## ARTICLES

# The Application of European Law in the New Member States: Several (Early) Predictions

*By Zdeněk Kühn*[*]

After the EU Enlargement of 2004, the law courts of the new Member States now fulfill a twofold role of applying both national and European law. The application of European law also entails the duty of judges to construe their own domestic law as close as possible with EU law, and, if that is not possible, the duty arises to set aside the domestic law found to be incompatible with European law. In consequence, developments in the next decade will test judges' capacity for properly applying European law and this process will inevitably present a serious challenge to the Central European judicial systems. While evaluations can first be made no sooner than a few years after the EU Enlargement, there are important indications that can suggest the probable outcome of that challenge. This article briefly outlines the application of European law in those countries prior to EU Enlargement and then deals with the important factors which are likely to influence its future application in the new Member States.

## A. The Application of EU Law before the EU Enlargement

As part of the first wave of fundamental changes in Central European legal systems in the early 1990's, the major deficiencies of the communist legal systems were eliminated, especially those primitive aspects which had lost contact with the systems' Continental roots, some major shortcomings of criminal and civil procedure, etc. These states simultaneously started making new laws. A second wave of changes came soon thereafter. In anticipation of joining the EU, the Central European nations were required to Europeanize their legal systems, i.e. to make

[*] Assistant Professor, Charles University Law School, Prague, Czech Republic. zdenku@seznam.cz. Ph.D., Charles University Law School (2001); LL.M., University of Michigan Law School (2002); S.J.D. Candidate, University of Michigan Law School (2003). All translations are mine unless otherwise indicated. I owe thanks to Professors Mathias Reimann and Eric Stein of the University of Michigan Law School for their comments and invaluable advice, to Mark Gillis for editing my text and to the Václav Havel Graduate Fellowship of the University of Michigan and the Summer Stipend for Issues of European Integration provided by the Milton and Miriam Handler Foundation and the Horace H. Rackham School of Graduate Studies at the University of Michigan for their financial support. The responsibility for errors rests solely with me.

their laws consistent with the accumulated body of European law, the *acquis communautaire*.

Complaints that the law is changing too rapidly are heard all over the region.[1] In this regard, European directives have had a clearly disruptive effect on national legal orders, questioning old values of legal science and calling for novel answers to old problems.[2] All post-communist countries have at the same time joined the Council of Europe and are bound by the decisions of the European Court of Human Rights. The following comment on the problems encountered in Poland, as described by the prominent Polish internationalist, W. Czapliński, is relevant more or less to all post-communist law-makers:

"[F]rom the substantive point of view the process of adaptation of Polish law to Community law suffers from certain shortcomings. The sponsors of the relevant legislation, followed by the Council of Ministers and the Sejm [the Polish lower house of the Parliament], seem sometimes to have settled for the simplest way out, limiting their activities to (often incorrect and careless) translation of directives. Their nomenclature is often translated word for word, thereby introducing concepts which are not known to the Polish legal system. Alternative options are omitted – even when a Directive requires a choice between them."[3]

Of course, similar shortcomings can be seen even in Western European EU Member States.[4] However, we must be cognizant of the fact that 'Europeanization' has been the second major challenge within a single decade for the rapidly transforming legal systems of post-communist nations. The mixture of often incompetent drafting of post-communist law, the immaturity of post-communist legal systems and judges adhering to textual positivism, has produced a deepening of the post-communist legal crisis.

---

[1] Attila Harmathy, now a Justice of the Hungarian Constitutional Court, estimates that between January 1, 1990 and December 31, 1997, 894 acts of Parliament, 1635 governmental regulations, and 2331 ministerial decrees were passed in Hungary. These rules filled a full 51,104 pages of the official law gazette. In the same period the Constitutional Court published 501 decisions. Attila Harmathy, *Codification In a Period of Transition*, 31 U.C. DAVIS L. REV. 783, 790 (1998). For a sophisticated view by a Justice of the Czech Constitutional Court (in 2003 reappointed to the bench), *see* Pavel Holländer, *The Judge Today: A Barrier to a Postmodern Deconstruction or an Industrial Factory for Decision-Making?*, *in* SYSTEMS OF JUSTICE IN TRANSITION. CENTRAL EUROPEAN EXPERIENCES SINCE 1989 (JIŘÍ PRIBAN/PAULINE ROBERTS/JAMES YOUNG eds., 2003), pp. 77-93.

[2] On this phenomenon generally, see MARTIJN HESSELINK, THE NEW EUROPEAN LEGAL CULTURE (2001).

[3] Władysław Czapliński, *Harmonisation of Laws in the European Community and Approximation of Polish Legislation to Community Law*, 25 POLISH YEARBOOK OF INTERNATIONAL LAW (PYIL) 45, 54 (2001),.

[4] *See* SACHA PRECHAL, DIRECTIVES IN EUROPEAN COMMUNITY LAW: A STUDY OF DIRECTIVES AND THEIR ENFORCEMENT IN NATIONAL COURTS 154 (1995).

The likelihood that national judges will correctly and properly apply European law increases if they have had some experience with the application of international law, i.e. a legal system other than their own legal system. With the distinct exception of the Polish judiciary, or at least the highest Polish courts,[5] this has not been the case for Central European ordinary courts. Up until the very end, the Central European socialist regimes kept international law out of their domestic legal systems. The socialist constitutions were silent on the status of international law in their legal orders.[6] Further, the relation between international and domestic law was rarely discussed by socialist legal scholars and was a theoretical issue rather than a practical one. International law came into play only where an ordinary statute explicitly referred to an international treaty and directed that the treaty should be applied in preference to statutory provisions.

