
Mahulena Hofmann, Von der Transformation zur Kooperations-offenheit?

Summary

From Transformation to Openness for Cooperation? Legal System Development in Central and Eastern European States to Accommodate International and European Law

Why and to what extent did the transformation states of Central and Eastern Europe open their legal orders for supranational legal systems? Why and to what extent did some of them withdraw this step at a later stage? Is there any relationship between the degree of this openness and the quality of rule of law order in a given State? To give an answer to these questions was the main focus of this study.

Quite a considerable amount of information on the relationship between the legal orders of the transformation countries with supranational legal systems has been gathered already; therefore, the present analysis could rely, to some extent, on the results of studies published so far.¹ The real challenge consisted in the attempt to link this openness with certain elements of the rule of law principle in the countries selected for this study: The Czech Republic, Poland, the Slovak Republic, and Slovenia as former socialist countries which joined the European Union in 2004, the Russian Federation as a country with a significant influence in other successor States to the former USSR, and the Republic of Belarus as an example of a country with promising step into the family of members of the rule of law which, however, moved considerably backwards since 1996.

¹ Especially *A. Albi*, EU Enlargement and the Constitutions of Central and Eastern Europe, Cambridge 2005; *S. Biernat*, Offene Staatlichkeit, § 21 Poland, in: IPE II, Heidelberg 2008; *S. Hobe*, Der offene Verfassungsstaat zwischen Souveränität und Interdependenz, Berlin 1998; *J. Malenovský*, Mezinárodní právo veřejné, jeho obecná část a poměr k jiným právním systémům, zvláště k právu českému, Brno 2008; *A. Nußberger*, Ende des Rechtsstaats in Russland?, Köln 2007; as well as *W. Rückert*, Das Völkerrecht in der Rechtsprechung des Russischen Verfassungsgerichts, Berlin 2005.

To this end, a questionnaire had been drafted which enabled an insight into the legal orders from this perspective. The first question dealt with the reasons for the opening of the legal orders of the transformation countries and their readiness for international cooperation. The next question focused on the existence, forms and limits of the transformation of legal acts of supranational legal orders – public international and European Community law – into a supplementary legal source of municipal law. In this regard, a specific interest was devoted to the State practice, especially on the models of the treatment of supranational law by the general and Constitutional Courts. Because of its explicatory power, the reaction of municipal law to decisions of selected international bodies such as the European Court of Human Rights has been explored. Subsequent to the analysis of the opening of the domestic legal orders for supranational orders, the limits of this process have been examined. The results enabled a categorization of the forms of reaction of municipal orders to supranational legal systems. On the basis of the answers to these questions, following theses could be formulated:

1. *The Reasons for the Opening*: The hypothesis that the opening of the municipal legal orders of transformation countries towards supranational legal orders was primarily a reaction to the former authoritarian and non-transparent legal orders in the 1990ies proved to be correct.² The drafters of the constitutions of these countries understood the commitment to these systems as a signal to terminate the period of disrespect with regard to these rules, especially to international human rights instruments. Irrespective of the prevailing political *couleur*, the respective State powers have been instructed not to reach their decisions without any external corrective represented by international rules.³ Thus, the “outwards” opening has been designed as a renouncement to the unlimited exercise of State sovereignty and a submission under external legal systems; both these aspects have been perceived as elements

² S. e.g. G. Danilenko, International Law in the Russian Legal System, in: International Law in Domestic Legal Orders: A Comparative Perspective, ASIL Proceedings, 1997, S. 295; K. Działocha, Źródła prawa, in: L. Garlicki (Hrsg.), Konstytucja Rzeczypospolitej Polskiej, Komentarz, Warszawa 1999, S. 2 et al.

³ S. e.g. L. Garlicki, Przesłanki ograniczenia konstytucyjnych praw i wolności, Państwo i prawo 10 (2001), 5 ff.

of the emerging rule of law.⁴ Simultaneously, it signaled the readiness of the municipal legal orders to share the values of international human rights instruments and to guarantee them in respect of the persons being subjects to such legal orders.⁵ Other subjects of international law were informed that the evolving legal orders intended to found the mutual relationship on the basis of international law, in a longer perspective also on European Community law, and that they were ready to comply with their international obligations.⁶

This is so notwithstanding the fact that the legal orders of the transformation States considered their respective sovereignty as being of high value: The renouncement to exercise absolute sovereignty can be understood as an expression thereof. An international legal obligation can reduce the scope of such sovereignty but cannot deprive it of its essence – by an *actus contrarius*, the subjects of international legal relations can regain their powers. This became specifically apparent during the process of the amendments to some of the constitutions which aimed at preparing the States concerned for their envisaged membership in the European Union. From this perspective, the post-communist constitutions do not necessarily appear as being “*souverainist*”,⁷ but rather as “sovereignty-aware”.

From a temporal perspective, it is symptomatic that the opening of the legal systems for *international law* occurred in a comparable stadium of the development of the legal orders – namely at the moment where the respective national orders were at the beginning of their path to the rule of law and disposed neither of a detailed human rights legislation nor of

⁴ Even the opening of the Constitution of Belarus in 1994 has been perceived as one of the attributes of the rule of law order. S. G.A. Vasilevič, *Konstitucija Respubliki Belarus, Naučno-praktičeskij kommentarij*, Minsk 2000, p. 61 ff.

⁵ As an example, the approach of the drafters of the Slovak Constitution can be mentioned who included their concept of openness of the Slovak legal order towards external legal orders in Article 1 para 2 of the Constitution.

⁶ S. e.g. Article 9 of the Constitution of Poland, Dz.U. 1997, No 78, Pos. 483.

⁷ Dissented A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe*, Cambridge 2005, 24 ff.

any consolidated jurisprudence in this field.⁸ The reference to external legal rules, especially international human rights treaties, contributed to assigning to them the role of a complementary legal source.

2. The Willingness for Cooperation and Integration Clauses: The constitutional willingness for cooperation can be considered as one of the attributes of the openness of a legal order. A proclaimed readiness for international cooperation existed even in the constitutions of the authoritarian regimes of socialist States. However, the decisive factor is the existence of legal provisions which formulate the preconditions and forms of the participation of States in international structures: They react to the necessity to adapt legal orders to new forms of the execution of sovereignty.

The overview has shown that all examined countries, irrespective of the fact whether they belong to the European Union or not, created the preconditions necessary for their adherence to supranational structures. From a municipal law perspective, these provisions were considered as an imperative to join such structure without infringing upon the own sovereignty. The content of these clauses varies both as concerns the description of the structure which should be joined and as regards the amount of the rights (to be) transferred.

