Legal constraints on EU Member States as primary law makers : a case study of the proposed permanent safeguard clause on free movement of persons in the EU negotiating framework for Turkey's accession

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8 General Conclusion

The purpose of this study was to establish whether there may be EU law based constraints on Member States as primary law makers in the context of drafting an Accession Agreement, and if so, to identify them. This identification was carried out with referencece to the proposed PSC clause on free movement of persons in Turkey's Negotiating Framework. It was argued that in the context of preparing an Accession Agreement there are legal constraints on Member States flowing from three sources: the pre-existing relations between the associate and the EU, in this specific case Association Law built around the Ankara Agreement; the rules of the enlargement process; and finally, the constitutional foundations of the Union.

Chapter 2 in Part I analysed the past and present of the concept "association". It looked into what type of relationship it entailed so as to be able to place the EEC-Turkey Association Agreement in its proper context. While it was demonstrated that association proved to be a flexible relationship that could fit the particular needs of the associate and the EU, it was also illustrated that originally it was intended as a temporary relationship between the EEC and less developed countries wishing to become full members. The association agreements with Greece and Turkey were "undoubtedly the purest form of application of Article 238 [now Article 217 TFEU]".[1149]

In time, in addition to the association based on a Customs Union signed with Greece and Turkey, which copied the development path of the EEC, other types of associations emerged. The association with Malta and Cyprus was based on a "potential" Customs Union, while the EAs with the CEECs, and SAAs signed with the countries of the Western Balkans were based on a free trade area. All these agreements were flexible enough to accommodate the changing needs of the associates and served as stepping-stones to the membership of those state, which were ready to join the Union. Even some of the EFTA states, with which an alternative deal to membership was struck, i.e. the EEA, managed to reorient their relationship to become full EU Member States.

1149 Given how similar both agreements were, what was said regarding the Association Agreement with Greece, could by analogy, also be applied to the Ankara Agreement. P. A. Blaisse, "Report prepared on behalf of the Committee on External Trade on the common trade policy of the EEC towards third countries and on the applications by European countries for membership or association", European Parliament Working Papers, No 134, 26 January 1963, p. 36.

In short, when the political will was there, the precise type of the association was of little concern for the associates as well as the Union. As far as the Ankara Agreement is concerned, which is the centrepiece of Chapter 3, nobody questions the fact that it was designed as a genuine pre-accession agreement. The agreement was ambitious, and it aimed to achieve its objectives by gradually integrating Turkey into the common market by gradually ensuring the free movement of goods, workers, services and establishment. What was important for our purposes was to establish whether the free movement of persons regime under the association developed far enough to be able to constrain Member States from including a PSC on free movement of persons in a future Accession Agreement. The analysis of association law, especially recent case law on the standstill clauses, demonstrated that it did.

The development of the association was envisaged in three stages: preparatory, transitional, and final. As Turkey strengthened its economy, in 1973 an Additional Protocol laying down the detailed rules and timetables for the establishment of free movement of goods and free movement of persons entered into force. While the parties abided by the timetable set for the establishment of the Customs Union, they did not do so regarding the one set for free movement of workers. There was no timetable in the Additional Protocol for the freedom of establishment or the freedom to provide services. There was only a standstill clause regarding those two freedoms, which prohibited Member States from introducing new restrictions in these areas. It was the Association Council that was supposed to breathe life into those freedoms by adopting specific decisions aimed to implement them, which it never did. It only adopted three decisions concerning the rights of Turkish workers who were already legally resident and employed in the Member States. Those decisions proved crucial, as they contained directly effective provisions which Turkish workers were able to invoke in the national courts of Member States. The rights embedded in these decisions, as well as in other instruments of the Ankara *acquis*, could be regarded as a source of constraints on Member States when negotiating an Accession Treaty with Turkey.

What surprisingly proved more important in terms of realizing free movement of persons than the provisions conferring specific rights on workers and their family members in those decisions, were the standstill clauses on free movement of workers (Article 13 of Decision 1/80), freedom of establishment and freedom to provide services (Article 41(1) of the Additional Protocol). Those clauses did not confer any rights on individuals. They would simply freeze the legal situation in Member States regarding those freedoms as of the date of entry into force of the legal instruments containing those clauses. The reason why they make a difference today is the simple fact that the rules on free movement of persons in the 1970s were much more liberal than today. Since Member States did not respect the standstill clauses and introduced stricter rules on free movement of workers, freedom of establishment and

freedom to provide servcies, the recent cases result in the partial reinstatement of free movement.

