

PREPARATION OF NATIONAL CONSTITUTIONS OF CANDIDATE COUNTRIES FOR ACCESSION

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***ABSTRACT.** In most candidate countries, enlargement will contribute most likely to the constitutional modernization of the country. The EU accession will be a fundamental landmark in this respect. This will especially concern the implications of their membership for the national constitutional provisions concerning, among others, the principle of the transfer of the exercise of certain state powers to the EU deriving from national state sovereignty, supremacy, primacy, priority, direct applicability and direct effect of community law, specific provisions of the EU and EC Treaty regarding European citizenship, voting rights etc., as well as specific provisions in national constitutions which contradict the *acquis communautaire*, such as acquisition of land and real-estate by non-residents, extradition of own nationals etc. This paper outlines some of the major problems of a new constitutional design in accession countries.*

Why adaptation of national constitutions?

It is in the interest of an enlarged EU to increase the effectiveness of its legal order. Enlargement of the EU has as a consequence enlargement of its legal order. The EC and EU proved to be a success story since after its existence many new countries have applied for membership and acceded to the European Community which is based on the rule of law. It was the rule of law as interpreted by the European Court of Justice, which supported further integration.

To achieve security, democracy and effectiveness of the rule of law, it is necessary to have an effective and transparent administration, an independent judiciary and an adequate system of legal protection at EU and National level.

National constitutions and the national courts interpreting these constitutions play an important role for the legal protection of the citizens of the European Union and the candidate countries.

The national constitutional aspects are especially important in the pre-accession period as the national constitutions of the candidate countries determine the legal consequences of the rule of law in the national legal order: legal protection, direct applicability, direct effect and supremacy, primacy or priority of community law. They determine the capability to enforce Community law as for example the Europe Agreements in the national legal order in the pre-accession period.¹ To reach a satisfactory system of legal protection not only the texts of the constitutions are decisive but also the interpretations given by the national courts when interpreting the constitutions and constitutional

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¹ **EU Enlargement The Constitutional Impact at EU and National Level**, Edited by Alfred E. Kellermann, Jaap W. de Zwaan, Jeno Czuczai, T.M.C. Asser Press / Kluwer Law International, The Hague, September 2001, Preliminary Conference Findings, Results and Conclusions pp. LVIII – LXI, especially Conclusion No 8

laws („*living constitutions*“). These constitutional aspects as well as an adequate legal protection have to be adjusted and regulated as far as possible before accession. But also after accession adaptation of national constitutions will be necessary as shows the example of the constitutions of the EU Member States.

At the national level enlargement will contribute in many candidate countries most likely to the constitutional modernization of the country. The EU accession will give impetus to fundamental changes in this respect. This will concern especially the implications of their membership for the national constitutional provisions concerning the following topics:

- A) The principle of the transfer of the exercise of certain state powers to the EU deriving from national state sovereignty.
- B) Supremacy, primacy, priority, direct applicability and direct effect of community law
- C) Specific provisions of the EU and EC Treaty (European citizenship, voting rights etc.)
- D) Specific provisions in national constitutions which contradict the *acquis communautaire* such as acquisition of land and real estate by non-residents, extradition of own nationals etc.

In this respect the candidate countries may learn from the problems and experiences of the EU Member States. The Irish referendum on the Treaty of Nice on 7 June 2001 is a recent example of these kind of constitutional problems of enlargement. The Nice Treaty was concluded by the EU Member States by common accord, but

ratification is however yet not possible because of the negative result of the Irish referendum. *May the EU Member States, for example Ireland, invoke their constitutional provisions in order to justify the negative result of a referendum and postpone ratification?*²

Above-mentioned considerations and practice have shown that there is a growing and continuous need - **before as well as after accession** - to adapt national constitutions and constitutional laws and practice:

- **Firstly**, for some constitutions of applicant countries this adaptation is necessary in order to be able to ratify the Treaty of the European Union. The constitutions of the candidate countries should not form an obstacle for accession of the candidate countries to an international organisation, as the EU for example is considered. In some smaller candidate countries, who have regained their independence since 1991 there are, however, political and psychological objections against for example the **transfer of sovereignty. If such a provision is not in the constitution the candidate countries risk afterwards a constitutional complaint.**

- **Secondly**, the way in which some constitutional texts deal with the European integration process is rather poor from a political and a psychological viewpoint. In some national constitutions the way in which the texts deal with the European integration process is rather poor and not transparent („**European Deficit**“). For example the Dutch Constitution, where no reference at all is made to the EC or EU.