Only the pertinent provision of the Constitution of the Slovak Republic mentions expressly the European Communities and the European Union.⁹ Other legal orders speak of “international organization or institution” (Czech Republic),¹⁰ “international organization or international organ” (Poland)¹¹ or “international organization” (Slovenia).¹²

⁸ S. e.g. Constitution of the Republic of Slovenia of 1991, Ur.l.RS, No 33/1991, Constitution of the Czech Republic of 1993, No 1/1993 Sb. as amended, Constitution of the Russian Federation of 1993, Rossijskaja Gazeta of 11.11. 1993.

⁹ Article 7 para 2 of the Constitution of the Slovak Republic, No 135/2001 Zb.z.; later also the Constitution of Romania of 21.11. 1991 as amended (2003) and Bulgaria of 13.7. 2001 as amended (2005).

¹⁰ Article 10 a of the Constitution of the Czech Republic, No 1/1993 Sb. as amended (2001).

¹¹ Article 90 para 1 of the Constitution of the Republic of Poland, Dz.U. 1997, No 78, Pos. 483.

¹² Article 3 a para 1 of the Constitution of the Republic Slovenia as amended, Ur.l.RS, No 24/03.

The integration clause of the Russian Constitution operates with the term of “interstate associations”¹³ and the Constitution of Belarus with the notion of “interstate structures”.¹⁴ The amount of the rights (to be) transferred ranges from “certain powers of bodies of the Czech Republic”¹⁵ to the “competence of organs of State authority in relation to certain matters”,¹⁶ “exercise of a part of its powers”,¹⁷ “the exercise of part of its sovereign rights”¹⁸ and “some of its powers”.¹⁹ All constitutional texts declare clearly that they do not provide for a transfer of “all” sovereign rights. Surprisingly, only two of them have followed the example of the German *Grundgesetz* and introduced a special clause comparable to its Article 23 (1) 1: The Constitution of Slovenia defines such a structure as an organization based on the respect for human rights and fundamental freedoms, democracy, and the principle of the rule of law;²⁰ the Constitution of the Russian Federation enumerates as preconditions human rights and liberties, as well as compliance with the constitutional system of the Russian Federation.²¹

3. *A Complementary Source of Law*: The next attribute of the openness of a legal order are the existence, forms and limits of the transformation of the supranational legal rules into complementary rules of municipal

¹³ Article 79 of the Constitution of the Russian Federation, Rossijskaja Gazeta of 11.11. 1993.

¹⁴ Article 8 Sentence 2 of the Constitution of the Republic Belarus as amended in November 1996, the website of the President of the Republic of Belarus, <http://www.belarus.net/parliame/constpre.htm>.

¹⁵ Article 10 para 1b of the Constitution of the Czech Republic, No 1/1993 Sb. as amended (2001).

¹⁶ Article 90 para 1 of the Constitution of the Republic Poland, Dz.U. 1997, No 78, Pos. 483.

¹⁷ Article 7 para 2 Satz 1 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.

¹⁸ Article 3 a para 1 of the Constitution of the Republic Slovenia, Ur.l.RS, No 33/1991.

¹⁹ Article 79 of the Constitution of the Russian Federation, Rossijskaja Gazeta of 11.11. 1993.

²⁰ Article 3 a para 1 of the Constitution of the Republic Slovenia, Ur.l.RS, No 33/1991.

²¹ Article 79 of the Constitution of the Russian Federation, Rossijskaja Gazeta of 11.11. 1993.

law. This study focused on the question whether and to what extent these rules – rules of international law and of European Community law – have supplemented the catalogue of directly applicable legal instruments. With regard to the structural differences between public international and European Community law, the analysis has shown quite a variety of models of such relations:

Concerning the rules of international law, differences occurred with respect to the *general principles of international law* on the one hand and international treaty law on the other.

The Constitution of the Russian Federation incorporates both categories of rules of international law.²² In contrast to this approach, the Constitution of Belarus²³ declares only the general principles of international law as standards of Byelorussian legislation. The Constitutions of Slovenia²⁴ and of the Slovak Republic²⁵ declare rather generally their readiness to “respect” both categories of sources of international law. The respective provisions of the Polish²⁶ and Czech²⁷ Constitutions which state that their legal systems observe their obligations under international law, are interpreted as an immanent commitment to general principles of international law.²⁸

²² Article 15 para 4 Satz 1 of the Constitution of the Russian Federation, *Rossijskaja Gazeta* of 11.11.1993.

²³ Article 8 Sentence 1 of the Constitution of the Republic Belarus as amended in November 1996, the website of the President of the Republic of Belarus, <http://www.belarus.net/parliame/constpre.htm>.

²⁴ Article 8 of the Constitution of the Republic Slovenia, *Ur.L.RS*, No 33/1991.

²⁵ Article 1 para 2 of the Constitution of the Slovak Republic, consolidated text No 135/2001 *Zb.z.*

²⁶ Article 9 of the Constitution of the Republic of Poland, *Dz.U.* 1997, No 78, Pos. 483.

²⁷ Article 1 para 2 of the Constitution of the Czech Republic No 1/1993 *Sb.*

²⁸ An analysis of this question can be found by *K. Wójtowicz*, Article 9, in: *J. Boć* (Hrsg.), *Konstytucje Rzeczypospolitej*, Wrocław 1998, p. 33; *J. Malenovský*, *Postavení mezinárodních smluv o lidských právech v českém právu po 1. červnu 2002*, *Právník* 141 (2002), 928 ff.; *V. Pavlíček*, *Ze stanoviska k vládnímu návrhu změny Ústavy ČR*, in: *V. Pavlíček a kol.* (Hrsg.), *Suverenita a Evropská integrace*, Praha 1999, pp. 309 ff.; *J. Filip*, *Parlament ČR schválil návrh euronovely Ústavy ČR*, *Právní zpravodaj* 11 (2001), p. 5.

A considerable obstacle to a more frequent application of general principles in the practice of the transformation countries is the non-existence of mechanisms for a binding determination of their scope and content. In some legal orders, they are considered to represent the international *ius cogens* (Russian Federation),²⁹ in others the legal principles of civilized nations (Slovenia)³⁰ or the principles of the Vienna Convention on the Law of Treaties (Slovakia).³¹ Differences occur also in relation to their legal force. A remarkable fact is that none of the analyzed legal orders provides for a provision comparable to Article 100 (2) of the German *Grundgesetz* which enables the German Federal Constitutional Court to determine whether a rule of public international law constitutes such a general principle of international law and, as such, forms part of the applicable (German) municipal law.