The case law on the standstill clauses was not however, merely a matter of removing new obstacles, it had its twists and turns. The most important one being the *Demirkan* ruling, which established that the freedom to provide services under the Ankara Agreement could not be interpreted in line with EU law. Hence, Member States, which had introduced new restrictions regarding Turkish service recipients, were able to keep those in place, as receipt of services under the Ankara Agreement was not considered to be an activity of a sufficiently "economic" nature, remaining therefore, outside the scope of the Agreement. According to the Court, "irrespective of whether freedom of establishment or freedom to provide services is invoked, it is only where *the activity in question is the corollary of the exercise of an economic activity* that the 'standstill' clause may relate to the conditions of entry and residence of Turkish nationals within the territory of the Member States".[1150] *Tum and Dari* established that this was the case regarding freedom of establishment, and *Soysal* established that regarding the freedom to provide services.

The fact that the standstill clause in Decision 1/80 covered the first entry of Turkish workers into the territories of some Member States was mentioned first in *Commission v Netherlands*,[1151] and later confirmed in *Demir*.[1152] Moreover, recently in *Dogan*, the Court ruled further that legislation that makes family reunification more difficult also constitutes a "new restriction" within the meaning of Article 41(1) AP.[1153] Except for the *Soysal* case, the Commission put no effort into establishing the laws applicable regarding different Member States, which means that implementation is late and patchy. Many Member States fail to adjust their immigration policies until there is a judgment referred to the Court directly from their own national courts.

As slow as the implementation of those judgments might be, this does not change the fact that a PSC on free movement of persons, would be a step back even from the existing regime on free movement of persons. As argued above, membership is supposed to complement and increase the rights of nationals of candidate countries upon their accession by equating them to those of existing Union citizens, not by curtailing their existing rights. In other words, the existing legal regime is a bare minimum, which would need to be complemented with further rights, and as such it would arguably constitute a constraint on Member States when drafting an Accession Agreement.

Having identified constraints flowing from the pre-existing relations between the EU and the candidate, Part II aimed to establish possible constraints that flow from the accession process itself, the backbone of which is

1150 Emphasis added. *Case C-221/11 Demirkan*, para. 55.
1151 *Case C-92/07 Commission v Netherlands*, para. 49.
1152 *Case C-225/12 Demir*, para. 34.
1153 *Case C-138/13 Dogan*, para. 36.

Article 49 TEU. It is the one and only provision in the Treaties governing specifically enlargement. It helped us identify both the procedural as well as substantive constraints on Member States that flow from the Treaties. As important as it is, it is quite cryptic, and fails to provide the full picture of what is a long and complex process. For instance, as demonstrated in Chapter 4, it does not fully reflect the roles of Union institutions in the process. While institutions can and often do play additional roles, it is important to note that they have to stick to the basics identified in Article 49 TEU, as any deviation might trigger external sanctions, i.e. the Court could annul the Council Decision approving the Accession Agreement for not fulfilling an "essential procedural requirement".[1154]

Since there is no other primary law provision, or secondary law for that matter, that could shed light on the accession process, Chapter 4 turned to analysing past practices of enlargement. That analysis revealed that the basics of the process were laid down during the first enlargement and were further consolidated in each subsequent wave. While some fine-tuning was done when deemed necessary, the basic contours of the process remained unchanged. Similarly, the main negotiation principles that were articulated prior to the first enlargement were consistently applied in each and every enlargement. The first of these principles mandated the full adoption of the *acquis communautaire*, while the second one allowed for some derogations to the first, though only for limited pre-specified transitional periods and in limited fields. Rather than derogation, the second principle should be seen as a reinforcement of the first, as its underlying rationale was to give the newly acceding Member State additional time to adjust so that at the end of the pre-specified transitional period they are able to adopt and apply the *acquis communautaire* in its entirety. The overall aim of both principles was obviously the continuity of the Community/Union legal order.

Chapter 5 identified the substantive constraints that flow from Article 49 TEU and examined past Accession Agreements with a view to finding out whether those constraints had been respected. The main substantive constraint specified in Article 49 TEU is the term "adjustment". What could be be inferred from Article 49 TEU is that it allows only for "adjustments", which can be defined as technical changes or adaptations that are strictly necessitated by accession, that extend the application of Union *acquis* to the new Member State. The term "adjustment" is more restrictive than the term "amendment" or "revision" used in Article 48 TEU, which implies less room for manoeuvre under Article 49 TEU. The fact that the Dutch, French and German versions of the Treaty similarly use more restrictive terms to indicate the limited scope of change allowed in the context of Article 49 TEU in comparison to the terms used under Article 48 TEU also proves this point.

