CONSTITUTIONAL HOMOGENEITY IN THE ACCESSION PROCESS

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I. Introduction

At the core of the drafting of the EU Constitutional Treaty are the questions of the delimitation of powers in the multilevel constitutional system. Existing constitutional system, i.e. the EC and EU constitutional treaties, on one hand, and national constitutions, on the other, is based on the multilevel governance within the structure of balance of powers and competences. However, the EU constitutional convention has raised the dilemmas of both deepening and widening of this system. I do not speak about widening of the Union only in the sense of enlargement. "Widening" would mean widening of the EU competence and its federal trends, and this process could lead to creation of new delimitation lines. These dilemmas, as it seems, cannot be resolved within short period of time i.e. even shortly after the accession of 10 new Member States.

II. The EU Constitution and the Constitutions of the Member States in a Multilevel Constitutionalism System

"Multilevel constitutionalism" is meant to describe and understand the ongoing process of establishing new structures of government complementary to and building upon – while also changing – existing forms of self-organisation of the people or society. It is a theoretical approach to explaining how the European Union can be conceptualised as a matter and creature of its citizens as much as the Member States are a matter and creature of their respective citizens. The same citizens are the source of legitimacy for public authority at the European as well as – regarding their respective Member State – at the national level, and they are subject to the authority exercised at both levels. The European Constitution would, thus, be composed by the national constitutions and the European Treaties to a bi- or multilevel constitutional system. As a consequence, my view is that Europe has already a constitution and the issue is to improve the existing Treaties in order to improve the system, not to make a new constitution."[1]

I would add that the EU constitution (i.e. existing constitutional treaties) and national constitutions do not yet constitute a kind of well-established set of European constitutional rules. Notwithstanding to so-called "Community clauses" which have been established in national constitutions in relation with the EC/EU membership, the "multilevel constitutionalism" is still bipolar. Transfer of certain sovereign rights to the Community and Un-

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[*] Opinions expressed in this report represent personal position of the author only.

[1] Ingolf Pernice. Multilevel Constitutionalism in the European Union Walter-Hallstein-Institute for European Constitutional Law:, WHI Paper 2002/5; see http://www.rewi.huberlin.de/WHI/english/papers/index2002.htm.

ion, shared competence within the system, and even direct effect and supremacy of the Community law: all this did not yet take form of completed hierarchical system.

As an example we could take the Irish constitutional model. The Constitutions of Ireland (article 29, paragraph 5) stipulates:

> "5.No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevent laws enacted, acts done or measures adopted by the European Union or by the Communities or by the institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State."

It is without doubt, that the notion of federalism in the EU multilevel governance system does not correspond to the notions of federalism in national constitutional systems. These are still based on the foundations of sovereignty and independence. At the same time, I would like to underline that the Community method did not and does not changed these foundations, since it is accompanied with the principles of subsidiarity and proportionality, and with more or less well-drawn balance of the powers and competences.

In this connection, the principle proposed by the European convention to include into Article 11 "Shared competences" of the Preliminary draft Constitutional Treaty (CONV 369/02) raises serious questions. According to the European convention, this article "establishes the principle that, as and when the Union takes actions in these areas, the member States may act only *within the limits defined by the Union legislation*" (emphasis added). The limits of action are established by the Treaties and could be clarified, if necessary, by new Constitutional Treaty. However, the legislation as such cannot create the delimitation lines between the competences of the EU and its Member States. Article 308 of the Treaty of Rome is rather exception than a rule.

