

SELECTED EU JUDGMENTS BY CEE CONSTITUTIONAL COURTS: LESSONS ON HOW (NOT) TO AMEND CONSTITUTIONS?

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Summary: The constitutions of the old and new Member States offer a wide range of models in terms of their adjustment for EU membership, with a number of them containing minimal or even no references to the EU. This paper highlights the importance of adequate amendments in light of selected recent judgments by the highest courts in Poland, Estonia and Latvia, where judges have found themselves in the rather vexed situation of having to find pragmatic solutions to ensure the constitutionality of legislation without jeopardising the supremacy of EC law. In this process, certain constitutional provisions that conflict with EC/EU law appear to have been put on hold, prompting the question of whether a move towards greater 'constitutional amorphousness' has tacitly been accepted by virtue of EU accession.

1. Introduction: Minimalism of constitutional amendments in CEE Member States

In the process of EU entry, it is incumbent upon the accession countries to align their legislation to the requirements of the wide-ranging *acquis communautaire*, under careful scrutiny by the EU. There is, however, one important legal instrument which appears to be virtually exempt from harmonisation: the national constitution. As a fundamental expression of state sovereignty, constitutions establish basic rules on the distribution of powers and decision-making within a state. States therefore hold the prerogative of determining whether and to what extent membership in the EU should be mentioned in their national constitutions. The latest enlargements, however, have offered some evidence of nascent inroads by the EU into national autonomy with regard to determining the content of constitutions. Examples include the European Commission's demands for amendment of constitutional provisions on the judiciary in Slovakia, Romania and Bulgaria, and for adjustment of the rules on the national

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currency in Estonia. However, core constitutional provisions on the organisation of powers and their transfer to the EU remain firmly within the remit of the Member States.

In the absence of unified EU requirements, national constitutions represent an area of law which, intriguingly, appears to be rather poorly adapted to EU membership. Of the constitutions of the 15 'old' Member States,¹ four offer no mention of the EU - the constitutions of the Netherlands, Luxembourg, Denmark and Spain. Indeed, Monica Claes has noted that, were an alien to land in these countries and read their constitutions, he might well fail to notice their EU membership altogether.² Three other constitutions - those of Finland, Belgium and (since 2001) Italy - accommodate the transfer of powers under a broader clause on international organisations, but make explicit references to the EU in relation to a limited number of specific issues. The third group, which best commends itself as a model for accession countries, consists of constitutions that contain explicit provisions on the delegation or transfer of powers to the European Union - those of France, Germany, Portugal, Ireland, Austria, Sweden and (after the 2001 reform) Greece. Besides the transfer clauses, most constitutions in this group contain further provisions dealing with specific aspects of EU membership, such as control by the national parliament over the government in the EU decision-making process, active and passive voting rights of EU citizens in local council elections in another Member State and elections for the European Parliament, and issues related to the Monetary Union.³

As regards the new Member States that joined the EU in 2004, the author has provided a detailed overview of the constitutional amendments elsewhere, characterising them broadly as minimalist for the reasons which follow.⁴ Firstly, in the majority of Central and Eastern European (CEE) countries, the amendments have been addressed to international organisations generally, rather than to the European Union explicitly. For instance, the new Article 10a of the Constitution of the Czech Republic provides that '[s]ome powers [...] may be transferred to an international organisation or institution'. Poland's 1997 Constitution provides that Poland may 'delegate to an international organisation or international institution the competence of organs of state authority in re-

¹ For a comparative overview, see M Claes, 'Constitutionalizing Europe at its Source: The "European Clauses" in the National Constitutions: Evolution and Typology' (2005) 24 YB Eur L 81-125. For accounts of individual countries, see the contributions published in AE Kellermann, J De Zwaan and J Czuczai (eds) *EU Enlargement: The Constitutional Impact at EU and National Level* (Asser Press, The Hague 2001).

² Claes (n 1) 107.

³ For details, see eg Claes (n 1) 81ff and A Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (CUP, Cambridge 2005) ch 2.

⁴ For details, see Albi, *EU Enlargement* (n 3) ch 5.

lation to certain matters' (Art 90(1)). The same approach has been taken in Latvia and Slovenia, although in Latvia a referendum for entry into the European Union was also specifically envisaged. Lithuania joined the EU under its existing provisions on international organisations (Art 136); a free-standing Constitutional Act on Lithuania's membership in the European Union was additionally adopted shortly after accession in July 2004, authorising the delegation of state competences to the EU. Only in Slovakia (Art 7(2)) and Hungary (Art 2A) did the provisions of constitutional amendments expressly address the European Union.

The second aspect of minimalism concerns the range of issues which led to the amendments. While a relatively extensive range of amendments were introduced in Slovakia, the Czech Republic, Slovenia and Hungary, in the remaining four CEE countries manifest conflicts with EU law in their constitutions were left unresolved, contrary to the advice of legal experts. In Latvia, Lithuania and Poland, however, the amendment process was to some extent resumed after accession, in the less politically charged post-referendum climate. Besides the delegation of powers, the following main issues have now been addressed in the constitutions of CEE Member States, together with their later amendments:⁵ the direct effect of the law of the EC⁶ or an 'international organisation';⁷ removal of the bans on buying real estate⁸ and on extradition;⁹ parliamentary control over government in EU affairs;¹⁰ the participation of EU citizens in local¹¹ and European Parliament elections;¹² facilitating the implementation of EU obligations;¹³ and the role of the national central bank.¹⁴ It should be noted that amend-

⁵ For details, see Albi, *EU Enlargement* (n 3) ch 5; tables with the text of the amendments are available on p 238ff.

⁶ Art 7(2) of the Slovak Constitution. A provision on the application of EU law was also introduced into Lithuania's Constitutional Act on EU Membership in July 2004.

⁷ Art 3a(3) of the Slovenian Constitution; Art 10 of the Czech Constitution; Art 91 of the Polish Constitution.

