authorities, as we have seen, reacted with force to the risk of the PHARE project becoming bureaucratized and centralised, for instance by favouring decentralisation in the performance of assistance projects to the advantage of the EU Delegations in the field. This means that the Delegation task managers can take an increasingly active part in performing the activities requested. In many cases, though, this has led to a bureaucratic re-centralisation of projects under the local Delegation (an effect still being felt in the Western Balkan States, following a chain reaction).

While wishing to avoid second-rate anecdotes, another point to make is that the choice of favouring, as far as possible, the admission of qualified local personnel to the Delegations, though positive in itself, has not always produced the effects hoped for. This strengthening of the local delegations also has repercussions on the consultancy firms that manage the projects. If they want to keep their reputations they must show that they have managed to trigger the change set out in their job descriptions. It becomes more difficult to form tacit agreements of non-interference with stubborn partners (in particular the bureaucratic structures of government organizations, which are particularly inflexible by tradition). On the contrary, the partners begin to recognise the pressure of project management, to become aware and within certain limits accept the pressure bearing on them. They also know that the Delegation will intervene at government level should reform projects under the accession partnership be put at risk.[46] The impression is that the Delegations have often ended up taking on characteristics comparable to the role of the East India Company before the English assumed direct responsibility.

It is a situation not devoid of dangers for the future, as we can see if we examine the CARDS Programme, the instrument of legislative assistance provided for in the SAA. We have already mentioned how, by the standard of the CARDS Programme,[47] the consolidated approach of the first 10 candidates in the final phase becomes the basis for relations with the new countries. Just to be able to begin negotiations on the SAA, the WB States are being asked to ensure a level of legislative alignment far higher than the level on which the EA were based. In this connection, signs of friction with Serbia, which cannot be further investigated here, must not be underestimated. The risk here entails a shift in legislative choices by the Serb Government apparatus towards US models (confirming the dissonant choice of Serbia compared with the other WB countries).

We have also seen, on the other hand, how the range of instruments governing the making of a Europe of variable geometry does not allow itself to be trapped in a pattern of exclusive recourse to vertical instruments on the part of the Community apparatus, which would be almost like a 'soft' version of the attempted takeover of Iraq by the world superpower and a group of allied States that is still ongoing.

From the outset, the use of instruments of *centralisation/re-centralisation* have been accompanied by the use of instruments giving transversal flexibility: the most

[46] Blecher, above n. 9, p. 14.
[47] See above n. 15.

recent example of the former being through the new Title XXI, the realignment of the PHARE Programme and its offshoots; of the latter, through the new wave of projects within INTERREG. The instruments giving transversal flexibility have somehow managed to act together in preparing the technical legal instruments needed for enlargement of the Union.

Bearing in mind especially the countries not due to enter the EU immediately and the new candidates, we should hope to see a more marked corrective contribution of the transversal type, in the nature of a plan that arises from the confluence of competent elements in the territory, and bringing in the bodies representing the different parts of European civil society that are affected; elements of a bottom-up approach should also be brought into play in the process of harmonising the whole of European society.[48] The Court of Justice has, moreover, made a contribution to the process just described. Following a technique already used on other occasions, the Court has intervened at the decisive moment, establishing that a significant part of the immigration law in force in the single Member State is essentially inapplicable to citizens of the EA countries.[49] One of the main obstacles to enlargement was thus cleverly circumvented (in part, at least) even before the final phase of negotiations with those States began. What is more, Romania and Bulgaria will remain outside the EU for many years yet.

As a result, following the case law of the Court, a category of non-Community immigrants has been created possessing rights that are not commensurable with those of any other group; it is a fixed term category, so to speak, since Romania and Bulgaria are due to enter the EU in time, but nevertheless it is a category that is destined to last for years. Further, a similar profile is beginning to take shape in favour of Turkish citizens.