In contrast to the rather vague provisions on the rank of general principles of international law in the municipal legal order, the rules on the incorporation of *international treaties* enable an assessment as to the openness of a particular legal order. Moreover, they open – under certain preconditions – the path for the application, in the respective domestic legal orders, of international treaties, especially human rights instruments including their interpretation by the respective international bodies. *A contrario* the legal orders of the former socialist regimes and of the Republic of Belarus³² show that the absence of such constitutional rules can serve a special, “defensive” purpose for these regimes.

The majority of the examined States limits the “intrusion” of international treaty rules into municipal law to constitutionally qualified, most significant international treaties. This qualification takes place usually

²⁹ Vgl. *J.S. Romanov*, Ob uslovijach formirovanija obščepriznannyh norm, Moskovskij žurnal mezhdunarodnogo prava 2 (1999), p. 38.

³⁰ Z.B. *M. Škrk*, The European Law and the Constitutional Order of Slovenia, European Law in the Case-Law of Constitutional Courts, Bratislava 2001, p. 70.

³¹ Motives to the Amendemet of the Slovak Constitutiton, 2001, <http://www.nrsr.sk/Slovak/Zakony/Ustava/index.htm>, p. 24.

³² The position of international treaties is regulated by an ordinary Statute on International Treaties No 1188-XII as amended, Vedomosti Verhovnogo Soveta Respubliki Belarus, 1991, No 32, Pos. 584; Vedomosti Nacional'nogo sobranija Respubliki Belarus, 1998, No 29-30, Pos. 469; Nacional'nyj rejejr pravovych aktov Respubliki Belarus, 1999, No 47.

through the parliamentary approval to these treaties which appears either in the form of a statute or in parliamentary resolutions, and in case of EU-accession treaties partly through referenda. This mechanism guarantees to the legislative power or, in case of referenda to the electors, the right to directly influence the choice of international rules determined for domestic application (e.g. in Poland,³³ the Czech Republic³⁴ and Slovakia³⁵). An extreme form of incorporation of international treaties represents the Russian Constitution³⁶ which incorporates generally all international treaties into municipal law, without any further constitutional preconditions. However, this general treatment of international treaties has to be qualified in light of the pertinent State practice: Not fully in accordance with the Constitution, two resolutions of the Supreme Court (1995 and 2001) and the Russian Statute on International Treaties reduced this category to the group of „ratified” international treaties.³⁷

4. *“Part of the Legal Order”*: The application of rules of international treaties as a complementary source of municipal law is connected with their quality as “part of the legal order”. In this relation, it has to be stressed that the notion of “part of the legal order” does not automatically mean the direct applicability of the said legal norm. Thus, the instruction of the Slovene Constitution to directly apply all “ratified and published treaties” can be implemented only with difficulties.³⁸ The majority of the examined legal orders (e.g. the Polish,³⁹ the Czech⁴⁰ and the

³³ Article 89 und 89 of the Constitution of the Republic Poland, Dz.U. 1997, No 78, Pos. 483.

³⁴ Article 49 of the Constitution of the Czech Republic, No 1/1993 Sb., as amended (2001).

³⁵ Article 7 para 4 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.

³⁶ Article 15 para 4 of the Constitution of the Russian Federation, Rossijskaja Gazeta of 11.11. 1993.

³⁷ Statute on International Treaties, Sobranije zakonodatel'stva Rossijskoj Federacii 1995, No 29, Pos. 2757; dazu *T. Beknazar*, Das neue Recht der völkerrechtlichen Verträge in Russland, *ZaöRV* 56 (1996), 406 ff.

³⁸ Article 8 s. 2 of the Constitution of the Republic Slovenia, *Ur.l.RS*, No 33/1991.

³⁹ Article 91 para 1 of the Constitution of the Republic Poland, Dz.U. 1997, No 78, Pos. 483.

Slovak⁴¹) transforms only qualified international treaties into a “part of their legal order” and transposes only *self-executing* treaties into directly applicable ones; the direct applicability of European Community law results from the obligations of EU Member States to fully respect European Community primary law.

The concept of the Russian Federation which grants general principles of international law the quality of a direct source of municipal law indicates parallels to Article 25 of the German *Grundgesetz*. Contrary to this regulation, the Russian Constitution enlarges this category of direct applicable rules by including international treaties which have to be applied – similarly to the solution in the Czech Constitution – in case of differences with statutory rules.⁴²

5. *The Hierarchy of Rules*: If the provisions on the relation between international and municipal rules had remained limited to the issue of applicability, the relation of international law to municipal regulations would have remained unclear and, theoretically, changeable through any subsequent or more specific national legal norm (*lex posterior* and *lex specialis* principles). Thus, the majority of the States studied has included constitutional rules which determine more precisely the hierarchy between international treaties and the rules of municipal law. The prevailing model (e.g. the Polish,⁴³ Russian,⁴⁴ Slovak⁴⁵ and Czech⁴⁶ Constitutions) is characterized by the primacy of qualified treaties – usually approved by Parliament – to the rules of municipal law. In contrast thereto, the problem of this hierarchy remained unsolved in Slove-

⁴⁰ Article 10 para 1 of the Constitution of the Czech Republic, No 1/1993 Sb., as amended (2001).

⁴¹ Article 154 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.

⁴² Article 15 para 4 of the Constitution of the Russian Federation, *Rossijskaja Gazeta* of 11.11.1993.

⁴³ Article 91 para 2 of the Constitution of the Republic Poland, *Dz.U.* 1997, No 78, Pos. 483.

⁴⁴ Article 15 para 2 s. 2 of the Constitution of the Russian Federation, *Rossijskaja Gazeta* of 11.11.1993.

⁴⁵ Article 7 para 5 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.

⁴⁶ Article 10 of the Constitution of the Czech Republic, No 1/1993 Sb., as amended.

nia: The relevant provision has been designed as a rule on the consistency of domestic norms with international law and does not offer any complete criteria for the ranking of international rules in the hierarchy of legal rules. According to the jurisprudence of the Slovene Constitutional Court,⁴⁷ only the primacy of international law to the Constitution is excluded. The model chosen by the Constitution of Belarus is confusing: Two ordinary statutes⁴⁸ formulate the rule that the position of international treaties is determined by the form of its internal adoption and its position in the hierarchy of municipal legal norms. The possibility of a variety of forms of internal adoption (statute, governmental directive, presidential decree) leads to a variety of their relations to sub-constitutional norms. The confusion and controversies concerning the hierarchy of municipal norms make the situation even more problematic.

6. *Legal Acts of Supranational Structures*: Undoubtedly, the provisions of primary and secondary law of supranational structures acquire their binding force in municipal law through international treaties providing for the accession of the State concerned to such structures.⁴⁹ Because of the high legislative intensity of some of these structures – especially in the case of the European Communities – and its influence on a high number of addressees, the positioning of these rules in the municipal legal order can contribute to the transparency of the catalogue of applicable legal norms in a given country.