Another crucial issue concerns the modalities of the revision of the Constitutional Treaty. Will it be done unanimously? Will we be confronted with the permanent constitutional crisis when the national referendums on amendments of the EU Constitution would mean nothing, whereas the revision of the EU Constitutional treaty will take place by 2/3 or 3/4 majority of the Member States? It is a matter of principle, that the Constitutional Treaty should respect the sovereign rights of the EU Member States and the democratic constitutional traditions common to all European nations. The Irish referendum on the Treaty of Nice is a recent example of the importance of national constitutions and its impact on enlargement.[2]

Actual text of the Provisional draft Constitutional Treaty raises other delicate question related with the sovereignty issue. There is no provision, no article concerning the accession to this international treaty. It seems also a crucial issue. Notwithstanding the fact that the accession of new Member States coincides *per se* with the accession to the EU itself, this is not the same. The meaning of the accession of a sovereign and independent State to the

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[2] See, for example, Alfred E.Kellerman. The Irish referendum on the Treaty of Nice and article 10 EC: a recent example of the constitutional problems of enlargement. In: Marmara Journal of European Studies. Vol 9, no. 2, 2001, p. 1-7.

Constitutional Treaty shall not be undermined. The accession to Constitutional Treaty could have some sense in relation with the development of closer (enhanced) cooperation within new constitutional system. There could be national constitutional reasons to accede to the EU and its Constitutional Treaty and, at the same time, to abstain from taking part in the most advanced forms of the EU integration.

It seems that the States Members of the EU still possess the traditional customary international law qualifications of the States, which have been codified in the Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States:

> "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States".

The transfer of sovereignty to the Union in the areas defined by the EC and the EU treaties does not deprive the States Members of such traditional elements of statehood in international relations. This is a matter of transfer of certain sovereign powers, rather than the loss of control of the Government over population and territory. Free movement of persons in the Community has nothing to do with the existence of "a permanent population" of a State Member. The same concerns the citizenship of the Union: by introduction of the citizenship of the Union there was no intention to replace national citizenship of a nation-State. There is no "double EU/Member State nationality".[3] Citizenship of the Union is limited only to those who have the nationality of one or other of the Member States and that the Member States retain the full powers to define conditions of their nationality. The rights of the EU citizens, in including the fundamental rights under the EU Charter of fundamental rights, complement the rights of citizen embodied in the constitutions of the Member States. The same is with the territory: the Union does not possess its own territory or power to change "a defined territory" of the Member States. As for "government", the institutions of the Union, such as the Council and the Commission, acting within the powers conferred them by the EC and the EU treaty do not substitute the governments of the Member States. Here, in addition, the principle of sovereignty is applicable. Finally, the "capacity to enter into relations with other States" could be linked with the question of the external relations of the European Community, where, according to and in the limits of the EC treaty, the Communities have exclusive competence (common commercial policy, common fisheries policy and, to some extend, competition) or shares competence with its Member States (transport, research and technological development, environment, development and assistance policy, protection of intellectual property, etc.). There is authority for the view that shared competence is the general rule, and exclusive Community competence the exception; besides, certain provisions of the treaties *expressis verbis* provide that the existence of Community competence does not prejudice the competence of the Member States to negotiate in international bodies and to conclude international agreements (Arti-

[3] Draft article 5 of the Preliminary draft Constitutional Treaty (CONV 369/02) which provides for "dual citizenship, national citizenship and European citizenship" makes doubts, since it does not change the existing EU citizenship concept.

cles 111 (5), 174 (4), 181, etc.).[4] Membership in the Union does not deprive a State of his general capacity to enter into relations with other States, i.e. of an element of its international legal personality, including capacity to conclude international treaties, to be admitted into international organizations and to bring international claims.[5]