⁸ Art 68 of the Slovenian Constitution; Art 47 of the Lithuanian Constitution (as regards the purchase of agricultural land).

⁹ Art 47 of the Slovenian Constitution. In Latvia, such an amendment was introduced after accession in 2004; in Poland, an amendment was introduced in 2006, following the European Arrest Warrant case discussed in section 2.2 of this paper.

¹⁰ Art 3a(4) of the Slovenian Constitution; Art 10b of the Czech Constitution; Art 35A of the Hungarian Constitution. A provision on parliamentary control was also introduced into Lithuania's Constitutional Act on EU Membership in July 2004.

¹¹ Art 119 of the Lithuanian Constitution; Art 30(1) of the Slovak Constitution; Art 70(2) of the Hungarian Constitution. In Latvia, such an amendment was introduced after accession in 2004.

¹² Art 70(4) of the Hungarian Constitution.

¹³ Art 120(2) of the Slovak Constitution; this provision also permits the imposition of duties upon citizens by government decree. A provision on the implementation of EU obligations was also introduced into Lithuania's Constitutional Act on EU Membership in July 2004.

¹⁴ Art 32D(1) of the Hungarian Constitution.

ments in Romania and Bulgaria, the 2007 accession countries, appear to run counter to this minimalist trend. In October 2003 Romania adopted a remarkably comprehensive package of amendments addressed specifically to the EU. Central to this is the new Title V¹ on 'Euro-Atlantic Integration' (Art 145¹), which allows the transfer of 'certain powers' to Community institutions, provides for the application and precedence of EC law, and envisages parliament's control over the government in EU affairs. Elsewhere in the Romanian Constitution there are amendments concerning issues such as EU citizens' voting rights in local elections, the election of European Parliament members, the extradition of Romanian citizens, the right of non-nationals to acquire land, and the possibility of adopting the common currency. Bulgaria's constitutional amendments permit the country to 'participate in the establishment and development of the European Union', and additionally address issues such as the land ownership regime, the ban on the extradition of citizens, and the active and passive voting rights of EU citizens in local and European Parliament elections.

The third aspect, procedural minimalism, is specific to the Baltic countries. Here the amendment process proved rather difficult and controversial, because rigid constitutional amendment procedures required a referendum to amend the constitutional articles on sovereignty and independence. This requirement proved too challenging to comply with in the process of EU accession, against a background of public support for EU membership that was consistently the lowest among the candidate countries, while the issue of delegation of sovereignty sparked controversy due to these countries' recently regained independence. Estonia and Lithuania adopted free-standing constitutional acts rather than amendments to the texts of their constitutions, Lithuania doing so only after accession. Latvia created a special referendum for EU accession, with a reduced turnout requirement.

Overall, the amendments in Central and Eastern Europe may thus broadly be described as minimal, albeit in different respects in different countries, and with some improvements later in the post-accession period. As accession referendums were imminent at the time, it was probably essential to keep a low profile concerning constitutional revision, as a wider range of amendments could have fuelled the eurosceptics' outcries about loss of sovereignty. Additional reasons for minimal amendments included the sheer difficulty of amendment procedures in some countries and the prevalence of traditional theoretical views on sovereignty, which fed into the 'international organisation' approach.¹⁵

¹⁵ See Albi, *EU Enlargement* (n 3) 409ff. The prevalence of a traditional approach to sovereignty in the CEE countries has also been noted by A Sajó, 'Accession's Impact on Constitutionalism in the New Member States' in GA Bermann and K Pistor (eds), *Law and Governance in an Enlarged European Union* (Hart Publishing, Oxford 2004) 417.

While shortcomings in the adjustment of constitutions are, as seen above, a matter of national discretion, and will not trigger any sanctions from the EU, they do have at least two important ramifications for Member States' internal legal systems, which will be the main focus of this paper. Firstly, courts, and in particular constitutional courts, may find themselves in the rather vexed situation of having to find pragmatic solutions to ensure the constitutionality of legislation without jeopardising the supremacy of EC law. To this end, the paper will consider the Polish Constitutional Tribunal's European Arrest Warrant (EAW) decision,¹⁶ where national provisions implementing the European Arrest Warrant Framework Decision¹⁷ were annulled on the ground of their incompatibility with Article 55 of the Polish Constitution. This provision, which expressly prohibits the extradition of Polish nationals, had not been amended prior to EU accession, despite numerous calls to that effect. The Tribunal displayed considerable resourcefulness in granting the Polish Parliament an 18-month period during which extradition could continue while the Constitution was amended. In another decision to be considered here, the Tribunal was presented with 14 alleged conflicts between the Constitution and the Polish Accession Treaty.¹⁸ It will be seen that the Tribunal rejected all of these, at the same time making a strong statement about supremacy which has been perceived as representative of 'unconditional national constitutional sovereignty'.¹⁹ As Sadurski astutely notes, such a move, which displayed a striking contrast between its 'Euro-friendly' outcome and 'Europe-unfriendly' tone, was aimed at simultaneously reassuring several audiences, by placating political forces concerned about the surrender of sovereignty, on the one hand, while on the other ensuring compatibility with obligations arising from EU membership.²⁰ The paper will also consider judgments by the highest courts in Estonia and Latvia, where the courts had to gloss over certain questionable practices in the constitutional amendment procedure, due to the lack of any room to manoeuvre.

¹⁶ Wyrok z dnia 27 kwietnia 2005 r. Sygn. akt. P 1/05 [Judgment of 27 April 2005 in Case P 1/05]. A summary of the judgment is available in English on the Constitutional Tribunal's website: <www.trybunal.gov.pl/eng/summaries/documents/P_1_05_GB.pdf> accessed 1 August 2007.

¹⁷ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

¹⁸ Wyrok z dnia 11 maja 2005 r. Sygn. akt. K 18/04 [Judgment of 11 May 2005 in Case K 18/04]. A summary of the judgment is available in English on the Constitutional Tribunal's website: <www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf> accessed 1 August 2007.