Then, as far as the rights of citizens emigrating from the WB States are concerned, as these countries gradually conclude SAAs with the EU, the Member States cannot rely too securely on the clauses excluding direct applicability that exist in those agreements and are repeated at every turn. The developing sequence of the Community cycle is punctuated by the Court overcoming similar obstacles. All the elements therefore point to the formation of a legal hierarchy over the long term of the rights of citizens from non-Community countries within the EC.

In conclusion, we find confirmation of the tendency during the course of enlargement to mix international law contours belonging to EU external relations, with transnational contours acting as a model and reference point for the activities of both local and foreign private parties. Indeed, the latter often tend to weigh

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[48] Laura Picchio Forlati, "Il diritto dell'Unone europea tra dimensione internazionale e transnazionalità," *Jus*, XLVI (1999), pp. 461–473. Interesting points for reflection also in Marco Frigessi di Rattalma, "Il ruolo del contratto nei rapporti tra Enti pubblici territoriali appartenenti a Stati diversi," in *Regioni, Costituzione e rapporti internazionali* (Milano: Franco Angeli 1995), pp. 93–115.

[49] Sec. II, above.

themselves down with ambiguous supranational contours not justified by any basis in treaty law. This is due both to the attitude of the executive staff of the EU structure (and of the national experts) sent to the single candidate States, and to the acceptance of such a role by those at the receiving end of their activity, with the consequent withdrawal of the administrative apparatus of those States.

From the viewpoint of the international law scholar, what is remarkable is the extreme functionality revealed by the instrument of positive sanctions in the process outlined; in short, the positive sanction has proved to be decisive in achieving what seemed at first sight to be an extremely hard objective to attain.[50]

5. Conclusions

It is not the task of this chapter to examine in depth the prices paid and the risks that lay ahead, at the end of this first phase of the enlargement process, both for the former Eastern Bloc States and for the States historically belonging to the EU. From the viewpoint of the present paper, we must restrict ourselves to posing only certain problems.

In the first place, the way the instruments for a Europe of variable geometry are structured must be set in relation to the tumults going on in the south of the world, in particular in Africa. It is then easy to see how that panoply of instruments directed at creating reorganization and hierarchical system going from the centre to the periphery cannot be re-proposed in relation to the States on the southern side of the Mediterranean. The cardinal element of a Europe of variable geometry is in fact the positive sanction. This is an instrument that for obvious reasons can be used in an incomparably less effective way in relation to any countries other than the States of Central Eastern, South Eastern and Eastern Europe. Indeed the policy of granting economic aid as a means to a certain end is one thing (in this case, preventive control of migrations towards Europe, readmission agreements centralised at EU level for illegal immigrants who are nationals of that State or a third State, but are assumed to have crossed the frontiers of that State, etc.) while the outlook of co-opting the State apparatus over the medium or long term in the Union venture is quite another thing. Anyone who, like the present writer, has had the opportunity to witness at first hand the break-up of a Country's State apparatus (in this case, Albania) and then to see its unexpected return to life when confronted with an explicit takeover on the part of the Community apparatus, can easily appreciate how decisive such an element is.

The present author does not wish to escape the onerous consequences of this reasoning. The opposition between a short-sighted EU policy of externalising

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[50] See Laura Picchio Forlati, "La partecipazione al dialogo del diritto internazionale," in *Giornale di Diritto del Lavoro e delle Relazioni Industriali*, XIV (1992), pp. 799–781. Also Cortese, above n. 10, *passim*.

repressive control of the migration phenomenon, as against a virtuous policy based on prevention, cherished in some scholarly writings[51] and relying on the successes achieved in South-East Europe, does not exactly hit the point. Since one of the two horns of the dilemma is unworkable, I fear that such a dichotomy would end up leaving room for the other—the repressive method—which really is workable in the short term. A watery Auschwitz would thus be round the corner.

Other solutions are to be thought of, then. They must be capable of claiming for themselves those aspects from the experience of a Europe of variable geometry, of interweaving between the transnational and international dimensions (enhancing the transnational) that have been developed in the last decade in relations with the CEEC and WB States.

