Europe, communism operated differently and was received differently by elites and populations, while relations between these countries and the Soviet Union also varied. Countries like Hungary after 1956, Czechoslovakia after 1968, Poland from 1945, the German Democratic Republic (GDR), Romania and Bulgaria were all distinct in the way in which the communist system(s) operated, the way they were perceived by elites and populations and the way these communist states interacted with the Soviet Union. They were all sovereign states but subject to limited sovereignty by virtue of the *Brezhnev* doctrine.[12]

Briefly stated, the *Brezhnev* doctrine was embedded in Article 30 of the 1977 Soviet Constitution (the so-called "*Brezhnev* Constitution"), which committed the Soviet Union to "friendship, cooperation and comradely mutual assistance" in accordance with the principle of "socialist internationalism" and also to participate in "economic integration". Accordingly, important principles of equality, territorial integrity, independence, non-interference in domestic affairs were subject to particular interpretation in the interests of "fraternal assistance" towards other Eastern bloc countries. In other words, support for Soviet interventionism was justified on the grounds of the need to protect the socialist community of states. This self-imposed limitation on state sovereignty in the socialist bloc was a device to cloak Soviet interventionism to sustain its hegemony in Eastern Europe, and in particular its military occupation of the German Democratic Republic.[13] The Soviet Union, as its interventions in Hungary and Czechoslovakia illustrate, was unable to accept a "national" form of communism. To do so would have called into question its hegemony over the socialist bloc and even its leadership of the Warsaw Pact.[14] Consequently, in the aftermath of the crushing of the Hungarian revolution of 1956, the Soviet Union imposed a doctrine of limited sovereignty on the socialist bloc of

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[12] For a discussion of the Brezhnev doctrine and its demise under Gorbachev see Charles Gati, *The Bloc that Failed Soviet-East European Relations in Transition*, (Bloomington: Indiana University Press, 1990) at pp. 71–79. For an exposition of the doctrine in Brezhnev's own words see the extract from his "Speech to the Fifth Congress of the Polish United Workers Party" (November 12, 1968), *Current Digest of the Soviet Press* 20 (46), 1968 at pp. 3–5.

[13] The Soviet military interventions in Hungary in 1956, Czechoslovakia in 1968, Afghanistan in 1979, and the pressures on Poland in 1980, were seen as legitimate measures to defend the socialist bloc. Those socialist states which did not accede to the hegemony of the Soviet Union, such as Yugoslavia (which broke with Moscow under Tito in 1948) and Albania, were isolated on the grounds that they had pursued the road of "nationalism"—the ultimate form of deviation from the socialist cause. Note that a "special relationship" which was maintained until the end as the discussions between Gorbachev and Honecker illustrate. See Daniel Küchenmeister (ed.)*, Honecker-Gorbatschow. Vieraugengespräche*, (Berlin: Dietz 1993) at pp. 92–93. See also Hagen Schulze, *Staat und Nation in der Europäischen Geschichte*, (München: Beck 1994), at p. 323.

[14] *Ibid*.

states, which was referred to as "proletarian internationalism".[15] Thereafter, any development of national forms of communism which was perceived to threaten Soviet hegemony was met with the "fraternal assistance"[16] of military intervention, as the Warsaw pact invasion of Czechoslovakia in 1968 demonstrated. This so-called *pax sovietica* was also secured by a process of integration in the socialist bloc whereby ruling elites (the communist party nomenklatura), economies, militaries, and national interests were locked into Soviet controlled supranational organizations such as Comecon and the Warsaw Pact.

It is of interest to note that a model for the special relationship or the "fraternal assistance" between the countries of the Soviet bloc and the Soviet Communist party was never explicitly addressed nor was it developed. In the case of the German Democratic Republic, for instance, it was placed on a legal footing in a 1964 Treaty[17] which dealt with the event of any attack of force by another country.[18] Indeed, the Treaty goes further in providing that if any state which was a signatory to the Warsaw Pact had come under attack, the others were obligated to give immediate support[19] to each other through economic aid and the exchange of economic and technical know-how. The relationship between the GDR and the USSR is viewed in the West as one of forced dependency or a *Zwangsverhältnis*. The relationship was not regulated by transparent legal norms or the courts, but by non-transparent formal and informal agreements of communist party leaderships.