The models of respective constitutional rules vary: The provision of the Constitution of the Slovak Republic is limited to legally binding acts of the European Communities and the European Union which “have precedence” over laws of the Slovak Republic;⁵⁰ the Constitution of

⁴⁷ Rm 1/97, Ur.l.RS, No 40/1997.

⁴⁸ Statute on International Treaties, No 1188-XII as amended, *Vedomosti Verchovnogo Soveta Respubliki Belarus*, 1991, No 32, Pos. 584; *Vedomosti Nacional'nogo sobranija Respubliki Belarus*, 1998, No 29-30, Pos. 469; *Nacional'nyj rejestr pravovykh aktov Respubliki Belarus*, 1999, No 47, and the Statute on Generally Binding Legal Acts, *Vedomosti Nacional'nogo sobranija Respubliki Belarus*, 2000, No 5, Pos. 40.

⁴⁹ Also the Decision of the Polish Constitutional Court K 18/04 of 11.5.2005.

⁵⁰ Article 7 para 2 s. 2 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.; similarly the Constitution of Rumania of 21.11.1991, as amended (2003).

Slovenia defines its relation to “legal acts and decisions adopted within international organization” and orders to apply such acts in accordance with the regulations of these organizations⁵¹ – such acts include, e.g., also decisions of the UN Security Council. The Polish Constitution uses the term “the laws” established by an international organization and accords to them, in case of conflict, both direct applicability and precedence over statutes.⁵² Interestingly, also the legal orders of the Russian Federation⁵³ and the Republic Belarus⁵⁴ envisage legislative activities of supranational structures. Only the Czech Parliament decided not to include into the Constitution any reference to legal acts of supranational structures.

None of the constitutions accords to legal acts of supranational structures priority over constitutional rules. This situation, which is the prevailing one in Europe, has been confirmed by the jurisprudence of their Constitutional Courts.⁵⁵

7. The Application of International and Community Rules: The application of *international* rules by *general courts* of the transformation countries studied depends solely on the position of these rules in their municipal legal orders. A constitutional rule determining that judges are being bound by international agreements can only play a declaratory role but it can contribute to the transparency of the legal system.

Two constitutions under examination – the Slovak⁵⁶ and the Czech Constitution⁵⁷ – declare the judges of ordinary courts as being bound

⁵¹ Article 3 a para 3 of the Constitution of the Republic of Slovenia, Ur.l.RS, No 33/1991.

⁵² Article 91 para 3 of the Constitution of the Republic Poland, Dz.U. 1997, No 78, Pos. 483.

⁵³ § 15 para 1 of the Statute on International Treaties, Sobranije zakonodatel'stva Rossijskoj Federacii 1995, No 29, Pos. 2757.

⁵⁴ Article 116 Verf. of the Constitution of the Republic Belarus as amended in November 1996, the website of the President of the Republic of Belarus, <http://www.belarus.net/parliame/constpre.htm>.

⁵⁵ E.g. Decision of the Czech Constitutional Court Pl. ÚS 50/04 of 8.3. 2006 or of the Polish Constitutional Court K 18/04 of 11.5. 2005.

⁵⁶ Article 144 para 1 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.

⁵⁷ Article 95 para 2 of the Constitution of the Czech Republic, No 1/1993 Sb., as amended (2001).

by international agreements; in Slovenia, the judges are bound by international law on the basis of a statute.⁵⁸ In other countries (Poland⁵⁹ and the Russian Federation⁶⁰), the judges are – similarly to Article 20 (3) of the German *Grundgesetz* – bound by the Constitution and statutory law.

Despite of this fact it was interesting to analyze the effects of this situation on the practice. It appeared that “being bound by international law” was a mere formality and did produce only minimal effects: Regardless of the existence of special constitutional provisions, ordinary courts apply international law only in exceptional cases.

The ordinary courts of the new EU Member States apply *European Community* law since the EU-accession.⁶¹ They perform their role as “community courts”⁶² and according to Article 234 EC Treaty raise preliminary questions to the European Court of Justice. Both these forms of activities have been established and are performed by courts of all instances.⁶³ In order to provide for a statutory basis for a suspension of proceedings before ordinary courts in case of a preliminary question, the Slovak Republic amended its civil procedure legislation, the Czech Republic both its civil and criminal procedure laws; for the same reason, the Statute on Judges has been amended in Slovenia. Whereas the issue of legal consequences of an ordinary court not raising a preliminary question has – as yet – not been decided upon by the courts, it has been addressed in the doctrine: Similarly to the jurisprudence of the German Federal Constitutional Court on Article 101 of the German

⁵⁸ § 3 of Statute of Courts, Ur.l.RS, No 19-779/1994, as amended by Ur.l.RS, No 45-2161/1995, No 26-1210/1999, No 38-1874/1999, No 28-1254/2000, No 26-1582/2001, No 26-2759/2002 and No 67-3232/2002.

⁵⁹ Article 178 para 1 of the Constitution of the Republic Poland, Dz.U. 1997, No 78, Pos. 483.

⁶⁰ Article 120 para 1 of the Constitution of the Russian Federation, Rossijskaja Gazeta of 11.11. 1993.

⁶¹ See the contributions in *M. Hofmann* (Hrsg.), *Europarecht und die Gerichte der Transformationsstaaten*, Baden-Baden 2008.

⁶² S. e.g. the decision of the Administrative Court of the *Wojewodship Lublin* of 25.5. 2005, I SA/Lu 77/2005.

⁶³ E.g. the Administrative Court of the *Wojewodship Warszawa* in the case III SA/Wa 254/07, C-313/05; district court *Český Krumlov* in case C-437/05; district court *Prague 3* in case C-65/06.

Grundgesetz, it is most often considered as representing a situation where a party to the litigation is removed from the jurisdiction of the judge predetermined by law (*Entzug des gesetzlichen Richters*).⁶⁴

Supranational regulations played a substantial role in the formulation of the catalogues of competencies of *Constitutional Courts* in the 1990ies. International law emerged first as an object of control. This had usually two motives: First, it signaled the wish to maintain control over the contents of international treaties; second, it was derived from the necessity to secure the necessary instruments for their domestic implementation.