From other standpoints, too, moreover, a Europe of variable geometry does not seem destined to end. This is not so much because of the geographical fact that there are still European countries waiting behind the acceding or candidate countries. What should be borne in mind, instead, is the formidable development that has taken place over the last decade of the issue of the protection of minorities, and above all, the transformation of that issue from a claim to prohibit forms of discrimination, to the active pursuit of a policy protecting individuals' right to their identities and cultural differences.

On the one hand, events in ex-Yugoslavia have influenced this development as well as the reflections on it sparked off both within the Council of Europe and at the EU. On the other hand, also as a consequence of global phenomena that there would be no point dwelling on here, we have witnessed a process of revival of local cultural entities in the Member States themselves; one scholar refers to this as an opportunity for a new, third way between Westphalia and Cosmopolis.[52] Again, we must not forget an important institutional aspect: in the tough political and administrative clash with the biggest Member States and their government apparatuses, and at the expense of a certain lack of coherence with the past (although one might speak of making an important evolutionary leap), the Commission has become the champion of the plurality of cultural identities within the EU in the hard-fought battle over the constitutional Treaty, both at State level and more especially at sub-State level.

So, the imminent enlargement creates a series of new contradictions and the task of this paper will be brought to a close by indicating what they are. On the one hand, minorities are pushing at the other side of the borders of States that are more or less close to joining the EU, and they can only be coped with in a trans-Union dimension (we refer firstly to the question between the Turks and the Kurds, but it is not necessary to look so far afield). Even involuntarily, this alone brings the

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[51] Boswell, above n. 18, *passim*.

[52] Peter A. Kraus, "Cultural Pluralism and European Polity-Building: Neither Westphalia nor Cosmopolis," *Journal of Common Market Studies*, 41 (2003), pp. 665–686.

instruments of variable geometry into play.[53] On the other hand, the problem of protection of minorities affects the legislative choices of a nationalistic character of certain new Member States: see, for example, the recent Hungarian legislation on citizenship. To be sure, the Commission is watching over the problems stemming from that tendency.[54]

Nonetheless, it is the Commission itself that seems willing to take upon itself a policy of dramatic closure towards the planetary migrations of desperate hordes, in pressing for the creation of a European immigration agency, requiring new Member States meanwhile to incorporate in their laws the full weaponry with which the historical Member States are endowed: readmission agreements, etc.[55] There is a strong impression that the "archangel" approach within the Union and at its immediate borders counterbalances an extreme carelessness verging on cynicism on the part of the Unionist institutions in handling relations of a global character. Nor would this be for the first time.[56]

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53 Christin Henrard, "The Impact of the Enlargement Process on the Development of a Minority Protection Policy within the EU: Another Aspect of Responsibility/Burden-sharing?", *Maastricht Journal of European and Comparative Law*, 9 (2002), pp. 357–391.

54 See Barbara Brandtner and Allan Rosas, "Human Rights and External Relations of the European Community: An Analysis of Doctrine and Practice," *European Journal of International Law*, 9 (1998), pp. 468–490; Henrard, above n. 53; Gaetano Pentassuglia, "The EU and the Protection of Minorities: The Case of Eastern Europe," *European Journal of International Law*, 12 (2001), pp. 3–38.

55 See Caroline Forder, "Common Minimum European Standards in Immigration Matters," *Maastricht Journal of European and Comparative Law*, 9 (2002), pp. 221–229; Catherine Phuong, above n. 18, *passim*.

56 See Laura Picchio Forlati, "Contratto (diritto internazionale privato)," *Digesto delle discipline privatistiche, sezione civile*, IV (1989), p. 235.

Concluding Remarks

Conclusions: The Adhesion of New Member States to the European Union and the European Constitution

Sergio Bartole

1. Introduction

In dealing with the problem of the adhesion of new member States to the European Union and with the question of the Constitution of the Union at the same time, we have to adopt two different points of view, looking, on one side, at the legal order, and, on the other side, taking into account the internal system of law of the interested States. Moreover, all three major items have to be considered which are respectively studied in the three parts of this book: democratic institutions, constitutionalism and rule of law. The topic of the European Constitution and that of the accession of new Member States to the Union, as far as they are connected, are at the center of a knot of different strands of research relating to some of the main questions of the constitutional studies: for instance, sovereignty, alternative models of direct or deliberative and parliamentary democracy, coexistence of parliamentary and judicial making of law, national and supra-national protection of human rights and fundamental freedoms, judicial review of legislation and its justification in the frame of a democratic order, and so on.