*I. Examples of Application*

The process of Enlargement had a peculiar nature. Prior to accession in 2004, EU law was not yet formally binding on domestic courts, but the obligation of gradual harmonization with EU law rested on the EU candidates.[7] Consequently, the application of EU law in not-yet-Member States presented particularly interesting problems and challenges and called for the understanding of the sophisticated concept of EU law's persuasive force. The only rational choice was to apply community law, not only considering the "limited law" of the texts of harmonizing legislature, but also taking into account community law in its full meaning. This included the texts of European directives, which had to be transposed into domestic law,[8] their reasoning and rationale, which would explain why a particular policy was regulated on the European level, ECJ jurisprudence, and ideally also case law of the EU Member States.

This is nicely demonstrated by Polish examples. The Polish judiciary, or at least its highest courts, staffed by many prominent Polish lawyers and academics, have

---

[5] *See* Anna Wyrozumska, *Direct Application of the Polish Constitution and International Treaties to Private Conduct*, 25 PYIL 5 (2001).

[6] *See* Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 A.J.I.L. 427, esp. 433 (1994). The Polish Constitution of 1952, the Hungarian Constitution of 1949 and the Czechoslovak Constitutions of 1948 and 1960 (the "Socialist" constitution) simply did not address the issue.

[7] *Compare e.g.* Art. 69 of the EU-Czech Association Agreement.

[8] Lajos Vékas, *Antizipierte Umsetzung von Verbraucherrichtlinien und das Internationale Privatrecht*, FESTSCHRIFT SIEHR, 775-95 (2000); *Autonome Angleichung an das Gemeinschaftsprivatrecht und das EU-IPR Ungarn*, 2000 IPRAX 240-243.

seemed willing to fulfill the mission of Europeanization. In fact, their activity appears to be a logical outcome of their friendly approach to the application of international law and their high aspiration in performing judicial review.[9]

As the Supreme Administrative Court in Warsaw put it, candidate states fail properly to fulfill their obligation to harmonize domestic law with EU law not only by incorrectly harmonizing (the problem of the national legislature), but also "in cases when the interpretation of internal legal acts by public authorities is contrary to the *acquis communautaire*"[10] (the problem of the national judiciary). When applying a national rule, a national judge shall take into account the EU rule corresponding thereto (for instance, a directive which has been implemented by the candidate state) including its interpretation by the ECJ or (ideally) also the practice in the EU Member States. Moreover, the Polish Constitutional Tribunal stated this to be a general rule of construction under its domestic law:

"Of course, EU law has no binding force in Poland. The Constitutional Tribunal wishes, however, to emphasize the provisions of Article 68 and Article 69 of the [Polish Association Agreement] … Poland is thereby obliged to use 'its best endeavours 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*."[11]

Similarly, the Czech antitrust authority, staffed by young lawyers, many of whom have the benefit of foreign legal education and knowledge of foreign languages, has taken into account EU law in almost every important case. This practice was approved by the Czech High Court in the *Skoda Auto* case. In that case, the appellant, the most important Czech company, challenged the decision of the antitrust authority with the argument that EU law was not a binding source of law

[9] Wyrozumska, *supra* note 5.

[10] Decision of the Supreme Administrative Court (SAC) in Warsaw of 13 March 2000 in the *Senagpo* case, translated in (1999-2000) 24 PYIL 217, 219. The Supreme Administrative Court referred to European tax law "as the additional grounds for its judgment." *See also* case note by Skrzydło-Tefelska, 24 PYIL 217, 220 ("We should welcome with satisfaction the commented judgment of the SAC since it constitutes the proof that Polish courts have properly understood the obligation of harmonization of Polish law with the *acquis communautaire*, which shall be realized not only by initiatives of legal acts consistent with European law but also by the proper interpretation of the existing provisions.").

[11] *Gender Equality in the Civil Service Case*. In Polish decision K. 15/97, *Orzecznictwo Trybunalu Konstytucyjnego* [Collection of Decisions of the Constitutional Tribunal], nr. 19/1997, at 380; English translation 5 E.EUR. CASE REP. OF CONST. L. 271, at 284 (1998) (my emphasis).

in the national legal system and that, therefore, it could not be taken into consideration in the interpretation of the domestic law. The High Court rejected this claim, emphasizing the international links between national antitrust laws:

"The protection of free trade is specific in the way that national law is often not sufficient, and therefore is often enriched by the application of rules used in the countries with a long tradition of antitrust law (Germany, the United States). For that matter [the Czech antitrust law of 1991] received the basic ideas of the Treaty of Rome, particularly already mentioned articles 85, 86 and 92; this was from the perspective of harmonization of the legal systems of the European Communities and the Czech Republic an absolute necessity."[12]

Subsequently the High Court concluded that it was not an error of law for the public authority to interpret Czech antitrust law consistently with the case law of the Court of Justice and with Commission decisions. The decision of the Constitutional Court affirmed this approach, emphasizing that both the Treaty of Rome and the 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 interpretation of the corresponding Czech rules.[13] Both courts understood the difference between a source of law that is merely persuasive (interpretation consistent with European law) and a source that is binding (which would be the case only if the EU law had direct effect in an EU candidate country).[14]

The Constitutional Court emphasized the value of this Euro-friendly approach above all in the review of the constitutionality of laws. In the case dealing with the competence of the national government to impose a quota for producers of milk a group of Senators questioned the validity of the law. The Constitutional Court denied this argumentation, and proclaimed, *inter alia*, that certain types of this regulation were also permitted under EU law and GATT. In addition, the regulation was a part of approximation with EU law.

---

[12] Decision of the High Court in Olomouc, November 14, 1996, published in (1997) 5 (9) PRAVNI ROZHLEDY [Legal views] 484.

[13] *Re Skoda Auto*, *Sbírka nálezů a usnesení* [Collection of Judgments and Rulings of the Constitutional Court], Vol. 8, p. 149 (in Czech).

