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Constitutional change in light of European Union membership: trends and trajectories in the new member states

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1. Introduction

After the fall of the Iron Curtain, all states in Central and Eastern Europe (CEE) amended their old constitutions or adopted new ones. The shared experience of forced subordination to the Soviet Union provided a compelling incentive for these countries to put a strong emphasis on sovereignty as they drafted their new constitutions. In the Estonian Constitution, for example, according to Article 1, the “independence and sovereignty of Estonia are timeless and inalienable”. Similar formulations typically appear in many of the constitutions of these countries.

Not long after their newly gained independence and the adoption of their new constitutions, the states in CEE started to realise that the prospect of membership in the European Union (EU) seemed a very distinct possibility. In 1994, only a few years after the collapse of the Soviet Union, Hungary and Poland formally applied for membership in the EU and more countries would soon follow suit. As a consequence, all of these countries needed to start a process of adapting their constitutions for EU membership. The need for constitutional change stemmed from the fact that most constitutions of these countries, due to their “sovereignist” character (Albi 2005b, 25), simply did not allow for membership in a supranational organisation like the EU. However, a number of other important issues, besides the grounds for membership, needed to be addressed, including provisions on: the transfer of powers to the EU; the relationship between EU law and national law; and the selection of representatives to EU institutions.

Constitutional change in democratic political systems can be achieved in two different ways (cf. Behnke and Benz 2009; Sutter 1995; Voigt 1999a). *Explicit constitutional change* means that the wording of the constitutional document is changed, whereas *implicit constitutional change* involves changing the meaning of the constitution while leaving the constitutional text itself unaltered. While much has been written about the constitutional reforms undertaken in order to prepare the countries of CEE for EU membership, we still lack a complete picture of how constitutional change was brought about in these countries. Previous research has focused almost exclusively on explicit change by examining constitutional amendments that were implemented in these countries in order to prepare for EU membership (Albi 2005a, 2005b). However, explicit change through constitutional amendment is only half of the story, and much less attention has been devoted to studying implicit constitutional change in this context. Accordingly, we still have more to learn about how frequently these different modes for constitutional change were used in the process leading up to the accession of the new member states to the EU.

The aim of this article is to shed light on the trends and trajectories of constitutional change in the new EU member states of Eastern and Central Europe. It will offer a focused and systematic description of how the new member states made use of explicit *and* implicit constitutional change in order to prepare for membership in the EU. In order to fulfil the overarching purpose we seek to answer two questions. First, has explicit or implicit constitutional change been the dominating mode for constitutional reform in the new member states? Second, what factors may help explain the varying degree to which these countries have made use of explicit and implicit constitutional change?

The article proceeds as follows. The next section discusses the scholarly literature on constitutional change and the constitutional reform process in the new member states. Section 3 presents the analytical framework and discusses how the data has been gathered and coded. Next, the analysis and the main results related to overall trends in constitutional change are presented. Section 5 conducts a comparative case study of the trajectories in the Baltic states. The final section presents the main conclusions and implications for future research.

Previous work on constitutional change

When looking at the general literature on constitutional change, a main finding of previous studies is that both modes of constitutional change occur regularly in liberal democracies (Behnke and Benz 2009; Contiades 2013; Karlsson 2014; Oliver and Fusaro 2011; Voigt 1999a). As we take a closer look at previous research on constitutional change in general, it is striking that a clear majority of all studies have looked exclusively at explicit change, seeking to describe and explain constitutional amendment. The research done in this area has improved our knowledge on differences between existing types of amendment procedures, how often constitutions are amended, and what explains variation in amendment frequency (Ferejohn 1997; Lutz 1994; Rasch and Congleton 2006; Roberts 2009).

