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THE EUROPEAN CONSTITUTION FROM THE PERSPECTIVE OF THE NEW MEMBER STATES

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1. Introduction

I would like to thank you for the honour of granting me the opportunity to present a lecture at the Humboldt University in Berlin, devoted to the European Constitution seen from the perspective of new Member States. I owe particular thanks to Professor Ingolf Pernice for the invitation to deliver my presentation within the framework of so prestigious a scientific endeavour as FORUM CONSTITUTIONIS EUROPAE.

Before I embark on the topic, allow me a personal reflection. As it turns out, my family's first contact with the University of Berlin is fairly old. It is connected with my grandfather, Stanisław Stefański, for several decades a teacher of Polish, German and Latin in secondary schools. He was born in the 19th century in a small picturesque village in the province of southern Poland called Galicia which then belonged to the Austro-Hungarian Empire. After he had graduated with distinction from secondary school, he enrolled in 1909 in the Faculty of Philosophy of the Jagiellonian University, Cracow, to study Polish and German philology. My ancestor must have been a very good student and the favourite pupil of Wilhelm Michael Creizenach, Professor of German Language and Literature, since the latter found his young graduate a place in a one-semester study visit at the University of Berlin. My grandfather went there, still as an Austrian subject, and continued his studies from October 1913 until February 1914. In his memoirs, which he wrote shortly before his death, my grandfather gave a short description of his studies and the atmosphere in the metropolis, as well as of his contact with his German colleagues. In the family archives there is one particularly interesting document. It is a certificate in Latin, confirming that my grandfather took the academic pledge and was given the rector's approval to enter studies at the Faculty of Philosophy. The name of the rector is printed in capital letters and below it is a clear handwritten signature. And the Rector's name is Max Planck.

As we all know, the year 1914, when my grandfather returned home from Berlin, was not a particularly good time for European integration and the idea of the unity of Europe.

My first visit to Berlin took place in September 1989. I was then on an Alexander von Humboldt Foundation scholarship at the University of Heidelberg. For its scholarship-holders and their spouses, the foundation organised a three-week-long "Deutschlandsreise" around the then Federal Republic and West Berlin. I remember the view from a vantage point near the Reichstag of the Berlin Wall and the Brandenburger Tor. I was not aware then that the Humboldt University is a mere kilometre or so away. Again, September 1989 was not yet a good time for European integration and the idea of the unity of Europe.

At the time, I would not have believed it, had any clairvoyant told me then that fifteen years later I will have the honour to deliver a lecture at the Humboldt University and that, in that lecture, Poland and other countries of Central and Eastern Europe will be referred to as "new Member States of the European Union" and the topic of the discussion will be a document ambitiously titled: "The Constitution for Europe".

2. The Perspective of the New Member States

I am expected to look at the European Constitution from the viewpoint of the new Member States. For two reasons, I will be able to meet these expectations only in part.

First, we are often inclined to treat these countries as a whole and forget the differences between them. However, I have chosen some aspects of the constitutional debates and some attitudes of the countries in question which, in my opinion, are common to all new Member States.

Second, as one can note, discussions on the European Constitution in the new Member States are still at an early stage. It is even difficult to foresee if they will become more intense in the months to come. For some reasons, which I will return to later, the work of the European Convention has not been monitored closely in the countries acceding to the Union. It was only during the IGC at the end of 2003 and the beginning of 2004 that there was a certain increased interest in the Draft Constitution, but only in some acceding states, particularly in Poland.

At present, the Member States are at the stage of ratifying the Constitutional Treaty (CT), which prompts a more attentive approach to the Constitution and encourages voicing opinions thereon. Among the ten new Member States, eight decided to ratify the Constitutional Treaty via their national parliaments. As indicated by statements made by politicians, these Member States consider that it is not necessary to carry out referenda there. The reason is that, in their opinions, the CT is not introducing any principal changes compared with the treaties on which the Union is founded at present and these treaties were approved in 2003 in the accession referenda. It was therefore concluded that organising new referenda after such a short period of time would be superfluous especially as most political forces and citizens in those states are pro-European and "pro-Constitutional". Therefore, one should not expect vivid constitutional debates to be conducted in these countries. It should be remembered that the Constitutional Treaty has already been accepted without any lengthy discussions by the parliaments of two new Member States - in Lithuania and Hungary - in November and December 2004.

