Report on the Regional Conference

“Membership in the European Union: Constitutional Challenges for South East Europe Applicant Countries”

Held on December 2, 2011 in Skopje, Macedonia

The Association for Development Initiatives – Zenith
Skopje, 2011
The organizer would like to acknowledge that this Conference was made possible through support provided by the Swiss Agency for Development and Cooperation (SDC) and the Konrad Adenauer Stiftung Rule of Law Program South East Europe.¹ It also would like to express sincere appreciation for the contributions from Dr. Jens Woelk researching the constitutional challenges of EU membership. Its gratitude also extends to all the individuals and organizations who have contributed valuable insights and inputs.

¹ The opinions expressed herein are those of the authors and do not necessarily reflect the views of SDC or the Konrad Adenauer Stiftung Rule of Law Program South East Europe.
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I. Outline of the report

The following report provides an account of research, views and opinions related to the Regional Conference entitled “Membership in the European Union: Constitutional Challenges for South East Europe Applicant Countries” held on December 2, 2011 in Skopje, Macedonia. This report is published in English and Macedonian only and is made available on the Zenith’s web-site at http://zenith.org.mk/events.

It consists of five parts. Following this outline, the second part, presents an introduction to the topic and the aims of the Conference. This is followed by a section providing the overview of the flow of the debate, displaying the addresses of limited number of participants in a summarized form. The fourth segment presents the main conference conclusions, while the final part of the report annexes various conference materials, including a conference research paper, as well as documents provided by conference participants.

II. Introduction to the topic

The initiative has focused on the challenges that applicant countries in the South East Europe (SEE) region will face or have already faced in terms of constitutional and institutional adjustments on the way to EU membership. Practice shows that such adjustments are imminent. Most of the EU Member States have amended their constitutions so as to meet the requirements resulting from their integration in the EU legal system, either on occasion of Treaty revisions or during their accession process. It is therefore clear that the EU integration process will influence the national constitutions of Albania, Croatia, Macedonia, Montenegro and Serbia, both in terms of alignment needed in particular fields of the acquis communautaire, and constitutional adjustment that will ensure effective functioning of the countries once they reach membership.

The initiative touched on the following three subjects:

- constitutional “integration clauses”;
- the role of Constitutional Courts and their relationship with the European Court of Justice, and
- the role of Parliaments in the constitutional adjustments, in improving the participation in the EU decision-making process and the implementation of EU law.
Although the handling of chapter-specific constitutional issues can be agreed between the European Commission and each applicant country during accession negotiations, the general constitutional issues arising from the merger with the political and legal system of the EU have to be dealt with internally in each country. As there are no general guidelines for the latter type of constitutional amendments, ideally they should be initiated and adopted with a wide consensus among the expert public and the decision-makers. Such consensus cannot be achieved without extensive debate and analyses in the respective countries. The interaction between the civil society, including the academic community, Parliament, Government and the judiciary is a prerequisite for achieving sound and accepted outcomes. The research paper that was initiated and the exchange of critical opinions on the Conference, aim to provide the necessary input for opening a broader expert debate enabling elected representatives and other decision makers to have deliberations based on facts and analyses and, ultimately, to make informed decisions.

In this regard, the broad aim of this endeavor is to enhance the cooperation in the field of constitutional law in the region of South East Europe, especially the countries mentioned above, that scholars, researchers, public institutions, law practitioners and Members of Parliament will use to further broaden the foundations for policy expertise.

III. Account of proceedings

The Conference attracted the interest of more than sixty participants from the region. The account of proceedings is presented in a manner of displaying summaries from the addresses of the conference participants. At the beginning of this section we are
laying forward summaries from the opening remark, and continue (in chronological order) by referring to the keynote speech and the consecutive speakers. Due to time constraints and the broad list of speakers, many of them did not strictly confine their addresses to the topic of a particular panel, but rather extended their addresses touching upon the contents of two or even all three panels. Hence the difficulty of displaying the addresses aligned by panel topics.

**Opening remarks**

The conference was opened by the Executive Director of the Association Zenith Mr. Nikolov, by greeting the present and expressing appreciation for the support received by the Swiss Agency for Development and Cooperation in Macedonia and the Konrad Adenauer Stiftung – Rule of Law Program for South East Europe as well as thanking KAS Office Skopje for its generous support in organizing the whole event. Referring to the topic, Mr. Nikolov stressed the importance of tackling the EU related constitutional challenges, laying ahead of the SEE applicant countries and brought forward his expectations for fruitful and relevant discussion.

