A Response to Daniel Smilov and Michael Hein

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Any author must consider him- or herself very lucky – as indeed I do – to have such thoughtful, constructive and generous commentators as Dr Michael Hein and Assoc. Professor Daniel Smilov. They have both approached my recent book very charitably, and in terms flattering to me. At the same time, they have identified some genuine gaps, weak points, and questions to ponder over as a follow-up to my project. I am immensely grateful to the both of them – all the more so since I am happy to declare that they both captured my aspirations and the main message of the book very accurately. There is no need for me to escape into the “This is not what I really meant” kind of response. And if occasionally, as will become clear below, there are some statements or ideas that I intended to be understood somewhat differently from the interpretation offered by my commentators, the fault is entirely mine; I should have been more clear and precise about my true intentions.

In his observations about the story contained in the first chapter of the book, about the enlargement of the Council of Europe (CoE) as a stimulus for the constitutionalization of the European Court of Human Rights (ECtHR), Dr Hein raises two intriguing questions. First, he invites the reader to engage in a counter-factual exercise and reflect upon a scenario without the Eastward enlargement: “Would it not be plausible that the echr system would have been constitutionalized sooner or later?” To which I would respond: “Later rather than sooner – probably, yes, but not necessarily”. Of course, there is always a degree of unverifiable speculation in every counter-factual, and Dr Hein is perfectly aware of this. Thus, he offers an explanation for a likely constitutionalization in the hypothetical scenario of the CoE maintaining its pre-1989 composition: the law of judicial self-empowerment. As Dr Hein observes, in the case of a “higher” law – like the European Convention vis-à-vis national laws – a degree of constitutionalization would have occurred anyway.

I am not so sure about this proposition. After all, we know from international law that there are all sorts of “higher laws” – including the whole body of
international treaty law, which binds states that have ratified the relevant treaties. And yet, this body of law has not produced constitutionalization through judicial self-empowerment, even if a judicial or quasi-judicial body has been set up to enforce the rules. The International Court of Justice has not become a constitutional court for international community, to take an obvious example—and that is not for the absence of ambition, skill or prestige on the part of the judges. One may very well imagine that the ECtHR could have continued to persist in the model it had settled on by the late 1980s: a quasi-appellate court of human rights for Western Europe (plus Turkey), with occasional adventures as in *Marckx v Belgium*,¹ where the legal rule rather than an individual decision had been censured.

Much hinges of course upon the “higher law” description. If anything, the European Convention was seen at the beginning as a “lower law” by the founding states—as a set of rules describing a common denominator of achievement rather than aspirations for progress in human rights. And the relationships between national constitutions and the ECtHR (and, relatively, between the national constitutional/supreme courts and the ECtHR) represent a broad variety of patterns. In the absence of strict supremacy and direct effect, national legal orders have broad discretion as to how seriously they have to take account of ECtHR rulings, especially when they were not party to a given case. *Görgülü* decision of the German federal Constitutional Court² is an emblematic example of a top national court respectfully keeping its distance from the authority of the ECtHR.

I do not want to overstate this point. I did not mean, in my book, to suggest that the enlargement was the single factor which affected the transformation of the ECtHR system. One should be wary of any single-causal explanations. But I believe that it was a very important factor—indeed the most important cause—and I hope to have produced some evidence for that.

Pilot judgments are my “Exhibit No 1” in this demonstration—and the second critical observation made by Dr Hein concerns “pilot judgments”. Providing statistics from recent years, he shows that there is now a roughly even number of pilot judgments arising from CEE and non-CEE member states. On this basis, he suggests that “[t]hese updated proportions do not support Sadurski’s hypothesis” about the enlargement triggering constitutionalism through the mechanism of pilot judgments. I am not so sure. It is an evident fact that all initial pilot judgments (and especially, all the initial “full” as opposed to “quasi-”

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¹ Judgment of 13 June 1979, appl. 6833/74.