¹⁹ D Chalmers et al, *European Union Law* (CUP, Cambridge 2006) 198 and 201.

²⁰ W Sadurski, "'Solange, Chapter 3": Constitutional Courts in Central Europe' (2006) EUI Law Working Paper 40 pp 22-23.

Examination of these cases will lead us to the second and more fundamental point, namely, whether a move towards greater 'constitutional amorphousness' has been tacitly accepted by virtue of EU accession. With constitutional courts glossing over clashes with EC/EU law in their quest to find pragmatic, EU-friendly solutions, it appears that the CEE Member States' constitutions, which have hitherto provided a robust basis for vigorous constitutional review frequently leading to annulments of incompatible national acts, may have partly been reduced to paper tigers, with provisions conflicting with EU law put on hold.

2. Constitutionality challenges in Poland

2.1. The Accession Treaty case: EU-friendly interpretation

By way of background to the case studies that follow, it should be mentioned that Poland adopted a new constitution in 1997, with Article 90(1) allowing the country to delegate certain competences to international organisations, and Article 91 establishing the direct effect and supremacy of ratified international agreements and EC secondary law.²¹ However, there were calls to amend the Polish Constitution prior to EU accession, so as to remove certain conflicts with regard to EC/EU law which might nonetheless arise.²² The problematic provisions included Article 62(1), under which voting rights in local elections are the preserve of Polish citizens; Article 227(1), which grants the National Bank of Poland the exclusive right to issue Polish currency; and Articles 52(4) and 55, which prohibit the extradition of Polish citizens. However, amending the Constitution would have posed the risk of strengthening nationalist anti-EU movements ahead of the accession referendum which was then imminent, with public support for accession already at a borderline 50 per cent. Furthermore, it would have been difficult to secure the necessary political support, as constitutional amendments required the approval of two parliamentary chambers, and involved the possibility of holding a referendum.²³

²¹ For more detail, see eg S Biernat, 'Constitutional Aspects of Poland's Future Membership in the European Union', (1998) 36 *Archiv des Völkerrechts* 398; J Barcz, 'Membership of Poland in the European Union in the Light of the Constitution of 2 April 1997' (1997-98) 23 *Polish Yearbook of International Law* 21; A Łazowski, 'Poland' in A Ott and K Inglis (eds), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (TMC Asser Press, The Hague 2002) 299.

²² See K Wojtowicz, 'Proposed Changes in the Polish Constitution of 1997 Ahead of Poland's Accession to the European Union' (2001) 25 *Polish Yearbook of International Law* 40-44 and S Biernat, 'The Openness of the Constitution of the Republic of Poland Towards European Integration' in G Amato, G Braibant and E Venizelos (eds), *The Constitutional Revision in Today's Europe* (Esperia Publications, London 2002) 439, 445ff.

²³ For more detail, see Biernat (n 22) 446ff.

It did not take long for the Constitutional Tribunal to be seized with regard to conflicts between these provisions and EC law. To begin with, in a case decided on 31 May 2004 a group of members of the *Sejm* (the lower house of the Polish Parliament) argued that the 2004 Act on Elections to the European Parliament was unconstitutional, since the participation of foreign nationals was in conflict with the principle of the sovereignty of the Polish people (Art 4(1) of the Constitution), as well as with clauses granting the right to vote to Polish citizens only. According to Article 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. In rejecting their claim,²⁴ the Constitutional Tribunal underlined the importance of the constitutional principle mandating an EU-friendly interpretation of national law. According to the Tribunal, '[when] interpreting legislation in force, account should be taken of the constitutional principle of favourable predisposition towards the process of European integration and the cooperation between States'.²⁵ According to the Tribunal, the Polish Constitution is the supreme act establishing the legal basis for the existence of the Polish State; however, it does not apply to structures other than the Polish State.²⁶ Under Articles 90(1) and (3) of the Constitution, in combination with the Accession Treaty, certain powers were delegated to the EU level; reviewing the acts of EU bodies is a matter for EU law, and Polish implementing provisions and the Constitution may not be deployed in order to review the constitutionality of political decision-making at the EU level.

A similar pragmatic approach followed in the Accession Treaty case.²⁷ The claimants, who came from among three political groups in the *Sejm* that were opposed to Poland's EU membership, argued that a number of provisions in the Accession Treaty and EC/EU Treaties were in conflict with the Polish Constitution, particularly with the constitutional principles of the sovereignty of the Polish people and the supremacy of the Constitution within Poland's legal system. The fourteen alleged conflicts arose, *inter alia*, from the right of EU citizens to vote and stand in both European Parliament and municipal elections, the adoption of the common currency, and changes affecting the separation of powers.

It is telling that the Tribunal dismissed all fourteen of these claims. As regards municipal elections, the Tribunal held that the aforementioned

²⁴ Judgment of 31 May 2004 in Case K 15/04. A summary of the judgment is available in English on the Constitutional Tribunal's website: <www.trybunal.gov.pl/eng/summaries/K_15_04_GB.pdf> accessed 1 August 2007.

²⁵ English summary of Judgment in Case K 15/04 (n 24) para 10.

²⁶ English summary of Judgment in Case K 15/04 (n 24) para 1.

²⁷ Judgment in Case K 18/04 (n 18).

Article 4 (on the sovereignty of the Polish people) does not encompass local elections, and that Article 62(1), which guarantees to Polish citizens the right to elect, *inter alia*, representatives to local self-government bodies, does not preclude the possibility of also according this right to citizens of other states. The Tribunal equally rejected the applicants' claim that the powers of the European Central Bank are in conflict with Article 227(1) of the Polish Constitution, which establishes the National Bank of Poland as the central bank of the state and vests in it the exclusive right to issue money and to formulate and implement monetary policy. This claim was rejected because Article 105 of the EC Treaty, which deals with these matters, is not of a self-executing nature. Importantly for the purposes of this paper, the Tribunal stated that when Poland adopts the common currency in the future, a decision may well be required to amend the Polish Constitution in this respect. Another interesting point was that the claimants also raised the issue of the constitutionality of potential future introduction of same-sex marriages, an issue that has generated much controversy in this strongly Catholic country. According to Article 18 of the Polish Constitution, marriage is a union between a man and woman. The Tribunal dismissed this claim by noting that the current wording of Article 13 EC does not pertain to the institution of marriage as such; any future change in this respect would, however, require amendment of the Polish Constitution.