First to address the participants and the audience was H.E. Dr. Teuta Arifi, Macedonia’s Deputy Prime Minister for European Affairs. Ms. Arifi praised the organizers for taking the initiative and expressed her gratitude for receiving invitation to address the Conference. She highlighted the strong inspirational force of the Euro-integration idea, which demonstrates the inclusive ability to create a more prosperous...
society. Ms. Arifi, elaborated that the EU integration remains among the top 5 priorities of the Macedonian Government, pointing out that the EU is expecting from Macedonia to achieve progress in the areas of: implementation of judiciary reforms; state administration reforms and creating a professional administration; fight against the corruption; and the freedom of expression. Ms. Arifi closed her remarks by stressing the benefits from the cooperation between the neighboring Balkan countries on their joint voyage, pointing out that the road toward becoming a full EU member requires a lot of small steps to be taken in order to achieve the final goal.

Mr. Robert Liddell, Chargé d'Affaires a.i. at the Delegation of the European Union to Macedonia commenced his address by concluding that it was normal for the content of the constitutions to be adapted to the newly emerged realities. The same is valid for the EU Treaties – said Mr. Liddell. He emphasized that the issues related to the judiciary and the rule of law will be scrutinized in details under the chapters 23 and 24, as a part of the accession process for every applicant country. Mr. Liddell referred to the recent Bulgarian and Croatian practice of adapting the constitutions, where Bulgaria amended its Constitution in order to comply with the transfer of national sovereignty and the direct effect of the EU legal instruments, while Croatia did the same considering the provisions of the Constitution related to the extradition of Croatian citizens.

Ms Tatjana von Steiger Weber, Head of the Swiss Agency for Development and Cooperation (SDC) in Macedonia addressed the conference participants by greeting the project initiative and the implementer. Ms. Steiger Weber portrayed the Swiss Agency for Development and Cooperation active involvement in supporting the efforts of the Balkan countries for becoming full EU members. Consequently, she accented that the Swiss Agency for Development and Cooperation is implementing programs and projects directed toward the improvement of the legislative and administrative capacities of Macedonia and the neighboring countries in order to meet the criteria for membership in the EU.

After the opening speech of Ms. Steiger Weber, the floor was given to Mr. Thorsten Geissler, the Director of the Konrad Adenauer Stiftung, Rule of Law Program for South East Europe. Mr. Geissler emphasized the importance of the topic while saying that the integration in the EU can really pose a challenge vis-à-vis national Constitutions, illustrating his statement with the German experience, where the conflicts between the EU legislation and the German Basic Law appeared even after the incorporation of the “Integration clause” in the Constitution. Mr. Geissler suggested that a comprehensive approach for addressing the issue should be taken.
Keynote speech by Dr. Jens Woelk, presentation of the research paper – "Membership in the European Union – Constitutional challenges for South East European applicant countries"

