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INTERNATIONAL LAW"**

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**"PRIMACY OR SUPREMACY OF INTERNATIONAL AND EU LAW IN
THE CONTEXT OF CONTEMPORARY CONSTITUTIONAL
PLURALISM"**

**REPORT
by**

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Primacy or Supremacy of International and EU Law in the Context of Contemporary Constitutional Pluralism

Introductory Remarks

This brief report focuses on the national constitutions and supranational legal orders interaction in the context of contemporary constitutional pluralism and multilevel governance instead of the more traditional and much broader issue of comparative prospective of interaction between public international law, EU law and national legal systems.

The reason the first prospective enjoyed preference over the latter is the theoretical speculation that after experiencing different stages of constitutionalization it seems that the terms constitutional pluralism and multilevel governance would be more indicative to prospective trend in the future development of supranational legal orders. This approach however reduces the sphere of analysis by excluding the legal cooperation based on customary international law and national legal systems concentrating on international treaties, supranational and national poly constitutional or mono constitutional acts. It leaves aside issues that are of not less importance to the interaction between the legal orders like the customary and principles of international law and soft supranational law especially concerned with commitments and soft law instruments.

No doubt the analysed phenomena should be reduced in order to stay within the limits of the length of the present report and to better focusing of the lense on their relationships and dependencies.

Another basic notion attempts to clarify the terminological difference in this report between primacy and supremacy. Both of these terms have been applied interchangeably or treated as synonyms by the academia. Simultaneously or alternately both have been ascribed to the International or EU Law.

Contemporary supranational legal orders appear in different forms of which most important are the international (universal and regional) law, the EU law and in some sense relations between member states and central governments of federations , confederations or sui generis unions of nation states with most unique of them being the EU (something like platypus - a sui generis international organization or sui generis statal union entity).

Types of interaction between national and supranational legal orders follow different paths, depending on the mode of multilevel governance, instruments of implementation or pre-eminence enforcement of supranational legislation, international and founding treaties, constitutional, EU institutional and national legislation relationships.

Still the contemporary context when constitutional monism is undergoing a gradual transformation into constitutional pluralism complicated the picture and very essence of the interaction between multiple legal orders that slowly sometimes in a step by step trend transform interaction between different constitutional orders.

Due to the topic of the present conference the emerging societal and global constitutionalism also should be left outside of this report concentrating on the interaction of supranational and municipal constitutional orders.

I The Emerging Constitutional Pluralism

In the global age constitutional pluralism poses challenges to traditional legal theory failure to explain emerging new issues. Here I will speculate on the coexistence and interaction

between multiple constitutional orders referring to the national constitutions, European constitutional construct (having still the form of an unwritten constitution) and emerging beginnings of the world constitutionalism.

According to legal positivistic method including its most developed forms like the doctrine of law autopoiesis all legal and constitutional systems are hierarchically structured and provide institutions for conflict resolution within the law. The courts protect human rights, enforce the hierarchy of law excluding the contradictions between provisions in various sources of law and guarantee the legitimate monopoly of violence which lies at the heart of the Weberian definition of the state. Even libertarians and legal minimalists bring up catalaxy to rule out conflicts within the legal system. Without a hierarchical structuring the legal and constitutional systems are considered to be chaotic phenomena or amorphous conglomerate of inconsistent and disintegrated legal rules created by various regulatory bodies.

Treating the coexistence of constitutions in multiple layers of national and supranational governance we find that they are not arranged by a straight forward hierarchical Kelsenian or Hartian pattern identical to the nation state legal system of municipal law.

Scholars might identify plethora methods of structuring interrelationships between the international, EU and municipal law include harmonization of values through introducing international democratic standards (reception, transplants, mutual influence) and implementation of international law instruments in the national legal systems by the national legislation of parliaments and bylaws of the executive bodies

Still another avenue to implement the international standards particularly in the field of human rights is applying decisions of the ECJ and ECtHR by the national courts Opening the national constitutional order by the EC member states by amending the national constitutions. Pooling of sovereignties to secure division of competences. It seems that at least 3 types of relationship between the different levels of pluralism develop. Multilevel governance in constitutional pluralism should rely on toleration, legitimation built on common values, contrapunctualism and hierarchy within the powers consigned to different levels of Constitutional governance.

Lisbon treaty has added another dimension by providing the constitutional identity principle that balances the absolute supremacy of EU law

The evolution of legal pluralism has taken centuries during the last milleniums of human civilization. For long time the legal pluralism appeared to follow the dualistic type of division depicted by Ulpian in the Digest of the Roman Law.¹ *Ius civile* within many state legal systems existed simultaneously with the single *ius gentium* or law of the peoples. International and municipal law developed in separate realms of legal continuum that never collided for the implementation of international provisions in the national legal system was virtually non existent. Mutual influence between the plural legal systems was experienced rather as reception of legal patterns and solutions through legal transplants by a scenario where various national legal systems played the roles of donor and recipient. Except for the last couple centuries when the international law expanded through multilateral treaties during the whole previous time period legal pluralism followed the dualistic separation between multiple monistic municipal legal orders and common but limited by its regulatory ability international law. Emergence of global society bolstered diversification, structured the international law normative institutes to facilitate harmonization of different fields and universal or regional levels of international cooperation. Although being an interesting object of research legal pluralism has been a field much more explored by legal theory and comparative legal science.

In comparison to legal pluralism constitutional pluralism is of a more recent origin for it emerged at a much later civilization stage.

One of the most fascinating events of our age has been the emergence of multilevel constitutionalism.

