

**Constitutional Courts in Central and Eastern Europe and their Attitude  
towards European Integration**

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**I. Introduction**

The aftermath of the communist regimes in the Europe of XXth century was characterised, among other things, by a struggle for constitutional justice:<sup>1</sup> together with their democratic constitutions, CEE countries opted for the abstract (with elements of concrete review in the form of preliminary questions) and centralised model of constitutional review, thereby trusting constitutional review of laws in the hands of constitutional courts. It was the time of proliferation of these courts, which emerged powerfully in Central and Eastern Europe. The picture was not new: after the Second World War the model of constitutional justice was embraced quickly by Western European countries,<sup>2</sup> which were eager to guarantee a successful settlement of democratic regimes. As Luis Lopez Guerra<sup>3</sup> points out, constitutional courts emerge during the building of democratic regimes, after experiences of authoritarian regimes “in which constitutional norms and guarantees had been violated or disregarded, often with the collaboration of the legislature”.<sup>4</sup>

Constitutional courts in the region undertook an important role in the political, economic and social reforms of their respective countries. After the first years of judicial activism, which was mainly related to internal reforms and fashioning of a new democratic system, these courts have shown that they could turn into important actors of the European integration process, which implies among other things the integration of national legal orders

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<sup>1</sup> Term borrowed by **H. SCHWARTZ**, *The Struggle for Constitutional Justice in Post-Communist Europe*, Chicago, University of Chicago Press, 2000.

<sup>2</sup> Constitutional courts were established or re-established as in the case of Austria, in many European countries such as Germany, Italy, Greece, Spain, Portugal, Belgium, France.

<sup>3</sup> As cited by **H. SCHWARTZ**, *The Struggle for Constitutional Justice in Post-Communist Europe*, *supra* note 1, p.19.

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

into the European one. Recent challenges to the European Arrest Warrant and other Community acts have identified these courts as important factors in the context of relations between the national and the European legal order.

The main purpose of this paper is to explore the role played by constitutional courts of CEE in order to assess their position as participants in the integration process in Europe. This shall be done through analysis of their pre- and post-accession case law. The main finding of the paper is that constitutional courts of CEE have taken quite an equilibrated stance towards European integration: generally speaking, their rhetoric is characterised by a Euro-friendly discourse in the pre-accession period which, after the enlargement was complemented by a set of *controlimiti*, especially with regard to the safeguard and superiority of national constitutional values.

In the first part of the paper there is a short introduction on the establishment of constitutional review in Central and Eastern Europe. This shall be followed by a general overview of the pre-accession jurisprudence by highlighting the main constitutional discourse in the region. Afterwards, the post-accession period will undergo a careful analysis in order to understand the general tendencies shown by these courts after the European enlargement of May 2004.

## **II. General remarks on the establishment of constitutional review in Central and Eastern Europe**

During the important political transformations in Central and Eastern Europe, one could detect a general prevailing tendency according to which constitutional adjudication was considered an important and sometimes even indispensable factor of a democratic system. Constitutional courts were perceived as important factors of implementing the rule of law in the fragile democratic systems of countries of CEE. According to Venelin I. Ganev in a country report on Bulgaria “the prevailing consensus was that the mechanism of judicial review is an indispensable component of modern democracy”.<sup>5</sup> According to the same report, a small faction of communist party opposed the creation of a Constitutional Court in Bulgaria,

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<sup>5</sup> V.I. GANEV, “The Rise of Constitutional Adjudication in Bulgaria”, in W.SADURSKI, *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*, The Hague, Kluwer, 2003, p. 250.

by proposing that the review of constitutionality of legislation should be entrusted to the Supreme Court and with a right of a qualified parliamentary majority to override the decisions of the court. This proposal was not accepted and in the Bulgarian Constitution the chapter on the Constitutional Court was included. Similarly, Lithuania dropped the American model of constitutional review, by arguing that “the constitution drafters determined that a completely independent institution was necessary to ensure that the Constitution would be implemented accurately and the branches of power would be kept separate and balanced”.<sup>6</sup>

Moreover, there is an important ‘European’ argument when it comes to the establishment of constitutional review in CEE. One of the most active European institutions militating in the area of human rights protection and constitutionalism, the Council of Europe, became a central point of reference for countries coming out of communist regimes. At the same time, the European perspective played an important role in the emergence of the European model of constitutional review in CEE countries. As Prochazka argues, “the EU membership perspective, however, impacted also the process of constitution making as a whole. In fact, it became the principal legitimising feature of political action as such”.<sup>7</sup> Prochazka points out that, return to Europe for CEE countries (and especially for the Visegrad countries which are at centre of his research) was not equivalent to informing the EC/EU about their reforms, but rather to adjust their own institutions according to the model of Member States. This did not happen as an imposed set of rules and guidelines to be followed by CEE countries; on the contrary these countries had a strong will to achieve “normality, which in other words meant compliance with European institutional choice”.<sup>8</sup> This argument seems to reflect quite well the reality in the region, if one takes into consideration the urge of CEE countries to approximate their governance and institutional framework to the European democratic standard and their rush to get rid of their communist past.

The first period of the institutional life of these courts can be easily related to the period of substantial political, economic and social reforms in Central and Eastern Europe. The Hungarian constitutional court -sometimes labelled as “the most powerful constitutional

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<sup>6</sup> N. GELAZIS, “Defending Order and Freedom: The Lithuanian Constitutional Court in its First Decade”, in W.SADURSKI, *Constitutional Justice, East and West, o.c.*, p. 395.

<sup>7</sup> R. PROCHAZKA, *Mission Accomplished on Founding Constitutional Adjudication in Central Europe*, Budapest, Central European University Press, 2002, p.17.