At the beginning of his research paper presentation Dr. Woelk elaborated on the purpose of the comparative study (please refer to Annex A for the study), i.e. what is necessary to prepare a country (constitution wise) for becoming a full EU member (please refer to Annex C for an outline of the presentation). He conveyed the message that the membership in the EU not only raises various constitutional challenges for the applicant country wanting to join but also for the member states. What started as an international organization, developed into an integrated legal system of a new kind and quality. Due to this transformation from a traditional international organization to a multilevel constitutional framework, EU law is commonly referred to as "supranational" in order to distinguish it from international law. He suggested that the alignment with this newly emerging "integrated legal system", in some cases can be achieved by a wide interpretation of the existing constitutional provisions, but most often it would require amendments to legislation and even to the Constitutions of the member states in order to clarify and regulate fundamental questions. Thus, almost all EU Member States have amended their Constitutions, either on occasion of Treaty revisions or in view of their accession to the EU, he underlined. His discussion was furthered by expressing that, while some of the necessary constitutional adaptations derive from concrete requirements of the Acquis Communautaire (and are thus specifically addressed in the accession negotiations, in the individual chapters), other constitutional implications result from the general impact of EU membership on the domestic constitutional and legal
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system. These include, above all, the constitutional basis for membership, but also its consequences, such as changes in the balances between domestic institutions (in particular between Government and Parliament), changes in the internal distribution of competences as well as the participation in the EU-decision making process and the implementation of EU law. By contrast with the Acquis-specific matters, for these fundamental questions no blueprint or model for the necessary changes is provided by the EU. Thus, each (future) Member State has to find its own answers and way to adapt. Dr. Woelk further explained that the expansion of competences of the European Union (especially in the Maastricht-Treaty), as well as the direct interaction with individuals, were elements of potential conflict of EU legislation with Member State Constitutions. He pointed out to the possibility that the supremacy of EU law might lead to the non-application of contrasting national legislation. “It is still controversial whether this also includes constitutional law” - he said. As EU law is still based on international Treaties these questions raise issues of legitimacy and, sometimes, concern and have thus been challenges for national Parliaments and Constitutional Courts. While the former have, in many Member States, created specific constitutional provisions related to EU membership (“integration clauses”) as well as specific procedures and institutions, the latter have engaged in a judicial dialogue with the European Court of Justice, in an attempt to (de)limit the respective spheres of influence. The fundamental constitutional adaptation regards the overall preparation for accession and membership, i.e. a provision permitting the transfer of sovereign powers to an international organization or to the European Union. His presentation was concluded with a suggestion that each country has to decide for itself how to identify or create a constitutional basis for membership, while limiting its own sovereignty by authorizing the application of sources of EU law within its legal system.

Discussion

Mr. Ivica Bocevski, former Macedonia’s Deputy Prime Minister responsible for EU affairs touched upon the issues of sovereignty and democracy. He stated that the Constitutional Court of Macedonia thus far had not made an effort of putting forward a definition of the EU from a national perspective. Such a definition would be needed not only in the light of accession challenges but also to assess the constitutionality of the 1997 Cooperation Agreement between Macedonia and the European Communities and the 2001 Stabilization and Association Agreement. This is necessary in order to be able to comprehend the ratio between the integration and the state sovereignty. The German Constitutional Court defines EU as a Union of States, thus putting a clear limit to the boundaries of integration, beyond which a change of the Constitution would be necessary. Concerning the issue of democracy, Mr. Bocevski pointed out that the main role throughout the process of integration will reside in the hands of the executive branch of power on expense of the decreased role of the Parliament which will have a rubber stamping role, i.e. merely as an instrument for formal verification of the legislation.

Ms. Margarita Caca Nikolovska, currently judge in the Constitutional Court of Bosnia and Herzegovina and former Judge at the European Court of Human Rights put
forward her expectations that the Constitutional Court of Macedonia should be making assessments of the alignment of the Macedonian Constitution and other legislation (bearing constitutional characteristics) with the international treaties ratified by the Republic of Macedonia. So far the Constitutional Court has not engaged in such a process. In this regard, she particularly stressed the necessity for assessing the alignment of the Macedonian Constitution and the legislation considering human rights with the European Convention on Human Rights which is integrated part of EU legislation and also ratified by the Republic of Macedonia. Ms. Nikolovska also stated that there might be situations where certain provisions of the national constitution and legislative acts (the Law on Prevention and Protection Form Discrimination was mentioned) might be in conflict with the European Convention on Human Rights, thus the Constitutional Court might be placed in a difficult position on deciding the precedence between the Constitution and the international binding treaty.

**Dr. Svetomir Shkaric, Professor of Constitutional Law at the Faculty of Law “Iustinianus Primus”, University Ss. Cyril and Methodius in Skopje** suggested that the Constitutional Court (as institution with superior expertise in constitutional matters), should be more actively involved through “guiding” the processes of legislative alignment especially with regards to the legislation of constitutional character. In addition Dr. Shkaric emphasized that unlike the judges in the European Court of Justice who exercise the right to interpret the legal phenomena from the standpoint of the future and use the teleological method, Macedonian judges are “squeezed” within the limitations of the legal provisions. This shows the need of immediate replication of the European judges profile to their colleagues in Macedonia, so that not only they would be able to judge in accordance with the Law, but would also be able to base their judgments on reasoning.

