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Challenges to the Dialogue”**

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REPORT

**“COMPETING HIERARCHIES: CONSTITUTIONAL SUPREMACY
VERSUS SUPRANATIONAL LAW PRIMACY”**

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I. Introductory Remarks

The classical principle of constitutional supremacy is assuming new dimensions with the development of the relations between the national legal systems and the international legal order.

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 of 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.

Supranational law in Europe a network of intercrossing multiple legal orders with different hierarchies and levels of constitutionalization.

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

The systems of implementing the treaty obligations however are different due to the choice of monistic or dualistic system in the national constitutions.¹ Incorporation of the treaties provisions and international standards provided in the treaties follows two types of procedures.²

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.³

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

1. See 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.

2. 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.

3. 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.

having come into force as for the Republic of Bulgaria, shall be a part of 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.4.⁴

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.⁵ 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.⁶

4. The 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.

5. Article 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;

6. 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.

III. Sovereignty in the Federations and in the Unwritten Constitution of the European Union

If in the past state sovereignty shielded independence between the national and supranational legal orders today it might be compared to spectacles through which the national legal orders decrease or increase the sight of supranational legal orders and accommodate to the nation state constitutions.

State sovereignty has been defined as an ability of the national state to determine alone and independently from the other subjects of international law its domestic and foreign policy.⁷ The international legal order established after World War II is based on respect of the sovereignty of national states, which is most solemnly proclaimed in the UN Charter,⁸ but the principle is not an absolute category.

The relative nature of state sovereignty in the modern epoch is based on the need to have it balanced with other principles and values legitimating the realization of power. As early as the time of E. De Vattel protection of basic human rights has been the most frequent argument in favor of limiting state sovereignty with a view to guarantee freedom.

Globalization, on one part, and the economic and political power of states as subjects of international relations, on the other part, are factual preconditions, which often result in eroded state sovereignty of countries, which are smaller in terms of territory, economic potential and population. This trend reveals again the superiority of political sovereignty over legal sovereignty, which is manifested both internally and in the area of international relations.

After the end of World War II the scope of state sovereignty is also narrowed through the principle of primacy of international law over national law. The constitutions of nearly all democratic rule-of-law states accept as a model the standards recognized at supranational level and introduced in international law; the treaties to which national states are parties become part of the domestic law, which acquires parity and even priority over domestic legislation.

The European integration process makes the state sovereignty issue particularly acute.⁹

The European structure evolves from a regional organization through a special *sui generis* international union to reach a unique political system of the European states¹⁰ and in a

7. Some authors analyse the content of state sovereignty in several different aspects. Krasner maintains that in international relations state sovereignty is exercised in the first place as Westphalian sovereignty, which excludes the intervention of external legal and political subjects in defining the internal organization of the national state; legal sovereignty manifested in the requirement for international recognition of states; and interdependent sovereignty covering the methods employed by states to control trans-border migration, S. Krasner, *Sovereignty*, Princeton, 1999,9.

8. According to Para 1, the Organization is based on the principle of the sovereign equality of all its Members; Para 4 says that Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, and Para 7 proclaims a ban on the intervention in matters, which are essentially within the domestic jurisdiction of any state.

9. This aspect of sovereignty was been discussed in the Bulgarian legal literature even before the European Union was established, see Д. Георгиев, *Суверенитетът в съвременното международно право и сътрудничеството между държавите*, София, 1990, 70-81.

10. Vattel is the first to write about Europe as a political system, meaning that the national states on the old continent are linked as a single body where the independent states are united by a common interest to maintain order and protect freedom. Of course, the European Union today is not a political system within the meaning attributed to this notion by Vattel, E.De.Vattel, *Op.cit.*, book 3., Ch. 3, sect 47.

nearer or a more distant future – a federal union, though one unknown to the typology of classical federalism and confederalism.

The multi-level government in the European Union is a triunity of community, intergovernmental and federal government method, which ensures successful development of the national states and the supranational formations comprising the European integration architecture.

The basic trend in terms of state sovereignty is not its elimination but its existence parallel to the so-called “open system of government” where member states delegate some of their internal political powers to the European Union and its institutions. The movement towards a federal union does not automatically mean loss, abdication and full transfer of sovereignty to the European Union, which is not yet a state formation. What is more, the experience of classical federations does not prove that member states had lost their sovereignty to reach the status of territorial formations in a centralized Unitarian state.

In all forms of classical federalism the success of the political union depends first of all on the advance consensus on the sovereignty and division of established powers, detailed in the distribution of authority to the union institutions and the bodies of the member states.

In a logical order context the concepts of sovereignty influence the form of the union and also predetermine the forms of vertical division of powers, which in turn is realized as distribution of authority between institutions.

The history of federalism is full of various structures of solving the problems of sovereignty in the complex state formations. The basic objective of the doctrines of sovereignty in a federal environment is to differentiate the holder of sovereignty and to superpose more than one state sovereignty on one people and one territory.