[14] The inability to distinguish between these two concepts is nicely illustrated by the analysis by V. Týč, who considers the decision of the Czech Constitutional Court as though it accorded the EC Treaty direct effect. *See* Týč V., *Czech Republic*, *in* HANDBOOK ON EUROPEAN ENLARGEMENT. A COMMENTARY ON THE ENLARGEMENT PROCESS (ANDREA OTT & KIRSTYN INGLIS EDS., 2001), at 229, 231.

The petitioners, however, argued that European law could not be applied because it was not binding (note here a tension between binding and persuasive sources of law, typical for post-communist legal thinking, often unable to realize the importance of the latter sources). The Court rebuffed this idea, emphasizing the existence of general principles of law, common to all EU Member States. The content of these principles is derived from common European values; the general principles imbue with content the abstract concept of the state governed by the rule of law, which includes human rights. The Constitutional Court must apply these principles--thus it must follow European legal culture and its constitutional traditions. "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."[15] In other words – the Czech Constitutional Court rejected the conception of law as composed merely of binding sources of law, thus allowing for a broader conception of law.

*II. Examples of Non-Application*

In most courts, textual positivism prevails without constraints. Deeply rooted legislative optimism has produced an atmosphere where ordinary judges and lawyers generally overemphasize the impact of legal transplants made by the legislature on the one hand, while they seriously understate their own role in that process. That is why one should not be surprised that legal transplants operate often in a very different way than they do in the donor countries. In systems where persuasive arguments are not recognized as relevant, a sensible harmonization is not likely to succeed.

This path of "limited law" was followed by both supreme courts of the former Czechoslovakia. A typical example is the decision of the Slovak Supreme Court of August 25, 1999. In that case the Supreme Court was invited by the parties to consider the fact that the interpretation of the law employed by the lower courts was contrary to the EU directive which the law was intended to transpose. The Court openly refused to consider EU law as an argumentative tool to interpret domestic law in a Euro-friendly way. The Court did not distinguish authoritative and persuasive arguments because in the world of limited law only binding sources

[15] *Milk Quota Case*, published as No. 410/2001 Official Gazette (English translation *available at* http://www.concourt.cz). Under European law it would be unlikely to consider the milk quotas as an example of the general principles of European law. However, it is not entirely clear which principles would, according to the Czech Court, qualify – whether the possibility to impose production quotas themselves or the right to engage in free enterprise (as this latter right resides at the core of European legal culture, the existence of production quotas within the EU legal order would lead to the conclusion that the milk quotas would not constitute a breach of this right).

exist; anything else is not the law and cannot be taken into consideration by a court. In the Slovak Supreme Court's view, "considering the current stage of EU integration," an argument based upon a European directive was not relevant.[16]

Its Czech counterpart provides a similar example. In its decision dealing with the validity of an agreement between a consumer and a distributor of expensive pottery, the consumer argued that the agreement was contrary to good morals, as the distributor sold him exceptionally expensive pottery under very harsh conditions. The consumer argued also with reference to the law of Western countries and European directives and urged the courts to take these into account, as Western European countries, in contrast to the Czech Republic, have a long experience in dealing with consumer agreements. None of the three Czech courts dealing with the issue accepted this invitation to engage in a comparative analysis. The Supreme Court based its decision on quasi-liberal rhetoric of the freedom of contract, reminiscent more of the ideas governing European discourse in the mid-19th century than the 20th century discourse governed by the widely-accepted necessity to protect a weaker party.

The Supreme Court did not consider comparative arguments drawing upon European law as capable of filling the general clauses of good faith and good morals. Deciding as the court of final instance, it conceived of the defendant's arguments as arguments referring to binding sources. Here is the reason it opined:

"… validity of the agreement made between the parties on August 31, 1993 must be decided according to the then valid law, as both lower courts did. In contrast, laws and directives valid in the countries of the European Community are not applicable, as the Czech Republic was not (and still is not) a member of the Community, and that is why the Czech Republic is not bound by these laws. The binding force of the rules to which the appellant refers cannot be inferred from any provision of the [the Czech Association Agreement], as the court of appeal concluded. The question of harmonization of legal practice of the Czech Republic with legal practice of the European Community is gaining in, but this cannot change anything in the outcome of this case."[17]

---

[16] The decision was published as No. 76 of the Slovak case reporter for 2000: *Zbierka stanovísk Najvyššieho súdu a rozhodnutí súdov Slovenskej republiky* [Collection of decisions of the Supreme Court and courts of the Slovak Republic] (Vol. No. 4/2000, p. 55).

[17] Decision of the Czech Supreme Court of December 12, 2000, 25 Cdo 314/99 (not published, but *available at* http://www.nsoud.cz).

Textual positivism, with its severe "binding vs. non-binding" dichotomy, thereby relegated to nothingness, at least prior to the Enlargement, the role of European law. To put it in blunt terms, European law can only be relevant once it has become binding. Because it is obviously not binding in a not-yet-EU Member State, until the Enlargement was completed, it was beyond the view of the ordinary judiciary. In the view of Czech and Slovak judges, candidate countries were implementing only texts, and in interpreting them lawyers could consider nothing but these texts.[18]

This 'anti-European' approach, as well as the overall 'isolationist' practice of the Czech ordinary courts, was severely criticized by a few exceptional ordinary judges[19] as well as by some politicians. In 2002 the Czech Minister of Justice (who in the meantime became Chief Justice of the Constitutional Court) noted that few were fully aware that ordinary judges are responsible to deal with the bulk of international law and that, after joining the EU, it would be up to them to ensure the priority of EU law over national law.[20]

## B. Central European Judges as New "European" Judges

### *I. The Application of European Law: General Maxims*

Since May 1, 2004 European Union law has been binding in the new member countries and takes precedence over their domestic law. Post-communist judges thus entered the realm of an important and substantial field of law made by the judges of the European Court of Justice (ECJ) in Luxembourg. The ECJ's role is to ensure as far as possible the uniform application of community law on the basis of preliminary references sent by national courts.[21] The uniform application of

---

[18] On this in more detail *see* Zdenek Kühn, *The Application of European Law in Central European Candidate Countries*, 28 E.L.REV. 551 (2003).