Two new Member States have decided to hold a referendum: Poland and the Czech Republic. I will present the issues emerging in connection with the ratification of the CT in the concluding part of my presentation

3. Reasons for the New Member States' Special Attitudes to the Constitution

The question arises whether the new Member States have any special attitudes towards the Constitution. I personally believe that there are some features specific to these states which may make their perspective on the Union's reform different from those of the "old" states.

(a) Lack of Experience

The first of these features may even seem to be tautological: After all, these are the *new* EU members. I will try to explain why this is important. If particular provisions contained in the Constitution are analysed and evaluated by the "old" Member States, they are compared, quite naturally, with those provisions of EU law currently in force. It is understandable then that the "old" Member States make use, in the constitutional debate, of their good or bad experience to date concerning the organisation and functioning of the Union and its institutions on the basis of the EC and EU Treaties.

The new Member States, naturally, do not have sufficient experience. Indeed, before accession, their authorities did not participate in the Union's decision making processes and their nationals did not benefit from the rights and freedoms guaranteed to EU citizens. It is in fact only since May 1, 2004 that the new Member States have been acquiring practical experience in dealing with the Union's institutions and everyday contacts with other states. My impression is that the new members have not yet established their positions and have not defined their interests in many institutional, procedural and substantive matters. This makes the constitutional debate far more difficult in the countries under consideration.

It seems that, viewed from the perspective of the new Member States, the principal aims and directions of constitutional reforms are advantageous. I mean, for example, the formal abolition of the Union's division into three pillars, the delimitation of competencies between the Union and its Member States, the reform of legal instruments and law-making procedures, some new institutional arrangements, actions aimed at improving governance and democratisation of the Union, as well as the simplification and updating of primary law.

Undoubtedly, the granting of binding force to the Charter of Fundamental Rights in part two of the Constitution is beneficial to the nationals of the new Member States even if they are not yet fully aware of the legal consequences of such a solution.

(b) The Attitude to the Constitution as a Function of Timing

The fact that the states concerned are new in the Union exerts further influence on their approach to the Constitution. Indeed, it should be borne in mind that in the first half of 2003, those States underwent the ratification procedures of the Accession Treaty, the most important element of which were nationwide referenda organised in nine out of the ten acceding states. In the context of my presentation I would only like to emphasise one aspect of this issue. The premise for the ratification of the Accession Treaty was the consent of the acceding countries to the conditions for accession and acceptance of the "acquis communautaire", as applicable in 2003. It so happened that the accession referenda and the further stages of the ratification process coincided almost exactly in time with the final work of the Convention and with the presentation of the Constitution. Emphasis on that convergence in time is important. It comes to mind that the work of the European Convention in the states under consideration was not followed very closely, and was for some time overshadowed by the discussion on the Accession Treaty.

Interest in the Draft Constitution increased only following successful referenda – that is once the draft was already completed. In this situation it became inevitable that the Constitution was, and still is, evaluated in the new Member States to a large extent by being compared with the state of EU law as ratified upon accession.

Let me make a short digression in this context. I do not want to discuss here Poland's position concerning the system of qualified voting in the Council which contributed, together with the stance of Spain and the opposite positions of France and Germany, being equally inflexible, to the failure of the IGC in December 2003. I would only like to express my opinion that Poland's unyielding position was caused to a significant extent by the fear of the Constitution being rejected by the Polish citizens in the future constitutional referendum. Please note that the new rules of voting which changed Poland's influence in the Council were accepted by the Convention without public debate, just a few days after the referendum in which Poland's citizens had accepted the Accession Treaty. Therefore the idea of the Polish government was to postpone the final decision of the IGC and to try and reach a compromise rather than approve an unsatisfactory text and risk graver problems in the next stage of the Constitution's enactment, namely its ratification.

(c) Level of Economic Development

Another feature of a vast majority of the new Member States is that they have been democratic just for a dozen years or so, and it is only recently that they have been following the principles of market economy. With few exceptions, these are states whose level of economic advancement is much lower than the average of the hitherto Member States. Therefore, in evaluating the Constitution, the states concerned pay attention to whether the provisions of the Constitution will improve their position. This relates to, among other things, the determination of the Union's objectives and tasks, financial arrangements, the principles of solidarity or the economic cohesion of states at different degrees of development, etc. The Constitutional Treaty includes some general clauses in this last respect but makes no progress as compared with the treaties now in force.