1154 *Case C-65/90 European Parliament v Council*.

To be able to find whether the substantive constraint imposed by Article 49 TEU was respected in the past, the rest of Chapter 5 distinguished between measures used in past Accession Agreements which share the broad underlying rationale of the term "adjustment", i.e. the eventual full extension of the *acquis* to the newcomer, and those that do not. It should be noted that while "adjustments" and "adaptations" ensure the immediate extension of, respectively, the Treaties and secondary law to the new Member State upon its accession, the other measures identified as sharing the same broad rationale postpone the full implementation of specific parts of the *acquis* for limited amount of time after the newcomer's accession. Transitional measures, quasi-transitional measures and safeguard clauses, which are examined together as measures facilitating the full integration of a Member State, allow the newcomer an additional period to prepare itself to be able to fully undertake its obligations under Union law. While transitional measures can be taken only for a pre-determined period of time, quasi-transitional measures differ in that they are supposed to be in place for a limited time, which is however not pre-determined. Regarding the latter measures, the newcomers have the obligation to join those areas, such as the Eurozone and Schengen; however, they are allowed to do so once they fulfil certain conditions.

As far as safeguard clauses are concerned, they have always applied for a pre-specified period of time and have served as safety valves in case of unforeseen problems in given areas. Unlike transitional and quasi-transitional measures they are not clauses that apply automatically upon a newcomer's accession: they are dormant clauses. They could be triggered by either the old or the new Member States so that they are able to take protective measures against an unforeseen situation. There are no uniform terms or conditions for triggering safeguard clauses. Each clause can be different. What is common to transitional measures and safeguard clauses is that they apply for a pre-specified period of time, which usually is the end of the so-called transitional period, by the end of which the newcomer is expected to be ready to operate on the same terms as the other Member States.

Lastly, Chapter 5 examined the most problematic aspect of past Accession Agreements: measures that go beyond being mere "adjustments". As past Accession Agreements are the concrete examples of past practice, the aim was to establish whether the substantive constraint that those agreements should contain only "adjustments" necessitated by accession was respected. The idea behind that exercise was that our findings on past practice would shed light on both the existence of substantive constraints as well as on future practice in this area.

While some of the measures analysed under this title could be clearly categorised as permanent derogations such as the Maltese restriction on buying secondary residences by non-residents, and the exception obtained by Sweden for the marketing and use of "snus", most of the other measures identified as *prima facie* falling under that category (as measures going beyond being

mere "adjustments") on a closer look turn out to be "adjustments" in the broad sense of the term. To provide a few examples, the inclusion of "cotton" as a product under CAP, the exception created for granting national aid to Nordic agriculture (more specifically areas to the north of the 62nd Parallel), special rights granted to the indigenous Sami people, were all necessitated by the need to accommodate the particularities of the newly acceding States. In those cases the aim was to extend the *acquis* to the newcomers by taking their special situations into account, i.e. there was no country that produced cotton prior to Greece's accession; there were no countries with harsh climatic conditions; and neither were there indigenous people, whose special lifestyles had to be accommodated prior to Sweden's accession. In any event, those were permanenet arrangements negotiated and adopted at the request of the acceding States. They were in no way unilaterally imposed arrangements by the existing Member States.

Overall, it is argued that despite the existence of a few permanent derogations that go beyond being mere "adjustments", those derogations are exceptions, which are not of such scope and nature as to seriously challenge the existence of the rule itself. They did not affect the proper functioning of the internal market, competition or one of its well-established policies. Moreover, past experience also cautions us against another danger that can be inferred from Turkey's Negotiating Framework, i.e. the statement that "the decision-taking process regarding the eventual establishment of freedom of movement of persons should allow for a maximum role of individual Member States".[1155] The fisheries regime is a clear illustration of how a transitional arrangement intended for a certain period of time might turn into a permanent one, if the fate of that measure is left to the hands of the Member States in at a future point in time.

The last part turned to the constitutional foundations of the Union, with a view to establishing whether and how they could also operate as a constraint on Member States *qua* primary law makers. Just like various national constitutional courts have come up with doctrines to protect what they see as the essence of their legal orders, such as the "basic structure" doctrine of the Indian Constitutional Court or the "inner unity" or "coherence" doctrine of the German Constitutional Court, Opinions and case law of the Court of Justice demonstrate that similarly, it safeguards what it sees as the "very foundations" of the Union legal order.