[19] *See* the commentary of judge Filemon of the Regional Court in Brno: "It would serve the development of specialized legal sub-branches of the copyright protection and the protection of industrial rights, if the Czech judiciary were more connected to 'abroad' (following foreign up-to-date legal theory and case law) and overcame the 'Czech' isolationist way of ignoring the importance of comparative law, as well as censorship of the editors of the collection of judicial judgments … That is why we are attempting at least in the areas with applicable international treaties … to use foreign commentaries and case law in original (e.g. from the Internet) or from the few available Czech translations." A commentary of B. Filemon on a judgment sign. 11 Cms 231/96, *in Jurisprudence,* VYNUTITELNOST PRAVA A PRAVNI PRAXE [The Enforceability of Law and Legal Practice], n. 4-5/2000, 34.

[20] *See* the interview with former Czech Minister of Justice Rychetský (since 2004 Chief Justice of the Constitutional Court) in the Czech daily, PRAVO, 25 Sep. 2002, page 1.

[21] *See* EC Treaty art. 234 (ex Art. 177), as construed by the ECJ in Case 166/73, Rheinmühlen-Düsseldorf v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1974 ECR 33, paragraph 2: "Article 177 is

European law is a fundamental requirement of the Community legal order.[22] The relationship between the ECJ and national courts is based on the principle of cooperation rather than on a hierarchical structure.[23] Article 234, the basis of that cooperation, "entails a division of duties between the national courts and the Court of Justice in the interest of the proper application and uniform interpretation of community law throughout all the Member States," as the ECJ emphasized many times.[24] Although the ECJ has never explicitly so stated as such, it is clear from its case law that its decisions form something akin to binding precedent,[25] though the rhetoric of European precedent does not correspond completely to the common law ideals.[26] Considering the nature of the ECJ's activity, there is no other way but to recognize its decisions in a quality of precedent for the national courts, notwithstanding different national orthodoxies especially in continental legal systems.[27]

The national courts, however, play a rather important role in making European law. Unlike the original idea of the relationship between the ECJ and the national judiciary, in which the former was supposed only to interpret and the latter only to

---

essential for the preservation of the community character of the law established by the treaty and has the object of ensuring that in all circumstances this law is he same in all states of the community."

[22] *See* joined Cases C-143/88 and C-92/89 Zuckerfabrik 1991 ECR I-415 [1991], paragraph 26 or joined Cases C-46 and C-48/93 Brasserie du Pêcheur/Factortame (No. 3), 1996 ECR I-1029 [1996], paragraph 33.

[23] Which the ECJ proclaimed as early as 1964 in the "foundational" Case 6/64, Costa v. ENEL 1964 ECR 614 [1964]. *See* HENRY G. SCHERMERS, DENIS WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES 394 (5th ed. 1992), Konrad Lenaerts, *Form and Substance of the Preliminary Rulings Procedure*, *in* INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION, ESSAYS IN HONOUR OF HENRY G. SCHERMERS, vol. II, 355 (Deirdre Curtin & Ton Heukels eds. 1994).

[24] *E.g.* Case 244/80 Foglia v. Novello (No. 2), 1981 ECR 3045 [1981], paragraph 14.

[25] *See* clearly Case C-224/01 Köbler 2003 ECR I-10239 [2003], paragraph 56: state liability for the breach of Community law arises when the decision of the national court concerned is "in manifest breach of the case law of the Court in that matter."

[26] *See* Barceló J.J., *Precedent in European Community Law*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 407 (Neil D. MacCormick, Robert S. Summers eds., 1997).

[27] As early as 1985 the Constitutional Court of Italy emphasized that the ECJ's case law is binding on Italian national authorities as part of directly applicable Community law. Specification of the meaning of Community law by declaratory judgment of the ECJ has the same direct effect in Italian law as the interpreted provision itself. *See* the decision No. 113 of April 23, 1985, 68 RAC.UFF. 775 (1985), 1985 GIUR.COST. 694, quoted by PAOLO MENGOZZI, EUROPEAN COMMUNITY LAW. FROM COMMON MARKET TO EUROPEAN UNION 70 (1992). Similarly the German Federal Constitutional Court concluded that if the German national court declines to follow the interpretation of community law given by the ECJ, it is bound to refer the issue again to the ECJ according to the procedure found in EEC Treat art. 177 para. 3 (now EC Treaty art. 234 para. 3).

apply community law, it is now clear that the role of national judges is far more important than that. In fact, when applying Community law, judges of national courts must at the same time also act in their capacity as European judges; they have to enforce European regulations and directives and to decide cases with the goal of an integrated Europe in mind.[28]

A major problem that arises in analyzing the application of European law by national judges lies, however, in the fact that "the correct and loyal application of substantive EC law by the national courts is all too often presumed with little verification as to whether this is actually the case in practice."[29]

*II. Constitutional Courts*

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. At most, national constitutional courts, viewing themselves primarily as guardians of national constitutions and following the lead of the German archetype, might pursue their national judicial politics, show themselves as the ultimate guardians of national sovereignty and delineate the limits of the ECJ's competences in the way the German Federal Constitutional Court did in its *Solange II*[30] and *Maastricht*[31] decisions.[32]

---

[28] That is the reason prominent scholars claim that there are not just two European courts, but in fact thousands of them, dispersed throughout the territory of the EU. This is the primary idea of THE EUROPEAN COURT AND NATIONAL COURTS – DOCTRINE AND JURISPRUDENCE (Anne-Marie Slaughter, Alec S. Sweet, Joseph Weiler eds., 1998).