¹ Дигесты Юстиниана, Москва 1984, кн.I, титул I, 23

For less than 3 centuries written constitutions have been monopoly of the nation state which was perceived to be the sole legal entity in possession of constitutional capability to draft and adopt the supreme law of the land. Of course, national constitutional law coexisted with the international law which though the *pacta sunt servanda* principle was irreversibly established in the legal and political reality after WW II, was considered to be within the scope of national constitutional supremacy. With the foundation of the European Communities a new transnational legal order emerged having the supranational, direct, immediate and horizontal effect within the legal systems of the EC member states. At a first glance supremacy of the community law might be considered to undermine position of the nation state constitutions as the supreme law of the land. In fact for the first time a supranational legal order has been gradually acquiring the formal characteristics of a constitutional system though founded on a typical unwritten constitutional arrangements. In this way European integration transformed the legal pluralism built on the coexistence of national and international law into interaction between various levels of constitutional arrangements. Initially it took the shape of interrelationship between unwritten EC constitution which encompassed some primary EC law provisions from the founding treaties, seminal decisions of the ECJ and few important rules created by the EC institutions, and written nation state constitutions of the EC member states. Since 1960ies constitutional pluralism was enriched with EC law - a new legal system reaching beyond the legal dualism of international and municipal law.

The term global constitutionalism has received wide range of connotations in legal theory. It has been approached from comparativist prospective referring to the national models of constitutional government in the world and not within the symbiosis of constitutionalization of power relationships in contemporary globalization process.²

Globalization of constitutionalism and adopting a constitution for a non statal entity has been treated in the context of unwritten constitution within the founding treaties.

During the last decade scholars tackled a new phenomenon or a new stage in the development of constitutionalism emerging on a global level.³ They have treated the global constitutionalism as but another form of governance where the power in order to meet benchmarks of democracy has to be framed with constitutional restraints.⁴ Primacy of international law, the increasing role of many international organizations like WTO, development of human rights legal instruments at supranational level has been considered as different streams forming the fabric of global constitutional beginnings posing limitations on the actors of the emerging global governance. Although these phenomena resemble the guarantist function of the constitutions it would be an exaggeration and a simplification to look for supremacy of the global rule of law moreover for an emerging unwritten constitution. At present, proposing a draft world constitution is utopian illusion bordering science fiction like the Constitution of Mars.⁵ Within the context of global democratic governance international legal standards have been instrumental to the bridging national and global constitutionalism. Nowadays the intensity of legal binding and hierarchical structures are

² See for the best papers in this field with analysis of post World War II trends in **T.Fleiner**, Five Decades of Constitutionalism, in Publications de l' Institute de Federalisme Fribourg, Suisse vol .5, 1999, 315 – 344; also his Ageing Constitution, paper to the Conference The Australian Constitution in Retrospect and Prospect, Perth, 21-23 September 2001; **B.Ackerman's** seminal article The Rise of World Constitutionalism, Virginia Law Review, May 1977, N.83, 771-798

³ Л.Ферайоли, Отвъд суверенитета и гражданството. За един световен конституционализъм, Съвременно право, 1995, кн.4,70-78

⁴ One of the best liberal definitions of constitutionalism emphasizing the constitutions role as frame of government was offered in the second half of the 19 century in the US by John Potter Stockton " The constitutions are chains with which men bind themselves in heir sane moments that they may not die by a suicidal hand in the day of their frenzy.", **J.E.Finn**, Constitutions in Crisis,1991,5

⁵ See A CONSTITUTION FOR THE FEDERATION OF EARTH, As Amended At The World Constituent Assembly In Troia, Portugal 1991. Now being circulated worldwide for ratification by the nations and people of earth. Distribution for ratification under the direction of the World Constitution and Parliament Association and the Global Ratification and Elections Network (wcpagren.org). World Constitution and Parliament Association 8800 West 14th Ave.Lakewood, Colorado 80215 USA ; See **K.S.Robinson**,The Constitution of Mars, in The Maritans, HarperCollins,1999.

strongest within national constitutionalism, they are present in federalism and are in the process of affirming in the relationship between EU constitution and the constitutions of the member states. In the current global constitutionalism there is some compatibility of democratic standards but not a full fledged hierarchy of constitutional orders. Globalization is still looking for its own constitutional order and the rule of law and global standards interaction with national constitutional orders has still to rely on *pacta sunt servanda* principle. Significance of international legal standards increases since they compensate the weaker legal binding force of the emerging supranational global constitutionalism.⁶ National constitutions are affected by the emerging global constitutionalism for it is a challenge to the role of nation state constitutions as utmost expression of sovereignty. Global constitutionalism influences the status of the national constitutional self-determination in the idea of self-government, the form of participation, power distribution and representation. The legal standards established by the international treaties and soft law might be interpreted as a fourth pillar through which the emerging global restraints on governance are transposed to national constitutionalism as universal criteria to the constitutional governance.

The EU unwritten constitution which norms could be found mainly in the EU founding treaties and the EU charter of human rights surpasses the proposition that the constitution is an attribute reserved for the nation states and marks a new stage in the constitutional civilization. For the first time in history, a non statal entity has adopted a written constitution.⁸ With the EU Constitution mankind has entered the third stage of constitutional civilization when constitutional governance has expanded beyond the nation state.

Three distinct stages in the evolution of the governance and constitutionalism can be outlined. Mankind has lived for millenniums in a state without a constitution limiting governmental power. After the Westphalian treaty and especially after the last decades of the 18th century when the first written constitutions were adopted – for centuries the constitutions became monopoly of the nation states. The rule of law has been entrenched in a written constitution as legal form of state legitimately structuring power built on supremacy of constitutional limitations, supporting hierarchy of the legal and political system to ensure democratic government and protect human rights at the national level.