The first group of constitutionalists accepts the thesis of divisibility of sovereignty, which is divided between the federation and the subjects of the federation. Thus both state formations are bearers of sovereignty¹¹ and there are two sovereignties in the federation – of the federation and of the member states. The sovereignty of the subjects of federation is natural and primary and the sovereignty of the union is a derivative one, formed by delegation of rights by the member states establishing the federation.

According to the second school sovereignty is indivisible. The member states or the federation are alternatively holders of the sovereignty.

Whenever constitutionalists maintain that sovereignty belongs to the states, which have formed the federation, they practically identify the federation with a confederation. Thus in the USA immediately before the civil war Southern States representatives justified their sovereignty with the fact that it preceded the formation of the federation.¹² Federal bodies are only agents of the subjects of the federation who restrict their activity within strictly limited powers. M. Seydel in Germany also maintains that sovereignty is indivisible and belongs to the states forming the federation.¹³ Thus the organization and functioning of federal institutions come close to the intergovernmental method established after World War II in community law.

11. This view is expressed by J. Madison, A. De Tocqueville about the USA and G. Waitz, L. Duguit, *op.cit.*, 189-194; G. Waitz, *Grundzuge der Politik*, Breslaw, 1862, 161-176; In modern times this school is represented by L. Siedentop, see Л. Зидентоп, *Демокрация в Европа*, София, 2003, p 132-133.

12. Sovereignty is a single whole, to divide it means to destruct it., See J. Calhoun, *A Disquisition on Government*, Boston, 1881, v. I, 118.

13. M. von Seydel, *Staatrechtliche und politische Abhandlungen*, Freiburg, 1893, 15.

Other constitutionalists maintain that sovereignty is indivisible but it belongs to the union only.¹⁴ The states forming the federation are not sovereign.¹⁵ At the same time, the subjects of the federation preserve such a level of autonomy from the central government, including their own constitution and citizenship, which makes them significantly different from the territorially differentiated administrative subdivisions of the decentralized unitary state. Today German landers, though not having their own sovereignty, are declared constitution able formations.¹⁶ The cooperative federalism doctrine developed as early as the 30ies of the 20c in the USA and in the second half of the 20 c in Germany, gives flexibility to the federal state. According to the representatives of this dominating school, constitutional regulation is directed on one part towards cooperation and overcoming the conflicts between the central government and the landers, and on the other part towards coordination of the relations between lands.

C. Schmitt in his day noticed the defects of the sovereignty in a federation framework. In his federalism doctrine he formulates the antinomy theoreticians come to in their attempt to build an orderly framework of the sovereignty in the federal state. If sovereignty is single and indivisible, then the existence of the federation is practically impossible. If it belongs to the federation and the subjects of the federation are non-sovereign formations, the federation itself becomes a unitary state. In the opposite hypothesis, where the member states are bearers of sovereignty, it turns out again that there is a confederate union or an international union.¹⁷

Very pragmatically, the constitutional discourse in the European integration process avoids the contradictions and antinomies of the sovereignty in federations. The gradual success in uniting Europe is definitely a result of the evolved functional cooperation and community methods. The delayed political union is largely compensated by the economic cooperation and the community law based integration as a new transnational order having direct, immediate and universal effect with respect to all legal subjects in the member states. The Maastricht Treaty, which lays the foundations of the European Union, places on the agenda the issue of partial transfer of sovereignty, which was envisaged in the constitutions of some member states tens of years earlier. The development of a constitutional treaty goes far beyond the "open system of government" framework insofar as it replaces multi-level government with the federal method of distribution of authority between the European Union and the national member states.

Champions of integration try to tone down Euro skeptics' criticism of the radical federalization of the European Union by calling the Constitution of the EU a constitutional treaty, on one part, and by refusing to solve the problem of state sovereignty in an environment of federal system of government, on the other part. But it is well-known from the history of federations that it is the content of the structural act and not its name that is decisive in determining the form of the state union.¹⁸

14. P. Laband, *Das Staatsrecht des Deutschen Reiches*, Tübingen, 1911, vol. I, 91.

15. G. Ellinek, *op.cit.*, 280.

16. E. Stein, *Staatsrecht*, Tübingen, 1998, 103; The same view is maintained by O. Kiminih in the seven-volume commentary of the fundamental law of FRG, *Государственное право Германии*, Москва, 1994, т 1, 77.

17. C. Schmitt, *Theorie de la constitution*, Paris, 1993, 517-522.

18. In his federation doctrine C. Schmitt notes that "the federal treaty is a constitutional treaty" and its content immediately forms the federal constitution and becomes part of the constitution of each member state., see C. Schmitt, *ibid*, 518 The work of the European Convent seems to paraphrase his thesis reformulating it to mean that the development of a constitutional treaty establishes a federal union.