The drafting of the EU Constitution raises a set of serious questions, and first of all: are we really facing a real constitutional reform of the Union? Do we give the *Kompetenz-Kompetenz* power to the EU? Will the three pillar system merged and the Community method fully extended to the II and III pillars? Will the EU therefore acquire clear and strong international legal personality? The same with the election of the president of the Council, the establishment of the two chamber structure of the European Parliament, extending of the qualified majority voting to the broad and extremely important fields of common defence, social policy, possible extending of the EC competence to direct taxation, etc. It seems, that the needs of strengthening of the EMU could lead in future to creation of efficient powers and competence to the EU in social and taxation policies. In reality, most of these questions could be resolved within the framework of existing EU Constitution, i.e. EC/EU constitutional treaties in force. However, the tasks of simplification of treaties, more clear delimitation of powers, incorporation of the Charter of fundamental rights into a constitutional treaty(-ies), as well as the needs of the formal "EU constitutionalisation" of the fundamental principles of transfer of sovereignty, directs effect and supremacy of the EC/EU law, all this shows the necessity of a new but realistic constitutional treaty of the EU for the sake of legal certainty. At the same time, national constitutions of the candidate countries will become a constituent part of a new constitutional system of multilevel governance in the EU and its member states. In this system a new balance between the national and the EU constitutions will be created. One thing, in my opinion, should be avoided: creating of a national (parliamentary or judicial) checking of legality of the Community measures. It could destroy the Community method and the fundaments of existing multilevel governance system. Instead, the competence of the European Court of Justice should be strengthened. As for the Council, I would share the opinion that the Council shall become a permanent institution with the elected president.

In these circumstances more precise definition of EU and Member State competencies and division of competence between them, a vertical division of competence is addressed. It is also noteworthy that a vertical division of competence arrangement can strongly affect a horizontal division of competence on both national and EU levels. Nowadays situation is rather a consequence than an imposed reality. In this context I do not think that giving some competence areas back to EU Member States would be possible or even discussed. Certain areas have fallen under EU competence not in an artificial manner, they arise from aspiring to achieve certain common goals and bearing in mind that regulation goals can be reached more effectively on the Union scale than on the scale of each State.

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4 I. MacLeod, I.D. Hendry, S. Hyett. The external relations of the European Communities. Oxford: Clarendon Press, 1996, p. 64, 235, etc.

5 As the International Court of Justice stated in its advisory opinion in the *Reparation for Injuries (1949)* case: "What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims". – ICJ Reports 1949, p. 179.

With regard to vertical division of competence, the competence to adopt legislation rather than administrative instruments is implied. Four categories of the competencies of the EU, reflected in the Constitutional Treaty, should be identified and listed in a systemic way: exclusive competence, shared competence, additional competence, and co-ordination (promotion) of co-operation in certain areas. However, in order to avoid the stagnation, it could be done rather in listing of the principles, than making complete set of the competence rules and norms. "Negative" competence must also be born in mind, i.e. neither the European Union nor the Member States may take decisions in some areas (for example, framework provisions of the Treaty establishing the European Community on free movement of goods and capital, on freedom of establishment, competition law). General principle, the right of the EU to act only in those areas which are granted to it by the Constitutional Treaty should be retained.

On the other hand, should certain rules for assigning the kinds of secondary legislation (regulations, directives, decisions, etc.) to certain types of competence be established? For example, when acting within a certain competence, regulations should be adopted, while in case of a shared competence, it should be directives or other legal acts of that level, and in still other cases non-binding measures may be sufficient. At the same time, I doubt about the correctness of using of terms "the laws" and "the framework laws" or *les lois* and les *lois-cadres* (article 25 of the Provisional draft Constitutional Treaty) in the sense of doubtfulness of transferring national legal terminology into Constitutional Treaty.

Much more serious issue is merging Pillar I, II and III and the consequent expansion of the Community method for Pillar II and III. Once such a decision is taken, and once the European Union is granted a legal personality, a question will be put as to the vertical division of competence between the European Union and the Member States (e.g. the common foreign and security policy, which is of a particularly importance). The issues that should fall within pillar II and III should be clearly determined (e.g. decisions on common defence or on sanctions in respect of third countries, etc.), and what is left should be assigned to the shared competence of the EU and the Member States.