Chapter 6 firstly, established the existence of the "very foundations" of the Union as a constitutional constraint on Member States. Then, it tried to identify the substance of those "very foundations" as far as they would have the effect of precluding Member States from introducing a PSC on free movement of persons. Based on the Treaties, case law and Opinions of the Court,

1155 Point 12, para. 4 of the Negotiating Framework for Turkey.

it identified three areas that could have that effect: fundamental freedoms, in particular free movement of persons, the Union citizenship status, and fundamental rights.

To begin with the freedoms, the EEC Treaty placed them under the title "Foundations of the Community" from the very start. Empowered by the case law of the Court their importance only increased over time. The Court called them "fundamental freedoms",[1156] and it even labelled free movement of workers as a "fundamental right".[1157] Scholars unanimously agreed that they constituted the crux of the internal market as well as the integration project. The introduction of Union citizenship, which was seen by the Court as "destined to be the fundamental status of nationals of Member States"[1158] pushed free movement of persons further up in the hierarchy of norms.

While initially criticised for being devoid of any substance, the case law of the Court changed the opinion of many when it linked free movement and equality directly to Union citizenship. Both became inalienable components of citizenship. The Court even slightly modified the terms of application of Union law so as ensure that Union citizens are not deprived of the enjoyment of the substance of their citizenship rights.[1159] Today many regard free movement linked to citizenship as the general rule, and the economic freedoms as its specific expressions.

The last area of relevance for our purposes that constitutes part of the "very foundations" of the Union is that of fundamental rights. In *Kadi I* the Court made that statement explicitly. It identified "respect for human rights and fundamental freedoms enshrined in Article 6(1) TEU (now Article 2 TEU) as a foundation of the Union".[1160] In *Cresson* and *PKK*,[1161] by checking whether primary law provisions were ECHR-compliant, the Court implicitly acknowledged the "precedence" of fundamental rights over other Treaty provisions.

It was the Court that developed the *acquis* on fundamental rights over the years. Member States acknowledged the foundational role of those rights in the Treaties, and eventually enshrined them in a Charter of Fundamental Rights. Interestingly, in their process of constitutionalisation, i.e. achieving primary law status, they also constitutionalised the legal order by making it more autonomous. While for a long time, they were enforced as general principles of EU law; they now have a central place in the Treaties and the Charter. Their increasing importance has prompted the Member States to insert an obligation in the Lisbon Treaty, under Article 6(2) TEU, to accede to the

1156 *Case C-19/92 Kraus*, para. 32; *Case C-55/94 Gebhard*, para. 37.
1157 *Case 152/82 Forcheri*, para. 11; *Case 222/86 Heylens*, para. 14.
1158 *Case C-184/99 Grzelczyk*, para. 31.
1159 *Case C-34/09 Zambrano*.
1160 *Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi*, para. 303.
1161 *Case C-432/04 Cresson*; *Case C-229/05 P PKK and KNK v Council*.

ECHR. The Union's accession will add another source and layer of constraints on Member States and Union institutions.

As to the application of those constraints on Member States, Chapter 6 clarified that the argument laid down here is not that Member States cannot ever bring the existing legal order to an end. They can do so. The argument was rather that they have to respect the "very foundations", or genetic code of the legal order, so as to preserve its essence. Changing those very foundations is not impossible, but as argued above, would mean bringing to an end the existing legal order as we know it, and replacing it with a new one. Like constitutional courts of states, the Court of Justice as the guardian of the Union legal order could in certain circumstance act to protect its *raison d'être.* The *Pringle* case[1162] demonstrated it is not inconceivable for the Court to review a Council Decision approving an Accession Agreement. It could carry out a procedural review as well as a substantive review and check whether the agreement contains anything that goes beyond what the terms of Article 49 TEU allow Member States to undertake, i.e. anything that goes beyond being an "adjustment" necessitated by the accession of a new Member State. If the Court detects such an element, especially something that would be contrary to the "very foundations" of the Union legal order, such as a PSC on free movement of persons, it could annul that Decision.

To prove that a PSC on free movement of persons would be contrary to the "very foundations" of the Union, Chapter 7 provided a case study of the principle of non-discrimination based on nationality. Non-discrimination or equality would be without doubt the most gravely violated principle, if a PSC on free movement of persons were to be included in Turkey's future Accession Agreement, as it would directly discriminate against Turkish nationals only. A PSC regarding "agricultural policy or structural funds" would similarly discriminate directly against Turkey. Hence, the aim of Chapter 7 was to demonstrate that the principle of non-discrimination is part of the "very foundations" of the Union legal order. The implication of that demonstration was that a principle of such importance would preclude the inclusion of a PSC clause that would breach it.