Sui generis state alike entities like EU and in some foreseeable future international organizations perhaps WTO and/or UN founded on agreement between the participating sovereign nation states with “open statehood” will entrench the rule of law in a written constitution coexisting and interacting with the national constitutions.

However, success of the EU constitutionalism rules out two primitive conclusions.

It doesn't mean that by adopting a constitution EU might be automatically transformed into a state or a full fledged federation. It also doesn't mean that the EU constitution and the emerging beginnings of global constitutionalism mark the process of the withering of nation states. Instead the EU and global constitutionalism will exist hand in hand with the constitutions of the nation states, will be made possible through the national constitutional and legal systems and will not replace them. Moreover, the nation states will be the main actors in the evolving constitutional pluralism and will work together with other non statal actors.

⁶ In a recent article, M. Maduro offers three pillar constructs of constitutions in a national and global context. **M. Maduro**, From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance, Lead Paper to the Workshop Changing Patterns of Rights Politics: A Challenge to a Stateness?, Hamnse Institute for Advanced Studies, Delmenhorst, Germany, June, 2003, 9-12

⁸ For a brilliant critique on the thesis of no demos as reflected in the German Maastricht decision see **J. Weiler**, The State “uber alles, Demos Telos and the German Maastricht Decision, EUI WP RSC N95/19; The classical Ellinek trinity of territory, nation and sovereignty as a prerequisite to constitution drafting has been overcome. Some definitions extended the benchmarks of the state by adding independence, effective government, recognition by other states, capacity to enter in agreements with other states, states apparatus, organized economy, fictional pars of states as official residences of foreign diplomatic envoys, see **LTA Seet Uei Lim**, Geopolitics: The Need to Reconceptualize State Sovereignty and Security in the Journal of Singapore Armed Forces 1999, www.mindef.gov.sg/safti/pointer/back/journals/1999/Vol25_2/7.htm

II How Supranational Constitutional Orders penetrate and influence Nation State Constitutional Law

The most typical method of tackling the issue of the international legal standards is approaching them from international and comparative law prospective. The fourth generation national constitutions² have been drafted in a globalized world in which primacy of international law has become an element of the rule of law. The constitutions of the emerging democracies adopted after the fall of Berlin wall reflect the international standards and include special provisions on supremacy of international law. If these international standards especially in the area of elections are integral part of the treaties they are transplanted in the national legal orders after states adhere to the treaties.

The systems of implementing the treaty obligations however are different due to the choice of monistic or dualistic system in the national constitutions.³ Incorporation of the treaties provisions and international standards provided in the treaties follows two types of procedures.⁴

According to the dominant in Europe monistic system the international treaty becomes an integral part of the national law after having been ratified. When a country has adopted dualism implementation of treaty obligation can take place not by ratification but by drafting a special law or including a provision in the existing national legislation.

Comparative analysis of European systems demonstrates another type of difference due to the position of the international treaties in the national legal order.

In some countries like Belgium, Luxembourg and Netherlands the international treaties provisions have supranational effect and stand above the legal system superseding the authority of constitutional norms.

According to the constitutional practice of other countries like Austria, Italy and Finland the treaties having been ratified with parliamentary supermajority vote have the same legal binding effect as constitutional provisions.

The third type of implementation of treaties obligations under the monistic system in Europe places them above the ordinary parliamentary legislation but under the national constitutions according to their legally binding effect. This is the current practice in Bulgaria, Germany, France, Greece, Cyprus, Portugal, Spain and others.

In Czech Republic, Lichtenstein, Romania, Slovak republic only the treaties relating to human rights stand above the ordinary legislation.⁵

The primacy of international law standards should always be regarded as a minimum, and if especially in the area of human rights and the electoral law national constitutions establish more democratic standards the national provisions should be preferred and would not be considered as a breach of treaties.

1991 Bulgarian constitution proclaims primacy of international law treaties which have legally binding force and supersede the contradicting provisions of the national legislation. Under the monistic approach international treaties, constitutionally ratified, promulgated, and having come into force as for the Republic of Bulgaria, shall be a part of

²See **S.E. Finer**, Notes Towards a History of Constitutions, in *Constitutions in Democratic Politics*, ed. V. Bogdanor, Aldershot, 1988, 17-32; also *Constitutions and Constitutional Trends Since World War II*, ed. A. Zurcher, Greenwood Press, 1955

³See for different legal orders in dualistic system and integrating the both legal orders in monism **M.Kumm**, Towards a Constitutional Theory of the Relationship between National and International Law *International Law Part I and II, National Courts and the Arguments from Democracy*, p. 1-2, www.law.nyu.edu/clppt/program2003/readings/kumm1and2.pdf ; **L.Wildhaber**, Treaty-Making Power and the Constitution, *Bazel*, 1971, 152-153

⁴**P. van Dijk, G. J. H. van Hoof**, *Theory and Practice of the European Convention on Human Rights*, Boston, 1990, 11-12; **A.Drzemczewski**, *European Human Rights Convention in Domestic Law*, Oxford, 1985, 33-35

⁵**C. Economides**, *The Elaboration of Model Clauses on the Relationship between International and Domestic Law*, The European Commission for Democracy Through Law, Council of Europe, 1994, 91-113, 101-102 ; **L.Erades**, *Interactions between International and Municipal Law*, T.M.C. Asser Institute – The Hague, 1993 ; *The French Legal System: An Introduction*, 1992, 45; ., Вж **Й.Фровайн**, *Европейската конвенция за правата на човека като обществен ред в Европа*, София, 1994, 32 ; Вж също така **Л.Кулишев**, *Прилагането на Европейската конвенция за правата на човека в българския правен ред*, сп.Закон, бр.2, 1994, 3-25

the domestic law of the country. They shall take precedence over any conflicting legal rules under the domestic legislation.