EU Constitution could clearly stipulate the principles according to which competence is divided. They should not, however, reiterate the currently effective provisions of the Treaties. If the Constitutional Treaty specified detailed norms concerning the division of competence, negative consequences would be unavoidable: (1) the goal of simplifying the Treaties set in the Laeken Declaration would not be accomplished; (2) due to the complexity of the procedure for amending the Constitutional Treaty, amendments to such norms would be impeded, and expedient response to the dynamics of EU activities would be prevented, and (3) the provisions of the effective treaties would have to be abolished. In any case, the task of merging the founding constitutional treaties into one single Constitutional Treaty would correspond to the needs of simplifications, legal certainty and clarity.

Art. 308 of the Treaty of Rome should not be abolished in order for the Council to be able to take necessary measures on the basis of unanimity in case that is needed for accomplishing Community goals, authority over which is not stipulated in this Treaty, in the area of the functioning of the common market. The same applies to the provisions of Article 95 of the Treaty. If the limits of exclusive competence of the EU were clearly defined, in a certain respect, legal clarity would be ensured, and there would be no danger of the EU "taking

over" new areas under its exclusive control. At the same time, though, such a system would be less dynamic and would offer less freedom of action in a rapidly changing environment.

The majority of areas that are outside the scope of exclusive EU competence, in essence, can have both transnational as well as national aspects. In this case it all depends on what goals are pursued by each instrument. On the other hand, experience shows that the situation in a modern world is changing dynamically. Therefore a precise catalogue of competencies may not be the most reasonable thing to do since that would limit flexibility and possibility to choose the best instruments for each particular case. Thus the focus is on proper provision and effective implementation of the principles of subsidiarity and proportionality. It is important to ensure that at this point of time all the EU institutions involved in decision-making should assess the proposed initiatives in the light of these principles. The European Commission usually gives a possibility to all the interested parties, before submitting a particular initiative, to offer its comment on the issue.

At this stage, national parliaments could already be actively engaged by enjoying their right to express their views on such initiatives referring to the principles of subsidiarity/proportionality. Moreover, in order to ensure stronger need to enforce these principles, the Committee on subsidiarity/proportionality could be set up and authorised to evaluate the projects submitted in the light of the said principles. Bearing in mind that the European Parliament is elected by direct vote, the way described above should be seen as the most proper way to ensure the "political" scrutiny over the application of these principles. However this type of control, as performed by national parliaments, may be exercised in the same way as it is done now, i.e. acting according to internal procedures through national governments, which take decisions at the Council. The judicial scrutiny over the principles is ensured by the European Court of Justice. With this in view, the following question is to be answered: whether the Court should have a specialised division for investigating this type of cases, on the other hand though, there is no certainty that the number of such cases will justify the decision to have such a division.

As for the needs of implementation of EU secondary legislation, and in view of the principle of subsidiarity, the enforcement of the *acquis* in the areas of shared competence should stay with the Member States.

III. Accession to the EU and Constitutional Reform: the Lithuanian Case

Constitutional amendments (i.e. draft "Community clauses") already under the discussion in Lithuania are aimed to establish constitutional backgrounds to its accession to the European Union. By their very nature these amendments are closely linked with current constitutional development of the Union, its future Constitutional treaty and the discussion in the Convention. At the core of this discussion both in the EU and in Lithuania is the question of sovereignty and division of competences. This discussion maybe leads to total revision and abandonment of the sovereignty concept foundations build by Jean Bodin long time ago. It could be substituted by the notions of "multilevel governance" and, as far as the constitutions (national and the European) are concerned: by the European multilevel constitutional system.

The issues of sovereignty and delegation of State powers to the supranational EU, i.e. to "a multilevel governance system", using its modern definition, are of great importance to

Lithuania, which has re-established its independence in 1990, after 49 years of foreign rule. It is without saying that the European Union has nothing in common with the former Soviet Union, nevertheless the constitutional questions of the EU accession are very sensitive in such a small country, as Lithuania is, first of all, due to its history.