The Tribunal also made a strong statement about the supremacy of the Polish Constitution, which has become the best-known part of this judgment. However, it is important to underline the fact that all of the claims above were rejected, as this demonstrates the Tribunal's endeavour to interpret national provisions in an EU-friendly way, even though at times its interpretation may appear rather far-fetched to an outside observer. The part of the decision concerning supremacy was closely conditioned by the Tribunal's decision in the European Arrest Warrant case, which was made two weeks before the Accession Treaty decision. In order to fully understand the Tribunal's statements on supremacy, we will first examine the EAW decision and then return to the supremacy aspect of the Accession Treaty decision.

2.2. The European Arrest Warrant decision: Limits to interpretation

The cases above having offered ample evidence of the Polish Tribunal's EU-friendly approach, the focus will now turn to the European Arrest Warrant decision,²⁸ where the Tribunal was confronted with a lack

²⁸ Judgment in Case P 1/05 (n 16). See A Łazowski, 'Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005' (2005) 1 *EuConst* 569, 573ff and K Kowalik-Barńczyk, 'Should We Polish It Up? The Polish

of manoeuvring space due to an unequivocal conflict with the national constitution. The case concerned Article 55(1) of the Polish Constitution, which provides in explicit and unconditional manner that '[t]he extradition of a Polish citizen shall be forbidden'. The Polish legislature transposed the European Arrest Warrant Framework Decision by amending the 1997 Penal Procedure Code in 2004,²⁹ without any accompanying amendment to the Constitution. Instead, a terminological distinction between 'extradition' and 'surrender' was employed, implying that the latter is not prohibited under Article 55(1) of the Constitution. However, the Regional Court of Gdańsk initiated proceedings before the Constitutional Tribunal to review whether the surrender of Polish citizen Maria D. to the Netherlands was compatible with Article 55(1) of the Constitution.³⁰

The Tribunal held that, despite numerous procedural differences between extradition and surrender, the two procedures are very similar in substance.³¹ Thus, according to the judges, the surrender procedure is but a variation on extradition, and the prohibition enshrined in Article 55 of the Constitution is, therefore, fully applicable to both procedures. Furthermore, the Constitutional Tribunal argued that a pro-European interpretation of this provision is not possible, as the principles of supremacy and indirect effect do not apply to third-pillar legislation (the *Pupino* decision had yet to be delivered by the ECJ³²), and in any event ECJ jurisprudence has placed limitations on the principle of indirect effect, especially as regards aggravating criminal liability.³³ As a consequence, the implementing provision in the Penal Procedure Code was declared unconstitutional. However, the Tribunal did not bar extradition, instead granting Parliament an 18-month transitional period during which the Constitution was to be amended, and the surrender of Polish nationals could continue.

Although this case concerned the third pillar, where EU law does not enjoy supremacy, the Tribunal's judgment is regarded as sitting somewhat uneasily with the *Pupino* judgment delivered shortly afterwards by the ECJ.³⁴ According to *Pupino*, the obligation of loyal cooperation under Article 10 of the EC Treaty and the principle of indirect effect do also

Constitutional Tribunal and the Idea of Supremacy of EU Law', (2005) 6 German Law Journal 1355 <www.germanlawjournal.org> accessed 1 August 2007.

²⁹ Ustawa z dnia 18 marca 2004 r. o zmianie ustawy - Kodeks karny, ustawy - Kodeks postępowania karnego oraz ustawy - Kodeks wykroczeń [Act Amending the Penal Code, the Criminal Procedure Code and the Minor Offences Code] [2004] *Dziennik Ustaw* 69 item 626.

³⁰ For information on the factual background, see Łazowski (n 28) 573ff.

³¹ See Łazowski (n 28) 574ff, especially 576-577.

³² See n 34 and accompanying text.

³³ See eg Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR I-3969.

³⁴ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-5285. For discussion, see Łazowski (n 28) 578ff.

apply to the third pillar; the Polish EAW decision had excluded indirect effect from this domain. However, these judgments could nonetheless be regarded as compatible, given that *Pupino* places certain limits on indirect effect, including the rule that indirect effect should not lead to *contra legem* interpretation. Indeed, given the Constitutional Tribunal's inability to interpret the Polish Constitution in light of the Framework Decision without going *contra legem*, it appears to have been permissible to grant priority to the Polish Constitution.

In any event, the 18-month transitional period it granted proves that the Tribunal essentially sought to ensure an EU-friendly, pragmatic approach,³⁵ especially in light of its previous case law considered above. Indeed, the Tribunal emphasised that the Polish legislature should 'give the highest priority' to ensuring the functioning of the EAW system.³⁶ Moreover, the explicit prohibition of extradition in the Constitution clearly left the Tribunal with no room to manoeuvre. As seen above, other provisions allowed a certain measure of interpretation, and indeed were interpreted by the Tribunal as either compatible with EC law (eg provisions on voting rights) or requiring amendment in a more distant future (eg provisions on the Central Bank in the event of Poland's adoption of the common currency). However, Article 55(1), which was formulated as a rule rather than a principle,³⁷ left the Court's hands rather tied.