**Dr. Sasho Georgievski, Professor of International Law and International Relations at the Faculty of Law “Iustinianus Primus”, University Ss. Cyril and Methodius in Skopje** elaborated that the supremacy of EU law is not foreseen in the Macedonian constitution. Article 1 of the Macedonian Constitution is restrictive to the process of EU accession, and reads that “the sovereignty is undivided”. Therefore an amendment of the Constitution with inclusion of an integration clause and of the procedure that the constitutional judges follow will be necessary. The answer to the question: “What is the EU”, is very important for the constitutional dimension of the accession process. Article 120 of the Constitution requires a majority vote in Parliament for joining an international organization, and a referendum on entering in a union with other countries or union of countries coupled with a two-thirds majority vote in the Parliament. In addition, the broad and vague formulation of Article 8 of the Constitution will create problems as it does not provide a mechanism to resolve potential situation where the constitutional provisions clash with the international law. Therefore, an amendment with a special clause that will allow the supremacy of EU law is needed, although it would be important to devise a method for its application by the Constitutional court and the basic courts. Despite the lack of such an amendment, the Constitutional court in several of its decisions has referred to sources of EU law (mostly directives). The EU law has a “persuasive force” and has an indirect effect in interpreting national law. However, a discouraging example is the
refusal of the Constitutional court to assess the constitutionality of legislation in relation to international treaties, despite the existence of Article 118 which stipulates that such treaties are part of the internal legal order. Such was the case during the proceedings on a rulebook intended to foster the consumption of domestic products which was in contradiction to the Stabilization and Association Agreement.

Dr. Georgievski also said that it is very important for the Macedonian judges to receive training and assistance from an expert body that will assist them with the implementation in practice of EU law. He pointed out that it is very important for additional trainings to be held in the Academy for Judges regarding EU law. This was backed up with data from a recent survey among judges in basic courts on the application of international law. 20% of the judges stated that international treaties cannot be applied without having respective national legislation, and stunning 48% stated that the Stabilization and Association Agreement, which was ratified in Macedonia’s Parliament, cannot be applied in court proceedings.

Dr. Djordjije Blazic, the Dean of the Faculty for State and European Studies at the University of Montenegro, Podgorica put the independence of the judiciary as one of the biggest challenges to be achieved in parallel with the process of progressing toward the EU. He pointed out that no system can be sufficient if the present rules have not been obeyed. Taking the Montenegrin case, but also referring to other countries from the region, Dr. Blazic elaborated that the judiciary is under a strong influence of politics and family ties. He made a reference to an example where the Government had decided to ignore a decision of the Constitutional Court, indicating underdeveloped institutions and predominance of party influences on the system. Therefore, he showed skepticism toward achieving independence of the judiciary if the efforts are not complemented with a change in the mentality of the citizens, and especially of those who exercise power, which would allow establishing viable checks and balances.

The assigned project expert, Dr. Woelk in relation to the question of supremacy of the national or the EU law, explained that from the point of view of the European Court of Justice, the supremacy resides in the EU law, but from the standpoints of the Constitutional Courts the supremacy resides in the Constitutions of the member states. The Constitutional Courts from the older EU member states were moving parallel with the process of growth of the EU and its regulations. Few decades ago they could not possibly imagine that the EU would transform from an international organization into a sui generis form of organization that will require a special treatment in the Constitution. German Constitutional Court underlined that there has to be foreseeable and clear steps that would guarantee a certain control by the member states i.e. by their Parliaments. Constitutionally guaranteed rights for the Parliaments of the member states need to be clearly delineated prior to transferring sovereignty powers, otherwise the problem of democratic legitimacy will emerge, because the basic assumption of the German Constitutional Court for example is that the authority of the EU law in the domestic system is based on the constitutional authorization. Coming back to the issue of who has the final say, the European Court of Justice or the national courts, Dr. Woelk stated that currently there is no real answer to this. And continued, saying that this was a paradox also known as
"constitutional tolerance", meaning that both Courts are trying to pursue the logic of harmonization. He concluded by saying that the general discourse is moving toward understanding the EU members as "integrated states", which is qualitatively different from being sovereign state, because sovereignty in its exclusive, independent and absolute sense was something that belongs to the past.