Some countries had room for maneuver under the shadow of the *Brezhnev* doctrine which others did not. The three Baltic States (Latvia, Lithuania and Estonia) were units in the Soviet Federation after their annexation. The reality was that there were important differences regarding how the Soviet Union treated them and the other members of the Soviet bloc in terms of their sovereignty. Poland, for example, had privatized agriculture (other Communist countries had socialized

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15 As proclaimed in Moscow in October 1957 in the declaration of the communist parties in power to commemorate the 40th anniversary of the October 1917 Russian Revolution. The full text of "the twelve" is reproduced in *The Communist Manifesto and Related Documents* in Dan N Jacobs (ed.), 2nd edn., (New York: Harpertorch Books 1962) at p. 176.

16 Referred to as "comradely cooperation" in the Czechoslovak Constitution (article 14 (2) at 145), "friendship and cooperation" in the Polish Constitution (article 6 (2)) and "friendship, cooperation, and mutual assistance" in the Bulgarian Constitution (article 3 (1) *supra* n. 15).

17 Vertrag über Freundschaft, gegenseitigen Beistand und Zusammenarbeit zwischen der Deutschen Demokratischen Republik und der Union der Sozialistischen Sowjetunion vom 12 Juni 1964 (GB1. IS. 132).

18 *Ibid*.

19 See Article 5 of the Vertrag über Freundschaft, gegenseitigen Beistand und Zusammenarbeit zwischen der Deutschen Demokratischen Republik und der Union der Sozialistischen Sowjetunion vom 12 Juni 1964 (GBl. IS. 132).

collective farming),[20] the Catholic Church in Poland operated in a less constrained way than Orthodox or Protestant churches elsewhere. Indeed, the legacy of the Catholic Church's political leverage during communism is still felt today as the discussions concerning abortion and the EU Charter of Fundamental Rights in Poland testify. From the early 1960s, Hungary was allowed to introduce into the socialist market limited decentralized reforms in the economy and privatization. The country whose sovereignty was most limited was that of the (GDR) which was a country under military occupation[21] thereby illustrating the extent to which the Soviet Union both adopted and implemented a differentiated approach.[22]

It would be as erroneous to view the CEECs in a non-differentiated manner under the mantle of communism, and what came next, the period of transition which arose as a consequence of post-communism after 1989.[23] Indeed, the transition period was also differentiated, as illustrated by, for instance, the diverse and respective experiences of the roundtable talks between regimes and oppositional groups that took place in 1988 and 1990.[24] In the case of the GDR, for example, the very existence of the state was at the heart of the deliberations.[25] This was in direct contrast to the position of the other countries involved in roundtable talks. The Baltic States, for their part, claimed independence and, in terms of sovereignty, aspired to a return to the status quo which existed prior to 1946. In the case of Poland, the agenda of the initial talks did not include a revision of the constitution or the introduction of political democracy.[26]

The formation of a market economy necessitates the implementation of certain preconditions—both institutional and extra-institutional. The experience of the relatively quick transition of Spain, Portugal and Greece provide useful examples, although of limited use as analogies.[27] As regards the CEECs, this has involved a complete and systematic overhaul of *inter alia* regulations, the way in which

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[20] See David Stark, 'Path Dependence and Privatisation Strategies in East Central Europe', *East European Politics and Societies*, 6 (1992), p. 17 for an excellent typology of Central and Eastern European privatization strategies.

[21] See Miriam Aziz, "Sovereignty Über Alles: (Re)Configuring the German Legal Order" in Walker, above n. 11 at p. 279.

[22] See generally Gianmaria Ajani, *Diritto Dell'Europa Orientale*, (Torino: Unione Tipografico-Editrice Torinese 1996).

[23] See Jon Elster, Claus Offe and Ulrich K. Preuß (eds.), *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge: University Press 1998).

[24] Jon Elster (ed.), *The Roundtable Talks and the Breakdown of Communism*, (Chicago: University Press 1996).

[25] See Ulrich K. Preuß, "The Roundtable Talks in the German Democratic Republic" in Elster, *op. cit.* n. 24 at pp. 99–134.

[26] Instead, the idea was to obtain official recognition of Solidarity in exchange for Western Aid and Solidarity's support of the economic reforms that the government deemed necessary.