Therefore the task of drawing the conclusions of the debate raised by the papers collected in the book is extremely complex and engaging. Complying with it in a satisfactory way would require more space and more time than the editors are ready to allow the author of these notes. I shall limit my attention to a few key issues and I hope that such a summary presentation will offer an idea of the conclusions reached during the workshop while promoting new research which could be started on the basis of these conclusions. As a matter of fact, some of the hypotheses concerning the mutual interference between the adhesion of the new member States to the European Union and the adoption of the Treaty establishing the Constitution of the Union have to be tested in the framework of the future developments which we might be able to envisage, but certainly not in the position of describing with exactitude.

2. Direct Effect and Democratic Deficit

The first judicial elaboration of the concept of the European Constitution by the European Court of Justice highlighted two key elements, which interest not the substantial normative content of European law but rather its legal effects. In emphasizing the direct effects of European law in the internal legal order of the

Wojciech Sadurski et al. (ed.), Spreading Democracy and the Rule of Law?, 381–390.

Member States and its supremacy over the national law of those States the Court has taken a formal approach to the problem in a very Kelsenian way. The main principles of the European Constitution, that is, the principle of supremacy of the European law and the principle of direct effect are the *Grundnorm* of a legal system which is made up by European and national law. If European and the national law of the Member States concur in shaping a unitary legal order according to a peculiar hierarchy of the relevant sources of law, the result is made up by the specific legal force of the different legislations and by their mutual relations. But these technical aspects, which deserve to be appreciated specially, if not exclusively by the legal scholars and by the professional interpreters of European law, have a political relevance if we look at the impact of European law on the people of the Member States.

The content of the European Constitution is more and more frequently developing a substantial nature. Therefore, the direct effects of European law on the status of the citizens of the Member States should require—according to the political theory of democracy—the direct participation of the people concerned in the making of both the European Constitution and the law of the European Institutions. On the one hand, the people should not be excluded from the choices concerning the organization and the formation of the law-making bodies of the Union and, on the other, the citizens and their representatives ought to be given a say in the decision-making processes aiming at the adoption of the European law.

The implementation of these theoretical consequences apparently conflicts with the generally accepted idea that the European Union is characterized by the so-called democratic deficit, the presence of which is emphasized by comparing the constitutional organization of the European Union with the form of the governments of the member States.

Many are of the opinion that the new European Constitution ought to be approved by referenda in all member States: only this method of direct democracy would guarantee an immediate participation of the people concerned in a decision affecting the shape and the role of the European Union and its relations with the citizenry. It is true that the procedure for the revision of the European Treaties was already modified when the newly established European Convention was entrusted with the task of drafting the text of the Constitution. But the Convention only played a preparatory function, and the relevant formal deliberation was adopted by the intergovernamental conference. Moreover the members of the Convention were not directly elected by the citizens, but were nominated by various European and national bodies whose authority is in different ways, directly or indirectly, based on the vote of the people.

As a matter of fact, the adoption of the European Constitution (or of the Treaty establishing it) by referendum would be a partial novelty in Western European countries. Only in Denmark, France and Ireland was the innovative Treaty of Maastricht approved by referendum, while in all the other countries the relevant decisions were

adopted by the Parliaments. On the contrary, in all the Central European countries which became member States on May 1st 2004, a referendum was called to ask the people about adhesion to the Union. This choice was not formally required by the governing bodies of the Union—sometimes there are constitutional provisions on the matter (e.g. Art. 7 of the Slovakian Constitution). But it is well known that a popular vote on the matter was considered essential to establish the legitimacy of accession by those bodies. Therefore, should all the Member States choose to adopt the Constitution by way of referendum, this could be construed as an interesting development of the accession of the new Member States: the Western European States would follow *ex post* the soft suggestion which was given *ex ante* to the Central European new democratic States, and it is interesting to note that, according to the established principle, referenda might be called again to approve the Constitution also in the ex-communist new Member States.