The Polish decision can be further contextualised by comparing it with decisions by the constitutional courts of some other Member States, which have equally faced controversial issues and asserted their prerogatives with regard to the third pillar. Indeed, in November 2005 the Supreme Court of Cyprus annulled a national implementing law, based on reasoning that closely followed the Polish EAW decision.³⁸ In Germany, the Constitutional Court declared a national law implementing the European Arrest Warrant unconstitutional in July 2005, on the ground that the margins afforded by the Framework Decision on the European Arrest Warrant had not been exhausted in such a way as to ensure the highest possible consideration for the protection of fundamental rights.³⁹ Jan

³⁵ For a similar conclusion, see also Łazowski (n 28) 581; Kowalik-Bańczyk (n 28) 1360; J Komárek, 'European Constitutionalism and the European Arrest Warrant: Contrapunctual Principles in Disharmony' (2005) Jean Monnet WP 10 pp 13-14 <www.jeanmonnetprogram.org>. However, Sadurski notes that the overall tenor of the EAW decision was 'We really hate what we are doing, but we have no choice'; see Sadurski (n 20) 24.

³⁶ English summary of Judgment in Case P 1/05 (n 16) para 17.

³⁷ See Komárek (n 35) 12.

³⁸ Judgment of 7 November 2005, Ap No 294/2005 (English summary on file with the author).

³⁹ Judgment of 18 July 2005, 2 BvR 2236/04. For a summary in English, see Press Release No 64/2005 of 18 July 2005 on the Court's website: <www.bverfg.de/bverfg/cgi/pressemitteilungen/frames/bvg05-064e> accessed 1 August 2007.

Komárek has observed that the Polish Tribunal acted in a much more pro-European way than did its German counterpart: firstly, the latter was not forced to decide on an explicit conflict between Germany's Basic Law and a provision of EU law; and, secondly, whereas the Polish Tribunal had used all its powers to avoid the negative consequences of such a conflict, the German court was not quite so cautious about the consequences of its judgment for the European legal order.⁴⁰ Cases concerning an alleged conflict between national constitutions and obligations arising from the Framework Decision have also been brought before the constitutional courts of Spain⁴¹ and the Czech Republic.⁴² In addition, the ECJ was seized with a question on the validity of the EAW Framework Decision itself. The Belgian *Cour d'Arbitrage* made a preliminary reference concerning the legal basis of the Framework Decision and the compatibility with fundamental rights of abolishing the dual criminality rule; the ECJ upheld the legality of the measure.⁴³

Against this background, the Tribunal went on to emphasise, in the previously discussed Accession Treaty decision that followed two weeks later,⁴⁴ that in some cases limits to interpretation may exist. In this decision, the Tribunal began by reiterating the requirement 'to respect and be sympathetically predisposed towards appropriately shaped regulations of international law binding upon the Republic of Poland', in line with Article 9 of the Constitution.⁴⁵ Moreover, the Tribunal developed a version of the pluralist approach to relations between EC and national law, stating that, unlike traditional dualism and monism, EC law has created a new situation 'wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative'.⁴⁶ It also underscored the assumption of mutual loyalty between EC/EU institutions and the Member States, which creates 'a duty for the Member States to show the highest standard of respect for Community norms', but also 'a duty for the ECJ to be sympathetically disposed towards the national legal systems'.⁴⁷

⁴⁰ Komárek (n 35) 5 and 14.

⁴¹ Cases Nos RA 3865-2004, RA 3865-2004, RA 4760-2004, RA 3988-2005 and RA 3988-2005.

⁴² Case No Pl. ÚS 66/04. English translation available at: <http://test.concourt.cz/angl_verze/doc/pl-66-04.html> accessed 1 October 2007. The Czech Constitutional Court decided the case on 3 May 2006, finding that Article 14(4) of the Czech Charter of Fundamental Rights, which prohibits forcing Czech citizens to leave their homeland, does not preclude the temporary surrender of Czech citizens under the EAW, thus interpreting this provision in conformity with EU obligations.

⁴³ Case C-303/05 *Advocaten voor de Wereld* (ECJ 3 May 2007).

⁴⁴ Judgment in Case K 18/04 (n 18).

⁴⁵ English summary of Judgment in Case K 18/04 (n 18) para 10.

⁴⁶ *Ibid* para 12.

⁴⁷ *Ibid* para 16.

However, it then went on to state that, under the explicit wording of Article 8(1) of the Polish Constitution, the Constitution remains supreme, and that there are limits to interpreting domestic legislation in a manner sympathetic to European law.⁴⁸ In certain circumstances, an irreconcilable inconsistency may emerge between a constitutional norm and a Community norm, which cannot be removed by means of interpretation.⁴⁹ Such cases cannot lead to the constitutional norm losing its binding force (eg norms protecting fundamental rights), or applying only to areas outside the scope of Community law. In the case of such explicit conflicts, Parliament must decide on the appropriate manner of resolving the inconsistency, with three options at its disposal: amendment of the Constitution, renegotiation of the EU measure, or, ultimately, Poland's withdrawal from the Union.⁵⁰

The EAW decision shows us the importance for other institutional actors to take their role in 'cooperative constitutionalism' seriously. Since there were genuine limits to interpretation, the Tribunal sent a clear message to Parliament to amend the Constitution. As Komárek puts it,

the question will shift from who [...] *the final arbiter* in the EU legal order is [...] to what *the limits of law* are. In other words, we will have to ask different questions: to what extent the conflict can be decided by the courts (and by their interpretation of law) and what should be left to the other constitutional discourse actors, these actors being not only politicians, but also the legal/constitutional doctrine and the public at large.⁵¹

Indeed, as seen above, several other new Member States had amended their constitutions in order to accommodate the European Arrest Warrant system. As a matter of fact, in the follow-up to the EAW decision the Polish president submitted a bill on revision of Article 55 of the Polish Constitution, according to which the extradition ban was to be maintained, subject, however, to the exceptions set forth in international treaties. This amendment was adopted on 8 September 2006.

3. Estonia and Latvia: Cases contesting the constitutional amendment procedure

Apart from Poland, the adequacy of constitutional amendments has also been addressed by the highest courts in Estonia and Latvia, where

⁴⁸ Ibid para 14.