[27] See the Country Reports for Spain, Portugal and Greece in Luca Mezzeti (ed.), *Costituzione Economica e Libertà di Concurrenza*, (Torino: G. Giappichelli Editore 1994).

the system of law operates, reforms of the administrative structure of the state, changing the structure of ownership and so on. I say extra-institutional as the change in attitude to the law of both its political and legal elites and ordinary citizens is pivotal.

2.2. Sovereignty and the Age of Post-Transition

In the period of "post-transition", the importance of differentiation is borne by the fact that while all these countries are regarded as democracies and market economies within the Copenhagen criteria,[28] they are all different in terms of their constitutional architecture. What are the criteria or "markers", so to speak, of differentiation?[29] The distinction between unitary states and federal states[30] arguably serves as a useful line of departure, but in a way which must be qualified. Speaking in terms of constitutional systems, distinctions must be drawn between plurality elections or proportional representation, a presidential or parliamentary system, a federal or a centralized system, judicial review or lack thereof and so on, all of which vary significantly in terms of their operation, particularly as regards the system of proportional representation which have generally been held to be capable of "infinite variation".[31]

Although all of the CEECs are unitary states, the qualification which must be made is that one can also distinguish between states which are strongly centralized and states which are strongly regionalized. Together with the categories of Unitary/Federal, Centralized/regionalized, differential institutional arrangements also arise as a consequence of Presidentialism, semi-Presidentialism and Parliamentarism. These criteria of differentiation, so to speak will no doubt represent a considerable challenge to the implementation of the *acquis de l'Union* and will give rise to a similar—but not the same—tension which was experienced during the transition period. It is not my intention, however, to address these criteria here except to make the following point: it would not be useful to regard the legal systems of the CEECs as representing one homogenous unit as it would not be useful to presuppose that the legal systems and cultures of the Member States of the EU are homogenous. This has clear implications for the enlargement research agenda. Legal research has much to learn from political science in terms of the importance of empirical research: what is needed is empirical work on the transformation of legal systems and legal cultures as a consequence of enlargement, with particular emphasis on

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[28] That is to say the political and economic conditions for EU membership established at the Copenhagen European Council of 21–22 June 1993 (*Bull. EC* 6-1993, I.13.).

[29] See generally Mark Tushnet, 'The Possibilities of Comparative Constitutional Law', *Yale Law Journal*, 108 (1999), at p. 650.

[30] Note that the only two Central European federal states, namely, Yugoslavia and Czechoslovakia, collapsed as part of the transition process.

[31] See Robert Dahl, below n. 40 at p. 44.

administrative law.[32] This includes observing the behaviour of the constitutional courts, the administrative courts and the lower courts, the reforms to legal education as well as informal changes to the respective legal cultures of the CEECs. It must be stressed, however, that this is more than a mere exercise in legal pathology. The aim of such research should be targeted to the reception of EU law into the national legal systems of the CEECs with the thoroughness and erudition which has informed examinations of the status quo in current EU Member States[33] whilst allowing for, and acknowledging, the particular characteristics of the legal systems and cultures of the CEECs. The prospective burden which local and regional administrative authorities will be facing post-accession has already been recognized in the case of, for example, the implementation and enforcement of EU Environmental Policy in the Candidate Countries.[34] Indeed, some financial provision has been made to facilitate this process from pre-accession instruments.[35] The budgetary impact of compliance is considerable. In the case of EU Environmental Policy, for example, it has been estimated as constituting approximately 80–110 billion Euro.[36]

The "language of post-accession"[37] must be framed not only in terms of questions of what are the criteria for a "good" or "bad" fit but also what in terms of an evaluation of the process of *how* a "good" or "bad" fit has and is taking effect within the respective constitutional orders of the CEECs and impact post-accession.[38] This raises the issues commonly associated with constitutional "borrowing" or

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[32] This argument has, as yet, only been made in relation to the current EU Member States although it may, and indeed must, be made as regards the potential Member States. See generally Carol Harlow, 'European Administrative Law and the Global Challenge', in Paul Craig and Graínne de Búrca (eds.), *The Evolution of EU Law*, (Oxford: Hart Publishing 1999), at p. 270.