[29] MALCOLM A. JARVIS, THE APPLICATION OF EC LAW BY NATIONAL COURTS: THE FREE MOVEMENT OF GOODS 439 (1998).

[30] *See* BVerfGE 73, 339 (1986), *Solange II.* Sadurski remarked that it would be ironic, "at today's stage of the development of EU law," were the constitutional courts to "replicate" the *Solange I* doctrine, now of course outdated. *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* 10 EUR. L.J. 371, 392 (2004). Even a development such as this, however, cannot be completely excluded, as one should not overestimate the expertise in EU law of constitutional court justices (or their advisers). In contrast with most Central European courts, preparations for the modified role of the constitutional court after the Accession seem to be generous in Poland. On the Polish Constitutional Tribunal's website all major decisions of national constitutional courts on the relation between EU and national constitutional law have been translated and posted. See http://www.trybunal.gov.pl/index2.htm (visited on February 14, 2005).

[31] *See* BVerfGE 89, 155 (1993), *Maastricht.*

[32] Already in the late 1990's the Hungarian Constitutional Court indicated its willingness to play the role of the guardian of the national constitution against Community law. Decision 30/1998 (VI.25) AB 25 June 1998, *see* 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 8/99, Harvard Law School (2000). The decision itself has been severely criticized as allegedly

The first two constitutional decisions from new Central European Member States show both the Polish Constitutional Tribunal's willingness to support the application of EU law and the rather awkward position of the Hungarian Constitutional Court.[33]

The Polish decision merits brief discussion. On May 31, 2004 the Polish Constitutional Tribunal decided a case in which the law on elections to the EU Parliament was claimed to be unconstitutional.[34] According to Art. 19 EC Treaty every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and stand as a candidate in municipal elections and elections to the European Parliament. The petitioners argued that participation of foreign nationals was in conflict with the principle of the sovereignty of the Polish people as laid down in Art. 4 of their Constitution, as well as with the clauses which grant the right to vote in Poland only to Polish citizens. The Constitutional Tribunal rejected this argumentation. First, the Tribunal rejected the contention that the supremacy either of European or national constitutional law was at stake.[35] Most importantly, however, the Tribunal reemphasized the importance of the constitutional principle mandating a Euro-friendly construction of national law:

---

demonstrating the Court's complete ignorance and misunderstanding of international and community law. Imre Vörös, *The legal doctrine and legal policy aspects of the EU-Accession*, 44 ACTA JURIDICA HUNGARICA (AJH) 141 (2003), especially pp. 149-151.

[33] The decision of May 25, 2004, 17/2004, quoted in Andras Sajó, *Learning Co-operative Constitutionalism the Hard Way: the Hungarian Constitutional Court Shying Away from EU Supremacy*, 2 ZEITSCHRIFT FÜR STAATS- UND EUROPAWISSENSCHAFTEN (ZSE) 351 (2004).

[34] *See* the decision of May 31, 2004, K 15/04, quoted according to the English summary at www.trybunal.gov.pl/Eng/.

[35] Quoted according to the Polish text, part III.2, published in *Orzecznictwie Trybunalu Konstytucyjnego . Zbiór urzędowy* [Collection of Decisions of the Constitutional Tribunal. Official Collection], ser. A., nr. 5, item 47, 655-668 (this part is not translated in the English summary). Instead, the Tribunal emphasized that the Polish Constitution "is the supreme act establishing the legal basis for the existence of the Polish State, regulating the principles of exercising public authority on its territory and the modes of establishing constitutional State organs, together with the functioning and competences thereof." Yet, the Constitution may not be "directly applied to structures other than the Polish State, through which the Republic realizes its interests." (*see* the English summary Decision of May 31, 2004, K 15/04 *supra*, note 34, para. 1). For that reason the Constitution may not be used for reviewing the constitutionality of political decision-making on the EU level. Reasoning pragmatically ("It is the function of law in a society to resolve conflicts and not to exacerbate them", Decision of May 31, 2004, K 15/04 *supra*, note 34, para. 9), the Tribunal rejected the argument that the mere fact that the Polish statute had come in force before EU law became applicable in Poland is the reason for this statute's unconstitutionality.

"Whilst interpreting legislation in force, account should be taken of the constitutional principle of favorable predisposition towards the process of European integration and the cooperation between States."[36]

The Polish example is important. It shows that at least one constitutional court from those of the New Member States is aware of its EU law obligations and the need to cooperate with the ECJ; it does not merely resist the "intrusion" of EU law while rhetorically defending national sovereignty, as is often demanded by Euro-skeptics in Central Europe.

Yet, one should be cautious and not expect that all Central European constitutional courts will follow the Polish path. The Hungarian decision of May 25, 2004 proves that there is a clear danger that constitutional courts might ignore EU law and pursue their task of protecting national constitutions as if nothing had happened with the Accession. The Hungarian Constitutional Court annulled a Hungarian law, which had transposed a European law for the alleged conflict of the former with the domestic constitution, however completely ignoring its European dimension.[37]

While pluralist conceptions of the interactions between the European and the national legal orders was rising in Western Europe,[38] post-communist Europe returned to the Kelsenian concept of the legal system as a pyramid. While for Western Europeans it is an old-fashioned concept, for Central and Eastern Europeans this concept holds the charm of something precious lost and recently rediscovered. In communist Europe the very paradigm of continental legal thinking, the classical hierarchy of legal sources, in fact disappeared; a unified legal order comprising the enumerated sources of law prevailed only on paper and was displaced in genuine significance by an enormous number of decrees of very different character, some of them even not promulgated in the official gazettes. The central role of the statute, typical for the region, was abandoned. The most important matters were dealt within by-laws, ministerial decrees and government

[36] The decision quoted Decision of May 31, 2004, K 15/04 *supra* note 34, at para. 10.