Mr. Jugoslav Milenkovic, Spokesperson of the Constitutional Court of Macedonia said that the respect for the provisions of the international law is considered among the fundamental values in the Macedonian law. The Constitutional court does not assess the constitutionality of the international agreements pending ratification, but once ratified by the Parliament, these agreements are becoming part of the national law and therefore enter under the jurisdiction of the Constitutional Court.

Therefore, as explained by Mr. Milenkovic, most probably the Constitutional Court should commence with the practice of assessing the alignment of the international agreements prior to being ratified in the Parliament. This was a practice already present in several countries, but in order to put this into practice there is a clear necessity of amending the provisions pertaining the jurisdiction of the Constitutional Court.

Ms. Orinda Malttezi, Head of the Political Science Department at the Faculty of Social Science, University of Tirana referring to issues related to the process of Albania's accession, said that the internal struggle and cleavages between the main political actors is making impossible passing of legislation that is requiring qualified majority vote. She added that there was a general impression among the public that the approximation of the national law with the EU law is simply a technical process where the Parliament is only expected to pass all the necessary legislation, without actually having the opportunity to influence the content. She concluded by saying that many legal provisions from the EU do not necessarily fit or could not be actually viable in the context of the Republic of Albania.

Dr. Marijana Pajvancic, Professor of Constitutional Law at the Faculty of Law, University of Novi Sad accentuated the importance for every state to be following the procedures and the requirements set forward in the Constitution. In this respect, the disputes concerning the validity or the applicability of the constitutional provisions have to be resolved using a legal framework, and avoiding the partisan influence from the key political players. Dr. Pajvancic elaborated that the Constitution of Serbia is facing difficulties (for example related to the status of the provinces), and the legislator instead of offering a legal solution, is hoping for a political solution for the issue. The relation between the international law and the domestic one is not clearly delineated. The practice of basing decisions on international legal provisions might often lead to conflict with the national law. Dr. Pajvancic pointed out that in accordance with the Continental tradition the law is to be made by the Parliament, therefore the creation of law by the virtue of precedents or the tendencies for depriving parliaments from their legislative function should not be tolerated.

Ms. Gordana Chomic, Deputy Speaker of the National Assembly of the Republic of Serbia, addressed the forum with her views on the role of national parliaments in
constituational adjustments on the way to membership (please refer to Annex D). She set the stage by providing a categorization where any reform comes down to issues (who decides about the issues; who defines the debate) and procedures (how to create them; how to apply them). When those two dimensions are established the reform should become a subject of democratic discourse. In SEE countries sometimes there is lack of debate, and a culture of monologue is instated instead of following the democratic practice of listening to the voice of minority. Such a tendency contributes to a development of a system where efficiency is often more important than fundamental human rights. Thus, while once upon a time people used to die for enshrining constitutional freedoms, today important things can be taken for granted. What could focus the situation is a reminder of the purpose of reforms, including those related to EU accession, and that ultimately comes down to fundamental freedoms and rights, and rule of law. The abovementioned categorization was then used to present a “recipe on how to prepare (adjust) a good Constitution”. The pivotal step would be to reverse the process where power of parliament has been drained out, which has left democracies in gloom. “Let there be light and take the power back to Parliaments” – concluded Ms. Chomic, pointing out that that is where the ‘power of the people’ should be, and that Parliament should reclaim the responsibility for representation and take the leading role in the reform process.

**Dr. Karolina Ristova Asterud, Profesor and First President of the Committee on European Issues in the Macedonian Parliament** suggested the best approach for the positioning of Macedonia's Constitution, would be by adding a chapter to the existing Constitution. This chapter will include provisions related to the issues concerning the relations to the EU, as well as the relations between the Parliament and the Government. The membership in the EU will also require changes to the provisions of the Constitution considering the state sovereignty and the transfer of competencies. The latter will reflect upon some of the competencies of Macedonia’s Parliament, such as: the ratification; the influence of the Parliament upon the legislative process in the EU; ex ante and ex post participation in Government treaty negotiations, or the role of Parliament in protection of the principle of subsidiarity. She concluded that the tendency would be to move away from a “democratic deficit” (which is actually a “parliamentary deficit”) and “de-parliamentarization” towards “re-parliamentarization”.