The Constitutional Court of Republic of Bulgaria in an interpretative ruling has extended the validity of this constitutional provision i.e. art 5, par.4 to include all the treaties which were signed before the entry in force of the Constitution if they fulfill the requirements of art. 5, par.4.⁶

Interpretation of art. 85, par. 3 and art.149, par.1, 4 in connection with art 5, par. 4 makes apparent that the 1991 Constitution of Bulgaria has situated treaties only second to the Constitution itself but above all the national legislation.⁷ In this way the primacy of international law has complied with the requirements of art 2 of the UN Charter respecting the nation state sovereignty. Of course supranational, direct, immediate and horizontal effect of EU law will require introduction of EU clause in the Constitution providing for transfer of sovereign powers to the EU and its institutions.

The process of implementing treaty establishing international standards in the national legal system is different from interaction between EU legal order and EU member state legal orders. If an European standard is provided by EU constitution or primary law, due to the transfer of sovereignty it prevails over the national constitutional norms and has legal binding effect after the EU member states have been notified. That is why implementing of the international legal standards bears no similarity to obligation to comply with *acquis communautaire* in adapting the national constitutions and approximation of legislation in order to provide supranational direct immediate and horizontal effect of primary and institutional EU law. This follows from EU law supranational, direct, immediate and universal effect on all national legal subjects within the territory of European Union member states.⁸

The term global constitutionalism has received wide range of connotations.

It has been approached from comparativist prospective as an instrument of analysis of constitutionalism within the different national models of constitutional government

⁶The Constitutional court ruled that the legal effect of treaties signed and ratified before 1991 Constitution entered in force is determined by the regime that was in effect at that time and especially according to the requirement for their publication. The treaties are part of the Bulgarian legal system if they are published or if there was no requirement to be published. If they are not published they do not have primacy to the contravening provisions of the national legislation. They might acquire the superseding effect over the contravening norms of Bulgarian legislation from the moment of their official publication. вж. **Мотиви на Решение N 7 от 1992 г. по к.д. N 6 1992 ., ДВ, N 56, от 1992 г.**

⁷Article 85.(1) The National Assembly ratifies or denounces with a law international treaties that: 1. Are of a political or military nature;

2. Concern the participation of the Republic of Bulgaria in international organizations;

3. Call for corrections to the borders of the Republic of Bulgaria;

4. Contain financial commitments by the state;

5. Stipulate the participation of the state in any arbitration or court settlement of international disputes;

6. Concern basic human rights;

7. Affect the action of a law or require new legislation for their implementation;

8. Specifically require ratification.(2) Treaties ratified by the National Assembly may be amended or denounced only in accordance with the procedures stipulated in the treaties themselves or in accordance with the universally accepted provisions of international law.(3) The signing of international treaties that require constitutional amendments must be preceded by the passage of such amendments.

Article 149.(1) The Constitutional Court:

4. Rules on the consistency between the international treaties signed by the Republic of Bulgaria and the Constitution, prior to their ratification, as well as on the consistency between the laws and the universally accepted standards of international law and the international treaties to which Bulgaria is a signatory;

⁸ These undoubted characteristics of the European law are formulated by the Court as early as the beginning of the 60s, *N.V. Algemene Transport - en Expeditie Onderneming van Gend & Loos, v. Netherlands Fiscal Administration*; Case 26/62; *Costa v. ENEL*; Case 6/ 64. See in a detail **E. Stein**, *Lawyers, Judges and the Making of a Transnational Constitution*, *American Journal of International Law*, vol.75, January 1975, N 1, 1-27; **P. Pescatore**, *The Doctrine of Direct Effect*, *European Law Review*, 8, 1983, 155-157 ; **J. Weiler**, *The Community System: the Dual Character of Supranationalism*, *Yearbook of European Law* 1, 1981; **A. Easson**, *Legal Approaches to European Integration in Constitutional Law of the European Union*, F. Snyder, EUJ , Florence, 1994-1995

in the world and within the symbiosis of constitutionalization of power relationships in contemporary globalization process.⁹

Globalization of constitutionalism and adopting a constitution for a non statal entity has been treated in the context of unwritten constitution within the founding treaties and in the context of the written constitution drafted by the EU convention. Another glimpse at the standards of elections concerns the relationship between EU constitution and adapting of the national constitutions of EU member states i.e. the constitutional *acquis*.

Recently during the last decade scholars have made attempts to describe a new phenomenon or a new stage in the development of constitutionalism emerging on a global level.¹⁰ They have treated the global as but another form of governance where the power in order to meet benchmarks of democracy has to be framed with constitutional restraints.¹¹ Supremacy of international law, the increasing role of many international organizations like WTO, development of human rights legal instruments at supranational level might be considered as different streams forming the fabric of global constitutional beginnings posing limitations on the actors of the emerging global governance. However, it would be exaggeration and oversimplification to look for supremacy of the global rule of law moreover for an emerging unwritten constitution. International legal standards are within this context a linkage between national and global constitutionalism. They provide compliance of different legal orders of contemporary constitutional pluralism. The intensity of legal binding is strongest within national constitutionalism, it is present in federalist context and it has been in the process of affirming in the relationship between EU constitution and the constitutions of the member states. In the global constitutionalism there is some compatibility of democratic standards but not a hierarchy of constitutional orders. The globalization is still looking for its own constitutional order and the rule of law and global standards interaction with national constitutional orders has still to rely on *pacta sunt servanda* principle. Due to this fact significance of international legal standards increases and them since they are compensation to the weaker binding legal force of the emerging supranational constitutionalism at a global level.

