms were rendered “impossible” under the Tribunal’s interpretation of the Constitution (which the new majority is incapable, with the post-2005 division in the Parliament, to amend).

The Czech Constitutional Court has also been going through turbulent times over the recent years, and, for a much longer period than its Polish counterpart, it has had to face the openly hostile attitude of the executive and the parliamentarians alike.<sup>143</sup> The first act in this confrontation occurred during the period of the minority government of the Social Democrats who were supported by their main rival, the Civic Democratic Party (1998-2002),<sup>144</sup> when Milos Zeman, the then Prime Minister, and Vaclav Klaus, the then President of the Chamber of Deputies, drafted a series of laws amending the Constitution and the political system. The fact, in particular, that the Court declared the electoral law unconstitutional triggered a series of political attacks against the Court. However, they were merely verbal and rhetorical at the time. The attacks turned from verbal to real after Klaus became President in 2003 and basically blocked the Court’s functioning by not appointing new judges. At one point (in 2004), due to this non-appointment, the Court lost its power to decide about the constitutionality of laws because the number of justices fell below twelve, which is the minimum number to declare the laws unconstitutional.<sup>145</sup> When finally President Klaus formally nominated his candidates, he did it by deliberately avoiding any prior consultation with the Senate, effectively ensuring that they would not get sufficient support (the judges of the Court are appointed by the President “with the consent of the Senate”): by the end of 2005, the Senate had rejected seven nominations.<sup>146</sup> The most recent episode in the battle between the Court and the President followed President Klaus’s dismissal of Supreme

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<sup>139</sup> Decision of 23 March 2006.

<sup>140</sup> Decision of 19 January 2006.

<sup>141</sup> Decision of 26 October 2005.

<sup>142</sup> Decision of 19 April 2006.

<sup>143</sup> I am grateful to Professor Jiri Priban for helpful comments on this point.

<sup>144</sup> O. Szantova, *Opposition treaty continues*, Radio Praha, (12-03-2001), <http://www.radio.cz/en/article/10973>.

<sup>145</sup> For a detailed description, see Zdenek Kühn and Jan Kysela, “Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic”, *Europ. Constitutional Law Review* 2 (2006): 183-208 at 196-205.

<sup>146</sup> Kühn and Kysela at 198.



Court's President Iva Brozova,<sup>147</sup> a dismissal that was eventually found unconstitutional by the Constitutional Court.<sup>148</sup> The Court's judgment triggered a fierce response by Klaus himself, who criticized the Court's decision as 'wrong', as 'an example of judicial corporativism' [sic] and a 'threat to democracy'; he even added that the Constitutional Court's decision could have a negative impact on the situation of the Czech judiciary.<sup>149</sup> In fact, even quite apart from this particular outburst, President Klaus has a long record as a strong opponent of "judicial activism", which he has dubbed (using approvingly the concept coined by Robert H. Bork) as "judicial imperialism", and which he finds antithetical to the principles of democracy. He also declared that it "leads to the rule of lawyers instead of the rule of law".<sup>150</sup> The general public opinion often seems to be supporting the President in this contest.<sup>151</sup>

The Hungarian Court escaped, happily, the bad fortunes of its Polish and Czech counterparts,<sup>152</sup> perhaps because (in the opinion of many Hungarian observers) it adopted a much more passive, perhaps even deferential approach towards the executive. Some would explain it by referring to biographical factors (the ex-President of the Hungarian Constitutional Court Laszlo Solyom became the President of the Republic; some of his former collaborators became in turn judges of the Constitutional Court, including Professor Peter Paczolay) and also to the fact that many of those newly appointed judges have no background in constitutional law. Be this as it may, they are certainly not unaware of the fate of their Polish and Czech colleagues, and this awareness may well weigh on their minds.

So, according to this perspective, the constitutional courts' resistance towards the supremacy of European law can be well explained by their attempt to reinforce their domestic inter-institutional position, especially in the face of challenges and threats, real and imagined, from the other governmental branches. There is nothing puzzling about an institution adopting whatever argumentative strategy it can find to consolidate and increase its power. But here comes the final paradox, in addition to the democracy paradox noted in the opening paragraphs of this paper. The democracy paradox, if I may recall it, consisted of the fact that the very argument (consolidation of democracy), which had served to justify the accession to the Union, may now be used against a smooth legal integration within the Union. The last paradox is about Europe as a legitimating myth for constitutional courts. One of the hypotheses about the sources of the impressive strengthening of the power of constitutional courts was that they were legitimated by their being so "European".<sup>153</sup> While the argument (made occasionally)<sup>154</sup>

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<sup>147</sup> Pl. ÚS 18/06.

<sup>148</sup> *Brozova remains Supreme Court chairwoman-Constitutional Court*, ČeskáNoviny.Cz (12.09.2006), [http://www.ceskenoviny.cz/news/index\\_view.php?id=209019](http://www.ceskenoviny.cz/news/index_view.php?id=209019).

<sup>149</sup> *Klaus considers Constitutional Court ruling on Brozova erroneous*, [http://www.ceskenoviny.cz/news/index\\_view.php?id=209019](http://www.ceskenoviny.cz/news/index_view.php?id=209019).

<sup>150</sup> Vaclav Klaus, "Freedom and Its Enemies: Problems of Re-Establishing Freedom and Democracy in the European Context", *Economic Affairs* 25/2 (2005): 46-8 at 47.

<sup>151</sup> I am grateful to Mr Jan Komarek for his comment on that and other points related to the Czech Constitutional Court.

<sup>152</sup> I am grateful to Dr Renata Uitz for comments on this point; it should not be inferred that some, or all, of the opinions described in this paragraph are actually shared by her.

<sup>153</sup> See Christian Boulanger, "Europeanization through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and the 'Return to Europe'", in Wojciech Sadurski, Adam Czarnota & Martin

that part of the implicit political *acquis* was to have a strong and independent constitutional court is probably a nonsense (there is no uniformity across the rest of EU-land when it comes to the model of constitutional review), it may well be the case that there has been a *perception* that it is part and parcel of a properly functioning European State. The constitutional courts in CEE have undoubtedly been much more pro-European than any average citizen: their judges are highly educated, affluent, often with the satisfying experiences of studies or work in the West, lawyers (more often than not, legal scholars). They easily fit the profile of a “pro-European” CEE citizen. There is much anecdotal evidence that lawyers who staff and surround constitutional courts in CEE are no Euro-sceptic. And yet, for all the reasons suggested above, they may now be an obstacle in the alignment of the constitutional orders of the Member States with the EU-wide constitutional order. This would be the real irony of *Solange*, chapter 3.

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Krygier, eds., *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer: Dordrecht 2006) at 275-76; see also Prochazka at 17-20.

<sup>154</sup> See, e.g., Bruce Ackerman, “The Rise of World Constitutionalism”, *Virginia Law Review* 83 (1997): 771-797 at 776.