In contrast to the German legal order where the pertinent extension of the competencies of the German Constitutional Court were achieved through the interpretation of the *Grundgesetz* by this very Court, the Constitutions of transformation countries enable explicitly a *preventive control* of international treaties⁶⁵ which sometimes results in blocking the ratification process. The instrument of constitutional review of international treaties has been used in especially important occasions: Thus, the Constitutional Court of Slovenia has controlled the compatibility of the Europe-Agreement of Slovenia with the Constitution,⁶⁶ the Polish Constitutional Court reviewed the Treaty Concerning the Accession of Republic Poland to the European Union⁶⁷ and applications

⁶⁴ Z.B. *W.L. Dragica*, The Position of the Constitutional Court of the Republic of Slovenia in Relation to European Community Law, Round Table II on Consequences of Membership in the EU for Constitutional Courts, Vienna 17 October 2006, 96-98.

⁶⁵ Article 188 para 1 of the Constitution of the Republic Poland, Dz.U. 1997, No 78, Pos. 483; Article 87 para 2 of the Constitution of the Czech Republic, No 1/1993 Sb., as amended (2001); Article 125 a of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.; Article 160 para 2 of the Constitution of the Republic Slovenia, Ur.l.RS, No 33/1991; Article 125 para 2 d of the Constitution of the Russian Federation, Rossijskaja Gazeta of 11.11. 1993; Article 116 of the Constitution of the Republic Belarus, as amended in November 1996, the website of the President of the Republic of Belarus, <http://www.belarus.net/parliame/constpre.htm>.

⁶⁶ Rm 1/97, Ur.l.RS, No 40/1997.

⁶⁷ K 18/04 of 11.05. 2005.

have been lodged with the Constitutional Court in the Czech Republic challenging the constitutionality of the Treaty of Lisbon.⁶⁸

Furthermore, international law appeared in the form of a criterion of constitutionality. It has been included into the category of instruments on the basis of which Constitutional Courts examine statutory and sub-statutory norms. This inclusion was inspired by the idea that Constitutional Courts should not confine their means of control to municipal constitutional norms but should extend them in such a way as to include also supranational legal systems; it was closely connected with the general opening of the respective legal systems towards external rules. To some extent, it was only a logical consequence of the positioning of international norms above the statutory rules, as shown, e.g., in the recent practice of the Czech Constitutional Court.

The analysis proved that all countries included in this study follow the practice of applying international law as an instrument of the *abstract control* of sub-constitutional norms (*abstrakte Normenkontrolle*): Some of them on the basis of explicit constitutional norms (Poland,⁶⁹ Slovakia,⁷⁰ Slovenia⁷¹ or Belarus⁷²), others⁷³ by declaring international law to constitute “part of the legal order”. Thus, they differ from the legal order of the Federal Republic of Germany which principally confines the catalogue of instruments of constitutional control to the provisions of the *Grundgesetz* (see Article 93 (1) N° 2 thereof).

In practice, reference has been most frequently made to the provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights, in some of the countries (Czech

⁶⁸ In its decision Pl. ÚS 19/2008 of 26 November 2008, the Constitutional Court stated that the questioned articles of the Lisbon Treaty (art. 2, 4, 352 and 216) were not inconsistent with the Czech constitutional order.

⁶⁹ Article 188 para 3 und 4 of the Constitution of the Republic Poland, Dz.U. 1997, No 78, Pos. 483.

⁷⁰ Article 125 para 1-3 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.

⁷¹ Article 160 para 1 s. 2 of the Constitution of the Republic Slovenia, Ur.l.RS, No 33/1991.

⁷² Article 116 of the Constitution of the Republic Belarus as amended in November 1996, the website of the President of the Republic of Belarus, <http://www.belarus.net/parliame/constpre.htm>.

⁷³ Czech Republic, Russian Federation.

Republic, Poland) also to provisions of the respective Europe-Agreements. Notwithstanding the consolidated practice of the Czech Constitutional Court to apply international law documents as an instrument of constitutional control, the 2001 amendment to the Constitution of the Czech Republic removed international law from the catalogue of references;⁷⁴ however, the Constitutional Court continues to apply international law, now without an explicit constitutional norm.

In relation to the accession to the European Union, the question arises as to the competence of Constitutional Courts to examine European Community law as to its compatibility with national constitutional law. Whereas primary Community law can only be controlled in the framework of control of international treaties,⁷⁵ in case of secondary law, i.e. European Directives, the degree of the margin of appreciation accorded to the national authorities when transposing them into municipal law seems to play the decisive role (Poland,⁷⁶ Slovenia,⁷⁷ and the Czech Republic⁷⁸): The wider this margin the easier it is for the Constitutional Courts to justify their competence to control this “national” legal act.

The question as to the obligation of Constitutional Courts to raise a preliminary question to the European Court of Justice has been treated rather cautiously until now: The jurisprudence speaks of a relation of loyalty between both court systems⁷⁹ or of the “delicacy” of this question⁸⁰ and stresses the exception from this obligation which the European Court of Justice formulated itself (existence of a consolidated ju-

⁷⁴ Article 87 para 1 lit. a und b of the Constitution of the Czech Republic, No 1/1993 Sb., as amended (2001), Statute on the Constitutional Court No 395/2001 Sb.

⁷⁵ S. Decision of the Polish Constitutional Court K 18/04 of 11 May 2005 (EU-Accession); application to the Czech Constitutional Court on the constitutional control of the Treaty of Lisbon of 28 April 2008.

⁷⁶ S. Decision of the Polish Constitutional Court P. 1/2005 of 27 April 2005 (European Warrant).

⁷⁷ For example Decision of the Constitutional Court of Slovenia U-I-113/04 of 7 February 2007.

⁷⁸ Decision of the Czech Constitutional Court Pl. ÚS 50/05 of 8 March 2006 (Sugar Quotas).

⁷⁹ Decision of the Polish Constitutional Court K 18/04 of 1 May 2005.

⁸⁰ Decision of the Czech Constitutional Court Pl. ÚS 50/04 of 8 March 2006.

risprudence concerning the issue at stake) or bases its own right to assess the compatibility of a national provision implementing secondary Community law with the national constitution on Article 10 ECT.⁸¹

The existence of a power of Constitutional Courts to raise a preliminary question is, in general, not disputed: The Slovenian literature⁸² considers the Slovenian Constitutional Court as obliged to refer cases to the European Court of Justice especially in cases of constitutional complaints (*Verfassungsbeschwerden*). In other cases, however, it has been interpreted not so much less as an obligation, but rather as a possibility. Even the Constitutional Court of Poland which has been established in principle as a court of control of norms can in special cases decide to refer a preliminary question to the European Court of Justice.⁸³

Only some of the legal orders examined (the Slovak,⁸⁴ the Polish⁸⁵ and the Slovene ones⁸⁶) include provisions which expressly allow for a *concrete constitutional control* (*konkrete Normenkontrolle*) on the basis of international law. In other countries, the courts apply these rules on their own initiative and – as a rule – only on a complementary basis. It deserves to be mentioned that, again, the Constitutional Court of the Czech Republic has been deprived in 2001 of its previous power to assess by this means the compatibility of sub-constitutional norms on the basis of international treaties.