To demonstrate how deeply embedded the principle is in the constitutional foundations of the Union, Chapter 7 begins its analysis by looking into the very origins of the principle. That analysis clearly shows how instrumental and indispensible the principle has been in the construction and regulation of the internal market. In addition to the general prohibition of non-discrimination based on nationality, which always had a central place in the Treaties (initially, as Article 7 EEC, Article 12 EC and now Article 18 TFEU), the Treaties also contained many "specific expressions" of the principle. For our purposes

1162 *Case C-370/12 Pringle.*

the principle's most crucial and noteworthy role was as an integral part of the freedoms, and free movement of persons in particular.

The Court also played an important role in pushing the principle up in the hierarchy of norms. It ruled not only that the general principle of equality was "one of the fundamental principles of Community law",[1163] but also that it was a "superior rule of law",[1164] as well as an important part of the "fundamental personal human rights"[1165] which it protects. Chapter 7 demonstrated that the Court and Member States contributed to the constitutionalisation of the principle not only by placing it at the pinnacle of the hierarchy of norms, but also by spreading it throughout the legal order; more specifically, by making it part of the horizontal provisions of the Treaties, which require all Union activities to be in compliance with it.[1166] Moreover, its scope was expanded by the inclusion of "sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" as discrimination grounds on which further measures could be taken.[1167]

Equality is also considered as one of the core components of Union citizenship,[1168] the destiny of which is on the way to becoming the fundamental status of Member State nationals[1169] as predicted and partially fulfilled by the Court. Moreover, the Charter, which now has primary law status,[1170] contains an entire chapter devoted to "Equality".[1171] One could expect that its role might be even further consolidated by the Union's future accession to the ECHR.[1172]

While most of Chapter 7 was devoted to establishing that the principle of the equality of Member State nationals constituted part of the "very foundations" of the legal order, its last section briefly examined the principle of equality of Member States, which would similarly be breached by the inclusion of a PSC clause, be it in the area of free movement of persons, agriculture or structural funds. While it was an unwritten principle of EU constitutional law for a long time,[1173] now the equality of Member States has its solid place in the Treaties as Article 4(2) TEU.

To sum up, the principle of non-discrimination or equality is an inalienable part of all three areas identified as part of the "very foundations" of the Union: the fundamental freedoms, Union citizenship as well as fundamental rights.

1163 *Joined Cases 117/76 and 16/77 Ruckdeschel*, para. 7.
1164 *Case 156/78 Frederick H. Newth*, para. 13; *Case T-489/93 Unifruit Hellas*, para. 42.
1165 *Case 149/77 Defrenne III*, paras. 25-26.
1166 See Articles 8 and 10 TFEU.
1167 See Article 19 TFEU.
1168 See section 7.3.2 above.
1169 *Case C-184/99 Grzelczyk*.
1170 See Article 6(1) TEU.
1171 See Chapter III of CFR.
1172 See Article 6(2) TEU.
1173 See *Case 231/78 Commission v UK*.

Chapter 7 illustrated that in addition to violating those "very foundations", a PSC on free movement of persons would also breach the principle of equality of Member States. This thesis tried to demonstrate that such a clause would be a strong stab at the very heart of the existing Union legal order, which it might not be able to survive.

In short, what the story of the mountain revealed is how it gained its own life and existence partly independent from that of the will of its creator-Gods. However, our mystical mountain was to learn that having its own will, spirit, flesh and bones does not mean a carefree life devoid of constraints and limitations. On the contrary, it was to experience that it is in the nature of every "being" to be constrained by what it "is", i.e. what we can call "the terms of its existence". Its own free will, flesh and spirit were to limit it first before anything else did.

It exercised its free will and made promises. It gave its word for something it did not know whether it would still desire in the future. The time came when that promise (the promise of accession laid down in the Ankara Agreement) haunted and constrained it. Its growing body, flesh and bones were another constraint for the mountain (the Treaties, and in the context of this thesis specifically Article 49 TEU). It was a mountain; it could not be a bird and fly. As much as it loved its spirit for its beauty and uniqueness, the mountain was constrained by it as well. Yet, it still loved it above everything else. While its body grew and became large and clumsy, its unique spirit (the "very foundations") never changed. It was its essence, without which it would not be. It knew that something so precious had to be cherished and protected.