**Dr. Viktor Gotovac, Law Professor at the Faculty of Law, University of Zagreb,** related the EU integration process to the wider social changes that have begun since 1990, and pointed out that in that context the reforms related to EU accession are misperceived. Mentioning the ongoing campaign to persuade the public in Croatia in the merits of EU membership, he drew attention to the fact that the accession effort should be aimed at reaching EU standards, and should not be a purpose on its own.

**Ms. Blagorodna Dulikj, Member of Macedonia’s Parliament and President of Parliament's Legislative and Legal Committee**, pointed to the possibility to have clauses with postponed effect. On the potential role of the Constitutional court in reconciling national law with EU law, she reminded that in accordance with the
Constitution the international treaties are previously ratified in Parliament, and therefore the constitutional Court can review the ratification laws.

Ms. Inese Birzniece, Team Leader of an EU funded project Technical Assistance to Macedonia’s Parliament suggested that for the South East European countries a better model for constitutional adjustment might be posed by the Baltic countries, whose context and legal order is more similar to those of SEE when compared to the bigger and more advanced countries of the EU.

IV. Outcomes

Conference participants fairly preferred the approach of going for constitutional amendments over the approach of broad interpretation of the existing provisions of national constitutions. The former was recommended to the candidate countries as a secure means of achieving alignment with the EU law and at the same time avoiding the risk of conflict between the national and the legislation of the EU.

The Conference had undoubtedly revealed that the issue of supremacy between the constitutions of the member countries and the EU treaties cannot be resolved. The genesis of this problem was reviewed in the light of the structural evolution of the EU from an international organization to a "sui generis" form of organization bearing a tendency of developing its attributes in a direction of resemblance to the characteristics of a single state. At present, this situation is contended by exercising "constitutional tolerance", both, on the side of the European Court of Justice and from the constitutional courts of the member states.

It was also concluded that the use of international treaties and EU acts (regulations, directives, etc.) by the constitutional courts of the candidate countries is on a very low level. The treaties and other agreements that the candidate countries have made with the EU stipulate that the EU acts should be applied directly and that the national courts should not deny their effect. However, the practice has shown that a number of challenges persist and that applicant countries should develop mechanisms for tackling this issue in a viable manner, including training and assistance in implementation in practice of EU law.

The importance of human rights and freedoms was also pointed as an important challenge that lies on the path of every constitution in the process of EU integration. The countries in the SEE should pay more attention to this issue while venturing into constitutional adjustments. It was also noted that the dialog between the lawmakers and the public is on a very low level and that this may present a threat to the issue of human rights.

With reference to a recent decision taken by the German Constitutional Court, emphasis was placed on enhancing the control role of the national parliaments in EU-related issues. This was deemed necessary in fighting the “parliamentary deficit”, also in connection with the increasing role of the executive authorities of the member states on the expense of the role of parliaments.
V. Annexes

Annex A – Research paper by Dr. Jens Woelk, Constitutional Law Professor at the Law Faculty of the University of Trento, “Constitutional challenges of EU Accession for South East European Applicant Countries: A Comparative Approach”

Comparative Study - Constitutional Challenges of EU Accession for SEE-Dr. Jens Woelk.pdf

Annex B – Conference Agenda

Conference Agenda.pdf

Annex C – Presentation by Dr. Jens Woelk, Constitutional Law Professor at the Law Faculty of the University of Trento, “Constitutional Challenges of EU Accession for South East European Applicant Countries: A Comparative Approach”

WOELK Constitutional Challenges presentation.pdf

Annex D – Presentation by Ms. Gordana Chomic, Deputy Speaker of the National Assembly of the Republic of Serbia, “Legitimacy through Participation: the Role of National Parliaments”

CHOMIC-Role of National Parliaments presentation.pdf

Annex E – Parliament of Republic of Croatia, National Committee for Monitoring the Negotiations on the Accession of Croatia to the EU “General characteristics of the management of EU issues during negotiation process in the Croatian Parliament”

General characteristics - management of EU issues in Croatian Parliament.pdf

Annex F – Parliament of Republic of Croatia, National Committee for Monitoring the Negotiations on the Accession of Croatia to the EU, Information on the National Committee

Information on NATIONAL COMMITTEE for Monitoring the EU Negotiations .pdf


Karakamisheva-Jovanovska - The New Challenges of the European Constitution.pdf