The right to lodge *constitutional complaints* has been introduced in all transformation countries examined with the exception of Belarus. In several of their legal orders, the possibility has been created to assess the constitutionality of individual acts not only on the basis of the constitution, but also on the provisions of international treaties. As in case of other forms of constitutional control, this step signaled the readiness

⁸¹ Decision of the Czech Constitutional Court Pl. ÚS 66/04 of 3 May 2006.

⁸² *W.L. Dragica* (Fn. 64), 96-98.

⁸³ Compare Reasoning of the Decision of the Polish Constitutional Court K 18/04 of 11 May 2005.

⁸⁴ Article 144 para 2 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.

⁸⁵ Article 193 of the Constitution of the Republic Poland, Dz.U. 1997, No 78, Pos. 483.

⁸⁶ Article 160 para 1 of the Constitution of the Republic Slovenia, Ur.l.RS, No 33/1991.

of the legal system to open itself for the direct effects of international law in its dynamic form. Thus, the Constitution of the Slovak Republic includes a generous form of constitutional complaint which expressly allows the Constitutional Court to assess the constitutionality of individual acts on the basis of ratified and published international treaties.⁸⁷

There are two forms of constitutional complaints in the legal systems studied: In some of the countries (Poland⁸⁸ and Russian Federation⁸⁹), the object of control is the normative act which constituted the legal basis for the individual decision, but not the decision itself. This approach rather reminds of a normative control and differs considerably from Article 93 (1) N° 4a of the German *Grundgesetz* which served as a model for other countries (Czech Republic,⁹⁰ Slovakia,⁹¹ and Slovenia⁹²). Also the criteria of constitutionality vary: Similarly to §§ 90 ff. of the German *Bundesverfassungsgerichtsgesetz* the Slovenian Constitution does not explicitly mention international rules as criterion to determine the constitutionality of individual acts. Also in the Russian Federation and Poland, the control of individual acts remains limited to the assessment of their constitutionality in the narrow sense. Despite of this fact, international legal norms – especially human rights instruments – are regularly applied by all three Constitutional Courts, at least as a supplementary source of law used for strengthening their argumentation.

Notwithstanding the fact that international law has been deleted from the catalogue of constitutional criteria in 2001,⁹³ the decisions of the

⁸⁷ Article 127 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.

⁸⁸ Article 79 para 1 of the Constitution of the Republic Poland, Dz.U. 1997, No 78, Pos. 483.

⁸⁹ Article 125 para 4 of the Constitution of the Russian Federation, Rossijskaja Gazeta of 11.11. 1993.

⁹⁰ Article 87 para 1 lit. d of the Constitution of the Czech Republic, No 1/1993, as amended (2001).

⁹¹ Article 79 para 1 of the Constitution of the Republic Poland, Dz.U. 1997, No 78, Pos. 483.

⁹² Article 160 para 1 s. 6 of the Constitution of the Republic Slovenia, Ur.l.RS, No 33/1991.

⁹³ Article 87 para 1 lit. d of the Constitution of the Czech Republic, No 1/1993, as amended.

Czech Constitutional Court on individual complaints continue to rely on international law. In contrast to the Czech legal order, the Slovak constitutional complaint system fully includes the application of international law as criterion of constitutionality.⁹⁴

8. The Implementation of Decisions of Supranational Bodies: The criterion of the implementation of decisions of supranational bodies has been introduced in this study in order to show how the national legal orders react to external, possibly also disadvantageous decisions: The real test for the friendliness of a national legal order towards international law starts at the moment at which supra- or international control mechanisms decide that the interpretation and application of municipal law is in conflict with the international obligations of a given State. This test is passed if the State accepts and implements this decision. Because of their significance for transformation countries, the decisions of the European Court of Human Rights (ECtHR), the UN Human Rights Committee and the European Court of Justice have been chosen.

It can be stated that the majority of the States examined reacted to the Recommendation No (2000)2 of the Council of Europe Committee of Ministers to Member States on the Re-examination or Re-opening of Certain Cases at Domestic Level following Judgments of the European Court of Human Rights of 19 January 2000 and the Council of Europe Parliamentary Assembly Resolution No 1226(2000) "Execution of Judgments of the European Court of Human Rights" of 28 September 2000 and introduced special provisions in order to guarantee the implementation of the ECtHR decisions: Poland,⁹⁵ Russian Federation⁹⁶ and Slovenia⁹⁷ introduced provisions into their Criminal Procedure Acts which enable the re-opening of the criminal procedure on the basis of a ECtHR decision. Slovakia extended the possibility of the re-

⁹⁴ Article 127 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.

⁹⁵ § 540 para 3 of the Criminal Procedure of the Republic Poland, Dz.U. 1997, No 89, Pos. 555, as amended.

⁹⁶ §§ 413-415 Criminal Procedure of the Russian Federation, Rossijskaja Gazeta No 174- FZ.

⁹⁷ §§ 410-415 Criminal Procedure of the Republic Slovenia, Ur.l.RS, No 19-779/1994, amended by Ur.l.RS, No 45-2161/1995, Ur.l.RS, No 26-1210/1999, Ur.l.RS, No 38-1874/1999, Ur.l.RS, No 28-1254/2000, Ur.l.RS, No 26-1582/2001, Ur.l.RS, No 26-2759/2002 and Ur.l.RS, No 67-3232/2002.

opening to civil procedure, in the Czech legal order, the Constitutional Court is empowered to re-open the procedure on the basis of an ECtHR decision.⁹⁸ Moreover, in Poland and Slovenia, special procedures exist for compensation in cases of excessive length of procedures constituting a violation of Article 6 ECHR.⁹⁹ The Republic of Belarus, not being a Member State of the Council of Europe and, therefore, neither a State Party to the ECHR, is not being bound by the decisions of the ECtHR.

In contrast to legally binding decisions of the ECtHR, the views of the UN Human Rights Committee under Article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights have only a recommendatory character. For the citizens of Belarus who are outside the reach of the mechanisms of the Council of Europe, they play a significant role. However, it is only logical that the legal regimes of the States examined – similarly to the situation under the German Criminal Procedure Act – do not react explicitly to these views. The only exception is the Polish Criminal Procedure Act which does not exclude such views from the potential re-opening of criminal procedure:¹⁰⁰ It does not react explicitly to the judgments of the ECtHR but generally to “decisions of an international organ”.