[33] See, for example, Karl-Heinz Ladeur, 'Conflict and Co-operation between European Law and the General Administrative Law of the Member States', in Karl-Heinz Ladeur (ed.), *The Europeanisation of Administrative Law. Transforming National Decision-Making Procedures*, (Dartmouth: Ashgate 2002) at pp. 1–13.

[34] See Press Release DN:IP/03/81 published on January 21, 2003, European Commission on Track to Ensuring an Enlarged Europe is a Greener Europe.

[35] Namely, PHARE which supports priority measures related to the adoption of the Community *acquis*, the instrument for Structural Policies for Pre-Accession (ISPA—Finances infrastructure in the environment and transport sector and SAPARD Finances measures to support agriculture and rural development).

[36] This includes the implementation of the Urban Wastewater Treatment Directive (over 25 billion Euro), the Landfill Directive (10–12 million Euro). See Press release, above n. 34.

[37] Referred to by Helen Wallace at the Journal of Common Market Studies Conference, April 13, 2002 at the European University Institute, Florence.

[38] See generally Wojciech Sadurski, 'Conclusions: On the Relevance of Institutions and the Centrality of Constitutions in Post-communist Transitions', in Jan Zielonka (ed.), *Democratic Consolidation in Eastern Europe, vol. 1 Institutional Engineering*, (Oxford: Oxford University Press 2001), p. 455.

lending and the exportation of "western" legal norms whilst not overlooking their significance as essential preconditions for economic development,[39] for which there are a number of competing models.[40]

This also raises the issue of the exercise of tracking the changes of the adaptive capacity of the legal systems of the CEECs which includes the adoption of the spirit of the *acquis* by the legal elites and how they regard the challenge of EU law to their legal orders and its concomitant challenge to their loyalty.[41] This may not necessarily require the legal elites of the CEECs to become "EU-enthusiasts." The implementation of the *acquis* will, however, necessitate the co-operation on behalf of these elites in order to accept the consequences of EU membership for the legal systems which they serve. Indeed, the role of the legal elites is crucial in the process of consolidation of the European legal order in the CEE states. Not only must the knowledge of EC law be imparted and disseminated, but the elites must be persuaded to apply them and moreover recognize that it is in their own interest to apply them, a particularly difficult task if one bears in mind that sovereignty post-1989 has been a highly constrained and contested concept. If one can legitimately speak of "desiring sovereignty" in the context of the CEECs, then it makes sense to distinguish two forms of aspiration: either, a longing for that which was once possessed but which was lost, or a longing for that which was never possessed. Either way, sovereignty has traditionally been aspired to by constitutional lawyers, who regard it as the quintessential pre-requisite to independent state formation.[42]

The inroads made into the state sovereignty of the CEECs by the strident pace of Europeanization as part of the enlargement process are considerable. Indeed, the ambit of the obligations of the CEECs to approximate their laws is incredibly far reaching which serves as a useful reminder of the extent of the remit of EC law over the national legal orders. Thus, article 69 under Chapter III of Estonia's Europe Agreement, for example, lists the areas to which the approximation of laws shall extend to. They include customs law, company law, company accounts and taxation, banking law, intellectual property, financial services, rules on competition, protection of health and life of humans, animals and plants, protection of workers including health and safety at work, consumer protection, indirect taxation,

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[39] See David M. Trubeck and Mark Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', *Wisconsin Law Review*, 4 (1974), at p. 1062.

[40] See Robert A. Dahl, 'Thinking About Democratic Constitutions: Conclusions from Democratic Experience', in Ian Shapiro and Robert Hardin (eds.), *Political Order* vol. XXXVIII, (New York: New York University Press 1996), at p. 175.

[41] A point made in relation to administrative law in terms of "dual loyalty". See Mario P. Chiti, *Diritto Amminstrativo Europea*, (Milan: Giuffrè 1999) at Chapt. 7.

[42] See generally Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, (München: C H Beck 1992).

technical rules and standards, nuclear law and regulation, transport, telecommunications, environment, public procurement, statistics and product liability.