[37] The decision does not seem to be available in English so far; therefore I use the article quoted Sajó *supra*, note 33.

[38] *See, e.g.*, the numerous works on "multilevel constitutionalism" by Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?*, 36 C.M.L.REV. 703 (1999); *Multilevel Constitutionalism in the European Union*, 27 ELR 511 (2002); the concept of "legal pluralism" as defended by Italian theorists Massimo La Torre, *Legal Pluralism as Evolutionary Achievement of Community Law*, 12 RATIO JURIS 182 (1999).

regulations.[39] Acts of parliament were losing their normative character, as they consisted more of abstract principles and policies than of rules.[40] Lawyers were driven out of the law-making process, their role was much more that of mere "service personnel".[41] That is also one of the reasons the Polish Constitution of 1997 contains a detailed chapter on sources of law[42] and one of the reasons post-communist lawyers in the new Member States adhere so adamantly to the classical Kelsenian paradigm of the legal system.[43]

A very interesting development can be expected with regard to the relation between national ordinary judges and constitutional courts in the application of European community law. In Hungary and Poland, this problem is not of such interest, as there is no direct link between decisions of ordinary judiciaries and national constitutional courts. However, in the Czech Republic, Slovakia, and Slovenia, the possibility exists of lodging a constitutional complaint against decisions of the ordinary judiciary, which provides the national constitutional courts the impetus to stake out their positions in relation to European law. It is possible to expect that the less qualified the ordinary judiciary is and the less willing or capable the national ordinary high courts are to enforce Community law, the bigger pressure there will be on the national constitutional courts to protect at least fundamental principles of the application of EU law. One can fairly expect that, similarly as in Germany or Austria, a possible remedy against the failure of national courts of last resort to refer issues to the ECJ might be found in a constitutional complaint against such decisions, where the plaintiffs would base their arguments on the breach of the right to their lawful judge.[44]

---

[39] *See* Slawomira Wronkowska, *The Sources of Law in the Constitution of the Republic of Poland of 2 April 1997*, POLISH CONTEMPORARY L., QUARTERLY REV. No. 1-4 (1998), 59-70. On the analogous problems in the former Soviet Union *see* AKMAL K. SAIDOV, COMPARATIVE LAW 202 (2003, Russian original in 2000).

[40] Kalmán Kulcsár, *The role of law-making in the modernization process*, 25 AJH 19 (1983).

[41] Schmidt, *Konstitutsiono-pravovye voprosy sistemi istochnikov prava VNR* [The constitutional law problems of the Hungarian system of the sources of law], 27 AJH 155 (1985).

[42] Wronkowska, *supra* note 39.

[43] *see* on this Sajó, *supra* note 33, at 361.

[44] MICHAL BOBEK, PORUSENI POVINNOSTI ZAHAJIT RIZENI O PREDBEZNE OTAZCE PODLE CLANKU 234(3) SES [Violation of the Obligation to Initiate a Proceeding on a Preliminary Question pursuant to EC Treaty art. 234(3)] 46-66 (2004).

*III. Ordinary Courts*

Which particular problems might Central European judges face after 2004 in their new role as European judges? The real problem of ordinary courts seems to be rather a lack of knowledge and ability than an open defiance or flouting of their new duties.

Obvious problems are presented by their excessive reliance on a literalist (or textualist) reading of law, their ignorance of the underlying purpose of the law and their inability to apply abstract legal principles. This is the case because the typical division of labor in post-communist countries seems to be excessively centralized. By centralization I mean the concentration of the most important issues in a single judicial body, situated outside the judiciary proper. In the post-communist division of labor, the ordinary judiciary – 'the judiciary proper' – is entrusted with applying ordinary or 'simple' law (*Einfaches Recht*) in a rather textualist way, whereas constitutional courts (situated outside the judiciary proper) are the only bodies which feel empowered to deal with abstract principles, human rights, constitutional law, and international law. Though the level of this centralization varies (the most extreme example seems to be Slovakia, the least visible Poland). The general perception of ordinary judges, as those who should apply the (domestic) law in a textualist fashion, constitutes a major obstacle to the application of European law, a task which is by its very nature decentralized, as one of the European constitutional principles provides.[45]

For instance, one might note the completely divergent attitude towards teleological (purposive) argumentation manifested by Western European judges and the ECJ, on the one hand, and by their new Central European colleagues, on the other. Despite all its problems, purposive legal reasoning seems to be "the characteristic response of modern lawyers to the problem of formality and equity."[46] For instance, the doctrine of useful effect of Community law (*effet utile*), the teleological argument par excellence, stands at the very root of Community law.[47] Unless

[45] Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II), 1978 E.C.R. 629 [1978]. *See* Victor Ferreres Comella, *The European model of constitutional review of legislation: Toward decentralization?* 2 INT'L J. OF CONSTITUTIONAL L. 461 (2004), who claims that the centralized model of constitutional review seems to be in crisis, facing both internal and external problems.

[46] ROBERTO M. UNGER, LAW IN MODERN SOCIETY. TOWARDS A CRITICISM OF SOCIAL THEORY 209 (1976), further explaining the problems and deficiencies of purposive argumentation.

[47] *See* Case 41/74 Yvonne van Duyn v. Home Office 1974 ECR 1337 [1997], paragraph 12 ("where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article 177, which empowers national courts to

Central European legal and judicial methodology, which approaches the ideal of mechanical jurisprudence, is radically modified and made more open to teleological argumentation, the application of community law might face serious obstacles from lawyers unable to reason about the law's rationale and purpose.