Previous research focused on implicit constitutional change has shown how different forms of implicit constitutional change co-exist in modern democracies (Behnke and Benz 2009; Voigt 1999a). The existing scholarly work has also sought to explain which factors account for ‘the scope and extent of the implicit constitutional change to be expected’ (Voigt 1999b, 535) in political systems. This line of research has mainly focused on the judiciary and on variables that affect the ability of courts to act as drivers for implicit constitutional change. Cooter and Ginsburg (1996) as well as Voigt (1999a) provide evidence suggesting that the power of the

judiciary to bring about implicit constitutional change is constrained by such factors as the preferences of other government organs and of the population (Voigt 1999a) concerning the issue in question, as well as the presence or absence of a ‘dominant disciplined party’ (Cooter and Ginsburg 1996).

As we look at previous research, it is striking that only a few studies have compared the extent to which constitutional change has taken the form of explicit or implicit constitutional change. Behnke and Benz have identified patterns of constitutional change in a study on five federal systems; their examination shows that explicit and implicit constitutional change are not “mutually exclusive alternative modes”, but rather “complement each other” (Behnke and Benz 2009: 20). That these modes for achieving constitutional change complement each other is also a key conclusion in a comparative study of 14 states and the EU. The authors show that explicit constitutional change is a commonly deployed mechanism for achieving reform, but they also conclude that “constitutional change can and generally does also come about informally” (Oliver and Fusaro 2011, 429). Another study on 18 liberal democracies shows that countries faced with the need to reform their constitutions approach this task in different ways. Contiades (2013, 441) identify no less than five different models of constitutional change used in liberal democracies.

If we zoom in on previous studies concerning constitutional change in light of EU membership we find important comparative work done by Claes (2005, 2007) on EU-15 (that is, states that were EU members prior to 2004) and Albi (2005a, 2005b) on the new member states. These studies reveal that there are substantial differences when it comes to the extent to which regulations on EU membership are included in constitutional documents. When it comes to the member states of EU-15, we find on the one hand countries such as the

Netherlands, Luxembourg, and Denmark where the Constitution is practically void of any mention of the EU. On the other hand, we also find countries such as Austria and Germany which have extensive constitutional provisions covering a number of aspects of EU membership. These differences may, at least to some degree, be explained by the fact that some constitutions in Europe are “historically incremental” and have evolved over time, whereas others have their origin in “a revolutionary event” (Besselink 2007, 113-14). The records show that, on average, constitutions of the former kind, such as the ones in Denmark or the Netherlands, are less frequently amended than constitutions which belong to the latter group – such as the ones in Austria or Germany.

When it comes to constitutional development in new member states, we do find a number of interesting studies. Some have focused on the impact of EU accession on the national constitutions in the new member states (e.g. Kellerman et al. 2006), others have explored the impact of the ongoing constitutional development in the EU for national constitutions (e.g. Albi and Ziller 2007), while still others have examined the application of EU law in new member states (e.g. Lazowski 2010). All of these studies provide some relevant insights when it comes to the issue of constitutional change in light of EU membership. Still, Albi’s work on EU enlargement and the constitutions in the new member states (Albi 2005a, 2005b) is no doubt of particular relevance for the current study. Albi’s research examines the constitutional revision processes in the new member states from CEE that took place in order to prepare these countries for EU membership. Albi shows that we may categorise these countries in three groups depending on how extensive constitutional amendments they have introduced in order to deal with the adaptational pressure that followed from the EU accession process. The most extensive EU-related amendments are to be found in Slovakia, the Czech Republic, and

Slovenia (Albi 2005b, 67-75). At the other extreme, we find Estonia, Latvia, and Lithuania, which have only undertaken minimal EU-related amendments (Albi 2005b, 87-103).

While Albi's studies provide an excellent comparative overview of the constitutional amendments introduced in the new member states, it nevertheless provides only a partial picture, since it focuses exclusively on explicit constitutional change while leaving out implicit constitutional change. So, despite the previous work done by Albi and others, there is still a lack of comparative research on constitutional reform in the new member states which systematically examines the extent to which constitutional change has been undertaken in the form of implicit and explicit change respectively. This is where the current study seeks to make a contribution.