The decisions of the European Court of Justice (ECJ) are binding on all members of the European Union in accordance with Article 220 ECT. Because of the direct effect of primary Community law and the binding force of the decisions of the ECJ, some of the legal orders of the countries examined do not – similarly to the German legal order – refer to this situation (e.g. the Czech Republic). In other legal orders, there are special clauses which define the effects of decisions of supra-national structures: The Constitution of Slovenia states that “legal acts and decisions” of international structures “shall be applied in accordance with the regulations of these structures”.¹⁰¹ The Slovak Constitution guarantees to the “legally binding acts” of the European Communities and the

⁹⁸ § 119 of the Statute on the Constitutional Court, No 182/1993 Sb., as amended.

⁹⁹ Dz.U. 2004 No 179, Pos. 1843.

¹⁰⁰ *Supra* note 95.

¹⁰¹ Article 3 a of the Constitution of the Republic Slovenia, Ur.l.RS, No 33/1991.

European Union “precedence over laws of the Slovak Republic”¹⁰² which include – according to the Motives of the Amendment to the Constitution – also the decisions of the ECJ. The Czech legal order reflects the binding force of the ECJ decisions in the civil and criminal procedures; the Slovak Criminal Procedure Act qualifies these decisions as enforceable titles.

9. *The Limits of the Opening for Supranational Orders*: Having analyzed the forms of the opening of municipal legal systems for supranational legal rules, the limits of this process can be discussed: The study has shown that the States concerned have not opted for a general opening towards inter- or supranational order which would remain outside their control: With the exception of the general principles of international law and Community law which develop rather autonomously, the national Parliaments maintain their essential influence on the choice of the domestically applicable rules. All constitutions concerned have embodied rules on “parliamentary approval” to international treaties (Poland,¹⁰³ Czech Republic,¹⁰⁴ Slovakia¹⁰⁵) or a parliamentary “ratification” of international treaties (Slovenia,¹⁰⁶ Russia,¹⁰⁷ and Belarus¹⁰⁸).

The question is whether an unconditional openness towards supranational legal systems is possible and politically feasible. From the purely legal point of view, there is no argument why such openness would not be possible: A monistic legal system with a primacy of international law would allow for the application of self-executing norms without any act

¹⁰² Article 7 para 2 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.

¹⁰³ Article 89 and 89 of the Constitution of the Republic Poland, Dz.U. 1997, No 78, Pos. 483.

¹⁰⁴ Article 49 of the Constitution of the Czech Republic, No 1/1993 Sb., as amended.

¹⁰⁵ Article 7 para 4 of the Constitution of the Slovak Republic, consolidated text No 135/2001 Zb.z.

¹⁰⁶ § 75 of the Statute on Foreign Affairs, Ur.l.RS, No 45-2549/2001.

¹⁰⁷ § 15 of the Statute on International Treaties, Sobranije zakonodatel'stva Rossijskoj Federacii 1995, No 29, Pos. 2757.

¹⁰⁸ § 8 of Statute on International Treaties, No 1188-XII as amended, Vedomosti Verchovnogo Soveta Respubliki Belarus, 1991, No 32, Pos. 584; Vedomosti Nacional'nogo sobranija Respubliki Belarus, 1998, No 29-30, Pos. 469; Nacional'nyj rejestr pravovykh aktov Respubliki Belarus, 1999, No 47.

of transformation. The aspect of feasibility has to be approached from the perspective of benefits and disadvantages of a parliamentary involvement:

Among the benefits, the constitutive role of the approval of international treaties has to be mentioned: It prevents States to conclude important international treaties without the consent of the Parliaments and results in the direct applicability of self-executing norms in the national legal orders. Furthermore, it performs an important systemic function by including a legal act into the system of domestic applicable rules and thereby defining the position of the transformed norm within that legal order. As an expression of a principle of representative democracy, the parliamentary approval constitutes a guarantee for not imposing any “alien” rule on and an opportunity to assess the contents and the adequacy of the international legal act for the municipal order. This approval has an important informative role: Those who apply the law can be informed more easily about the contents of the applicable law if it was approved by the national Parliament than in case of those legal norms which affect the municipal system directly as it is the case as regards, e.g., the general principles of international law.

The disadvantages could consist in the length of the parliamentary procedure, sometimes a difficult political path to a compromise,¹⁰⁹ the threat of a refusal of a treaty which would be of significance for the country¹¹⁰ as well as the possibility for the abolishment of the norm of approval and a danger of a potential domestic infringement of an international obligation.

As concerns the States examined, the advantages of the parliamentary approval to international treaties prevail. The consequence is that their legal systems cannot be defined as “monist”. They seem to represent a special category which combines the parliamentary influence as an attribute of dualism with the direct applicability of transformed norms as its typical features.

¹⁰⁹ S. e.g. the discussion concerning the draft of a bilateral US-Czech Agreement on Extradition in the Czech Parliament, <http://www.psp.cz/eknih/2002ps/stenprot/030schuz/s030280.htm>.

¹¹⁰ S. e. g. the discussion concerning the ratification of the Statute of International Criminal Court in the Czech Parliament, <http://www.psp.cz/sqw/text/text.sqw?C=3462&T=K2002PSP4V&q=%d8%edmsk%fd%20statut&lem=1&j=1&d1=1>.

Some prominent Slovene authors see in the precondition of an obligatory parliamentary or governmental approval for the direct applicability of international norms an indication for a tendency of the Slovene legal order towards dualism.¹¹¹ Also the Polish system shows dualistic attributes: The legislator created a “closed system of sources of law”¹¹² based on a positivist concept; the parliamentary approval to international treaties adds dualistic characteristics. Article 10 of the Czech Constitution, as amended, and the primacy of international treaties over statutory norms place the Czech legal order formally in the category of “moderate monism”;¹¹³ the reduction of the powers of the Constitutional Court in relation to international law makes this model even more “moderate”.¹¹⁴ Also the constitutional order of the Russian Federation with its strong position of international treaties has some characteristics of monism; the parliamentary approval to international treaties as a means of introducing treaty provisions into the municipal legal order shifts it into an intermediate category of the known systems of relations between international and municipal law.

Despite of the parliamentary approval to significant international treaties, the legal order of the Slovak Republic stands close to monism. The difference to the Russian situation lies in an extensive incorporation of international law into municipal law including into the powers of the Constitutional Court. The legal order of the Republic Belarus can be described as a monist system with a primacy of municipal law.