One is inclined to wonder whether any areas of law remain untouched by the adoption of the *acquis*. The potential for dissent is considerable, such as in the case of competition law, which for many CEECs will be the first encounter of EC law with the law of the CEECs.[43] Thus, the Hungarian Constitutional Court has already taken a firm stance in this matter, stating that competition law is under the exclusive jurisdiction of state sovereignty which it interprets as signifying that the state may dispose of its sovereign rights in its international relations.[44] A similar tension may arise in relation to social solidarity. Here too, the Hungarian Constitutional Court has dug its heels in, in an attempt to protect welfare rights and institutional services inherited from state socialism.[45] In the so-called *Hungarian Benefits Case*[46] Zlinszky J held as part of his concurring opinion that,

> The Constitutional Court does not wish to tie the hands of the legislature in the search for the appropriate solutions, but in a form more express than that incorporated in the Decision, the Court must call [to] the attention of the legislature that it can expect the agreement and co-operation of society, which is the necessary precondition of the success of the reforms, only if it chooses and requires restrictive solutions which meet the moral perceptions and sense of social justice of society.

A central element of the Court's reasoning is that the transition period provided by the law in question was inadequate. However, the underlying *ratio* is one which is embedded in the thorny issue of values, that is to say those values which underwrite a constitutional order, values which may be at odds with those contained in other constitutional orders, particularly those which are supra- and international.

In the case of Poland, for example, abortion provides a further bone of contention. At the end of January 2003, Poland had put forward a request to the EU to include a declaration safeguarding Polish laws on the "protection of human life", a request which was made rather late in the days of the drafting stage of the accession treaty. Poland may be granted the possibility to have a unilateral declaration on this issue

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[43] See Janos Volkai, *The Application of the Europe Agreement and European Law in Hungary: the Judgment of an Activist Constitutional Court on Activist Notions*, available at http://www.jeanmonnetprogram.org.papers.

[44] See Volkai, *ibid.*, who cites Judgment 4 of 22 January 1997 (the so-called "Preliminary Issues Judgment") and Judgment 30 of 25 June 1998 which dealt with the merits of the submission (the so-called "Europe Agreement Judgment").

[45] See Andras Sajo, "How the Rule of Law Killed Hungarian Welfare Reform", *East Constitutional Review*, 5 (1996) at p. 31.

[46] 43/1995 (VI.30) AB (Constitutional Court of Hungary), 4 E. Eur. Case Rep. Const. L. 64 (1997) (English translation) reproduced in Vicki Jackson and Mark Tushnet (eds.), *Comparative Constitutional Law*, (New York: Foundation Press 1999) at pp. 1452–1475.

attached to the Treaty, similar to the position of Ireland. Nevertheless, the Polish church has expressed doubts over the clause. According to Archbishop *Tadeusz Goclowski*, the declaration approved and put forward by the Polish government did not fully meet expectations as bishops had asked clearly for human life to be protected from conception to natural death and a definition of marriage as a legal union of a man and woman. The original proposal for the text put forward by the Polish government which was submitted for consideration reads as follows:

> The government of the Republic of Poland understands that none of the provisions of the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall disturb the right of the Republic of Poland to regulate on issues of moral importance and concerning the protection of human life.

Malta, another country which joined the EU in 2004, managed to obtain a protocol on abortion which was annexed to Malta's Accession Treaty to the EU, which would give legal certainty that EU law, present or future would not be able to change Maltese law on abortion. However, the Greek Presidency sent a clear message to the 10 acceding states that there would be no re-opening of negotiations before the completion of the accession treaty in early February 2003 which was signed on 16 April 2003 under the Greek Presidency. This may, however, be left up to the constitutional courts further down the line in the period of post-accession.

It is clear that judges of the constitutional courts of the CEECs will have to come to terms with what has been referred to as "constitutional tolerance", that is to say, the allowance for, and indeed the acceptance of, the spirit of the *acquis* by constitutional court judges.[47] Weiler was addressing his remarks to constitutional court judges of the Member States of the EU. His notion could also, however, be extended to constitutional court judges of the CEECs. What these judges will have to come to terms with, is the fact that in the period of post-accession, they will serve a reconfigured legal order, which they may regard as one or two legal orders. It is the latter which is more problematic as regards the implementation of the *acquis* where lawyers in the future Member States could elect to view EC law as constituting an international legal order. And if exclusively so, this could affect the respect of the rule of law as laid down by the EU Treaty in Article 6 and could indeed mean that EU citizens' rights are respected in a different manner as well as to a lesser extent than their counterparts in the old Member States. Integration clauses of the constitutions of the CEECs are particularly telling. Thus, in Poland, for example, Article 90 (1) of the constitution provides that, "The Republic of Poland may, on the basis of an international agreement, transfer to an international organization or international institution the powers of organs of the state authority in