<sup>8</sup> *Ibid.*, pp. 18-19.

court in the world”-<sup>9</sup> is well known for its controversial decision on the constitutionality of property restitution law of nationalised lands to pre-Communist owners,<sup>10</sup> the decision on lustration law, and for its influence on the welfare reform in Hungary.<sup>11</sup> In Poland, as Judge Garlicki points out, the needs of transformation of the country determined the nature of matters referred to the Polish Constitutional Tribunal - mostly regarding economic, taxation and social regulations. Therefore, “the practical realisation of those tasks required a considerable dose of *judicial activism* reflected in a relatively high number of judgments of unconstitutionality of statutes” [emphasis added].<sup>12</sup>

In the new context of accession, where the approximation of national legal orders to the European one became substantial and where European law was given a status of precedence over national law, these courts emerged with the task of guarding their national constitutions and in the same time complying with all European requirements.

The following parts of the paper shall give a summary of the role of these courts in the pre-accession process, followed by a more detailed analysis of their post accession case law on the relation between national and European legal orders.

### **III. Constitutional courts in Central and Eastern Europe and their attitude towards European integration in the pre-accession stage.**

As Kuhn rightly points out, after the first wave of transformation in the early 90’s which was related to the elimination of major deficiencies of communist legal system, the second major challenge for the institutions of CEE countries was ‘Europeanisation’.<sup>13</sup> This process had broad implications on the legal and institutional framework of these countries and constitutional courts intervened as important actors.

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<sup>9</sup> J. ELSTER, “On Majoritarianism and Rights”, *East European Constitutional Review*, 1992, No. 3, p. 22.

<sup>10</sup> *Ibid.*

<sup>11</sup> A. Sajo makes a very strong argument to this regard, where he criticises the decision of the Hungarian Court regarding the welfare reform. He states that the decisions of the Constitutional Court “have slowed down the restructuring of the Hungarian welfare system and dramatically raised fundamental questions concerning society’s post-communist welfare dependence”; A. SAJO, “How the Rule of Law Killed Hungarian Welfare Reform”, *East European Constitutional Review*, 1996, p. 31.

<sup>12</sup> L. LECH GARLICKI, “The Experience of the Polish Constitutional Court”, in W.SADURSKI, *Constitutional Justice, East and West, o.c.*, pp. 281-282.

<sup>13</sup> Z. KUHN, “The Application of European Union Law in the New Member States: Several Early Predictions”, *German Law Journal*, 2005, p. 564.

During the pre-accession period, one of the most important discourses was that of “judicial harmonisation”, which according to Albi implied “whether the national courts should apply the interpretation of the European Court of Justice and take account of EU legislation when applying provisions of domestic laws or the provisions of the Europe Agreements”.<sup>14</sup> In this context, where European Union law *de iure* did not have binding force in the candidate countries, constitutional courts of these countries by acting as actors of Europeanisation, frequently made reference to the *acquis communautaire* and to the case law of the ECJ, by generating a pro-European doctrine of ‘consistent interpretation between national and European law’.<sup>15</sup>

In this context, the main general observation is that these courts have been quite receptive with regard to the harmonisation of their domestic legal orders with the European legal order. If one takes a look at secondary sources of literature (Albi, Kuhn, Sadurski, Volkai), it can be reported that in nine decisions overall of constitutional courts of Poland, the Czech Republic, Lithuania, Estonia and Latvia related to constitutional issues in the pre-accession period, six of them reflect a general tendency of referring to European case law or normative regulations. Last but not least, three dissenting opinions of constitutional judges in Latvia and Estonia point out the importance of referring to the case law and law of the Union, as well as of approximation of legal theory and thinking.<sup>16</sup> In contrast to the above, as it will be discussed in the following paragraphs of the paper, the Hungarian Constitutional Court showed defiance in its judgment on the Europe Agreement.

A few examples can be listed to illustrate the above general observation. An important case of the Polish Constitutional Tribunal, dating 1997 -which has been reported by many commentators-<sup>17</sup> dealt with the difference in age retirement for male and female employees. Respective domestic provisions were found contrary to the Constitution and to the *acquis communautaire* on equal treatment (precisely Directive 207/76/EEC). The Polish Constitutional Tribunal ruled that:

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<sup>14</sup> A. ALBI, *EU Enlargement and the Constitutions of the Central and Eastern Europe*, Cambridge, Cambridge University Press, 2005, p. 52.

<sup>15</sup> For sure, one should be careful not to overestimate, from a quantitative and qualitative point of view the pre-accession case law of CEE constitutional courts. However, one can not deny the importance of the “European discourse” during this stage of integration, especially in case one aims at shedding some light at the attitude of these courts in the aftermath of the 2004 enlargement.

<sup>16</sup> A. ALBI, *EU Enlargement and the Constitutions of the Central and Eastern Europe*, *supra* note 14, pp. 54-55.

<sup>17</sup> A. ALBI, *EU Enlargement and the Constitutions of the Central and Eastern Europe*, *supra* note 14, p. 53.

Z. KUHN, “The Application of European Union Law in the New Member States”, *supra* note 13, p. 566.

“Of course, EU Law has no binding force in Poland. The Constitutional Tribunal wishes, however, to emphasise the provisions of Article 68 and Article 69 of the [Polish Association Agreement]. Poland is thereby obliged to use ‘its best endeavors to ensure that future legislation is compatible with Community legislations’. The Constitutional Tribunal holds that the obligation to ensure compatibility of legislation (borne, above all, by the parliament and government) results also in *the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility*” [emphasis added].<sup>18</sup>

It is clear from the above statement that the Polish Tribunal established, through its interpretation, a distinction between *binding force of EU law* and, *obligation of ensuring compatibility between domestic and European Union law*. Even though EU law could not be deemed as binding in Poland (due to the fact that Poland was not yet a member of the European Union), Polish institutions -including the Court- were under the obligation stemming from the Accession Agreement, to provide for the maximum of compatibility between EU and domestic legislation. The Tribunal attributed to itself the obligation of interpreting existing legislation in a pro-European way.

In the case of Referendum on Poland’s Accession to the European Union, which also dates before the accession of Poland to the Union, the Tribunal repeated once more that the interpretation of domestic statutes should be done in a manner sympathetic to the process of European integration. Moreover, the Tribunal referred to a “constitutional principle of sympathetic predisposition towards the process of European integration and the cooperation between states”,<sup>19</sup> which should be taken into account during the interpretation of binding statutes. It is clear from the wording of the judgment that the Constitutional Tribunal granted to the above mentioned principle, a constitutional status, as a principle which could be derived by the Preamble and Article 9 of the Polish Constitution.