Following M.Maduro's three pillar construct of constitutions in a national and global context we can look at the international standards as a fourth pillar through which the emerging global restraints on governance are transposed to national constitutionalism as universal criteria to the constitutional governance.¹²

III. Jumping in the Semantic Bog of Primacy and/or Supremacy or v.v. in the Relationship of Supranational or National Legal Orders

Constitutions, Treaties, and academic writings have addressed interchangeably, cummulately or alternately the issue of relationship between supranational and national legal orders.

⁹See for the best papers in this field with analysis of post World War II trends in **T.Fleiner**, Five Decades of Constitutionalism, in Publications de l' Institute de Fedralisme Fribourg, Suisse vol .5, 1999, 315 – 344; also his Ageing Constitution, paper to the Conference The Australian Constitution in Retrospect and Prospect, Perth, 21-23 September 2001; **B.Ackerman's** seminal article The Rise of World Constitutionalism, Virginia Law Review, May 1977, N.83, 771-798

¹⁰Л.Ферайоли, Отвъд суверенитета и гражданството. За един световен конституционализъм, Съвременно право, 1995, кн.4,70-78

¹¹One of the best liberal definitions of constitutionalism emphasizing the constitutions role as frame of government was offered in the second half of the 19 century in the US by John Potter Stockton " The constitutions are chains with which men bind themselves in heir sane moments that they may not die by a suicidal hand in the day of their frenzy.", **J.E.Finn**, Constitutions in Crisis,1991, 5

¹²Maduro's three pillars in which national constitutions are affected by the emerging global constitutionalism are challenging the role of nation state constitutions as utmost expression of sovereignty and as criterion of ultimate validity of the legal system, national constitutional self-determination in the idea of self-government, the form of participation, power distribution and representation is also influenced by global governance., **M.Maduro**, From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance, Lead Paper to the Workshop Changing Patterns of Rights Politics: A Challenge to a Stateness?, Hamnse Institute for Advanced Studies, Delmenhorst, Germany, June, 2003, 9-12

Most of the scholars have tried to separate and reserve the terms attributed to the relationship of legal acts within and between the legal orders.¹³ In a way overcoming scientific challenges was attempted to be resolved by the famous latin maxim to conquer territories and peoples

Divide et impera. However, if this golden rule to conquer the enemy in war or diplomacy played best through the centuries and romans wisely coined it in a maxim, reverting to this principle in the area of science is next to useless. In the area of science to approach new challenges means to conquer all accessible knowledge, to reconsider and reconstruct knowledge and only then produce new divisions. Or it seems the reverse maxim or ***Impera et divide*** is more relevant. Mastering and command of knowledge comes before division of values, principles, constructs categories and terms being attributed to real phenomena.

Most often division between primacy and supremacy follows the difference between hierarchical systems and heterarchical entities of legal acts. In this train of thought supremacy is a term reserved for national law

and primacy is related to prevalence, priority, pre-eminence, preference in legal application for supranational legal systems. From this conclusion follows the assumption that for any relationship between the treaties and national law the correct term is primacy. For others primacy and supremacy especially in the case of international and EU law do not have significant importance and ordering of different legal orders has to be decided not on special rules but on concrete conflict resolution following the ECJ and national constitutional, civil and administrative courts jurisprudence.¹⁴

The relationship between terms is not a semantical purity issue alone as it has been also presented but is at the heart of interaction between national and supranational legal orders. It is a question about the very essence of EU law characteristics. Even after the declaration of primacy was humbly annexed and argued of being of political nature alone, the debates remain alive and we can only cite and update a famous statement from the beginning of M.Kumm article that "Forty years after the European Court of Justice (ECJ) declared the law of the European Communities (EU law) to be the supreme law of the land in Europe¹⁵, controversy over the relationship between EU law and national law remains alive¹⁶" with but for another decade more.¹⁷

If primacy means conquering and monopolization of terms referred in order of their chronological attribution and usage, the history of mankind would consist of inflation caused by coining words without any causal or functional relationship that is out of any other market than history.

¹³ See E.Drumeva, Primacy of the EU law in the National Constitutional Space – Reflections in Ceci nest pas une Constitution – Constitutionalization without a Constitution, I. Pernice, E.Tanchev ed. Nomos, Baden Baden, 2009, 100-104; M.Avbelt, Supremacy or Primacy of EU law- (Why) Does it Matter/?, European Law Journal, vol.17, N 6, Nov.2011, 744-763; Darinka Pijani, Supremacy of European Law revisited: New developments in the context of the Treaty Establishing a Constitution for Europe, www.enelsyn.gr/.../PaperDarinka Franz C. Mayer, Supremacy – Lost? WHI - Paper 2/06 Walter Hallstein-Institut für Europäisches Verfassungsrecht Humboldt-Universität zu Berlin

¹⁴ For thorough overview of French, English, German and Italian terminological usage and review of ICJ practice see P.Ravlusevicius, The Enforcement of the Primacy of the European Union Law: Legal doctrine and Practice, Jurisprudencia, 2011, 18(4), 1369-1388 internet version, www.mruni.eu/lt/mokslo_darbai/st/archyvas/dwn.php?id...

