Comment on Alexander Türk – The Concept of the "Legislative Act"

*By Barbara Mielnik**

I would like to present some general remarks on the problem of the concept of a "legislative" act in the Treaty establishing a Constitution for Europe[1] presented by Alexander Türk. All of these opinions are connected with the presentation and the Constitutional Treaty as such.

First, there are questions on terminology. Is one allowed to use terminology connected with internal law when the problems of international law or European Union law are considered? Is it possible to describe different events (acts of law) by the same terms?

Community Law in general, as was stated by the European Court of Justice, is a specific legal order. That means that this international system possesses its own legal instruments which are characteristic (typical) for this legal order. Moreover, we cannot analyze those existing instruments, or those which will be provided in the future, in the manner we used to in internal and international law. Therefore, I contend that it is not the best solution to look for compatibility of the Constitutional Treaty with the national legal order, especially in the area of legal acts and legislative procedures. This would be allowed only if we found answers to the questions: what the European Union is and what will happen after the Constitutional Treaty enters into force.

Article I of the Constitutional Treaty points out that EU is created by the will of European citizens and the Member States. There are no general characteristics associated with this new body. For us it ought to be obvious: the European Union is nothing more than an international organization. We can add that this system undeniably possesses special prerogatives. However, it does not matter which

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[1] Treaty Establishing a Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) (hereinafter Constitutional Treaty or CT).

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theory we will develop, for even at this stage of integration the biggest influence on the existence of this organization remains in the hands of the Member States. Of course the European Union will possess, thanks to the creators of the Constitutional Treaty, its own identity, international personality and competencies, but what has been pointed out: the Member States are still the main actors in this system. The role played by other actors on this stage is very limited.

Member States also play a fundamental role in the legislative procedure: if a Member State says "no", no legal act would be accepted. This could be crucial, especially in those "sensitive areas" where the interest of a Member State might be of great importance for the society. The influence on the legislation by the European Parliament is undeniable, but limited.

The Constitutional Treaty provides some changes in the legislative procedure. It changes some things to which we have been accustomed. Many people don't know why the Constitutional Treaty contains new names for legal acts proposed. What could be even more stressful: the catalogue of legal acts is supplemented by new acts which have the old names. Nevertheless, the aim of this reform was to create a more effective system. But during the initial period it could be the cause of unnecessary confusion – even for the Court of Justice. I just wonder if this is not a cosmetic reform which may cause problems, rather give than solutions.

The European Commission, as was pointed out in the presentation, will play the dominant role as the institution which initiates the legislative procedure. But even in this area there are some exceptions in favor of Member States, European Parliament, ECB and EIB (Art. I-34(3) CT). So the position of the European Commission as the only body responsible for the initiation of legal procedure is somewhat weaker than in the past. But these changes are justified if we consider new areas of the European Cooperation introduced by the Constitutional Treaty.

The role of the European Parliament is almost the same as it was in the former treaties. Therefore, in my opinion, the EP is not a truly legislative body in the narrow or strict meaning of this term. First, the EP lacks legitimacy to do so (to legislate) and lacks competencies as well. Its functions are still mainly consultative and monitoring. Of course, its role is very important but … sometimes I agree with the English lawyers that the EU would act the same without EP, because the final decisions belong to Member States.

Now I would like to analyze briefly the problem of whether it is necessary to change the place where these acts are adopted, especially the idea of making the entire procedure more "democratic". In my opinion it is not becoming so. The European Parliament, as has been pointed out, is a forum of communication –

whatever that means. It is very difficult to define "demos" or something like European demos, especially if this idea is considered on the basis of common values, rights and interests. It is more a philosophical problem than a legal one. The establishment of the European Union Citizenship is a fact and could help to develop or create the "European Nation" in the future, but I have an impression that, at present, Union citizens are not thinking about the realization of common European interests or the introduction of the new dimension of the Union. Even the common action taken, occasionally in the forum of the European Parliament, often collapses when it is contrary to the national interests of deputies.

The last organ in this system is the Council of Ministers; the role of this organ is undeniable as a main factor which is responsible for the adoption of the European legal acts. The decision-making system in this institution was changed in favor of minority voting, which seems to be proper for the organization exercising its power mainly in economic areas. Nevertheless I think that in the Constitutional Treaty the idea of transparency goes too far. The introduction of public meetings of the Council could lead to many problems. I would not like to analyze the whole idea of transparency, nor the necessity of providing some form of public control over the work of the Council. But I think that at this level of cooperation, it could be simply dangerous for the effectiveness of the Union. It could even stop the work of the entire organization as such. Personally, I would like to see the British Minister agree on some limitation on fisheries, the French and German Ministers agree on the freedom to provide services, and the Polish Minister to agree on limitation of quotas for agriculture. I fear that very sensitive areas of national interest, which could be simply adopted behind closed doors, would be very rare and only occasionally accepted in public. Although we could hope that the European interest will win, but also we may sometimes be witness to a form of public political suicide committed by some politicians. This behavior by the Council could provide more political character to those meetings; especially during national elections. At the Union level it could lead to a lack of flexibility. This last condition was a very important factor provided by the Amsterdam Treaty.

Conclusion: the concept of legislative acts presented is quite different than that provided in national law, which appears obvious because the EU is still an international organization and a special international legal order. Unfortunately, the language used in the Constitutional Treaty is borrowed straight from internal legal orders, which could lead to some misunderstandings. We must stress that such terminology has differing meanings and dimensions. Some changes in this area could present a challenge for the theory of law as it is. Unfortunately, the creators of the Constitutional Treaty have created a special legal order without its own terminology.