⁴⁹ Ibid para 13.

⁵⁰ Ibid para 13.

⁵¹ Komárek (n 35) 25.

not only the substance of constitutional provisions but also the very means of amending the constitution had been contested.

3.1. Estonia

As in Poland, there had been calls from various quarters in Estonia to amend certain provisions of the national constitution prior to accession, most authoritatively by the Constitutional Expert Commission in 1998.⁵² These included Article 1 of the Constitution, which declares the eternity and inalienability of Estonia's sovereignty and independence; Article 48, which reserves membership in political parties to Estonian citizens; and Article 111, according to which the Bank of Estonia has the exclusive right to emit Estonia's currency. However, due to low public support for EU membership in the years preceding the accession referendum, and the extremely arduous constitutional amendment procedure, amending the Constitution became a political rather than a legal issue, with the question of amending Article 1 increasingly exploited by eurosceptic movements. Against this backdrop, then-Prime Minister Mart Laar expressed uncertainty as to whether a constitutional amendment was necessary at all,⁵³ and it was unclear until 2001 whether a referendum would be held. Eventually the Constitution was, strictly speaking, not amended but rather 'supplemented' by a separate Act Supplementing the Constitution⁵⁴ (hereinafter the 'Supplementing Act'). The Act laconically authorises Estonia's membership in the EU (Art 1) and states that the Constitution is to be 'applied, taking into consideration the rights and obligations deriving from the Accession Treaty' (Art 2). The Act was approved in a referendum on 14 September 2003, in which two referendums – on accession and on 'supplementing' the Constitution – were fused into one, following an amendment to the Referendum Act. According to the accompanying media coverage, no harm to Estonia's sovereignty was posed by the Act.⁵⁵

A number of constitutional complaints were brought to the Constitutional Review Chamber of the Supreme Court, with regard to both the means of constitutional revision and substantive conflicts with EC law. As regards the former, nine cases in total were brought to the Supreme

⁵² Constitutional Expert Commission, 'Potential Accession to the European Union and its Consequences for Estonian Constitutional Law' (Tallinn, 1998) (in Estonian; on file with the author).

⁵³ Parliamentary session of 18 January 2001.

⁵⁴ Act Supplementing the Constitution (2003) 64 RT I (*Riigi Teataja* - Official Gazette) 429.

⁵⁵ Ü Mattheus, 'The Revisers of the Constitution Are Not Afraid of Harming Estonia's Sovereignty' *Raadio Vaba Euroopa Online* (16 May 2002) <www.vabaeuroopa.org> (in Estonian).

Court following the accession referendum.⁵⁶ In essence, these claimed that (a) the Constitution only allows 'amendment' of its text, not its 'supplementation' by a separate act; (b) it is impossible to retain 'eternal and inalienable independence' (Art 1 of the Constitution), while transferring part of it to the European Union, and thus the referendum question contained two mutually exclusive parts; (c) ratification of the Accession Treaty was unconstitutional, as it should have been preceded by amendment of Article 1 of the Constitution (which in turn would require a referendum); and (d) the new type of referendum was incompatible with the Constitution and the Referendum Act. All these claims were rejected by the Constitutional Review Chamber on procedural grounds.

While these cases appear to have been based on legitimate grounds deriving from the national constitution, their outcome reflects the pragmatic efforts of judges in a very small Member State not to 'rock the boat', given their new role as European as well as national judges. Although the Supplementing Act should inevitably be seen in the context of geopolitical and economic imperatives for joining the EU, some broader questions have been raised about the correctness of such a solution.⁵⁷ This criticism pertains in particular to the potential devaluation of Estonia's clear, directly applicable and up-to-date Constitution; the circumvention of rigid amendment procedures; and the failure to demarcate the EU's influence on the exercise of constitutional powers and to remove manifest conflicts between the Constitution and EU law.

As regards substantive conflicts with EC law, the Constitutional Review Chamber was seized in April 2005 with a case regarding the electoral rights of EU citizens.⁵⁸ In this case, the Chancellor of Justice⁵⁹ claimed that a provision of the Political Parties Act,⁶⁰ confining eligibility for membership in political parties to Estonian citizens only, was unconstitutional pursuant to the aforementioned Article 48 of the Constitution and the Supplementing Act, as well as in conflict with Article 19 of the

⁵⁶ Eg Decision No 3-4-1-11-03 of 24 September 2003 *Vilu and Estonian Voters Union* and Decision No 3-4-1-12-03 of 29 September 2003 *Kulbok* <www.nc.ee> accessed 1 August 2007.

⁵⁷ Eg in newspaper articles by A Jõks (Legal Chancellor) and R Maruste (Judge at the European Court of Human Rights) and in 'Joint Public Statement Concerning the Constitutional Problems of the Third Constitutional Act' (2002) 5 *Juridica* 352-353 (in Estonian).

⁵⁸ Decision No 3-4-1-1-05 of 19 April 2005 on the Electoral Law <www.nc.ee> accessed 1 August 2007.

⁵⁹ The Chancellor of Justice is an institution similar to an ombudsman; he has the right to initiate constitutional review proceedings in the Constitutional Review Chamber of the Supreme Court.

⁶⁰ Political Parties Act (1994) 40 RT I 654 and (2003) 90 RT I 601.

EC Treaty.⁶¹ Namely, the contested provision would not, in effect, ensure equal opportunities for an EU citizen standing as a candidate in local elections. The petition was dismissed on procedural grounds: there was no legal basis for declaring a national law invalid *in abstracto* on the ground of a conflict with EC law. Despite the applicant's reference to constitutional norms, the Court held that the provision had, in essence, been contested on the ground of its compatibility with EC law. In addition, the Court pointed out, with reference to the ECJ's decision in *IN.CO.GE.'90*,⁶² that a national act which conflicts with EC law could simply be set aside in a specific dispute. The Supreme Court's decision was criticised in a dissenting opinion, which argued that the Court should have requested a preliminary ruling from the ECJ on interpretation of Article 19 EC, so as to ascertain whether this article includes the right to membership in political parties. The dissenting opinion also expressed regret that Estonia's highest court had not seized the opportunity to explain the meaning and implications of the Supplementing Act and, in so doing, to enhance legal certainty.