On 27 August 1991 the European Communities have recognised the re-establishment of independence of Lithuania. Diplomatic relations were re-established with the all member states of the European Communities, except the United Kingdom, who constantly maintained its non-recognition of Soviet occupation policy and diplomatic relations with Lithuania via Lithuanian diplomatic mission in London (embassy in exile, the same with the USA, Holy See, etc.). In the years of 1991-2001, the EU Member States, such as the U.K., France, Germany and Sweden, have restored Lithuanian State property rights by way of restitution of the pre-war bank deposits, diplomatic archives, land property, or compensated its losses. This, *inter alia*, shows that State continuity is one of the founding principles of Lithuanian statehood; it is reflected in Lithuanian constitutional doctrine as well.[6] However, it does not mean that the constitutionalism in Lithuania is still based on pre-war notions of sovereignty and independence.

Main principles declared by the 1992 Constitution of Lithuania, i.e. rule of law (Preamble), freedom and democracy (Preamble and Article 1), and respect for human and minority rights (Articles 18-37 and 45), correspond to the founding principles of the European Union, common to its Member States and embodied in the Treaty on European Union: "attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law" (Preamble); "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States" (Article 6). At the same time, one should underline that Article 135 of the Constitution, which deals with the principles of foreign policy of Lithuania, contains the principles corresponding to the objectives of a common foreign and security policy of the Union.[1]

On its way to the EU Lithuania has already made all necessary steps. Speaking in short about the EC/EU-Lithuania relations, one should mention that on 8 December 1995 Lithuania has submitted its official application for the membership of the EU. On 12 June 1995 Lithuania has signed its Europe (association) Agreement with the EC and its member States. Europe Agreement stipulates that the Parties thereto recognise "the fact that Lithuania's ultimate objective is to become a member of the European Union" (Preamble) and sets forth the objectives of the association include an aim "to provide an appropriate framework for the gradual integration of Lithuania into the European Union" (Article 1, para. 2). On 15 February 2000 Lithuania has started the EU accession negotiations. Since then and up to now, Lithuania has closed 28 negotiations chapters (with 2 remaining open:

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6 In this respect the article 136 of the Constitution is of particular interest: "The Republic of Lithuania shall participate in international organisations provided that such participation does not contradict the interests of the State and its independence." It is without doubt that the EU could not be considered "an international organisation" anymore. Nevertheless, this constitutional provision should not be neglected in the accession process.

agriculture and financial/budgetary provisions) and today is on the top of the list of negotiations together with Cyprus.

Delegation of powers, division of competence between subjects of constitutional law, legal effect of different legal instruments and their hierarchy are the main issues in the theory and practice of constitutional law, both national and European. For that reason it should be adequately treated in the future Constitution of the European Union - the Constitutional Treaty of the European Union. At the same time, Lithuanian Constitution faces similar problems on the eve of accession to the EU. In fact we are dealing with the main issues of a statehood. Accession to the European Union would inevitably mean a transfer of sovereign powers (competence) of State to the Union. Here, i*nter alia*, one should not also ignore the EU Charter of Fundamental Rights, notwithstanding what kind of legal nature and validity it has, since the European Union in fact intervened into classical exclusive competence of a State, its *domaine réservé* to define constitutional, i.e. fundamental rights and freedoms of its citizens.

The instruments of accession of Lithuania and other candidate countries to the EU are already in well-advanced drafting stage. Bearing in mind current works on future EU Constitution, one may suppose that the accession could mean much more in a constitutional sense than it meant at the moment of submission of Lithuanian application for membership in 1995. This is a kind of "moving target". In any way, the EU federal trends are clearing the way to the constitutionalisation of the "multilevel governance system". The candidate countries taking part in the works of the Convention should choose their position with regard to future development of the EU governance system. It could in fact mean the option between the federalist way, on one hand, or the pragmatic, limited and functional one, on the other hand. This is a kind of dilemma to the small candidate countries of Central and Eastern Europe.