¹⁵ The leading cases are ECJ Case 6/44, Costa v. Enel, [1964] ECR 585; ECJ Case 43/76, Comet BV v. Produktschap voor Siergewassen, [1976] ECR 2043; ECJ Case 106/77. Amministrazione delle Finanze dello Stato v. Simmenthal, [1978] ECR 629.

¹⁶ For general overviews of note on the issue see A. M. Slaughter, A. Stone and J.H.H. Weiler, *The European Courts and National Courts – Doctrine and Jurisprudence* (Oxford, Hart Publishing 1998), Constance Grewe and Helen Ruiz Fabri, *Droits Constitutionnels Européens* (Paris, PUF 1995), Franz Mayer, *Kompetenzüberschreitung und Letztbegründung* (Muenchen, C.H. Beck 2000). For a collection of the leading cases across jurisdictions see A. Oppenheimer (ed.), *The Relationship between European Community Law and National Law: The Cases* (Cambridge, 1994 [Vol.1] & 2003 [Vol.2])

¹⁷ Matthias Kumm and Victor Ferreres Comella Altneland: The EU Constitution in a Contextual Perspective The Future of Constitutional Conflict in the European Union: Constitutional Supremacy after the Constitutional Treaty Jean Monnet Working Paper 5/04

The Lithuanian practice, as influenced by the jurisprudence of the German and the Spanish constitutional courts has enriched and contributed to the elaboration of the concept of relationship between the national and EU legal orders. I find extremely helpful the discourse by on the primacy of EU law during the drafting and adoption of the amendments to adapt the national Constitution of the Republic of Lithuania to the accession to the European Union.¹⁸ According to Article 2 of the Constitutional Act, the norms of the European Union law are constituent part of the legal system of the Republic of Lithuania. The principle of primacy of the EU law in the Lithuanian legal order was recognized by the founding EU Treaties direct application, and their primacy in case of collision with the national laws except for the supremacy of the Constitution. So the jurisprudence of Lithuanian courts as Guardians of the constitution has been founded on the primary role of the national Constitution.¹⁹ The Constitutional Court enforcing Article 7 of the national Constitution ruled that no legal act within the hierarchy of the national legal system may violate the constitutional requirements and judged that the EU law could not contradict with the national Constitution. The approach of the Lithuanian Constitutional Court has been influenced by their monist perspective with regard to the relationship between national and EU law. The EU law has been automatically transformed into the national law through the ratification of the Accession Treaty. The Constitutional Court position on primacy of the EU law is close to a similar judgment in the jurisprudence of the Spanish Constitutional Court. As the Lithuanian Constitutional Court, it has also recognised the primacy of EU law in the domestic legal order, however, it did not recognise the hierarchical supremacy of EU law against the Constitution. As it has been cited in literature the Lithuanian point of view was highly appreciated in the German and UK legal doctrine. Here I would like to add that this has been the position of the Bulgarian constitutional doctrine and Constitutional court jurisprudence that was just mentioned in the previous paragraph of my report based on the par.4 of art. 5 of the 1991 Constitution of Bulgaria on the primacy of international law treaties. When the international law instruments that have been implemented are in conflict with national norm they prevail over all of the parliamentary law and subordinate legislation but surrender to the constitutional supremacy. However, the contradiction of the treaty provision to the constitutional norms has been taken care in advance for the Constitutional Court has been empowered to pronounce on the conflicts between before the treaty ratification. In that case the conflicts might be avoided either by amending the constitution before they treaty ratification or if the treaty is open to adhere with reservations where the conflict between constitution and the international norms is evident.

An interesting solution to resolve primacy v.supremacy debate has been offered by prof. E.Kūris by avoiding the riddle of competing supremacies by a concrete practical solution with court's determination on the applicable law.²⁰ This idea is especially important for it extrapolates the lowest common denominator in the row of terms signifying the relationship between different legal orders. So the term application of the relevant law (resembling the conflict resolution between different legal systems), comes before primacy and supremacy of the supranational legal orders over the national legal system.

¹⁸ For Lithuanian debate and practice on the primacy I am indebted to the article of P.Ravlysevicius, The Enforcement of the Primacy of the European Union Law: Legal doctrine and Practice, *Jurisprudencia*, 2011, 18(4), 1369-1388, especially 1379 -1382; see for reference to the Lithuanian practice Damian Chalmers, European Restatements of Sovereignty LSE Law, Society and Economy Working Papers 10/2013, London School of Economics and Political Science Law Department www.lse.ac.uk/.../law/.../WPS2013-10_Chalmers.

¹⁹ Constitutional Court of the Republic of Lithuania, Judgment of 22 June 2009 concerning the legal act of territorial planning, No 16/07-17/07-20/08. *Jurisprudencia*. 2011, 18(4): 1369–1388. 1381

²⁰ See Kūris, E. Europos Sąjungos teisė Lietuvos Respublikos konstitucinio teismo jurisprudencijoje: sambūvio algoritmo paieškos [The EU Law in the Jurisprudence of the Constitutional Court of the Republic of Lithuania: Search for the Algorithm of Coexistence]. In: Teisė besikeičiančioje Europoje. Vilnius: Mykolas Romeris universiteto Leidybos centras, 2008, p. 673, 707; cit. in P.Ravlysevicius, The Enforcement of the Primacy of the European Union Law: Legal doctrine and Practice, *Jurisprudencia*, 2011, 18(4), 1369-1388 internet version https://www.mruni.eu/lt/mokslo_darbai/starchyvas/dwn.php?id=..., at 1381-1382

If we resort to Okkam's razor the term of application of the relevant law is contained in the term primacy and primacy is encompassed by supremacy. Or paraphrased in other words the construct might be simplified by using the formulae that application of the relevant law is subsumed in the term primacy and primacy is subsumed by supremacy.