The Constitution's provisions on enhanced co-operation are also of great importance from the perspective of the new Member States. Observers in these states sometimes express the concern that the use of enhanced co-operation to a broader extent and in major areas by more developed states could result in the creation of a hard-core or multispeed Europe, and that divisions within the Union could be intensified. This could be disadvantageous to the states concerned as they are less prepared to participate in advanced forms of integration.

(d) The Size of the New Member States

Another issue to be emphasized further is that all of the states that recently acceded to the European Union with the exception of Poland are small. Poland is by far the largest of all states acceding to the Union. This country with a population of more than 38 million, is equal to the combined population of the remaining nine new Member States. No wonder then that almost all the new Member States are interested in having the rights of small countries guaranteed under the new Constitution. This position found its expression for example in discussions on the composi-

tion of the European Parliament and the European Commission. Another example of a constitutional solution of benefit to the new Member States would be the strong position of the Commission as the guardian of the Union's interests, which may be a counterbalance to some larger Member States. Moreover, it is favourable for the new Member States to maintain the requirement of unanimity in the Council with regard to some sensitive matters such as social policy, taxes or defence.

(e) The Question of Sovereignty

The next major factor having an obvious effect on the attitude of most of the new Member States towards the Constitution is their history. For several decades those states were either part of or under the influence of the Soviet Union. For this reason they particularly value their sovereignty and are afraid of becoming dependent on their big and rich neighbours. Some brief comments can be made in this context.

The new Member States view favourably such provisions of the Constitution as the direct formulation of the principle of conferral, expressing the principle of subsidiarity in a more precise way, together with the new competencies of the national parliaments, a clearer division of competencies between the Union and the Member States, proclamation of the possibility of voluntary withdrawal from the Union, even if such a possibility is more theoretical and symbolic than practical.

On the other hand, some concerns may be raised by the direct proclamation in Article I-6 of the Constitution of the principle of primacy of the Constitution and of EU law over the law of the Member States. This principle is challenged by Eurosceptics in Poland and the other new Member States as a sign of the excessive limitation of national sovereignty. On the other hand, supporters of the Constitution stress that this principle is not new and follows already from the case law of the European Court of Justice (ECJ) to date. By acceding to the Union the new Member States have accepted this principle together with the whole *acquis communautaire*. Expressing this principle directly in the Constitution does not effect its content, which is expressly put in the declaration on Article I-6 referring to the jurisprudence to date.

This last statement is principally right although it does not solve the problem completely. The question emerges whether indeed nothing will change with respect to the principle of primacy when its scope becomes extended to cover the whole body of European Union law, and especially regarding the Area of Freedom, Security and Justice. Besides, even if when the Constitution enters into force, the primacy principle is construed in the same way as before, there is no guarantee that its content is not going to evolve in the further case law of the ECJ.

4. The Current State of the Constitutional Debate

As I have mentioned, discussions on the European Constitution are not particularly fervent in the new Member States. Apart from academic communities, statements on the topic come mainly from journalists and politicians. A characteristic feature of these opinions is that they include rather general judgments, not always anchored in the actual text of the Constitution.

The criticism that Polish politicians level at the Constitution is often limited to selected issues which have already been considered by the Convention and the IGC. Three of these emerge most often. Firstly, it is the lack of mentioning the Christian heritage of Europe in the Preamble. Secondly, it is emphasized that the new system of qualified majority voting in the Council will be less advantageous to Poland than the present Nice system. The opinions expressed quite often overlook the fact that the solution finally adopted in Article I-25 of the Constitution together with the declaration on this article, represent a change advantageous to Poland, compared with the proposals of the Convention. The third issue, already referred to, is the insertion of the principle of primacy of EU law into the text of the Constitution.

Apart from the general assumptions of the Constitution, some detailed solutions are also criticised by its opponents. I will give only one example: One of the most quoted provisions of the Constitution which is purported to illustrate solutions disadvantageous to the new Member States, is Article III-167, pertaining to the preferential treatment of state aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany. The Constitution's critics emphasise that this provision is unjust considering that all of Poland was affected by the division of Europe for several decades. Experts counter this objection saying that the provision in question is not new and is in force even now (Article 87 para. 2 c EC), and that, in light of the practice followed by the European Commission and the Community Courts, it does not cover all of state aid in the new German federal states and is of limited practical significance. Additionally, five years after the Constitution enters into force, the Council may decide to repeal this provision. The Constitution's opponents ask, however, why it is that, if this rule is of minor importance and raises so many doubts in the new Member States, the provision in question will be maintained in force for at least five years after the Constitution goes into effect? It is hard for me to find any satisfactory answer to this question.