In order to guarantee a more or less **uniform**

² Supra 1, p. 499 POST SCRIPTUM

legal language and terminology concerning EU topics the applicant countries should draft better proposals for constitutional texts in a multi country context. For political reasons the „European deficit“ of the national constitutions should be abolished. **An example of the constitutional drafting problems of terminology** is the wording of transfer of sovereignty in the English text of Article 90 (1) of the Polish Constitution which speaks in the official Government translation³ about *delegation* of the competence of the organs of a State authority to an international organisation, whereas it should be formulated as *transfer* of the competence to an international organisation. The meaning of *delegation* in constitutional law is limited to transfer of powers to a *lower* institution or organisation. The transfer of sovereign or state powers to the European institutions is according to Community law permanent and it is not possible, to draw these powers back, as is suggested by the term of delegation.

- **Thirdly**, there is a need to adapt national constitutions because many national constitutional provisions are contrary to (*See above under C* - European Citizenship, voting rights) or are not complying with the *acquis communautaire* (*See above under D* - Extradition of own nationals, transfer of real estate).

- **Fourthly** the Copenhagen criteria for accession as mentioned in Agenda 2000 - the stability of institutions guaranteeing respect for the rule of law, democracy, protection of minorities and human rights - are topics which

are generally laid down in the national constitutions or constitutional laws and practice. For an assessment if the national constitutions comply with these criteria and how these principles work in practice and to evaluate if the respective rights are also exercised in practice, an analysis of the national constitutional provisions and practice is necessary and as a follow-up an eventual adaptation. The attitude of the European Commission is, in my opinion, schizophrenic, as they consider the drafting of national constitutions belonging to the people of each accession country,⁴ whereas on the other hand in the Progress reports the European Commission is reporting on the daily practice of the constitutional principles in that country.

Finally a constitution is a moving target

Adaptation of national constitutions is aimed to contribute to improve the capacity to implement and apply Community law in the current pre-accession process, but also after accession as it happened with the EU Member States. The *acquis communautaire* is a moving target. This implies that adaptation of national constitutions is also after accession a continuing process. In this connection I like to refer especially to the Declaration on the Future of the Union of the Treaty of Nice and to the EU Charter on Fundamental Rights and last but not least to the EU Convention which was inaugurated on 28 February 2002. These documents will after ratification also belong to the *acquis communautaire*. Adaptation of national constitutions is therefore a continuous process

³ Professor Dr. Stanislaw Biernat, from the Jagiellonian University in Cracow on the other hand speaks about „transfer“ of the powers in. Archiv des Völkerrechts, Band 36 Heft 4, December 1998, in **Constitutional Aspects of Poland's Future membership in the European Union**, pp 398 – 424

⁴ Supra I. p . LX

and a moving target like the *acquis communautaire*.

For an efficient and effective preparation of national constitutions for accession the following suggestions should be considered

1) In order to improve the capacity to prepare and adapt national constitutions and constitutional practice taking into account the requirements of Community law, the **sharing of experiences** with drafting and research project activities in other candidate countries and EU Member States in a **multi-country context** is suggested.

Multi-country co-operation in adapting national constitutions is improving the quality of European constitutional law:

In its comparative approach a multi-country co-operation could support the efforts of the applicant countries in order to guarantee a more or less uniform legal language concerning EU topics and would stimulate the applicant countries to draft better constitutional texts. Discussion on constitutional problems for accession would raise the awareness of politicians, judges, experts in the candidate countries and improve the practical and theoretical knowledge of the national judiciary in the concept of primacy, direct effect and direct applicability of Community law

The following advantages may be added:

- It is useful to have an overview of possible adaptations of the constitutions and

constitutional practice of the applicant countries.

- The process could, however, also contribute after accession to proposals for an adaptation or revision of the national constitutional texts, in which national constitutional legislators will fully reflect the true importance of the European integration process.

- The development and use of an uniform European legal terminology in the national constitutions, concerning the relationship of Community law and national law, could also contribute to the development of an European Constitution.

- Finally the multi-country process of adaptation would contribute to the debate on the question how to establish a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity, as mentioned in the *Declaration on the future of the Union of the Treaty of Nice*.

The candidate countries will learn from the discussions and debates in a multi-country context from each other's experiences with respect to the process of adaptation of their national constitutions for EU accession. In so doing, they do not have to re-invent the wheel!