Analytical framework and data gathering

As we set out to compare trends of constitutional change in the new member states, we confront a number of methodological challenges and choices. The first decision to be made concerns how to delineate which aspects of EU membership to examine. Becoming a member of the EU naturally has a huge impact on the distribution and exercise of political power at the member state level. EU membership thus induces constitutional change in a number of important areas, and a choice needed to be made concerning which aspects of constitutional change to include in the study; the research strategy for making this decision was based on three general considerations. First, in order to examine constitutional change with some sort of precision, it was necessary to disaggregate the object of study into a number of separate variables. Second, less salient issues — for example, how member states appoint representatives to EU institutions of limited importance — were excluded from the analysis in order to make it a manageable research task. Finally, in order to facilitate a structured

comparison between countries, the set of variables chosen needed to reflect important aspects of EU membership in common for *all* of the new member states. For example, constitutional change induced by membership in the Economic and Monetary Union was not included in this study.

The first issue that raises demands for constitutional change is sovereignty. The EU is a supranational organisation that makes binding decisions, and EU law claims supremacy even over constitutional law at the national level. The constitutions of the member states, accordingly, have to deal with how to regulate the limitations on sovereignty that follow from EU membership. The most fundamental issue to deal with in this context is whether the constitution allows for membership in a supranational organisation like the EU. However, the sovereignty issue does not end here, and constitutional change induced by EU membership also manifests itself in connection with the transfer of power to the EU, and the relationship between EU law and national law.

The second important aspect is the selection of national representatives and delegates. One of the key tasks of any constitution is to lay down procedures for the delegation of power and the selection of representatives. EU membership introduces new sets of political representatives and officials to whom authority is delegated by the people. This in turn creates a demand for constitutional reform, for stipulating rules concerning how these new groups of representatives and delegates are to be appointed. The first aspect to deal with is the election of Members of the European Parliament (MEPs). While MEPs are the only directly elected representatives, there are indeed a great number of additional delegates that represent the member states in the EU institutions. This study will focus on how the most important groups

among such officials—members of the European Commission and judges on the Court of Justice of the European Union (CJEU)—are appointed.

Third, becoming a member of the EU means that key domestic institutions like the executive, the legislature, and the courts are charged with new tasks and afforded new competencies. This affects the distribution and exercise of political power, and EU membership accordingly triggers a need for constitutional change to account for the new roles and competencies of the main domestic institutions.

In the end, data was collected for nine aspects of constitutional change linked to:

Sovereignty

- I. Constitutional grounds for EU membership
- II. Transfer of powers to EU (substantive)
- III. Transfer of powers to EU (procedural)
- IV. Relationship between EU law and national law

Representation

- V. Election of members of European parliament
- VI. Appointment of commissioners and CJEU judges

Exercise of EU competencies

- VII. Executive
- VIII. Legislature
- IX. Judiciary

Having specified the aspects of constitutional change to be included in the analytical framework, the next task is to operationalise the key concepts. Explicit constitutional change simply means changes made to the constitutional document, that is, constitutional amendments. Now, extending the analysis beyond constitutional amendment makes it much

more challenging and laborious to examine constitutional change. Since implicit constitutional change can come in many different forms, it is quite naturally more difficult to capture (cf. Voigt 1999a, 198; Behnke and Benz 2009, 5). For a new interpretation of the constitutional document to qualify as implicit constitutional change, it needs to find approval in wider circles and ‘to be backed by some kind of formal acceptance’ (Behnke and Benz 2009, 6). So, for all intents and purposes, an implicit constitutional change can be defined as a change to the meaning of the constitution which comes in one of three main forms: (1) judicial sentencing that introduces a new interpretation of the constitution, for example, judgements by constitutional courts concerning the constitutional impact of new EU treaties; (2) ordinary laws which amend or alter the meaning of the constitution, for example, laws on elections or the working procedures for parliaments; or (3) a declaration by the executive or a general agreement among the political parties that contains a new interpretation of constitutional provisions, for example, an established practice that *de facto* changes the formal rules regarding the cooperation between the government and the parliament on European union issues.