5. Referenda in Two New Member States

As I mentioned previously, two new Member States decided to ratify the Constitutional Treaty by national referenda: the Czech Republic and Poland. I would like to elaborate on this topic.

In the Czech Republic, there are controversies in political circles as to the ratification of the Treaty. The constitutional situation in that state is unclear, since the organisation of a referendum requires a special constitutional act, which has not yet been passed. The view prevails, however, that a referendum will be held on this matter. Its result is difficult to foresee, because even the republic's president Václav Klaus publicly opposes the European Constitution. On the other hand, it is worth noting that the former president Václav Havel recently made a firm call for supporting the Constitution and its ratification by the parliament, without organising a referendum. He argued, amongst other things, that citizens had recently voted in favour of EU membership.

In Poland the political parties differ in their opinions about the support for European integration on the basis of the Constitutional Treaty. The constitutional situation is different than in the Czech Republic. The Constitution of Poland provides for a choice between the procedures of ratifying a special category of international agreements which transfers to an international organisation the powers of organs of the state authority in certain matters. The Accession Treaty has

been included in this category, and the Constitutional Treaty is considered as belonging there too. Alternative procedures include either a ratification statute in parliament or a nationwide referendum. The competence to make a choice between these two procedures belongs to the first chamber of parliament (the Sejm). A formal decision has not been made yet, but there are all indications that a referendum will be declared, because all political parties are in favour of it. In accordance with the Constitution of Poland, the results of the referendum will be binding, but only if the turnout is higher than 50% of eligible voters. In the circumstances prevailing in Poland, this becomes a major problem, because a turnout exceeding 50% in elections or referenda could be achieved in Poland only rarely and with much effort. If the turnout in the referendum is lower, the Sejm will again take a decision on the choice of the ratification procedure: Either a new referendum, or the ratification statute which requires a qualified majority of two-thirds of the deputies to the Sejm and two-thirds of the senators.

So there is also a possibility that, finally, due to insufficient turnout, a legally binding decision on the European Constitution will not be made in Poland in a referendum but in parliament, and that parliament will then vote against ratification. Next term's parliament is likely to have a larger representation of parties that are either reluctant or sceptical towards the Constitutional Treaty. The controversies among Polish politicians do not pertain only to the assessment of the European Constitution but also to the timing of the future referendum: Should it be in autumn 2005 together with the parliamentary or presidential elections, or in the second half of 2006, when the outcome of the ratification process in other countries will be known.

6. Conclusion

Thus it is now difficult to foresee the results of the ratification procedures in the Czech Republic and Poland. Undoubtedly, these two countries represent "high risk" potential. Of course one should not expect that the voters will make their deliberate choices, having read the text of the Constitution. Their decisions will rather be affected by the extent to which the political parties and numerous NGOs succeed in convincing citizens that their vote for or against the Constitution is to be beneficial to them and will not undermine prior benefits of EU membership. The most recent public opinion surveys show strong support towards membership in the EU and towards the idea of the European Constitution but not necessarily towards its actual content.

There is no public awareness in Poland yet on the consequences that could be brought about by a possible ratification crisis. The predominant opinion among politicians is that in such a case, the treaties in their present version established in Nice will simply remain in force. No account is taken of some quite radical solutions, suggested from time to time, which envisage the creation of a hard core of the Union, leaving out those Member States opposing the Constitution, or even persuading the recalcitrant states to withdraw from the Union. I personally hope that such pessimistic scenarios will not be implemented and that the position of Poland or the Czech Republic as Member States will not be jeopardized. My hope is based not only on an overall assessment of the situation but also on a very special event.

The accession of Poland to the European Union was celebrated in my city in a very solemn way. As did many thousands of my fellow Cracow residents, I spent the night between April 30 and May 1, 2004 awaiting midnight at the city's magnificent market square with champagne, fireworks

and Beethoven. Several weeks later, a special plaque with twelve golden stars was fixed in the surface of the market square to commemorate Poland's membership in the Union. This kind of distinction has been granted only to the most significant events in Poland's history. I base my optimism on this very fact. As I know the good political sense of the citizens of Cracow and their well-known inclination to spend money sparingly, I do not think they would ever decide to celebrate an event of a merely incidental and short-lived nature.

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