A comparative study on the adaptation of national constitutions and national constitutional practice is useful for the implementation and understanding of the application of Europe agreements by national courts in the national legal orders of the countries participating in this project. The cases Gloszczuk, Kondova and Barkoci⁵

⁵ **The rights of self-employed CEECs citizens in the Member States under the Europe Agreements**, Dr Andrea Ott, ECJ 27 September 2001 – Case C-63/99 – Gloszczuk; C-235/99 of 27 September 2001 – Kondova and C-257/99 of 27 September 2001 – Barkoci and Malik; 20 November 2001 – C-268/99 – C-268/99 – Jany and Others - The European Legal Forum, 8 – 2000/-1, pp. 497 – 556

Also on the cases Gloszczuk, Kondova and Barkoci: **Het rechtstreekse beroep van Oost-Europese zelfstandigen op de Europa Akkoorden**, Dr R.H.van Ooik & Dr H.Staples, *Nederlands tijdschrift voor Europees recht*, December 2001, No.12.

for example concern referrals from the High Court of Justice of England and Wales and deal with the interpretation of the effect and scope of the establishment provisions of the Europe Agreements. The European Court of Justice considered that the right of establishment for the respective Central and East European nationals implies a right of entry and residence and that these rights may be enforced by national courts which rights are based on the non-discrimination provisions of the respective Europe Agreement.

2) The **theoretical and practical knowledge** of Community law of persons who are or will be involved in the preparation, implementation, interpretation and application of national constitutional law and constitutions should be improved.

3) The **awareness of civil society, national parliaments and governments** of EU candidate countries for the constitutional impact of EU accession should be increased through organising debates, conferences and the dissemination of reports in the national language of the respective candidate country and in English for reasons of comparison.

4) The adaptation or amendment of national constitutions could take a long period taking into account the complicated amendment procedures. Sharing experiences with other candidate countries and with the Member States lawyers as well as with lawyers from the European Institutions is necessary in order to guarantee a more or less uniform legal language concerning the drafting of EU topics. Such a joint co-operation would stimulate the applicant countries to **simplify the complicated**

constitutional amendment procedures and draft better proposals for amendment of constitutional texts. The political support for accession is changing sometimes negatively in the candidate countries and could therefore form an obstacle for amendment of the constitution when the amendment procedures take too much time. Therefore, proposals for improving these constitutional amendment procedures are necessary and important for an efficient adaptation.

5) For an effective implementation of the process of adaptation the following group of persons should be involved

A) **scholars, civil servants, judges, prosecutors, (staff) members of national parliaments and government representatives** from candidate countries

B) **EU experts from candidate countries and EU Member states**

The following activities should be executed:

Completing the annexed questionnaire (Annex I), establishing national study or working parties and assistance in the drafting of the respective country report (in two languages: the national language of the respective country and English); Support in the organisation and implementation of the respective training programme and briefings

6) The capacity of the national judiciary to apply Community law, especially those principles which are relevant for the relationship between community law and national law should be increased and the awareness of national judiciary of their role as Community Courts should be promoted through **workshops, briefings and training sessions**.

European Law requires that the candidate countries being a Member should apply and give priority to Community law in the national legal order. It is therefore necessary to train the national judiciary and prosecutors in the principles of primacy, direct effect and direct applicability of Community law as well as in the constitutional impact of accession. To comply with for example the Copenhagen political criteria (democracy, the rule of law, fundamental rights, protection of minorities) not only the texts of the national constitutions are relevant and important but especially the interpretation („living constitutions“) given by the national judiciary and prosecutors in the candidate countries.

Participation in training sessions will raise the awareness of the participating judges, prosecutors, experts in the candidate countries for the constitutional problems of accession, legal protection and the rule of law. This is necessary as the Copenhagen accession criteria refer explicitly to democracy, the rule of law, human rights and protection of minorities, topics that are generally regulated by the national constitution or national constitutional laws.

The topics addressed in these training sessions shall be the following:

- The nature of EC law: direct and indirect effect.
- The application of EC law in national courts. In the pre-accession period a comparative analysis of the decisions of the national (constitutional) courts giving an interpretation of their constitutional provisions in relation to Europe Agreements would be a necessary element in the training.
- The relationship between EC law and

National law: Supremacy from the European Court of Justice's perspective and from the Perspective of EU Member States Constitutions.

- The place of Human Rights in European law (EU Charter, European Convention for the Protection of Human Rights etc).

The training programme demands full participation in case studies, exercises and group-discussion. The lectures will be held in English, but translation (preferably simultaneous) in the language of the participating country must be available, in order to be used by the participants to train their other colleagues (training-the-trainers). Therefore not only judges, prosecutors etc. will be invited for the training but also university teachers in order to ensure the „training-the-trainers“ effect.

On the Asser website (www.asser.nl) English texts of the national constitutions of the 13 candidate countries, and relevant documents and literature may be found.