In a case of the Czech Constitutional Court regarding the interpretation of the Czech antitrust law consistently with the case law of the ECJ, the Court affirmed that both the EC and EU Treaty derive from the same values and principles as Czech constitutional law, therefore the interpretation of European antitrust law by European bodies is valuable for the

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<sup>18</sup> Reported by Z. KUHN, “The Application of European Union Law in the New Member States”, *supra* note 13, p. 566.

<sup>19</sup> **Polish Constitutional Tribunal**, *Referendum on Poland’s Accession to the European Union*, 27 May 2003, K11/03.

interpretation of the corresponding Czech rules.<sup>20</sup> The Czech Constitutional Court reaffirmed this position in the *Milk Quota Case* where it stated in a Euro-friendly manner 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>21</sup>

Apart from pointing out the necessity of interpreting national law in conformity with the *acquis communautaire*, these courts have widely referred to the case law of the European Court of Justice and EC legislation. In the *Skoda Case* regarding the abuse of dominant position by the Czech car manufacturer, the Czech Constitutional Court referred to the ECJ case *Merci Convenzionali Porto di Genova*.

In the *Telecommunications’ Case* concerning the constitutionality of domestic law referring to the requirements of EU law, the Lithuanian Constitutional Court referred to EC Directives 90/388 and 98/10/EEC.<sup>22</sup> Moreover, in the *Death Penalty Case*, the same court makes reference to a political document as the European Parliament’s Resolution of 1997 on the abolition of death penalty, which is foreseen by the European Parliament as a condition concerning Partnership and Cooperation Agreements.<sup>23</sup>

On the other hand, the Estonian Review Chamber has highlighted in the pre-accession period the need to consider legal principles of EU law. According to the Chamber “in creating the general principles of law for Estonia, the general principles of law developed by the institutions of the Council of Europe and the European Union should be considered; these principles have their origin in the general principles of law of the highly developed legal systems of the Member States”.<sup>24</sup>

It is quite clear from the abovementioned examples that, even on the eve of accession, constitutional courts of CEE countries (1) have made use of interpretative tools with the purpose of establishing *an obligation of consistent interpretation of domestic law with*

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<sup>20</sup> **Czech Constitutional Court**, *RE Skoda Auto, Sbirka Nalezu a Usnesei, Collection of Judgments and Rulings of the Constitutional Court*, Vol. 8, p. 149 [in Czech], as reported by **Z. KUHN**, “The Application of European Union Law in the New Member States”, *supra* note 13, p. 567.

<sup>21</sup> *Ibid.*, p. 568.

<sup>22</sup> **A. ALBI**, *EU Enlargement and the Constitutions of the Central and Eastern Europe*, *supra* note 14, p.54.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, p. 55.

*European Union law*; (2) have referred widely to the case law of the ECJ and EC legislation by giving the message of *judicial harmonisation and that the process of integration implies also legal integration of domestic law into the *acquis communautaire**.

At the end of the day, one can detect a general Euro- friendly attitude of constitutional courts. Nevertheless, the particular context of regained sovereignty in which these courts pronounce their judgments, might be the source of certain claims regarding “violation of sovereignty” by the direct application of EU secondary law and ECJ case law, as was the case of the Hungarian Constitutional Court.<sup>25</sup> In its famous pre-accession judgment on the Europe Agreement,<sup>26</sup> the Hungarian Constitutional Court found partially unconstitutional the law implementing the Europe Agreement by ruling that European law had no direct effect and direct applicability before accession.<sup>27</sup> The Court highlighted that:

“The mechanism of direct applicability is a typical characteristic of the relationship between the Community legal system and EU Member States. However, the situation flowing from the ensemble of Article 62(2) EA and Article IIR has to be assessed in the course of constitutional control with regards to the fact that presently the Hungarian Republic is not a Member State of the European Union”.<sup>28</sup>

Furthermore, the Court clarified that norms of another public order (in this case Community norms) on the creation of which Hungary has no influence because of not being a member of the Union, cannot generate an obligation of applicability in the Hungarian legal order. This, according to the Court, would require an express constitutional authorisation.<sup>29</sup> The criteria and requirements deriving from Community law in the pre-accession stage, qualified as *foreign law* from the point of view of Hungarian law enforcement as Hungary is not a Member of the Union.

How much from the above attitude of these courts has been reflected in their post-accession jurisprudence? Have the Polish and Czech Constitutional Court maintained a Euro-friendly attitude towards European law? In what way has supremacy of European Union law

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<sup>25</sup> *Ibid*, pp. 55-56.

<sup>26</sup> **Hungarian Constitutional Court**, *Decision 30/1998*, (VI 25) AB.

<sup>27</sup> See, for further comments, **J. 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, No 8, p. 9, [www.jeanmonnetprogram.org/papers/99/990801.rtf](http://www.jeanmonnetprogram.org/papers/99/990801.rtf); **W. SADURSKI** “Solange, Chapter 3: Constitutional Courts in Central Europe, Democracy, European Union”, *EUI Working Paper*, 2006, No 40, <http://cadmus.iue.it/dspace/bitstream/1814/6420/1/LAW-2006-40.pdf>

<sup>28</sup> **J. VOLKAI**, “The Application of the Europe Agreement and European Law in Hungary”, *supra* note 27.

<sup>29</sup> *Ibid*.

has been shaped and what kind of compromises have the courts found with their constitutional requirements? The following part of the paper makes an effort to address some of these issues.

#### **IV. Après enlargement: Some reflections on the post-accession case law of CEE constitutional courts.**

Immediately after the enlargement of the European Union with 10 Member States in May 2004, one can take note of ten constitutional judgments rendered by four constitutional courts in CEE: the constitutional court of Hungary, Poland, the Czech Republic and Estonia.