The Supreme Court's decision appears to convey a measure of uneasiness with regard to the meaning and place of the Supplementing Act in the Estonian constitutional order. At the time of its adoption, the Act had provoked considerable controversy among lawyers.⁶³ It seems as if the judges deliberately refused to take a stance on the Act, which was widely perceived as a political compromise in order to make EU accession possible. As in the Polish European Arrest Warrant case, the Constitutional Review Chamber thus sent a message to Estonia's Parliament, suggesting that it might wish to adopt clear legislative provisions on this matter. According to the Constitutional Review Chamber:

The legislator is competent to decide whether it wants to regulate the procedure for declaring invalid Estonian legislation which is in conflict with European Union law, just as the legislator is free to choose whether it will or will not give the Chancellor of Justice the right to review the conformity of national legislation with European Union law.

One year later, however, the Constitutional Chamber was nonetheless forced to clarify the meaning of the Supplementing Act, following Parliament's express request relating to the aforementioned Article 111

⁶¹ Art 19 EC provides for the right of EU citizens to vote and stand in European Parliament and municipal elections when residing in another Member State.

⁶² Joined Cases C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE.'90 Srl* [1998] ECR I-6307.

⁶³ For details see Albi, *EU Enlargement* (n 3) 91.

of the Constitution, according to which the Bank of Estonia has the exclusive right to issue Estonian currency. The European Commission had earlier called on the Estonian Government to amend the Article; however, the Government insisted that Article 111 did not constitute an obstacle to adopting the common currency, when read together with the Supplementing Act. The Constitutional Chamber upheld this view in its opinion of 11 May 2006,⁶⁴ stating that the Draft Act Amending the Bank of Estonia Act, which made preparatory arrangements for eventual adoption of the euro, was compatible with the Constitution. In addition, the Court also directly addressed the position of the Supplementing Act in the context of the supremacy of EC law, stating that the text of the Constitution should be read together with the Supplementing Act, and that those parts of the Constitution incompatible with EC law should not be applied. By virtue of this statement, the Court appears, in fact, to have granted unconditional supremacy to EC law.

It should be noted that, following the numerous controversies surrounding the role of the Supplementing Act in Estonia's constitutional order, an increasing number of prominent lawyers and politicians have called for a wider EU-related amendment package, to be introduced directly into the text of the Constitution, or even for the adoption of a new constitution.

3.2. Latvia

The Latvian Constitutional Court has likewise had to address cases pertaining to the correctness of the means by which Latvia's Constitution was amended in view of EU accession, and has taken an equally pragmatic approach. As in Estonia (and also Lithuania), in Latvia the Constitution requires a referendum to amend its Articles 1 and 2 on sovereignty and independence. However, due to concerns similar to those in Estonia, the amendment was carried out by way of parliamentary procedure in May 2003. The amended Article 68 allows Latvia to delegate part of its competences to 'international institutions'. In addition, a new type of referendum was introduced for EU accession: whereas a constitutional amendment referendum requires, under Article 79, a minimum turnout of 50 percent, the new EU referendum merely required the participation of at least half the number of voters who participated in the previous parliamentary elections, of whom a majority had to vote in favour. A referendum was also envisaged for 'substantial changes' in the terms of membership; this expression was meant to include potential secession from the EU. Such a move rested on the argument that no harm to the

⁶⁴ Opinion No 3-4-1-3-06 on the interpretation of Article 111 <www.nc.ee> accessed 1 August 2007.

principles of sovereignty and independence, established in Articles 1 and 2 of the Constitution, would ensue from EU accession.⁶⁵ However, scholars argued that a wider constitutional revision was necessary,⁶⁶ particularly as regards enabling the extradition of Latvian citizens and granting EU citizens the right to vote in municipal elections. Amendment of these issues did indeed follow after Latvia's accession.

This method of constitutional amendment prompted the submission of five petitions to the Constitutional Court in November 2003,⁶⁷ claiming that Parliament was not authorised to adopt these amendments without prior amendment of Articles 1 and 2 of the Constitution. The petitions contested the constitutionality of both the amendments and the accession referendum, as well as of the Accession Treaty. The Constitutional Court declared the petitions inadmissible on the ground that the applicants had failed to substantiate a violation of their fundamental rights under the Constitution. It also noted that the choice of constitutional amendment procedure rested with Parliament, the Court having no competence to assess the conformity of one norm of the Constitution with another or with the Constitution as a whole. When a norm has been incorporated into the Constitution, it forms an integral part thereof and enjoys the corresponding legal force.⁶⁸

4. Towards 'constitutional amorphousness'?

Discourse on the reception of the supremacy of EC law in national law has predominantly focused on 'judicial dialogues'⁶⁹ and 'cooperative constitutionalism',⁷⁰ with national courts and the ECJ engaging in structured dialogue and cooperation to resolve issues pertaining to the

⁶⁵ Ministry of Justice of the Republic of Latvia, *The Theoretical Foundation of Amendments to Satversme Proposed by the Working Group* (Riga, 2001) 6ff.

⁶⁶ Reported in A Usačka, 'The Impact of the European Integration Process on the Constitution of Latvia' in Kellermann et al (n 1) 343-344.

⁶⁷ The registration numbers for these cases are 119-123/2003. The decisions of inadmissibility are not available in English. They are summarised in A Endzins, 'Constitutional Court of the Republic of Latvia' in *The Position of Constitutional Courts Following Integration into the European Union*, proceedings of the conference held in Bled, Slovenia (30 September - 2 October 2004) 214-215.

⁶⁸ See summary of the decisions in Endzins (n 67) 214-215.