The fact that constitutional change can be brought about in two different ways has been recognised for a long time (Jellinek, 1906), and both kinds of constitutional change occur regularly in modern democracies (Behnke and Benz, 2009; Karlsson 2014; Voigt, 1999a; Voigt, 1999b). This, however, does not imply that we should abandon the distinction between constitutional amendment and constitutional alteration, or for that matter, between constitutional law and ordinary law. We should rather acknowledge that these different ways of achieving constitutional change are fundamentally different, and that there are pros and cons attached with either method. If the constitution is explicitly amended, modifications will be visible to ordinary citizens, who may also get an opportunity to have a say about the proposed change, for example, through a referendum. There may thus be good reasons from a

democratic point of view to favour explicit constitutional change. However, procedural hurdles may make much needed constitutional change almost impossible to achieve (cf. Rasch and Congleton, 2006, p. 540). Implicit constitutional change thus provides flexibility and offers an opportunity for bringing about changes in the rules of the game that otherwise may not have been realised.

How then are we to measure the extent to which constitutional change induced by EU membership has taken the form of explicit or of implicit change? It is first of all important to recognise that we are not dealing with an either/or affair in practice. Certainly, the two methods are by no means mutually exclusive ways to bring about constitutional change; they are instead simply different modes that often appear in tandem. We will surely find examples of constitutional provisions that are so specific and detailed that there is no need for any instrument of implicit change to complement the written constitution. At the other extreme, we will occasionally find issues on which the constitutional document is completely silent, and where implicit constitutional change has been the exclusive technique used for bringing about changes to the fundamental rules of the game. On most issues, however, we will find explicit and implicit constitutional change existing side by side. The methodological challenge in such cases consists of ascertaining the relative importance of the two, in order to determine the dominant mode of constitutional change.

For each country, the existing instances of implicit change for the nine variables were identified partly through a meta-analysis of secondary sources covering the judicial and political aspects of EU membership in each individual country, and partly by examining the information on EU membership and EU politics present on the websites of the government, the parliament, and the constitutional (or supreme) court in each country. Once the relevant

instances of implicit constitutional change had been identified, primary data in the form of verdicts by constitutional courts, ordinary laws issued by parliament, or declarations made by the government were extracted from the websites of each institution. In cases where it was unclear how to interpret the meaning of, for example, a certain court verdict or an ordinary law regulating some aspect of EU affairs, requests for clarification were sent to the information offices of the institution in question. The data collection ended in early 2011.

The overall process of gathering information and determining to what extent constitutional change to deal with EU membership has been the product of explicit or implicit constitutional change was designed as a three-stage process for all issues examined. First, the relevant articles of the constitutional document were examined in order to determine how *extensive* and *precise* the constitutional provisions were. At the next stage, all instances of relevant implicit change in the form of judicial sentencing, ordinary laws, declarations and agreements – written or oral – were examined. The key analytical task at this point was to determine whether the instances of implicit change merely supplemented the constitutional document or in practice amended or changed its content. Finally, the extensiveness and precision of the constitutional provisions were weighed against the nature of the existing implicit change, in order to reach an overall judgement as to whether explicit or implicit change had been the dominant form of constitutional change, or if the two modes had been of roughly equal importance.