The Hungarian constitutional court presents an interesting case study,<sup>30</sup> due to the fact that it tried to isolate the challenged act from any European implication and therefore it ruled out the possibility of being involved in discourses of “relations between national and European law”. According to the Court, the case was completely domestic and it was under its full constitutional jurisdiction to review the constitutionality of the Act of Parliament which implemented certain European regulations on the surplus stock of agricultural products.

Different readings of this judgment have been suggested. On a first reading proposed by Sajo, the Hungarian Constitutional Court was unwilling to participate in the European learning process. According to another reading offered by Uitz, the Court avoided taking a stand directly on the supremacy of Community Law, showing judicial deference or self-restraint in seeking to leave Community law undisturbed to the farthest possible extent.<sup>31</sup> Furthermore, according to Sadurski, the Hungarian decision can be read as follows: “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) [...] but in order not to appear un-

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<sup>30</sup> **Hungarian Constitutional Court**, *Decision 17/2004 (V.25.)AB*. The mechanism of constitutional review was initiated by the Hungarian President who, after having declined to sign an act of Parliament on measures related to the accumulation of commercial surplus stocks of agricultural products, forwarded the act to the constitutional court for constitutional review on grounds of legal certainty and non-retroactivity. The Act of the Hungarian Parliament, aimed at the implementation in Hungarian of the European regulations, which on the other hand contained measures dealing with the prevention of speculative stock accumulation of agricultural products. The Court held as unconstitutional several provisions of the said Act of Parliament, by arguing that it violated the principle of legal certainty due to the fact that the Act imposed tax related obligations in a retroactive way. In fact, the Act would enter into force not earlier than the second half of May 2004, but it would eventually be considered as valid and with binding effects starting from 1st of May 2004, the day in which Hungary joined the Union.

<sup>31</sup> For a concise summary of both positions, see **A. ALBI**, “Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of ‘Co-operative Constitutionalism’”, *European Constitutional Law Review*, 2007, No 3, p. 56.

cooperative with regards to Hungary's accession to the EU, it preferred to characterise its scrutiny as concerning exclusively domestic issues, thus avoiding making any gestures questioning the (putative) supremacy of European law over the Hungarian constitutional doctrines".<sup>32</sup> Another reading proposed by the same author is that the Court seized the opportunity to establish its own position as the umpire of the validity of European law, according to its own conceptions of democracy, but chose to minimise 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>33</sup>

In practice, the Court used the surplus stock case to convey certain messages, perhaps both to the national and international (in this case European) audience, regarding the ultimate importance of the sacred Hungarian principles of legal certainty and non-retroactivity of laws. This was done through a clever move: the Hungarian Constitutional Court was conscious that it could not openly go against the European Regulation, which was mimicked in detail by the Hungarian implementing law. Therefore, it chose the path of situating the case in a very domestic context, thereby avoiding direct confrontation with Community Law.

The Polish Constitutional Tribunal has been far more active from a quantitative point of view: starting from the spring of 2004, it has rendered five constitutional judgments. The *Bio Petrol Case*<sup>34</sup> and the *European Parliamentary Elections Case*<sup>35</sup> can be considered as a follow-up to the pre-accession case law of the Tribunal: again the Tribunal points out the fact that "whilst interpreting legislation in force, account should be taken of the constitutional principle of sympathetic predisposition towards the process of European integration and the cooperation between states".<sup>36</sup>

While the above decisions seem to reproduce some of the Polish pre-accession judgments, the discussion becomes more interesting with the two famous decisions of the Tribunal: the *European Arrest Warrant Case*<sup>37</sup> and the *Treaty Accession Case*. Both decisions

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<sup>32</sup> See W. SADURSKI "Solange, Chapter 3", *supra* note 27, p. 14.

<sup>33</sup> *Ibid.*

<sup>34</sup> **Polish Constitutional Tribunal**, *Bio-Components in Gasoline and Diesel*, 21 April 2004, K 33/03.

<sup>35</sup> **Polish Constitutional Tribunal**, *Participation of Foreigners in European Parliamentary Elections*, 31 May 2004, K15/04.

<sup>36</sup> See paragraph 1 of the summary of the Judgment on the Participation of Foreigners in European Parliamentary Elections.

<sup>37</sup> **Polish Constitutional Tribunal**, *European Arrest Warrant*, 27 Apr. 2005, No 1/05. The mechanism of constitutional review was initiated by a legal question lodged by the Regional Court in Gdansk which requested

contain important indicators concerning the relations between the Polish and the European legal order. In the *EAW Case*, first the Tribunal asserts that there is no room for presumptions of conformity between derivative EU law and acts implementing it and the national constitution. Afterwards, it warns that the prohibition of extradition has constitutional value and it stands as an absolute prohibition. At a later stage, it touches upon the issue of consistent interpretation, a doctrine of the ECJ introduced and applied in the framework of community directives. By pre-empting the ECJ in parts of its later *Pupino* judgment, the Court does not rule out, at least in principle, the possibility to apply consistent interpretation in the case of framework decisions.

At the very end, the practical outcome of the ruling is clear: domestic provisions implementing the EAW Decision would normally apply, even if declared unconstitutional. This means that the absolute prohibition of extradition provided by the Constitution *was momentarily left aside* and European obligations to implement EAW prevailed. Moreover, the Tribunal suggested that the legislator should initiate respective legislative amendments which should be followed by constitutional amendments in order to avoid the possibility of encroachment upon requirements of EU law. As one commentator has rightly pointed out:

“This suggestion, in my opinion, indicates that the Constitutional Tribunal in fact recognised the supremacy of EU law. [...] It thus accepted that the constitution itself was no longer an absolute framework for control-if it hinders the correct implementation of EU law, it should be changed. [...] It seemed that in this judgment the Tribunal went further than the existing practice - it implicitly accepted the supremacy of EU law over constitutional norms”.<sup>38</sup>

In this context, the judgment can be considered as a hybrid of a pro-European attitude and several careful statements regarding the ultimate status of the national constitution. One commentator,<sup>39</sup> by elaborating arguments for both sides, emphasises that one of the reasons for which the ruling can be classified as anti-European is that the Tribunal defined extradition

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the Tribunal to consider the conformity with the Polish Constitution, of respective articles of the Code of Penal Procedure allowing the surrender of a Polish citizen to a Member State according to the procedures set by the European Arrest Warrant. Despite the fact that the Constitutional Tribunal declared the extradition clause of the Code of Penal Procedure implementing the EAW as incompatible with Article 55 paragraph 1 of the Polish Constitution, it decided that the article would apply for an additional period until a future revision of the Polish Constitution.