In addition, the use of legal principles can also be problematic. The more complicated and structured the legal system is, the more important is the role played by general principles of law, which provide the law with inner rationality and coherence. The general principles of law, such as the principle of proportionality, might also help to structure the legal discourse when a judge exercises judicial discretion. A judge adhering to the theory of limited law would have serious problems when applying European doctrines, which prescribe her to apply and balance abstract principles and other standards. The increased interest in legal principles that has been shown in post-communist legal scholarship can be explained also by this phenomenon.

For instance, a renowned Hungarian scholar, Csaba Varga, remarked that the transformation of a deformed 'socialist normativism' into a complex legal system of a modern democratic society leads to a fundamental revision in the traditionally conceived relation between law and statute (*Recht und Gesetz*). In his view, it is only through legal principles that the legal order can be sustained as a 'living entity.' The application of legal principles and other standards can turn what is prima facie a legal order characterized by conflicting rules into a rational system, able to respond appropriately to any individual legal question. This added element can introduce into the legal system a dynamic factor, on the basis of which law might be formed in a continual way.[48]

Let me give several examples of the use of legal principles in the application of European law. For instance, Article 30 of the EC Treaty (former Art. 36) as read by the ECJ[49] requires an extensive proportionality analysis of the justification for

refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provisions in question are capable of having direct effects on the relations between Member States and individuals."). *See* Joxerramon Bengoetxea, Neil MacCormick and Leonor M. Soriano, *Integration and Integrity in the Legal Reasoning of the European Court of Justice*, *in* THE EUROPEAN COURT OF JUSTICE 43-86 (Gráinne de Búrca & Joseph Weiler eds., 2001).

[48] *See* CSABA VARGA, TRANSITION TO RULE OF LAW / ON THE DEMOCRATIC TRANSFORMATION IN HUNGARY 86 (1995).

[49] However, *see* the description of this case law in joined Cases C-267 and C-268/91 Keck and Mithouard 1993 ECR I-6097 [1993].

quantitative restrictions on imports and exports and all measures having equivalent effect.[50] Considering the fact that post-communist judiciaries are not experienced in the use of such policy principles like the principle of proportionality, one might expect that they will face even more serious obstacles than those already encountered by the judiciaries of the old Member States.[51]

Or let us consider the established case law of the ECJ on the issue of the procedural autonomy of national judicial systems. That principle provides that, unless Community rules govern the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding directly effective Community law rights. However, such rules must not, inter alia, render virtually impossible or excessively difficult the exercise of rights conferred by Community law[52] (the principle of effectiveness). It is the ECJ's view that each case which raises the question of the principle of effectiveness must be analyzed by systemic and teleological arguments (by reference to the role that provision plays in the procedure, its progress and its special features, viewed as a whole, before the various national instances). In the light of that analysis, the basic principles of the domestic judicial system, such as protection of the rights of the defense, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration,[53] but most post-communist judges are unfamiliar with such matters.

Therefore, problems relating to interpretation, as reflected in judicial opinions, are likely to increase. In the face of the new rules provided by Community law, it is likely that the problems associated with the deficient style of Central European judicial opinions, in which judges are unable to address the arguments used in deciding the case, will become exacerbated. The ECJ has emphasized that a judge must decide a European issue in a way that satisfies the requirement that its legality under Community law can be reviewed and that the person concerned may ascertain the reasons for the decision.[54]

---

[50] *See* MIGUEL MADURO, WE THE COURT. THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION: A CRITICAL READING OF ARTICLE 30 OF THE EC TREATY (1998).

[51] On these difficulties *see e.g.* JARVIS *supra* note 29, 435.

[52] Case 33/76 Rewe v Landwirtschaftskammer für das Saarland 1976 ECR 1989 [1976], paragraph 5.

[53] Joined Cases C-430/93 and C-431/93 Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v Stichting Pensioenfonds voor Fysiotherapeuten 1995 ECR I-4705 [1995], paragraph 19.

[54] Case 222/86 Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others 1987 ECR 4097 [1987], paragraph 17.

It can be expected that problems will arise which are not unknown in other Member States,[55] such as the absence of justification for the non-referral of an issue to the ECJ by a domestic court of final appeal or the insufficient use of doctrines developed by the ECJ. In the post-communist atmosphere where the practice of judicial citation is underdeveloped, one cannot seriously expect proper references to ECJ precedents or other sources of law.[56]

The tendency of Central European lawyers to disregard persuasive arguments and soft law might also endanger the proper application of community law in the new Member States. I would say that, in many of its elements, EU law rests more on the idea of soft law than on hard law, the latter being associated with the classical conception of the dichotomy between binding/non-binding, applicable/non-applicable or valid/invalid, while the former views the same phenomena rather as points on a continuum. A typical example is the doctrine of indirect effect of European directives, which presupposes that directives do not have ('binding') direct horizontal effect, but gives them a sort of force in legal interpretation.[57] In other words, the ECJ understands that the law has an open texture and invites national judges to use this quality of the law in enforcing community rights in national legal system, as is shown by the reasoning of its key judgment on indirect effect:

"[T]he Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under article 5 [now 10] of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the Courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national Court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter …"[58]

---

[55] Bedanna Bapuly, *The Application of EC law in Austria*, IWE WORKING PAPERS SERIES No. 39, June 2003, *at* http://www.iwe.oeaw.ac.at/ , at 14-15 (visited May 23, 2004)

[56] *Id.* at 15, noting several Austrian examples.

[57] Case 14/83 Von Colson v Land Nordrhein-Westfalen 1984 ECR 1891 [1984] and Case C-106/89, Marleasing SA v La Commercial Internacional de Alimentation SA 1990 ECR I-4135 [1990]. *See* PRECHAL *supra* note 4, at 146 and 199.

[58] Case C-106/89, Marleasing SA v La Commercial Internacional de Alimentation SA 1990 ECR I-4135 [1990], paragraph 8 (referring to *Von Colson*).