[47] See Joseph H.H. Weiler, *The Constitution of Europe*, (Cambridge: Cambridge University Press 1999), in the Foreword.

certain matters." Neither the words "European Union" nor "European Community" are used. Nor, however, are they used in some of the constitutions of the current Member States. In short, an association with a supranational organization is referred to without taking into account the fact that the EC legal order operates both within and without the borders of the state. Indeed, it is part and parcel of a state's legal order. Viewing it in terms of an international legal order only, is not only analytically erroneous but has concrete consequences for the addressees of the rights contained therein.[48] Whilst it is conceded that in some countries, the position of international law is taken very seriously indeed by being governed, as in the case of the Polish constitution,[49] by the principle of direct applicability, one wonders whether this will provide an adequate legal mechanism whereby jurists can give full effect to EC law norms.[50] In other words, the way in which jurists perceive the European Community Legal order is of paramount importance. By jurists, it is important to stress that I mean all jurists in the CEECs, that is to say, judges, practitioners and legal practitioners alike who participate in the juridical debate concerning the impact of the *acquis* on their legal orders.

2.3. The Impact of the European Community Legal Order on National Legal Systems and Cultures

Law is a normative order which is traditionally both perceived and conceived of in terms of a hierarchy.[51] In the German case, for example, the prevailing hierarchy is constituted by the Basic Law, Federal Law and State Law (or the law of the *Länder*). European Community (EC) law may also be understood according to a hierarchical model to the extent that it prevails over national law[52] and consists of primary and secondary sources of law (such as Regulations and Directives) arranged according to a hierarchy of precedence.[53]

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48 Indeed, Professor Miroslaw Wyrzykowski, a judge of the Polish Constitutional Tribunal stated at a conference held at the European Centre, Natolin in Warsaw, Poland on January 31–February 1, 2003, *Enlargement and the European Constitutional Process*, that many constitutional lawyers regarded EC law in terms of international law.

49 See Article 91, para. 1 of the Polish Constitution in conjunction with article 9.

50 See generally Stanislaw Biernat, 'The Constitution of Poland and European Integration' in Giuliano Amato, Guy Brabant and Evangelos Venizelos (eds.), *The Constitutional Revision in Today's Europe*, European Public Law Series, Vol. XXIX at p. 439 et seq.

51 Through, for example, the doctrine of precedent housed in the English legal system or the *Anwendungsvorrang* in German law. See Hans Kelsen, *The Pure Theory of Law* (trans. M. Knight) (Gloucester: Peter Smith 1967).

52 Case C-6/64 *Costa v. ENEL*, 1964, ECR 585. However, this principle has been qualified by the *Maastricht* judgement of the German Constitutional Court. See 89 BVerfGE 155.

53 Although this has been under review by the Laeken Convention Working Group chaired by Giuliano Amato on Simplification which has suggested reducing the number of legal instruments to four.

The Nation State is central to the legal reasoning upon which the reception of EC law into the jurisdictions of the Member States is based. The underlying tension is as follows: either a state's membership of the EU entails categorical acceptance of the supremacy doctrine, which is in itself, an endorsement of the hierarchical model of law. Alternatively, the state retains the right, in certain cases, to set the supremacy doctrine aside, as has been effected by the German Constitutional Court. Thus, even if it is accepted that the sovereignty of a Member State has been qualified by its membership to the EU, it is a form of qualification which is by no means unconditional arguably giving rise to a hierarchy of qualifications. These two positions represent two versions of events, so to speak, of the relationship between EC law and national law and constitute competing schools of thought in the legal communities of some of the current EU Member States, such as Germany. To what extent, can we expect the emergence of a tension of this nature in the CEECs?