<sup>38</sup> **K. KOWALIK-BANCZYK**, “Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law”, *German Law Journal*, 2005, pp. 1360- 1361.

<sup>39</sup> **D. LECZYKIEWICZ**, “Case Note on the Judgment of 27 April 2005 of the Polish Constitutional Tribunal”, *Common Market Law Review*, 2006, p. 1187.

very broadly by including surrender as well, where it could have decided differently. Moreover, she suggests that “the Tribunal could have also argued, [...] that the institution of surrender grants a higher level of protection of fundamental rights than extradition, where the decision is made by the executive; this would have allowed the Tribunal to conclude that the rationale for prohibiting extradition of Polish citizens does not apply here”.<sup>40</sup> From another perspective, according to the same author the remedy chosen by the Tribunal -to delay the loss of the binding force of law provisions- counts as a pro-European aspect of the judgment. According to another commentator, the fact that the Tribunal encouraged the revision of the Constitution in an inter-institutional dialogue with the Polish Parliament shows its supportive attitude towards the EU.<sup>41</sup>

The EAW decision was the first important encounter between EU and Polish constitutional law. In the *Treaty Accession Case*,<sup>42</sup> the Tribunal further clarifies its doctrine on the interaction between national and European law. As it typically happens in delicate issues such as those tackled by these courts, the Tribunal’s decisions are built upon two important parts: the first -the ‘diplomatic’ part-, which generally refers to the new post-accession context and the need to comply with requirements stemming from accession to the EU, and a second one which sets limits to the sympathetic interpretation of European law and in a more general sense, to the intrusion of European law into national law.

By taking quite a balanced attitude, the Tribunal first sets the background for a typically pluralist approach by pointing out that:

“The concept and model of European law created a new situation, wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative. Their interaction may not be completely described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law. The existence of the relative autonomy of both, national and Community legal orders in no way signifies an absence of interaction between them. Furthermore, it does not exclude the possibility of a collision between regulations of Community law and the Constitution”.<sup>43</sup>

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<sup>40</sup> *Ibid.*, p. 1187.

<sup>41</sup> A. LAZOWSKI, “The Polish Constitution, the European Constitutional Treaty and the Principle of Supremacy”, in A. ALBI and J. ZILLER, *The European Constitution and National Constitutions: Ratification and Beyond*, The Hague, Kluwer, 2007, p. 178.

<sup>42</sup> **Polish Constitutional Tribunal**, *Poland’s Membership in the European Union (Accession Treaty case)*, 11 May 2005, K 18/04.

<sup>43</sup> See paragraph 13 of the judgment.

Afterwards, the Tribunal excludes any possibility of ultimate supremacy of Community norms over constitutional norms. It makes clear that in case of a collision between constitutional and Community norms, the supremacy of a Community norm may not be assumed over a constitutional norm. Moreover, it cannot be assumed that a constitutional provision might lose its binding form, or be substituted by a Community norm.

This is followed by a series of bitter paragraphs in which the Tribunal lists a number of limits regarding sympathetic interpretation of national law, the functioning of the Communities and the powers of the ECJ in relation to the application of the Treaties. Regarding the first issue, the Tribunal pointed out that the principle of interpreting domestic law in a manner sympathetic to European law, cannot lead to results which contradict the explicit wording of constitutional norms or which are irreconcilable with the minimum guarantee functions realised by the Constitution.<sup>44</sup>

Furthermore, the Tribunal asserted that the functioning of Communities and the European Union should be based upon conferred powers by Member States. On the other hand, Member States shall ensure that decision makers at European level, shall not transgress their competences and shall act by respecting subsidiarity and proportionality when legislating. In an opposite case, such European provisions cannot prevail over national law. In the same context, the Tribunal lists three limits which apply to the ECJ: (a) its interpretation of community law should fall within delegated competences; (b) interpretation of Community law by the ECJ should observe the principle of subsidiarity; (c) the interpretation should be based on the assumption of mutual loyalty between Community/Union institutions and Member States. According to the Tribunal, there should be sympathy from both sides: the assumption of mutual loyalty generates a duty for the ECJ to be sympathetically disposed towards the national legal system and a duty for the Member States to show the highest standard of respect for Community norms.<sup>45</sup> Having said this, it can be concluded that the Accession Treaty decision represents a significantly bitter decision regarding European Union law and its relation towards national constitutional law.

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<sup>44</sup> See paragraph 14 of the Judgment.

<sup>45</sup> See paragraph 16 of the Judgment.

In a more recent decision regarding excise duties,<sup>46</sup> the Tribunal seizes again the possibility to extend its doctrine on the interaction between national and European law.

The Tribunal points out that:

“Undoubtedly, of crucial importance in this matter is the fact that the ECJ safeguards Community law and, while passing judgments, *it does not have to take into consideration the standards deriving from legal orders of particular Member States*, including the status of the constitution in the system of sources of domestic law thereof” [emphasis added].<sup>47</sup>

As has been already analysed in the *Accession Treaty Case*, the Tribunal elaborated on an assumption of mutual loyalty between the Community/Union institutions and the Member States, which should serve as the basis for the interpretation of Community law by the ECJ. According to this assumption, the ECJ has *a duty to be sympathetically disposed towards national legal systems*. To be sure, the rhetoric of the *Accession Treaty Case* is one of greater expectation with regard to the attitude of ECJ *vis-à-vis* domestic legal orders, if compared with the wording of the *Excise Duty Case*.