Now let us reconsider which term might be most adequate for national and supranational legal systems qualities arrangement of the legal acts by tracing the characteristic features for application (enforcement) of legal acts within the national and between the supranational and national legal systems

Without any doubt the legal systems in the nation states and federations are hierarchically structured and all of the normative legal acts enjoy direct, universal and immediate effect after they are made public and after expiry of vacatio legis.

While the International law primacy with no doubt (purest monistic systems like Netherlands being an exclusion) surrender to supremacy of the nation state constitution, the other supranational legal order – EU law has some extra qualities like supranational, direct, immediate and horizontal effect that complicate its impact over the national legal system of the EU member state countries. Particularly due to conferral of powers from national to EU institutions sometimes referred as transfer of sovereignty the relationship to the national constitution is different from the primacy of International law treaties. In the areas where the powers were transferred to the EU institutions in a conflict institutional law (reglements and directives after their transposition) should prevail over the constitutional norm under two conditions.

- The first being if the national constitution is below the standard of the EU law or national constitutional limitation exceeds or poses a higher restriction than the EU law.

- The other point is that the EU institutional law does not conflict to the national constitutional identity which is reserved to be regulated by national constitutions. In this case primacy of EU law acquires supremacy over the national law.

Within the areas where powers were not delegated to the EU institutions and sovereignty has been intact and has been reserved for the EU member states national constitution should prevail if a conflict with secondary institutional legislation occurs. In this case primacy of the international law and primacy (supremacy) of EU law are almost identical.

IV. Does EU Law Supremacy Undermine Nation state Constitutional Supremacy or there is Fine tuning in the Relationship between National and EU Supranational Constitutional Order

EU Supranational effect has been associated with gradual affirmation of primacy, direct, immediate and horizontal effect of the founding treaties, part of mandatory secondary institutional legislation and ECJ jurisprudence which have been a part of the unwritten EU constitution since the 1960ies. In shaping the unique character of EU legal system two trends deserve special attention. The first one has been safeguarding and establishing absolute supremacy in the areas of conferral of powers and transfer of sovereignty in the process of opening constitutions to secure pooling of sovereignty of the EU member states. The second one has been the gradual expansion of the areas covered by EU law and its supremacy and penetration in new fields. Interaction between national judiciary and ECJ played crucial role in the process of affirming affirmation of primacy, direct, immediate and horizontal effect of EU law. From time to time there was vigorous reaction by some of the member state constitutional courts justified by partial and casual prevalence of national law that provided better human rights protection than community law. This sporadic reaction tempered but by no means undermined the EU primacy constant growth.

Among the many novelties introduced Lisbon treaty reinforced national identity by transforming it into constitutional identity in the art.4, par.2 of TEU. A leading authority in the area of EU constitutional law von Bogdandy has stressed that the biggest difference between identity notions as provided in Maastricht and Amsterdam treaties that it has been moved away from cultural, linguistic criteria and turns to the content of domestic constitutional orders

thus becoming a constitutional, not a cultural. An attempt at classification of constitutional untouchable or nonamendable core might contain features falling within three basic types.

The first one has been composed of those issues that are situated outside of any constituted and constituent powers constituting the so called eternity clauses. Constitutions of Germany²¹, France (from the Third, Fourth and Fifth French republics stating that the republican government cannot be amended), some provisions in the 1991 Romanian constitution etc.

Other constitution like 1991 Bulgarian one contain quasi eternity clauses related to the form of government, unitary character of the state, form of the established balance of powers or the established form of separation of power thus freezing or petrifying the constituent power. One of these provisions that is directly related to the EU supremacy is that under the Bulgarian constitution it is the Constitutional court alone that can proclaim unconstitutionality and refuse to enforce a provision or law that contradicts the constitution. Under Simmental decision doctrine affirming the EU law direct effect all courts in a country member state should directly enforce EU law instead of a contradiction provision of national parliamentary legislation. It is apparent that to provide legal basis of resolving this discrepancy Bulgarian constitution will have to be amended. However, this is extremely difficult for it requires action by the Grand National Assembly which is extremely difficult to call bringing de facto such an amendment to almost eternity clause.

The last group of provisions within the nonamendable core are specific national constitutional structure features whose amendment requires absolute or qualified parliamentary majorities. In Italy, Germany, Ireland, Denmark, Spain and other European countries constitutional courts or courts of general jurisdiction performing constitutional review posed some constitutional limits to the absolute preponderance of EU law.

The new normative constitutions of the emerging democracies in Central, Eastern Europe and the independent republics of the former Soviet Union broke away from nominal, instrumental constitutionalism. Drafted in the 90ies they generically belong to the last wave of the 4th constitutional generation born after the World War II.²²

All of them were created after the crisis of legitimacy of the old regime and collapse of the communist system.²³ Building new legitimacy of transition was a notification of the emergence of new statehood to the world community and a foundation of the transformation of the legal, political and social systems of these countries oriented to the rule of law, parliamentary democracy and market economy. By establishing the new legitimacy and implicit refutation of the legitimacy of the ancien regime, the new democratic constitutions are typical examples of reactive fundamental laws.