It is ironic, but well known, that the European Union which itself is supposed to suffer from a democratic deficit, not only cautiously and indirectly suggested the approval of the accession by referendum, but also strongly influenced the constitutional reforms of the Central European countries before and after the take-off of the process of adhesion. At the beginning, after the fall of the Wall, it was the Council of Europe that offered its help at the moment of the adoption of the new constitutions of the ex-communist States. Help and support meant not only guidance and advice but also a soft revision of the early drafts adopted by the competent national bodies. The membership of the ex-communist States to the Council was dependent on the implementation of its models of democracy, rule of law and protection of human rights and fundamental freedoms. As a matter of fact, separation of powers and indirect parliamentary democracy with anti-majoritarian guarantees were central to the dialogue between the Council of Europe and the Central Eastern European countries. Referenda did not have a central position in the new constitutions because they were supposed to be decision-making devices whose majoritarian nature does not allow a fair, participative and inclusive deliberation of the State's decisions. Nevertheless some of those countries had already shown a preference for the adoption of the institutions of direct democracy in the presence of fundamental decisions when at the moment of the proclamation of their independence Estonia, Latvia, Lithuania and Slovenia (but not Slovakia and the Czech Republic) decided to leave to the people the relevant decisions. Therefore, notwithstanding that the process of accession has been seen by the European Union as a follow-up of this very dialogue between the Council of Europe and the interested States, it is evident that the choice of referendum for the approval of the adhesion to European Union is strongly connected with the history of these States, even if its adoption is evidently an exception to the models of the deliberative and parliamentary democracy which were and are prevailing in Western European democracies. It is the price which has to be paid when the sovereignty of the concerned States and the revision of their national constitutions are at stake. Therefore I think that

the approval of the European Constitution by referenda may be justified in the same way.

3. The Role of the Judiciary and the Legislature

The principle of direct effect and the doctrine of supremacy of the European law impinge at the same time both upon the power of the national Parliaments and the national sovereignty of the concerned States. The importance of the decisions aimed at insuring the compliance of the internal orders implies the adoption of a special decision-making processes. But in the framework of an approach which emphasizes the moment of the deliberation of normative acts or by representative bodies or by referenda, the problem of the coexistence of these traditional ways of making law with the judicial law-making by the precedents of the case remains-law which is characteristic of European constitutional law. According to the construction of Joseph Weiler,[1] the judicial formation of the main principles of the European Constitution on the superiority of European law supported its expansion as far as (and because) the relevant developments were controlled by the Council of Ministers of the European Communities where the Member States were bound by the Luxembourg compromise and by the connected agreement of complying with the principle of the unanimity for the adoption of the decisions of the Council. The States accepted that European law has internal effects in their legal order and they profit from these effects in introducing with a unanimous vote, new common rules in many matters according to their common political conveniences. If this hypothesis is correct, there has been a mutual underpinning between the judicial making and the deliberative formation of European law.

But what is the position of judicial law-making in the development of the European Constitutional heritage? Is the common law tradition a part of this heritage? Or is the principle of the separation of powers prevailing over the partial confusion of judicial power and law-making which the common law system implies? Is judicial law-making compatible with the lesson of Montesquieu that the judiciary is the mouth of the law, and with Rousseau's theory who taught that the law is the expression of the people and of its representatives?

We cannot deny that in principle the traditional doctrine of the separation of powers of continental Europe did not allow much room for the judicial formation of the law, but it is also true that, after the Second World War, Western Europe has known a large diffusion of constitutional jurisdiction and the contemporary development of judicial law-making in the field of constitutional law by Constitutional Courts. The phenomenon recently interested also the Central Eastern European countries where, at the moment of their take-off, the Constitutional Courts, e.g.