Moreover, it might seem that the Tribunal in the *Excise Duty Case* loosened the requirements of loyalty addressed to the ECJ. However, the court did not abandon its protectionist declarations according to which the Constitutional Tribunal safeguards the Constitution, which on the other hand shall be the supreme law in Poland. Furthermore, the Tribunal asserts once more its role as guardian of the Constitution, which should not be

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<sup>46</sup> **Polish Constitutional Tribunal**, *Procedural Decision no. 176/11/A/2006 on the Excise Duty Tax*, 19 Dec. 2006, No 37/05. The case at hand reached the Tribunal as a question of law referred by the Regional Administrative Court in Olsztyn, which decided to stay its proceedings until the Tribunal would decide. The case dealt with a request of a Polish citizen regarding a refund of an overpayment of excise duty paid by him in the purchase of a passenger car in Germany. According to the applicant, who had addressed his question to respective Polish Tax authorities, the obligation to pay excise duty deriving from Polish legislation conflicted with several provisions of the EC Treaty (namely articles 23 (1)(2), article 25 and article 90- dealing mainly with free movement of goods, the customs union and tax provisions). The question of law brought before the Constitutional Tribunal was to determine whether respective provisions of the Polish Act on excise duty stipulating that passenger cars not registered in the territory of Poland shall be subject to excise duty, conform to Article 90(1) of the Treaty establishing the European Community and, to article 91 of the Constitution providing that an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with statutory provisions. The Constitutional Tribunal decided not to rule on the merits of the case by demonstrating considerable judicial self restraint. According to the Tribunal, ruling on the substance of the case, thus assessing the conformity of the Polish act on excise duty with Community provisions, would imply an interpretation of provisions of Community law by the Polish Constitutional Tribunal, which “would fail to take into account interpretation standards relating to all EU Member States”.

<sup>47</sup> See the decision on the Excise Duty Tax.

perceived only as an attribute, but also as an obligation deriving from the Polish Constitution. It reaffirms its position by stating that:

“A collision may occur between decisions taken by the ECJ and decisions taken by the Constitutional Tribunal. Taking the above into consideration, one must state that also by virtue of Article 8 § 1 of the Constitution, the Constitutional Tribunal is obliged to such recognition of its position that in fundamental issues relating to the constitutional system of the State it shall retain its status of the ‘last-word’ court”.<sup>48</sup>

Thus, it seems that the Tribunal decided to safeguard its position as the last word court, but at the same time it acknowledged that there might be situations where there is no need for its involvement, as matters might fall under the jurisdiction of the ECJ or simply ordinary courts. In this case, the Tribunal steps back by asserting that:

“The issue of solving conflicts in relation to domestic statutes falls outside the scope of jurisdiction of the CT, since the decisions of whether a statute remains in conflict with Community law, shall be delivered by the Supreme Court, administrative courts and common courts, while the interpretation of Community law norms shall be provided by the ECJ by way of a preliminary ruling”.<sup>49</sup>

Certain parts of the judgment, where the Tribunal claims an obligation on ordinary national courts to refuse to apply domestic law which conflicts with Community law, are a re-statement of the Simmenthal mandate as elaborated many years ago by the ECJ. However, the main source of the problem remains the constitutional conflict, the conflict deriving from a possible clash between a Union legal norm and a constitutional provision. In this context, it is hard for the Tribunal to abandon its status as the ‘last word’ court.

This complex picture of attitudes offered by the Polish Tribunal draws our attention to the equilibrist pattern which was attached to these constitutional courts in the main finding of the paper. After the accession to the European Union, constitutional courts of CEE countries had to deal not only with cases of constitutionality review of national laws, but also with problems of relation between national and European law. Therefore, they faced a new reality which required them to act not only as guardians of national constitutions (and in the same time by safeguarding their status as ‘last word’ courts), but also as courts of the Union.

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<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

In the Czech Republic the situation is not that different. The Czech Constitutional Court started its involvement in the supremacy discourse with the *Sugar Quotas Case*.<sup>50</sup> In this case the Court recognises, as its Polish counterpart, the fundamental change and new impact in the national legal order due to the accession of the country to the Union. Moreover, it acknowledges, by almost mimicking *So Lange II* that the level of protection of fundamental rights in the Community is not troublesome, and not lower than the level of protection in the Czech Republic. This would mean an extension of *pax germana* also in the jurisprudence of the Czech Constitutional Court. Nevertheless, the court reminds us that it will act as the protector of constitutionalism in order to protect the essential fundamentals of the Czech constitution and constitutional tradition. Again it seems that the judgment articulated by the court is structured in a way so as to provide for a balance between a Euro-friendly approach and qualified statements which mostly refer to the exercise of conferred powers by European institutions.

In the European Arrest Warrant decision rendered a few months later,<sup>51</sup> the Czech Constitutional Court was faced with an issue of European Union law, precisely with the extradition of indicted persons on the basis of the European Arrest Warrant. In the end, the Court managed to reconcile, through the use of interpretative tools, its domestic legal enactments with the requirements imposed by the EAW. The law implementing the EAW Decision was upheld as not being contrary to the Charter of Fundamental Rights and Basic Freedoms (forming part of the Czech Constitution). In contrast to its Polish (and especially German) counterpart, the Czech Constitutional Court tried to minimise any kind of possibility of a clash between its constitutional fundamentals and the European legal order. It did not engage in any kind of sovereignty discourse, which would be typical in the context of extradition procedures that usually trigger serious concerns for the protection by the state of its own citizens.

It is worthwhile to highlight one of the paragraphs of the judgment where the court ruled that: “if the Constitution [...] can be interpreted in several manners, only certain of

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<sup>50</sup> **Czech Constitutional Court**, *Judgment Pl. ÚS 50/04*, 8 Mar. 2006. The object of the case concerned a governmental regulation which regulated the process of allocation of sugar quotas production for sugar producers. The Court annulled paragraph 3 of the Government Regulation on the grounds that the Czech Government had acted *ultra vires* “by exercising an authority which had been already transferred to Community organs and which the Government, as a result, no longer held”.

<sup>51</sup> **Czech Constitutional Court**, *Judgment Pl. US 66/04*.

which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected which supports the carrying out of that obligation, and not an interpretation which precludes it”.<sup>52</sup> Yet again, the above statements identify a relatively friendly attitude towards European Union law and European integration.