In August 2001 the Asser Institute has published the Proceedings of the Conference on the Constitutional Impact of Enlargement (20 – 23 September 2000) at EU and National level in book form (See Annex II). In this book a proposal was published for a multi-country project for the development of some European models of constitutions. These **European models of constitutions** should focus especially on the relationship between the European Community legal order and the national and sub-national legal orders.

These European models could further be helpful for the candidate countries for the adaptation of their constitutions and for the development of a European constitution.

FINAL REMARKS AND SUGGESTIONS

Adaptation of national constitutions is necessary before and after accession.

Before accession - the Constitutional *acquis* should be added to the screening process.

The aim of the screening process is to help the countries concerned to increase their understanding of the rules that underpin the EU and identify more clearly which issues they need to address as they adopt and implement the *acquis communautaire*.

The relevant sectors are identified but not the constitutional *acquis*. A chapter on the constitutional *acquis* should be added and included. A post-screening meeting should be held for the candidate countries aimed at helping them to understand what the constitutional requirements of the accession process are about.

After accession - as the *acquis communautaire* is a moving target, the adaptation of national constitutions will also be a continuing process. The Nice Treaty, Charter of Fundamental Rights and the results of the EU Convention will have an impact at the EU and National level.

For the EU Convention is suggested a *top-down* as well as a *bottom-up* approach.

This Convention which was inaugurated on 28 February 2002 should also focus on the relationship of the European Constitution with the national constitutions of the EU Member States and candidate countries. Developing European models of national constitutions which focus especially on the relationship between the European Community legal order and the national and sub-national legal orders of the EU Member States and candidate countries, would be a *bottom-up* approach which might support the development of a European Constitution. The EU Convention should not consider only a top-down

approach. This is also in line with the Declaration on the Future of the Union as annexed at the Treaty of Nice.

The EU Convention in Brussels could recommend the establishment of a multi-country working group in order to investigate the constitutional relationship between the European Community and the national and sub-national legal order.

The EU Convention might also suggest recommendations for the approximation of national constitutional texts in this context. For example an obligation for the Member States to refer in their national constitutions to the EU and EC Treaties.

Another possibility could be considered similar as in the Canadian Constitution of 1982. Why for example not add an identical article from the Canadian Constitution stating that „the European Union Constitutional Law includes the constitutions of all Member States as interpreted by their highest Courts“ It would guarantee constitutional integration as well as constitutional and legal pluralism.⁶

At this moment all signs suggest that the Convention will not stimulate a doctrine-ridden debate of a European Constitution, which would no doubt have been a lively debate with wise contributions but with little concrete results. In order to avoid a theoretical debate and endless debating on the interpretation of the term of Constitution, the term „Constituent Treaty for the European Union“, was chosen.⁷ However focusing more on the relationship with civil society and adaptation of national constitutions which is a *bottom-up* approach, could render Europe more effective and close to the citizens.

The Hague, 14 March 2002

⁶ Europe 2004, **Le Grand Debat, Setting the Agenda and Outlining the Options**, Brussels 15 and 16 October 2001, *European Commission, Action Jean Monnet*, Antonio-Carlos Pereira-Menaut, p.77.

⁷ **Bulletin Quotidien Europe**, No. 8157 of 23 February 2002

Annex

Guidelines and questions for research on adaptation of national constitutions

National constitution

1) Do you classify your legal system as monistic or a dualistic? How is international law implemented in the national legal order?

Does your constitution allow the transfer of legislative powers to international organizations with or without limits? What is the legal situation in case of a conflict of your constitution with the Treaty (primary law) or community secondary law and a conflict of a prior or later national law with the Treaty on EU and EC Treaty? Do the relevant constitutional provisions for supremacy of international law guarantee supremacy or direct effect of European law?

2) Would your constitution require amendment for the ratification of the EU Treaty, EC Treaty, Euratom Treaty? If yes, how and which procedures for amendment are used.

3) If your constitution has to be amended for accession to the EU, what are the problems in practice? Which procedures for amendment are to be followed?

Role of courts

1) Do the courts in your country accept the principle of direct effect and supremacy of International Law obligations like for example Community law and do the courts accept a different attitude for primary or secondary community law and on which principles they base their reasoning (Community law constitutional law or international law)?

2) Do your courts recognise a rule of interpretation whereby national law must be interpreted in conformity with international obligations (principle of indirect effect)?

3) Could you mention and comment on some interesting cases of your Supreme Court and/or Constitutional Court dealing with such problems?

4) If a Community measure is inconsistent with prior international commitments of the Member States and that States, do your national courts give priority to the prior international commitments?

Role of Government/Administration

1) To what extent do the Government and Administration in your country implement and/or apply in practice the *acquis communautaire* and the Europe agreements?