[1] J.H.H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press 1999), pp. 20–22.

Poland and Hungary, were faced with the problem of the coexistence of the old revised constitutions and the principles of Western constitutionalism. Furthermore, after the adoption of new democratic constitutions, they had to settle the conflicts between the recently approved constitutional legislation, sometimes incomplete or ambiguous, and the previous communist law, which was still in force and could not be easily deprived of its effects without creating dangerous lacunae. If we keep in mind the role that Western European Constitutional Courts had in shaping relations between European and national law in the absence of the necessary constitutional provisions, we can envisage that the Central European Courts will display a similar role at least in those States which, at the moment of adhesion to the European Union, did not adopt specific constitutional rules providing for the direct internal effect and supremacy of European law.

In effect, only three States have specific provisions on the matter. The Constitution of Slovenia states that the European acts shall be applied in accordance with the legal regulations of the Union[2]; in Slovakia, the possibility of direct application of European rules conferring rights and duties is explicitly provided for in the Constitution,[3] however only in Poland does the Constitution state that European law shall be directly applied in the Polish legal order and have a legal force superior to national law.[4] Where similar rules are missing or the constitutional provisions are unclear or ambiguous, the judicial bodies of the new Member States, and especially the Constitutional Courts, shall perform the task of drawing the consequences of adhesion to the Union in the field of relations between European and the national law according to the dicta of the Luxembourg Court.

The enlargement of the scope of judicial law-making will probably be an additional effect of adhesion in connection with the multilevel structuring of the relations between the European Constitution and the national Constitutions. The Constitutional Courts shall take into account the implicit reshaping of the powers of the constitutional bodies of the States induced by the approval of the European Treaties and of the European Constitution. They will have to balance European commitments with internal constitutional principles, but it is evident that the powers of national Parliaments will be curtailed. Moreover, ordinary and administrative courts shall have to take care of the internal effects of European law and with regard to national law, as far as their coexistence is compatible with the principles of the jurisprudence of the Luxembourg Court.

Within this framework, the principle of the rule of law in the European legal system will be construed as a middle way between its old traditional Anglo-Saxon content and the more recent continental principle of legality. The law will be expressed by written documents adopted at the end of deliberative decision-making

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2 Art. 1 of the Constitutional Act amending Chapter I and Articles 47 and 68 of the Constitution of the Republic of Slovenia, 27 February 2003.

3 Art. 86 of the Constitution of the Slovak Republic.

4 Art. 91 of the Constitution of the Polish Republic.

processes, but the living law, that is the law which has to be applied day by day in the social relations of life, will be made up by the judicial construction and integration of those documents.

Professor Sajo posed the question: is it possible to compare the European Union with the model of the administrative State? The limited expansion of the powers of the European Parliament certainly displays negative effects on the functionality of the democratic principles in the frame of the European institutions. Conversely it emphasizes the role of cabinets in the internal framework of the Member States, where the curtailment of the powers of national Parliaments is balanced by the expansion of the normative functions of the Executives which are jointly exercised in the European Councils of Ministers. But an inversion of this tendency does not depend only on the enlargement of the powers of the European Parliament. It is evident that the democratic legitimacy of the Union is strictly connected with the approval of the European Treaties by national Parliaments (or by the citizens of the Member States). But we can say that compliance of the functioning of the Union with democratic principles depends also on the actual links binding national Parliaments and the members of the Cabinets who sit in the Council of Ministers. The accountability of the Ministers (who are members of the Council) before the national legislative Assemblies can partially compensate the internal democratic deficit of the Union. Therefore it is extremely important that the constitutional amendments adopted by some of the new Member States provide for the active participation of national Parliaments in the formation of European policies. This is the case of the Czech and Slovenian Constitutions which require the establishment of an active cooperation between the Cabinets and the Parliaments in the implementation of the State's obligations flowing from the Treaty on European Union. The governments shall inform the chambers which have to be given the possibility of expressing their views on the decisions which the European institutions are preparing. Somebody could say that these amendments offer a very weak solution to the problem of the democratic deficit if it looks preferable founding the democratic legitimacy of the functioning of the Union only upon a direct link between European institutions and European citizens. But when we look at them taking into account the special nature of the Union and the role that the Member States display in the frame of the Union, it is understandable that national Parliaments shall have a say in the formation of European policies.

