

Comment on Daniel Thym - United in Diversity or Diversified in the Union?

By Michał Kowalski*

A. Introduction

In his text, Daniel Thym presents in a persuasive manner, a comprehensive look at the institution of enhanced cooperation in the context of the European Union (EU) constitutional order.¹ It is especially important that the institution of enhanced cooperation be presented in a broader context of differentiated integration and related mechanisms - labelled as asymmetric - when introduced into the European legal order. This comment, within its framework, is only intended to refer to three specific issues. First, how the enhanced cooperation is perceived in Poland; second, to its alleged democratic potential; and third, to its character in the process of constitutionalization.

B. Asymmetry and Poland

Since the enhanced cooperation, known at that time as the closer cooperation, was introduced into the European law, it has been generally perceived as a threat to Poland, as well as, to other acceding countries. Such an approach has been especially true for political discourse; however, it has also been reflected in legal discourse.² Generally, enhanced cooperation was often perceived, both in political, as well as in legal discourse, as a threat in the sense that it might result in the emergence of category B membership status of states not being able for objective reasons, *e.g.* of economic character, to participate in the enhanced forms of

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¹ See Thym, in this volume.

² Yet, it should be noted that the issue has not been in the centre of the EU legal discourse in Poland and the first comprehensive monograph in Polish on enhanced cooperation and other asymmetric mechanisms was published only in 2005. See MONIKA SZWARC, ZRÓZNICOWANA INTEGRACJA I WZMOCNIONA WSPÓLPRACA W PRAWIE UNII EUROPEJSKIEJ [DIFFERENTIATED INTEGRATION AND ENHANCED COOPERATION IN THE EUROPEAN UNION LAW] (2005).

integration. Also, despite its last resort character, it was perceived as a possible means of putting irresistible pressure on a particular (weaker) Member State, instead of seeking an acceptable compromise for all. As such, the institution of enhanced cooperation was, to some extent, perceived as a potential danger to the principles of unity, solidarity and equity of the Member States.³ Some commentators, however, noted the positive outcomes of asymmetric mechanisms previously applied.⁴ Nevertheless, in the official statement by the Polish Government on the Treaty of Nice presented in 2001 by the then Minister of Foreign Affairs, Władysław Bartoszewski, the mechanism of enhanced cooperation was characterized as the effective instrument for flexible integration on the one hand and the instrument for open formula guaranteeing participation to all Member States on the other hand.⁵

The public debate on the Constitutional Treaty in Poland with regards to becoming a Member State, in the meantime, has made almost no reference to the institution of enhanced cooperation. However, it must be noted that it has been generally limited to only two main issues, the preamble in context of the missing direct reference to Christian values, and the voting system within the Council. Also, the issue of enhanced cooperation has not been the center of interest within the Polish legal discourse, in which the general position equal to that of Władysław Bartoszewski and quoted above, seems to be accepted.

Especially following the recent outcomes of referenda in France and the Netherlands, enhanced cooperation has returned as one of the possible options, which might be applied, if the ratification process of the Constitutional Treaty fails. Prior to the French and Dutch 'no,' the Prime Minister, Marek Belka, expressed in an interview for the *Rzeczpospolita* daily, his serious concerns that a failure of the Constitutional Treaty ratification process may lead to a multi-speed Europe.⁶ A negative attitude, in this respect, was also presented by the Minister of Foreign Affairs, Adam Rotfeld; already after the mentioned referenda.⁷ Indeed, the failure

³ Sławomir Dudzik, "Enhanced Cooperation" *Between EU Member States – An Opportunity or a Threat to Poland*, in *THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 239 (Adam Bodnar et al. eds., 2003); see, e.g., Brygida Kuźniak, *Komentarz do TUE art. 43-45 [Commentary to TEU art. 43-45]*, in *TRAKTAT O UNII EUROPEJSKIEJ. KOMENTARZ [TREATY ON THE EUROPEAN UNION. COMMENTARY]*, 461, 464 (Kazimierz Lankosz Ed., 2003).

⁴ Władysław Czapliński, *Koncepcja ściślejszej współpracy w prawie Unii Europejskiej [The Concept of Closer Cooperation in the European Union Law]*, 3-4 *STUDIA PRAWNICZE* 75, 89 (2001).

⁵ *TRAKTAT Z NICEI - POLSKI PUNKT WIDZENIA [The Treaty of Nice - the Polish Standpoint]* (2001).

⁶ *RZECZPOSPOLITA* of 4 May 2005, A5.

⁷ *RZECZPOSPOLITA* of 16 June 2005, A10.

of the Constitutional Treaty may result in diversification of the further integration process and in consequence of the legal status of Member States. Putting the mechanism of enhanced cooperation into practice, under the present regime, seems to be one of the possible scenarios aimed at introducing at least some institutions of the Constitutional Treaty only among some Member States. However, the substantive constraints and procedural requirements of enhanced cooperation under the present regime create excessive limitations in this respect, e.g. for introducing institutional changes.⁸

C. Asymmetry and Democratization

Daniel Thym supports the opinion that asymmetry, including the enhanced cooperation mechanism, holds a remarkable "democratic potential" as it manifests itself 'by allowing respect for national democratic majorities. Without this majority, which otherwise, might be cast in the role of a European minority. This would prevent the realization of majority rule in Europe.'⁹ This statement is disputable.