However, Central European judges, not truly excited by the opportunities presented by the open texture of the law and suspicious of the use of persuasive discursive arguments (such as, that interpretation should conform to community law as far as possible), are not likely candidates to use such doctrines.

Similarly, they are not likely to make use of comparative argumentation in fields where it would prove of great value for their developing legal systems, for example in fields of purely domestic character, not formally harmonized by European law. In an integrating Europe, however, the very concept of law of 'a purely domestic character' is open to dispute.[59] All rules are at least potentially subject to becoming 'Europeanized', a fact which deprives national judges of the possibility to refuse to consider the solutions adopted in foreign legal systems. For instance, members of the Commission of European Contract Law expressly claim in their comparative project, incidentally patterned on the American Restatements of the Law,[60] that their work (Principles of European Contract Law) is 'available for the assistance of European courts and legislatures concerned to ensure the fruitful development of contract law on a Union-wide basis.'[61]

Another peculiar feature of the Community legal order is its non-dogmatic approach towards legal argumentation. The European discourse is not dogmatic, rather it is pragmatic and instrumental. Although this feature of the ECJ distinguishes it even from its Western European national counterparts,[62] it is striking how entirely different its approach is to that of Central European lawyers and above all judges, who still inhabit a realm governed by dogmatic textual positivism.

Inexperience with the application of international law brings yet another problem. One might plausibly argue that the proper application of community law is supported by having judges with previous experience with the application of some legal system other than municipal law. Those judges who are experienced in the application of international law understand that the application of rules of that legal system differs from the application of rules of a municipal legal system. Judges who have never applied any law other than municipal statutory rules are

[59] Klaus P. Berger, *The Harmonisation of European Contract Law, The Influence of Comparative Law*, 50 INT'L & COMP. L. Q. 877, 887 (2001).

[60] *See* Ole Lando, *The Principles of European Contract Law and American Legal Thinking*, in: LAW AND JUSTICE IN A MULTISTATE WORLD 741, 743 (James A.R. Nafziger/Symeon C. Symeonides eds., 2002).

[61] PRINCIPLES OF EUROPEAN CONTRACT LAW xxii (Ole Lando & Hugh Beale eds., 2nd ed., 2000).

[62] HESSELINK *supra* note 2, 48; generally THOMAS M.J. MÖLLERS, DIE ROLLE DES RECHTS IM RAHMEN DER EUROPÄISCHEN INTEGRATION (1999).

not the best candidates to start to enforce Community law with all its specifics and peculiarities. In fact, I expect we will encounter the 'domestification' of Community law via judicial action.

C. From Judicial Self-Restraint to Judicial Activism?

In fact, all previous comments relate to unduly self-restrained nature of Central European ordinary judiciaries. A prime example is Slovakia, where, as I have shown, judicial review of laws and regulations had been, until EU Enlargement, entirely centralized within the Constitutional Court. Suddenly, as of May 1, 2004, Slovak ordinary judges became the enforcers of European law within their national legal system, with the important power to set aside any national act in conflict with European law. While for Polish judges, at least those at two highest courts of the ordinary judiciary, this merely represents the extension of powers they already possessed, for Slovak judges, and to a lesser extent for other Central European ordinary judges, the supremacy of European law enforced in a decentralized way represents a paradigm shift. Moreover, when they begin to review their national government's policies against the backdrop of the principles of EU law, all judges will start to face new problems with a vast political impact.[63]

On the other hand, the empowerment of the judiciary via the European Enlargement might be considered a treatment for many problems described in this work. The ideology of bound judicial decision-making[64] is not likely to survive the challenge posed by the realities of an empowered judiciary; a new ideological description of the judicial function will be even more urgently needed. A kind of "spill-over" effect will probably occur as national judges slowly begin to make use of the new tools provided by EU law even in purely domestic cases. As in the old EU Member States, "the increasingly intensive penetration of a patulous Community law into the fabric of the domestic legal systems" will bring about "a dramatic alteration in the constitutional status of the national judicial authorities."[65] The use by national ordinary judges of their new competencies, above all the power

[63] Ami Barav, *Omnipotent Courts*, *in* INSTITUTIONAL DYNAMICS OF EUROPEAN INTEGRATION, ESSAYS IN HONOUR OF HENRY G. SCHERMERS, vol. II, 265 (Deirdre Curtin/Ton Heukels eds. 1994). Not all Western judges enjoyed the new powers they had gotten in the area of the application of community law. Some English judges hesitated or even openly protested the use of their power in some delicate matters of national policies. *Cf. id.*, at 300, quoting Hoffman J, according to whom "[i]n applying the Treaty as interpreted by the Court, the national court has to be aware of another division of powers: not between European and national jurisdiction, but between legislature and judiciary."

[64] *See* JERZY WROBLEWSKI, THE JUDICIAL APPLICATION OF LAW (1992).

[65] Barav s*upra* note 63, at 301.

to set aside national legislation through the decentralized judicial system,[66] will inevitably call for more sophisticated descriptions of the significance of precedent (whether or not it is recognized as having binding force), which is a precondition of any sensible application of community law in the EU.

When this phenomenon occurs to a considerable degree, serious discussion about the proper level of judicial self-restraint and the limits of the judicial function might start. Although such discussions have already begun in the region, it seems to me that so far they are primarily discussions among conservatives calling for maintaining the current level of judicial self-restraint and limited law, on the one hand, and those opposing the legal dogmas of the 19th century mixed with some persistent communist heritage, on the other hand. Judicial self-restraint of the sort that Central Europeans currently have, however, is not something that is worth conserving.

[66] *See* the foundational judgment of European decentralized judicial review, Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA (II), 1978 E.C.R. 629 [1987].

https://doi.org/10.1017/S207183220001381X Published online by Cambridge University Press