If it is true that the new Member States are very sensitive to the limitations of their sovereignty and the following limitations of the powers of their Parliaments, these constitutional arrangements should be specially fitted to their political exigencies and conveniences.

4. The Future of National Sovereignty

It is generally accepted that the problem of limitation of national sovereignty can, for the ex-communist States, be a difficult problem to deal with at the moment

of the accession. They obtained their independence only recently and it is possible that adhesion to the European Union could be perceived by their citizens as subordination to a new "Breznev doctrine"[5] The hope is largely shared that accession to the European Union will start a process of further internal democratization, of enlargement of the internal spaces of political freedom, but also of expansion of the economic market and of great social and economic developments. These are purposes which certainly deserve to be pursued, and the European institutions have taken care of them. But it is also well known that the citizens of the new member States understood the proclamation of their newly acquired independence as a recognition and a strengthening of their national identity.

Therefore, in many States of Central Eastern Europe the proclamation of the State's sovereignty is strictly connected with the vindication of national identity. After the fall of the Wall, the return of the nation State was the result of the replacement of the communist economic and social theory with nationalistic ideology. In certain Constitutions[6] the defense of national identity apparently takes precedence over other principles and values. It follows that its coexistence with the safeguard of human rights and fundamental freedoms looks sometimes very difficult, especially when the protection of the national minorities is at stake, even if explicit provisions on the matter were included in the Constitution.

Will these constitutional choices have any impact on the jurisprudence of the Constitutional Courts when these judges deal with the problems of the limitation of sovereignty flowing from adhesion of the new Member States to the European Union? In Western Europe, Constitutional Courts covered the defense of state sovereignty under the guise of the vindication of their task of safeguarding national constitutional principles and rights.[7] Only the Maastricht *Urteil*[8] explicitly responded to the question of the coexistence of and the relations between people's sovereignty and European commitments by giving precedence to the exercise of sovereign rights of the people over the decisions of the European institutions. It is perfectly possible that in the new Member States the vindication of national sovereignty is placed at the center of the debate of constitutional jurisprudence and its limitations are accepted only as far as they don't imply its surrender in favor of the European Union. Constitutional Courts could refuse the substitution of the supranational approach to the European unity for the intergovernamental one. If this were the case, conflicts could arise not only between the interested Constitutional Courts and the Luxembourg Court, but also between the Member States. However, it is evident that the preexisting *acquis communitaire* should prevent

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5 It was incorporated in Art. 30 of the 1977 Soviet Constitution.

6 It is worth bearing Art. 6 of the Romanian Constitution in mind, but also Art. 1 of the Estonian Constitution is interesting.

7 M. Zuleeg, "The European Constitution under Constitutional Constraints: The German Scenario", 22 E.L. Rev. (1977), 19–34.

8 Bundesverfassungsgericht 89 (155).

the authorities of the new member States from adopting guidelines which could conflict with the principles of supremacy of European law and of its direct effects in the internal legal orders. If at the moment of take-off of the European Community in the fifties not all the authorities of the founding States were conscious of all the legal consequences implied by adhesion to the Community, the experience of the past years does not allow the interested States to adduce doubts and pretexts in the matter. In any case, while some Constitutions (e.g. in Latvia, Slovenia and Poland) explicitly state that a delegation or a transfer of powers to the European Union has to take place,[9] and in Hungary the exercise of constitutional powers jointly with other States is clearly provided for[10] other constitutional provisions are more ambiguous, such as in Estonia where the amended Constitution declares, on the one hand, that "Estonia may belong to the European Union on the basis of the fundamental principles" of its Constitution and, on the other, that, "when Estonia belongs to the European Union", its Constitution "shall be applied with due regard to the rights and duties arising from the Accession Treaty".[11]