Estonia represents an interesting case in the full picture of challenges to the supremacy of European Union legal order. In the pre-accession stage to the European Union, the Estonian Constitution, due to low public support for accession and a difficult amendment procedure, was not amended but only supplemented by the Act Supplementing the Constitution.<sup>53</sup> Many provisions of the Estonian constitution dealing with sovereignty and independence, right of Estonian citizens to belong to political parties and the exclusive right of the Estonian Bank to emit Estonia’s currency, were not tailored to the requirements of the *acquis*.<sup>54</sup> Therefore the chances of collision might be very high.

Instead, the Act Supplementing the Constitution authorises Estonia’s membership to the European Union and provides that the Constitution should be applied by taking into consideration the rights and obligations deriving from the Accession Treaty. Thus, the room for interpretation by the Estonian Court through its respective Review Chambers remains very broad as in a theoretical case of conflict between a constitutional provision and Union law, the only guideline given by the Act Supplementing the Constitution, is that the latter should be applied by taking into consideration rights and obligations stemming from Estonia’s membership in the European Union.

In the *Political Parties’ Case*,<sup>55</sup> the Estonian court took the opportunity to give its view on the supremacy issue by affirming that:

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<sup>52</sup> *Ibid.*

<sup>53</sup> A. ALBI, “Supremacy of EC Law in the New Member States”, *supra* note 31, p. 43.

<sup>54</sup> *Ibid.*

<sup>55</sup> **General Assembly of the Estonian Supreme Court**, *Case no. 3-4-1-1-05*, 19 Apr. 2005. The case was brought to the Supreme Court of Estonia by the Chancellor of Justice who requested the Court to declare certain provisions of the Political Parties Act to be in conflict with the Constitution read together with the Supplementing Act and with the Treaty Establishing the European Community. The Court decided to dismiss the petition of the Chancellor of Justice on the basis that the general assembly has no possibility to declare national legal acts invalid because of conflict with the European Union law

“The European Union law has indeed supremacy over Estonian law, but taking into account the case law of the European Court of Justice, this means the supremacy upon application. The supremacy of application means that the national act which is in conflict with the European Union law should be set aside in a concrete dispute”.<sup>56</sup>

Dissenting judges pointed out that the General Assembly of the Supreme Court should have declared the provision of the Political Parties Act restricting the membership in political parties only to Estonian citizens, invalid due to the unconstitutionality thereof or, should have asked the ECJ for a preliminary ruling for the interpretation of Article 19 of the Treaty Establishing the European Community. Moreover, according to the same dissenting judges, the Supreme Court did not fulfil its function as the interpreter of the Constitution. Moreover, their argument goes as follows:

“It is regrettable that the highest court of the state, who has the obligation to interpret the Constitution, did not explain the meaning and implications of the Constitution of the Republic Amendment Act, and did not give the foundations for interpreting the Constitution on the basis of the Act. [...] *The Constitution of the Republic Amendment Act does not constitute a mere permission for Estonia to accede to the European Union. It is just as important that within the context of EU membership the Constitution must be interpreted on the basis of the Amendment Act.* [...] Unlike the Constitutions of many other EU Member States, the Constitution of the Republic of Estonia Amendment Act regulates the relationship between Estonia and the EU very laconically, thus rendering further interpretation of the Constitution by the Supreme Court indispensable” [emphasis added].<sup>57</sup>

Dissenting judges found the challenged article of the Political Parties Act of Estonia in conflict with the interpretation of the Estonian Constitution, thereby “constituting an unacceptable intensive infringement of the passive suffrage of the citizens of other EU Member States”.<sup>58</sup> According to the dissenting bench, the second sentence of article 48 of the Estonian constitution which provides explicitly that only Estonian citizens may belong to political parties, should have been interpreted as to guarantee to EU citizens the possibility to belong to political parties with the aim of standing as candidates for municipal elections. The legal basis for this approach could be found in paragraph 2 of the Supplementing Act which provides that the Estonian Constitution should be interpreted by taking into account the rights and obligations arising from the Accession Treaty.

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<sup>56</sup> See paragraph 49 of the Judgment.

<sup>57</sup> *Ibid.*

<sup>58</sup> See paragraph 10 of the dissenting opinion by Justice Julia Laffranque joined by other judges of the Estonian Supreme Court.

The outcome of the case is similar to that of the *Excise Case* judged by the Polish Constitutional Tribunal. Both highest courts declined their competence of reviewing -and/or invalidating- domestic law in the light of Community provisions. Supremacy of European law implies *supremacy in application*, i.e. national law is set aside by courts in case it conflicts with norms of the European legal order. Constitutional courts declared their incapacity of declaring domestic law invalid in the light of Community law.

Nevertheless, one cannot draw exact parallels between the two cases: in the Polish case, the only direct link of review was between provisions of tax law and Community provisions on the free movement of goods, taxes etc. Therefore, the Polish Constitutional Tribunal could not assess domestic provisions exclusively in the light of Community law. In the Estonian case, the chancellor of Justice claimed that the provisions of the Political Parties Act were in conflict with the Estonian Constitution and European Union law. However, it is quite evident that the court decided not to use its broad interpretative power granted by the Supplementing Act. It followed a strategy of self restraint and did not clarify the function or status of the Supplementing Act in the Estonian legal order.