Democratic standards within Member States, which obviously remain out of the question, do not seem to be either positively or negatively affected by asymmetric mechanisms. The democratic legitimacy of the EU does not seem to be affected, either. Even if we assume otherwise, it may be argued that the application of the enhanced cooperation rather tends to weaken the democratic legitimacy of the EU. Art. I-1 CT states that the EU is established due to 'the will of the citizens and States of Europe to build a common future.' It shows that the democratic legitimacy of the EU is of dual character, that is, directly given by the citizens, as well as, given by the Member States.¹⁰ In this context, it should be taken into account that asymmetric mechanisms applied so far have been determined in specific norms of primary law and, as such, must have been accepted by all Member States through adequate ratification procedures. Thus, the legitimacy of introduced asymmetric mechanisms was ensured. What is more, in consequence non-participating Member States, although not bound by the new mechanisms, must have also approved their

⁸ See Stanisław Biernat, *Możliwe następstwa odmowy ratyfikacji traktatu konstytucyjnego przez jedno lub kilka państw członkowskich* [Possible Consequences of Constitutional Treaty Ratification Refusal in One or More Member States], in KONSTYTUCJA DLA EUROPY: PRZYSZŁY FUNDAMENT UNII EUROPEJSKIEJ [CONSTITUTION FOR EUROPE: FUTURE FUNDAMENT OF THE EUROPEAN UNION] 453, 469 (Sławomir Dudzik ed., 2005).

⁹ Thym, *supra* note 1, at para. 9 (referring to Armin von Bogdandy, *Europäische Prinzipienlehre*, in EUROPÄISCHES VERFASSUNGSRECHT 149, 180 (von Bogdandy ed., 2003)).

¹⁰ Cezary Mik, *Legitymacja demokratyczna Unii Europejskiej w świetle Traktatu Konstytucyjnego* [Democratic Legitimacy of the EU in the Light of Constitutional Treaty], in DEMOKRATYZACJA I WZMOCNIENIE LEGITYMACJI UNII EUROPEJSKIEJ [DEMOCRATIZATION AND LEGITIMACY STRENGTHENING OF THE EUROPEAN UNION] 18, 22 (Jan Barcz ed., 2005).

introduction to the European legal order.¹¹ In contrast, the possible future application of enhanced cooperation is dependent only on the provided general authorization procedure, with the Commission as the gatekeeper enjoying significant political discretion.¹² In this case, the democratic potential of enhanced cooperation remains rather questionable.

However, with at least one point, asymmetry, to a limited extent, seems to hold democratic potential, namely concerning transparency. Obviously it is not meant to suggest that asymmetric mechanisms, including enhanced cooperation, lead to the improvement of transparency within the EU. On the contrary, if enhanced cooperation were extensively applied, which would result in many co-existing legal regimes in particular policy areas, the transparency within the EU would only suffer. Nevertheless, asymmetric measures taken within the EU are generally more transparent than analogous measures taken by the Member States outside of the EU legal framework. The example of Schengen is significant in this respect. Indeed, the integration of the Schengen law into the European legal order greatly improved the transparency of the measures taken. Therefore, as enhanced cooperation forms an offer which should stop some Member States from seeking a legal framework for mutual cooperation outside the EU, it prevents the emergence of non-transparent legal regimes.

D. Asymmetry and Constitutionalization

I share the opinion that the asymmetric mechanisms in the European legal order seem to be a reliable and utilitarian offer, ensuring the further dynamics of the integration process. With regards to enhanced cooperation, however, much will depend on the scale used to put the mechanism into practice and the assessment of its actual operation. Nevertheless, the supposition that *'the asymmetric non-participation of individual Member States in selected areas of Union activity [...] does not contradict its constitutional aspirations, thereby giving substance to the Union's new motto "United in Diversity"'*¹³ seems highly questionable. The EU constitutional aspirations manifest themselves in the constitutionalization of the European legal order. This may be understood as a transformation of the legal order from a public international legal character to a constitutional legal character, and its progressing

¹¹ See Sławomir Dudzik, *Mechanizm wzmocnionej współpracy na tle konstytucyjnych zasad porządku prawnego Unii Europejskiej* [Enhanced Cooperation Mechanism in the Perspective of Constitutional Principles of the EU Legal Order], 1 KWARTALNIK PRAWA PUBLICZNEGO 7, 22 (2003).

¹² Thym, *supra* note 1, at para. 15.

¹³ Thym, *supra* note 1, at para. 1.

consolidation.¹⁴ Yet, asymmetric mechanisms lead to the diversification of the European legal order and the legal status of the EU Member States. Consequently, and more importantly, it leads to the diversification of the legal status of the EU citizens, and as such, may hardly contribute to the process. Rather, asymmetry seems to be an obstacle in the process of constitutionalization of the European legal order as it originates from different ideas within Member States on the scale of the European integration. The level of diversification of the European legal order seems to be decisive in this respect. Still, the motto, 'United in Diversity,' refers to the respect for various European identities, cultures, traditions that should not be destroyed or hindered by European integration, and not to the diversification of legal statuses on the EU level.

¹⁴ Frank Schorkopf, *Constitutionalization or a Constitution for the European Union*, in *THE EMERGING CONSTITUTIONAL LAW OF THE EUROPEAN UNION*, *supra* note 3, at 1, 11-12.