5. Conclusion

The present discussion on the problem of sovereignty opens the debate up to the issue of the protection of human rights and fundamental freedoms. Is this protection a task which can be satisfactorily dealt with by European law, or do we have in any case to reserve the last word to authorities of the Member States? The frequently reaffirmed tendency of Western Constitutional Courts could suggest a preference for the second option. However the elaboration of the so called European constitutional heritage by the Luxembourg Court and the provisions of the European Treaties concerning human rights and fundamental freedoms offer a different perspective of a European law which provides directly and in an exhaustive way for the protection of European citizens as well as of third country nationals.

During the workshop it was correctly underlined that both the concept of European heritage and the standards adopted at Copenhagen in view of the monitoring of the constitutional and legislative reforms in the new member States[12] do not always have a clear content. They are used by the interpreters with great freedom and fantasy. For instance, it is difficult to accept the opinion supported by some authors that regional autonomy forms part of the European constitutional heritage when many European States still use a centralistic form government. The organization of the judiciary follows at least two different models in Europe: the Southern

[9] Art. 68 of the Constitution of the Latvian Republic and Art. 90 of the Polish Constitution.
[10] Art. 2 of the Hungarian Constitution.
[11] The Constitution of the Republic of Estonia Amendment Act adopted by way of referendum on 14 September 2003.
[12] As put forth during the 1993 Copenhagen European Council.

European model premised on the institution of the Councils of the judiciary and their entrustment with governing functions, and the Central European model which places at the center of government of the judiciary, the executive organs or bodies and limits their discretionality by specific procedural rules. Even European authorities experienced difficulties in using a European constitutional heritage to monitor the constitutional and legislative experiences of the new Member States. For instance, with respect to Estonia, they clearly adopted guidelines for the protection of the Russian minority which gave priority to knowledge of the Estonian language above the safeguard of Russian identity. Also Bulgaria adopted criteria in the evaluation of judicial reforms which are distinct from those they preferred when dealing with other countries.

But the understanding of a European constitutional heritage is not only complicated by the ambiguities of its content as it is construed by European authorities. There are difficulties also on the side of the Member States. The obsession with the value of the national identity which is present in their societies restrains State authorities from correctly complying with some of the main principles of democracy and protection of human rights. Again the experience of the Baltic States in the field of citizenship admonishes us that the myth of national identity can endanger the application of the principles of equality and non-discrimination to the relations among the persons living "within the jurisdiction" (Art. 1 of the European Convention on human rights and fundamental freedoms) of the member States.

The institutions of the Council of Europe and, more recently, those of the European Union have been very attentive to the protection of the ethnic identity of the Roma. These policies are justified not only by the number of interested people, but also by their special nomadic conditions. This is a people of travelers frequently moving around European countries, especially in Central and Eastern Europe. Only if the principle of tolerance is incorporated in the Constitutions of the interested States, can they hope to be welcome and treated according to the needs of the policies of the protection of human rights and fundamental freedoms. But the example of the treatment reserved to the Roma can be a useful precedent for the implementation of the policies regarding the four well known freedoms which support the creation of the European (market and) space. It is worth mentioning that Joseph Weiler strongly and correctly emphasized the basic importance of tolerance in shaping the European Constitution.[13]

Tolerance cannot be established *uno actu* and simultaneously in all European member States. As antisemitism is still present in many countries of Western Europe, notwithstanding the long history of commitment of the European institutions to the protection of human rights and the statements which are present in the European Treaties, it is understandable that in the new Member States the establishment

[13] Most recently in *Un'Europa Cristiana: un saggio esplorativo* (Milano: BUR 2003).

of a frame of tolerance, democracy and freedom will take some time. These are problems which can be solved not only by constitutional declarations, in line with Sieyès but also—and, in a better way—according to a Burkeian approach. The long and difficult future developments of the accession process will undoubtedly enrich our research by new materials if we have the patience and the courage to wait and study them.