Later on, in an opinion issued by the Constitutional Review Chamber of the Supreme Court,<sup>59</sup> the status of the Supplementing Act and of the Estonian Constitution, as well as the issue of supremacy of Community law, was better clarified. One of the most important statements of the Court is related to its explicit acknowledgment that the adoption of the Supplementing Act amounted to a material amendment of those parts of the Constitution which are not compatible with the European Union law. Furthermore the Court opts for a broadly 'pro-European' approach by accepting ultimate supremacy of Community law.<sup>60</sup> It affirmed that:

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<sup>59</sup> **Constitutional Review Chamber of the Estonian Supreme Court**, *Opinion on the Interpretation of the Estonian Constitution*, No 3-4-1-3-06, 11 May 2006. The Estonian Supreme Court was seized by the Estonian Parliament which asked the interpretation by the Court concerning Article 111 of the Constitution in relation with the Supplementing act and European Union Law. This request by the Parliament was introduced in a specific context, where Estonia started its legislative procedures for the enactment of the draft act providing for the withdrawal of Estonian currency from circulation when the Republic of Estonia would become a full member of the economic and monetary union. Therefore, a new law providing for the withdrawal of Estonian currency was about to be introduced. In the same time Article 111 of the Constitution provided that "The Bank of Estonia has the sole right to issue Estonian currency. The Bank of Estonia shall regulate currency circulation and shall uphold the stability of the national currency".

<sup>60</sup> See also **A. ALBI**, "Supremacy of EC Law in the New Member States", *supra* note 31, p.45.

“Only that part of the Constitution is applicable, which is in conformity with the European Union law or which regulates the relationships that are not regulated by the European Union law. The effect of those provisions of the Constitution that are not compatible with the European Union law and thus inapplicable is suspended. This means that within the spheres, which are within the exclusive competence of the European Union or where there is a shared competence with the European Union, the European Union law shall apply in the case of a conflict between Estonian legislation, including the Constitution, with the European Union law”.<sup>61</sup>

## **V. Final comments on the rationale and implications of the case law of constitutional courts in CEE**

The above ‘excursion’ through the case law of constitutional courts of CEE has shown that these courts have adopted a relatively balanced attitude towards European integration and none of them has openly rejected the supremacy of EU law over national law (especially ordinary national law). They have plainly recognised that accession to the Union inevitably brings about obligations regarding the approximation and full integration of domestic legal orders into the *acquis communautaire*. It seems that Kuhn was correct in his early predictions that “considering the nature of the post-communist judiciaries, it is unlikely that they will manifest open hostility or refuse to accept the leading role exercised by the ECJ in the field of European law”.<sup>62</sup>

However, except for the interpretation of the Estonian constitution (opinion of the Estonian Constitutional Review Chamber regarding the emission of Estonian currency), which can be considered as a clear acceptance of the ultimate supremacy of Community law, other constitutional courts of CEE have been very careful in elaborating their views on the absolute supremacy of community law over constitutional norms. As has been mentioned above, the Polish Constitutional Tribunal made it clear that the norms of the constitution will be the standard for the review of implementing acts, and in the *Accession Treaty Case* the same court took a very clear stance against the ultimate supremacy of European law over the Polish Constitution. The Czech Constitutional Court also, in its *Sugar Quotas Case*, reminded us that any transfer of powers to Community institutions is conditional and not unlimited and that in any case, the constitutional court could be called upon to protect constitutionalism and inalienable fundamental principles of the Czech Constitution.

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<sup>61</sup> See Opinion of the Constitutional Review Chamber of the Estonian Supreme Court.

<sup>62</sup> Z. KUHN, “The Application of European Union Law in the New Member States”, *supra* note 13, p. 572.

Constitutional courts of CEE have been conscious of the fact that with the accession to the Union, some limitations of national sovereignty might occur and some powers are transferred to the institutions of the Community. As a result, national legal orders, here including the Constitution, should open up to accommodate the precedence in application of European law, in case of a conflict of the latter with national law. However (!), this limitation and transfer is conditional upon the fact that it should not transgress certain fundamentals such as fundamental rights, legal certainty, principles of a democratic-law based state, which usually happens to be tailored by constitutional courts according to their sensitivities and legal tradition.

Precedent case law -also elsewhere in Europe- shows that often there is a 'however' or a '*so lange*' clause or conditionality in the discourse of these courts which appears complementary to the integrationist attitude. These conditionality frameworks or *controlimiti* rarely emerge in the pre-accession stage: perhaps the willingness to join the club is so strong that it sets the tone of constitutional courts in high levels of European friendliness. Moreover, the post-accession stage brings about a new reality in which ordinary courts are transformed into courts of the Union and each of them can decide to disapply national law if it goes against a European norm. It is not unlikely that constitutional courts might perceive this as an empowerment of ordinary courts and therefore make use of any possibility of emphasising that the constitution is the supreme law of the land and that they remain the 'last word' courts.

On the other hand, this double reality of European friendliness and *controlimiti*, as served by CEE constitutional courts, is quite understandable if one takes into account the fact that these courts, similarly to their European counterparts, function as actors of European integration, but within a certain constitutional framework determined by their national constitutions. They are equipped by their constitutions with a constitutional mandate of observing the word and principles of national constitutions, which on the other hand is *the raison d'être* of these bodies. As De Witte rightly points out, in a remark on constitutional courts of Old Member States (regarding in particular the Italian, German, French and Belgians cases):

“The cause of all these reservations against an absolute primacy of EC law is the fact that constitutional courts, quite understandably, cannot accept that any source of law might prevail over the national

constitution itself, which after all is the source of their own existence. If the constitution is seen as the basis for recognising the primacy of Community law, then absolute primacy of the type postulated by the European Court in *Internationale Handelsgesellschaft* is only possible by way of an ‘auto-limitation’ clause in the constitution”.<sup>63</sup>

This is an extremely important finding which, in my opinion, applies similarly to the case of constitutional courts of CEE countries. Constitutional courts are creations of their respective constitutions and they have the obligation to act as their guardians. They have the constitutional duty to interpret the constitution by taking into consideration the obligations stemming from the accession to the Union, but in any case they cannot rule against its wording. Therefore, every kind of analysis on their role in the European integration process should take into account a certain constitutional ‘playground’, which very often might be delimited by a rigid wording of the constitution, specific principles strongly embedded in member states’ constitutional traditions (such as legal certainty and non-retroactivity in the case of Hungary), and sometimes a lack of European awareness in the old generation of constitutional judges.

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<sup>63</sup> **B. DE WITTE**, “Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?”, in **A.E. KELLERMANN et al.**, *EU Enlargement: The Constitutional Impact at EU and National Level*, The Hague, Asser, 2001, p. 77.