10. The Rule of Law Order: The next observation concerns the relation between the degree of the openness for external legal systems and the quality of the rule of law. The analysis showed that the existence of transparent, generally available rules – international law and later also Community law – on the position of external legal norms within the various national legal systems played a significant role in the period of

¹¹¹ S. P. Vebar/ T. Ilešič, International Agreements in the Legal Orders of the Candidate Countries. Slovenia, in: A. Ott/ K. Inglis (Hrsg.), Handbook of European Enlargement, Hague 2002, p. 331.

¹¹² K. Działocha, Źródła prawa, in: L. Garlicki (Hrsg.), Konstytucja Rzeczypospolitej Polskiej, Komentarz, Warszawa 1999, p. 2.

¹¹³ S. the opinion of the second Chamber of the Czech Parliament (Senat) in its commentary to an individual complaint, Decision of Constitutional Court No 153 of 11 February 2004, No 153/2004 Sb.

¹¹⁴ S. the Chapter „The Czech Republic“.

transformation. Moreover, the incorporation of human rights instruments increased not only the number of applicable legal sources but often also of the international control mechanisms monitoring the observation of these rules.

The relation between the openness for external systems and the quality of the rule of law is not lineal. On the one hand, the non-existence of rule of law is closely connected with the domestic ignorance towards international law. A legal system which does not respect the rule of law cannot substitute it by its being bound by international law. On the other hand, there are legal systems which do guarantee a high degree of rule of law but have a restrictive attitude towards the external legal order.

The results of the study confirmed the initial thesis about the narrow relationship between the degree of the openness of the legal order to external sources and the quality of the rule: The more a national legal order has been opened, the higher the probability that it also respects the rule of law.

11. The Relativization of the Openness for Supranational Legal Systems: The period of the opening towards external legal systems was followed by phases of its relativization in almost all of the States examined. In the Czech Republic, it occurred in the period when the national jurisprudence had gathered enough experience in order to build its own argumentative basis, especially in the field of human rights.¹¹⁵ Probably, the removal of the external, international law corrector from the powers of the Constitutional Court was intended as a compensation for the expected abundance of Community norms directly applicable in the legal order. Similar motive might have been the rather widespread uneasiness about the extent of Czech sovereignty subsequent to the accession to the European Union. This could be observed in the jurisprudence of the Constitutional Court, which stated in 2006 that if developments in the EC, or the EU, should threaten the very essence of the state sovereignty of the Czech Republic it will be necessary to insist that these powers be once again taken up by the Czech Republic's state organs.¹¹⁶

In the formerly quite Europe-enthusiastic Poland, the skepticism reached its summit during the negotiations on the text of Treaty for a

¹¹⁵ S. Constitutional Act No 395/2001 Sb. of 18 October 2001 amending the Constitution of the Czech Republic No 1/1993 Sb.

¹¹⁶ Decision of the Czech Constitutional Court Pl. ÚS 50/04, 8 March 2006.

Constitution for Europe and the Lisbon Treaty. On the constitutional law basis, this skepticism showed itself in the decision of the Constitutional Court on Poland's membership in the European Union. In this decision, the Court held that in the event of an irreconcilable inconsistency between a constitutional norm and Community law, the State authority or the nation would have to decide on various options, among them "the withdrawal from the European Union".¹¹⁷

In other countries, this fatigue towards supranational rules was less manifest; it did not show in the legislation or in the decisions of Constitutional Courts but mainly in the reduction of cases based on international law provisions (e.g. Slovenia).¹¹⁸ Also in Russia, the pragmatic practice to apply – even without a constitutional basis – international law as a supplementary source of information became rather rare. In Belarus, the openness of the legal system has been reduced through various statutory acts in the period of abandoning the path towards the rule of law and returning on the way back to an authoritarian regime.¹¹⁹

Summing up, the reasons of the relativization of the openness of municipal legal orders for supranational legal systems can be found either in the fear of a loss of independence by the introduction of another, complementary legal order, or in the conviction that the own legal order has reached such a high quality that the incorporation of a complementary, external order seems unnecessary. The third reason can be described as a generally defensive attitude towards the international community and the absent readiness to submit the municipal order under any external control.

12. A Prognosis: It will be interesting to observe how the phenomenon of the openness of the legal orders of the transformation countries for external legal norms will develop in the future: Whether it will find a successor or will remain a single phenomenon typical for the transition period from socialism to legal orders based on democracy and the rule of law.

As shown in this overview, the openness for supranational systems has been not only a complementary element of the rule of law, but also an important political signal, an offer for the application of external, inter-

¹¹⁷ Decision of the Polish Constitutional Court K 18/04, 11 May 2005.

¹¹⁸ S. the Chapter „Slovenia“.

¹¹⁹ S. the Chapter „The Republic of Belarus“.

national correctives. This may answer the question as to the successors of these models: The most open systems will most probably be found among those States which either wait for their EU-accession or consider it as the most important goal of their external policies. As an example can be mentioned the Constitution of Bulgaria which included, already in Bulgaria's pre-accession period, a provision on an extensive incorporation of external systems into the Bulgarian legal order.¹²⁰ Another example is the Constitution of Rumania which is not limited to the regulation of the relationship between the municipal legal system and international law¹²¹ but included an extensive catalogue of EU-relevant provisions even four years before its actual accession to the EU.¹²² A provision on the incorporation of international treaties into the municipal legal order is part of the Ukrainian Constitution¹²³ and it would be no surprise if it were to be supplemented by a typical integration clause within the near future.

13. Addendum: At the very end of this analysis, it seems to be appropriate to underline that the value of the openness of a municipal legal order presents itself most clearly in the comparison to the past.

Not only the present openness towards supranational systems, but also the former separation of the national legal system from the international legal order was a political instrument and had clearly defined practical reasons: The aim was to prevent international human rights such as the freedoms of opinion and movement with the latter including the right to choose a residence, the right to leave one's own country and the right to enter this country again, to be invoked by the citizens of the then socialist countries. A successful individual invocation of these rights was simply excluded. From this perspective, the non-openness of the legal order of Belarus is only consequent.

In contrast to the situation prior to 1989, the supranational legal systems have considerably contributed to establish the rule of law and assisted citizens in the transformation countries in numerous cases to re-

¹²⁰ Article 5 of the Constitution of the Republic of Bulgaria, as amended by No 85/26 D.V.

¹²¹ Article 11 of the Constitution of Romania as amended by No 429/2003 MO.

¹²² Article 16 of the Constitution of Romania, *ibid.*

¹²³ Article 9 of the Constitution of Ukraine, Vidomosti Verchovnoj Radi No 30/1996, Pos. 141.

establish their rights after the “fall of wall”. The vertex of the parabola which took place in the extensive application of external instruments in the municipal orders of the countries examined the 1990ies has to be seen from this perspective.