²¹ **The Eternity clause in 1949 German Grundgesetz**, is the Article 79 paragraph (3) of the Basic Law for the Federal Republic of Germany. The eternity clause is a very important topic, because it intends to protect (guarantee) "the basic principles" established in Articles 1 and 20 of "this Basic Law". Amendments of "this Basic Law" affecting "the basic principles" of Articles 1 and 20 are prohibited outright (as "inadmissible"), because they are the formal identity for the Federal Republic of Germany. To affect "the basic principles" of Articles 1 and 20 with amendments is to change the state's identity and supplant "this Basic Law" with a different order, i.e., different set of principles and different objectives.. See also U.Preuss, The implications of "Eternity clauses": German Experience, *Israel Law Review* vol.44, 2011, 429- 448

²² For differentiation see K.C.Wheare, *Modern Constitutions*, Oxford, 1966, 14-31; C.F.Strong, *Modern Political Constitutions*, London, 1970, 59 -79; H. van Marseeven and G.van der Tang, *Written Constitutions*, New York, 1978, 241-262; G. Sartori, *Constitutionalism: Preliminary Survey*, *The American Political Science Review*, v.56, 1962, 853; Ch.Debbach, J.M.Pontier, J.Bourdon, J.C.Ricci, *Droit constitutionnel et institutions politiques*, Paris, 1983, 71-75; P. Pactet, *Institutions politiques et droit constitutionnel*, Paris, 1985, 69; G.Mobidelli, L. Pegoraro, A. Reposo, M.Volpi, *Diritto Costituzionale Italiano e comparato*, Monduzzi ed., 1995, 82-87

²³ In general the crisis of legitimacy has been defined as a transition to a new social structure when the status of political institutions is threatened by the change or some of the political groups are excluded to the political system. , S. M. Lipset, *Op.cit.*, 78; However, his concept has been challenged by two of contemporary developments at least. In fact the erosion of the legitimacy of the communist regimes took place long before the beginning of the falling apart of the system in the 1989. Current stage of development of EU and the transformation of the nation states in Europe at the turn of the century have been treated as a lack of legitimacy and democratic deficit in the EU institutional framework functioning.

Adhering to the classical separation between constituent and constituted powers the new democratic constitutions belong to the rigid constitutions.²⁴ The procedure of constitutional amendment has been complicated in order to prevent the opportunity of premature, rash, ill -considered and undemocratic constitutional revision by the parties in government. The popular sovereignty through its institutions acting by super-majorities and building a higher degree of consensus than the will of the winner of regular elections has been authorized as a sole repository of constitutional amendment.

Eternity clauses in some of the constitutions serve as limitations to constituent power and preclude the destruction of legitimacy of the transition through abolishing basic values by constitutional amendment.²⁵

The most common limitations of constitutional revision concern human rights and in general correspond to the international standards of inviolability of human rights during the periods of emergency.

Some of the constitutions like the fundamental law of the Republic of Romania have provided extensive list of inadmissible constitutional amendments.²⁶

Rigidity of the constitutions in the post-communist societies was conceived to safeguard the transition legitimacy, irreversibility of transformation and to create solid foundation of legality as a means of preserving the hierarchy of the juridical acts. This feature of the constitutions was efficient in providing stability of transformation process framing the changing majorities in the parliament and withholding the constitutional amendment from the parties or coalitions in control of government. Some countries, like Poland, Lithuania and others, avoided objections to the early constitutional drafting by enacting interim or temporary fundamental laws at the initial stage of the transition.²⁷ Rigidity of the new democratic constitutions, however, created some difficulties which would have not been experienced with more flexible constitutions, that could have been adapted during the transition. Constitutional courts' activism in interpreting the constitutions with a different degree of success and acceptance of the political actors and public opinion contributed to the solution to these problems within the framework of constitutional legality.

After the accession to EU rigid constitutions in some of the countries joining the EU during the first decade of the new millenium might lead within the constitutional identity concept to malfunctioning in the EU membership by opposing EU law supremacy, direct immediate and horizontal effect. This might pose a danger to EU legal integration by eroding the constitutional *acquis communautaire*.

To conclude in short the basic trend has been from absolute sovereignty of the Constitutions of the nation states to absolute prevalence of supranational law in the EU and to the fine tuning between EU and national constitutional law by posing limits to the rigid absolute supremacy community law.

²⁴ Hungarian constitution being the exception.

²⁵ Nonamendability clauses are outcome of the experience of western constitutionalism to create safeguards to the preservation of constitutional democracy against the authoritarian encroachments or totalitarian takeover. 1949 German Grundgesetz proclaims inadmissibility of constitutional amendment of federalism and democratic and social character of the Republic, basic constitutional principles of popular sovereignty, constitutional supremacy to legislature and law and justice to the executive, right to resistance to anybody seeking to abolish the constitutional order if no other remedy is possible, human dignity, inviolability, inalienability and direct enforceability of human rights. (art. 79, 3; art.20; art.21). Following a tradition established by the 1875 Third republic, the 1958 constitution of the Fifth French republic provides in art. 89 that the republican form of government shall not be subject to amendment.

²⁶ According to art.148 of the 1991 Romanian constitution national, independent, unitary, and indivisible character of the state, the republican form of government, territorial integrity, independence of the judiciary, political pluralism, official language, elimination of human rights freedoms and their guarantees is explicitly placed out of the constitutional revision subject matter.

²⁷ Another "revolutionary" solution proposed was that these countries should not engage in constitutional drafting at the start of the legal reform. A period of chaos with legality suspended was conceived to be a better and more efficient approach of purifying the legal system from the acts of communist legacy. , see S. Holmes, Back to the Drawing Board, East European Constitutional Review, vol 2, N 1, Winter, 1993, 21-25. Even if we admit that this way would speed the legal reform it would have had a devastating effect on the low and shaky legal culture of the society emerging from communism.