The creation of the European Convention has established two classes of members.[54] Briefly stated, the Declaration of Laeken in December 2001 established a Convention as a framework for dialogue on the Constitution of the European Union the work of which was concluded by an Intergovernmental Conference in 2004. In short, it was the European Convention's mandate to underwrite the Union with a dose of constitutionalism.[55] Candidate countries did not enjoy the same standing in the EU's "constitutional moment"[56] as the current Member States, a situation which has been reproduced at the level of the Inter Governmental Conferences.[57] The contribution of the CEECs was constrained by this power asymmetry which in turn more than hints at the presence of "empire and coloniality" in the process of "eastern enlargement" as a whole.[58] As regards the CEECs, it is clear that the tenor of the debate of the Convention set a tone for the period of post-accession, which is why it is arguably unsurprising that it was one of the new Member States which initially "defeated" the adoption of the Draft Constitutional Treaty which arose out of the Convention.

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54 See Krassimir Y. Nikolov, "The Convention and the Accession States: Where Do We Stand? Where Do We Sit?", an abridged version of which is reproduced in the January 2002 issue of the electronic journal, *Challenge Europe of the European Policy Centre (EPC)* in Brussels, Belgium, http://www.theepc.be/challenge/.

55 See Laeken Declaration on the Future of the European Union, available at http://european-convention.eu.int/pdf/LKNEN.pdf.

56 Term borrowed from Bruce Ackerman, *We the People*, (Cambridge: Harvard University Press 1999).

57 See Bruno de Witte, "The Closest Thing to a Constitutional Conversation in Europe: The Semi-Permanent Treaty Revision Process", in Paul Beaumont, Carol Lyons and Neil Walker (eds.), *Convergence and Divergence in European Public Law* (Oxford: Hart Publishing 2002), at p. 39.

58 See Jan Böröcz and M. Kovács (eds.), *Empire's New Clothes. Unveiling Eastern Enlargement Central Eastern Review* (2001), available at http://www.ce-review.org.

The hypothesis being advanced is as follows: if the contribution of the new Member States to the framing of the constitution is marginalized from the outset, a commitment problem down stream is created. In other words, if they are not in at the rule making stage, how can they be expected to adhere to the rules later on? The CEECs do have participatory rights in the Council as a consequence of the accession Treaties, a position which also existed during the accession of Spain and Portugal. Casting our minds back to a previous wave of enlargement serves as a useful reminder of how quickly this process can occur. Spain and Portugal, for example, took part in the Inter Governmental Conference leading up to the adoption of the Single European Act in 1985 prior to having become full members. All that was done was that their signatures of the SEA were postponed until they acquired full membership. However, distinctions between old and new Member States were not made during the course of the IGC.[59]

Be that as it may, what is still unclear for many in the aftermath of the European Convention is what sorts of problems European constitutionalism must tackle and which problems it must leave to be resolved by the respective constitutional courts of the Member States. What can be accepted by the constitutional courts in certain cases can, however, be rejected in others, particularly in the face of the "moving target", so to speak of the competence question in the EU[60] and the eternally thorny issue of the corresponding division of powers between the EC and the Member States.[61] An example of dissent on behalf of the Hungarian Constitutional Court has already been cited in relation to competition law. However, the Hungarian Court has also been willing to consider international conventions as a constitutional obligation,[62] which have, as a result, repeatedly influenced its decisions such as those in the death penalty, agricultural land, the punishability of communist crimes and the statute of limitation, public data and information cases, to mention only a few.[63] The picture which begins to emerge is one where the issue of human rights

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[59] I am indebted to Professor Giuliano Amato for drawing my attention to this point at a conference held at the European Centre Natolin, Warsaw, Poland on January 31, February 1, 2003, entitled *Enlargement and the European Constitutional Process*.

[60] See Gràinne de Bùrca and Bruno de Witte, 'The Delimitation of Powers between the EU and its Member States', in Anthony Arnull and Daniel Wincott (eds.), *Accountability and Legitimacy in the European Union*, (Oxford: Oxford University Press, 2002).

[61] See the tobacco advertising ruling judgment of the European Court of Justice; Case C-376/98 *Germany* v. *European Parliament and Council* 2000, ECR-I-8419.

[62] See article 7(1) which provides that, "The legal system of the Republic of Hungary accepts the universally recognized rules and regulations of international law and harmonizes the internal laws and statutes of the country with the obligations assumed under international law".

[63] See generally I. Vörös, *Contextuality and Universality: Constitutional Borrowings on the Global Stage—the Hungarian View*, available at http://www/upenn.edu.