⁶⁹ See A Stone Sweet, 'Constitutional Dialogues in the European Community' in AM Slaughter, A Stone Sweet and JHH Weiler (eds), *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in Its Social Context* (Hart Publishing, Oxford 1998) 325-326.

⁷⁰ See A Sajó, 'Learning Co-operative Constitutionalism the Hard Way: The Hungarian Constitutional Court Shying Away from EU Supremacy' (2004) *Zeitschrift für Staats- und Europawissenschaften* 351.

relationship between Community and national legal orders.⁷¹ The cases considered in this paper demonstrate that, in certain situations, genuine limits to EU-friendly interpretation may well exist, and that in such cases courts in CEE Member States have instead engaged in dialogue with national parliaments regarding the need to remove manifest conflicts with EU law from national constitutions.⁷² Indeed, in a number of cases in both old and new Member States where a conflict between EC law and national constitutional law has narrowly been averted, constitutional courts appear to have been saddled with an unduly high burden in seeking a pragmatic solution. With the courts' hands thus tied by the constraints of EU membership, the role of political institutions, especially parliaments, assumes particular importance with regard to exercising self-control and extra prudence when drafting constitutional amendments. Furthermore, action at the political rather than the judicial level is also mandated by concerns about legal certainty and clarity for citizens, as well as broader concerns about legitimacy.

Such a change in focus is also warranted if the constitutional culture which prevailed prior to EU accession is to be sustained. The judgments considered in this paper, while taking a favourable approach towards participation in the European Union, seem to reinforce concerns that had been voiced earlier regarding a certain degree of devaluation of the constitutions in Central and Eastern European countries in the process of European integration.⁷³ Constitutions in general have been classified according to two main types, 'historic' and 'revolutionary'.⁷⁴ The former, which include the British and Dutch constitutions, for example, have developed incrementally over a long-term period; they are non-formalistic, and at least as much political as legal by nature. In contrast, 'revolutionary' constitutions, including those of Germany, Italy, France and Ireland, tend to have originated in a political or social cataclysm that forms the 'moving myth' which inspires them; these constitutions represent a political reality, and tend to have a distinctly legal character enforced by constitutional courts.⁷⁵ The constitutions of Central and Eastern Europe belong to the second group. As a reaction to the Communist period, marked by a nihilistic attitude to constitutional rules, they have a distinctly legal

⁷¹ For a more detailed account, see M Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing, Oxford 2006).

⁷² For further cases, including the Hungarian Constitutional Court's sugar stocks case of 2004, see Albi, 'Supremacy of EC Law' (preliminary footnote to this paper).

⁷³ See Albi, *EU Enlargement* (n 3) 114ff.

⁷⁴ See L Besselink, 'The Dutch Constitution, the European Constitution and the Referendum in the Netherlands' in A Albi and J Ziller (eds), *The European Constitution and National Constitutions: Ratification and Beyond* (Kluwer, The Hague 2006) 113ff.

⁷⁵ *Ibid.*

character, are relatively lengthy and detailed, and their observance is rigorously policed by powerful constitutional courts, with a high ratio of annulment of legislative acts.⁷⁶ In the process of accession, EU amendments to a number of these constitutions remained substantially and/or procedurally minimal, whereas equivalent changes in domestic aspects of governance would normally have led to corresponding constitutional amendments. This prompts the question of whether constitutions continue to be 'taken seriously' in CEE.⁷⁷

Concerns about a 'European deficit' have also been raised with regard to the constitutions of 'old' Member States, a number of which, as seen above, contain no or only minimal references to the EU, and might thus gradually become somewhat obsolete in terms of the real exercise of powers.⁷⁸ As Claes notes, '[t]he way in which European integration is dealt with in the constitutional texts [of the old Member States] is often disappointing, often inconsistent, at times downright clumsy [...] and in many cases underdeveloped'.⁷⁹ In Denmark, where in 2007 the Constitution still contains no explicit mention of the EU, and courts rarely exercise constitutional review, Hjalte Rasmussen has noted a trend towards 'waning constitutionalism' and 'constitutional amorphousness'.⁸⁰ Such constitutions have rightly prompted the following comment by Claes:⁸¹

The least that can be said is that these States may not be taking their own Constitution seriously, and that they may not do justice to the functions of a constitutional document, which is, among others, to constitute the polity. To omit the EU and the State's participation in it from the national Constitution can even be considered a devaluation of the national Constitution, and [an] expression of carelessness as regards the supposed most fundamental norm of the polity.

Against this background, a country such as Croatia, which is considering various routes for constitutional amendment in view of EU accession, would be well advised to exercise its discretion in favour of those models in which constitutions contain a wider set of provisions addressing the EU specifically, rather than membership in international organi-

⁷⁶ This argument has been developed in more detail in Albi, *EU Enlargement* (n 3) 22ff. See also E Smith, 'The Constitution as an Instrument of Change: Introduction' in E Smith (ed), *The Constitution as an Instrument of Change* (SNS Förlag, Stockholm 2003) 15ff.

⁷⁷ Albi, *EU Enlargement* (n 3) 114ff.

⁷⁸ B De Witte, 'Constitutional Aspects of European Union Membership in the Original Six Member States: Model Solutions for the Applicant Countries?' in Kellermann et al (n 1) 73.

⁷⁹ Claes (n 1) 124.

⁸⁰ H Rasmussen, 'Denmark's Waning Constitutionalism and Article 20 of the Constitution on Transfer of Sovereignty' in Albi and Ziller (n 74) 149-156.

⁸¹ Claes (n 1) 124.

sations in general. The constitutions of Germany, France, Portugal and, among the new Member States, Slovakia and Romania are particularly well suited to offer such examples. It is worth bearing in mind that 'there is life after accession',⁸² and that, more fundamentally, the broader nature and credibility of a constitution may well be at stake when choosing the course of action.

⁸² Comment by M Claes at the Zagreb University conference mentioned in the preliminary footnote to this paper.