Instead of following the beaten track of division or unity of sovereignty, the theoreticians of the federalized European integration propose the pooling of sovereignties formula. The idea of pooling the sharing of sovereignty itself was substantiated by H. Macmillan as early as 1962. "Accession to the Treaty of Rome does not imply unilateral waiver of sovereignty on our part, but pooling the sovereignties of all parties concerned, mainly in the economic and the social area. Delegating some of our sovereignty we will get in turn part of the sovereignty delegated by the other members."¹⁹ Instead of going into meaningless scholastic disputes, politicians and theoreticians offer a practical solution of combining the supremacy of the union with the supremacy of the member states by fixing the areas of their realization.²⁰ Thus in a globalizing environment the protection of states' national interests requires to pool their sovereignties and not to oppose them. It is not by chance that in the internet portal of the EU the introduction to EU's institutions is preceded by the common understanding of pooling of sovereignty. "The European Union is not a federation like the United States. Nor is it simply an organization for co-operation between governments, like the United Nations. It is, in fact, unique. The countries that make up the EU (its "member states") pool their sovereignty in order to gain strength and world influence none of them could have on its own. *Pooling sovereignty means, in practice, that the member states delegate some of their decision-making powers to shared institutions they have created, so that decisions on specific matters of joint interest can be made democratically at European level.*"²¹

Opening of the member states state sovereignty has shaped the process of adapting of nation state constitutions to the supranational EU unwritten constitution. It has been the core of the core of Constitutional *acquis communautaire*.

Outlining and distributing the authority of member-state institutions and of EU bodies is the practical solution to the antinomies of sovereignty in federalism and a precondition for introduction of horizontal and vertical division of powers in the European Union.

Thus the dispute on the sovereignty in a federation can be avoided by applying a pragmatic approach to the vertical division of powers and realizing the latter by distribution of authority between the center and the periphery. It is the distribution of authority, particularly of joint one, that will establish new legal figures and insofar as it does not fit in the notion of transfer of sovereignty, it will necessitate amendments to the constitutions of the EU member states.

Besides, one should not forget that, as history shows, even the most precise and comprehensive regulation of authority in the federal constitutions did not exclude disputes and conflicts. The basic method of settlement was the court one and in the context of the national states in Europe the constitutional jurisdictions after 1920 have been arbitrators in the dispute between the union government and the institutions of the member states.

IV. Does EU Law Supremacy Undermine Nation state Constitutional Supremacy or is there 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 an 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

19. H. Macmillan, Britain, the Commonwealth and Europe, 1962, in Tory Europe Network, www.toryeuropenetowrk.org.uk.

20. N. MacCormick, Beyond the Sovereign State, *Modern Law review*, v.56, January 1993, N1, 16.

21. www.europa.eu.int/institutions/index_en.htm.

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 non-amendable 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 Germany,²² 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 non-amendable 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,

22. 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.

instrumental constitutionalism. Drafted in the 90ies they generically belong to the last wave of the 4th constitutional generation born after the World War II.²³

All of them were created after the crisis of legitimacy of the old regime and collapse of the communist system.²⁴ 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.

Adhering to the classical separation between constituent and constituted powers the new democratic constitutions belong to the rigid constitutions.²⁵ 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.²⁶

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

23. For differentiation see K.C.Wheare, *Modern Constitutions*, Oxford, 1966, 14-31; C.F.Strong, *Modern Political Constitutions*, London, 1970, 59 -79; H. van Marseveen 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.

24. 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.

25. Hungarian constitution being the exception.

26. 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.

Some of the constitutions like the fundamental law of Republic of Romania have provided extensive list of inadmissible constitutional amendments.²⁷

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.²⁸ 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 millennium 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.

Instead of Conclusion

If one might find the picture in the previous part of this brief report a bit complicated an admirer of simple hierarchical arrangement of the legal orders and their norms will be perplexed still further. Legal and constitutional pluralism will in not so far future undergo a further complications and will pose a challenge to the classic orthodoxy of mono hierarchical legal order sacred to the positivist mind. . For the multiple national, international (universal, continental or regional) and supranational legal orders would not fit in the Kelsenian or Hartian hierarchy of law. Instead the legal world of today would be enter a new phase of pluralism of competing hierarchies between various constitutional and legal orders with different degrees of development.

For example one of the challenges might be the global constitutionalism of which only beginnings might be observed.

The term global constitutionalism has received wide range of connotations.

27. 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.

28. 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.

It has been approached from comparative perspective as an instrument of analysis of constitutionalism within the different national models of constitutional government in the world and within the symbiosis of constitutionalization of power relationships in contemporary globalization process.²⁹

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.³⁰ 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.³¹ 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 still not a firmly established 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.

29. 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.

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

31. 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 their 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

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.³²

32. Maduro'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