Having worked through this three-stage process, the coders then assigned values according to a five-point scale: (1) exclusively or predominantly explicit change with minor or no elements of implicit change; (2) primarily explicit change with some elements of implicit change; (3) approximately as much explicit as implicit change; (4) primarily implicit change with some

elements of explicit change; or (5) exclusively or predominantly implicit change with minor or no elements of explicit change. For all nine aspects of constitutional change included in the study, the coders assigned values measuring which method had been used to achieve constitutional reform in the various EU member states. It is thus the form constitutional change has taken rather than the frequency of reform which is of interest. There were two independent coders assigned to the task of measuring the type of constitutional change and the coding procedure proceeded in two steps. The coders first worked independently, assigning scores for all nine variables across the 12 countries, thus creating a data set containing 108 observations of constitutional change. The independent codings were then compared and inconsistencies were discussed until consensus was achieved. The inter-coding reliability was 78.6%. In the cases where the coders had assigned different values, the difference between the values was never more than a single step on the five-point scale.

A few examples of how the coding was done may be instructive (see also Karlsson 2014; 2016). Consider variable 1, where we are interested in determining how the constitutional grounds for membership have been regulated in the various member states. If we look at Bulgaria as a case in point we find that according to Article 4 (3) of the Bulgarian Constitution, the “Republic of Bulgaria shall participate in the construction and development of the European Union”. This general integration clause, which was inserted into the Constitution in 2005, provides the basis for Bulgarian EU membership as it clearly states that Bulgaria not only may, but in fact shall, participate in the EU. Accordingly, for all member states which, like Bulgaria, have amended their constitutions to include an integration clause that explicitly opens up for membership in the EU, the value “1” was assigned for the variable “Constitutional grounds for EU membership”.

The Bulgarian case may be compared to the Polish one in order to illustrate the difference between cases coded “1” and those coded “2”. If we look at the Polish Constitution we find that according to Article 90 (1) “[t]he Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority”. According to this article, then, Poland may delegate part of its competence to an international organisation. However, unlike the Bulgarian Constitution, the Polish Constitution contains no explicit mention of the EU, and there is no definitive way of telling whether Article 90 (1) refers only to strictly intergovernmental organisations or whether instead it also opens up for membership in supranational organizations like the EU. The fact that Article 90 (1) really provides the basis for Polish membership only becomes clear once we take into account the implicit change present in the Polish case in the form of declarations made during the proceedings leading up to the amendment of the Constitution. Cases like the Polish one, where we find explicit change in the form of a constitutional provision explicitly allowing for membership in international organisations, but where we also find implicit change that supplements the constitutional amendment will be coded “2” for the variable “Constitutional grounds for membership”.

Having acquainted ourselves with the process of operationalisation and data gathering, it is now time to turn to the data in search of trends in constitutional change in the new member states of Eastern Europe. How has EU induced constitutional change been brought about?

Trends in constitutional change

The first clear trend to be identified from the data presented in Table 1 below is that implicit constitutional change has been the more common reform method as the new EU member states have adjusted their constitutions in light of EU membership. The mean value for the

twelve countries is 3.63 on the five-point scale, that is, we find that the average constitutional change induced by EU membership in the twelve countries has primarily taken the form of implicit constitutional change, but with some elements of explicit change.

[table 1]

The results of the study thus, by and large, confirm the assumptions that we find in the theoretical literature on constitutional change (Behnke and Benz 2009; Buchanan and Tullock 1962), namely that implicit change will be the more common way to achieve constitutional change in democratic political systems.

While the overall picture points to implicit change as the more common reform method, the data also reveal that there exists substantial variation among the new member states of CEE. On the one hand, we find countries where the written constitution has been amended extensively so as to include regulations bearing on many aspect of EU membership. The Slovakian Constitution stands out as the one having the most extensive provisions regulating EU membership, but Lithuania and Hungary are also examples of member states which to a fairly high degree have chosen to rely on explicit constitutional change.

In articles 7 and 120 of the Slovakian Constitution, a number of key issues linked to the EU membership have been explicitly regulated. Not only are the grounds for Slovakian EU membership, the rules for the transfer of competencies to the EU, and the role of the government in EU affairs laid down in these articles, it is also noteworthy that article 7(2) explicitly states that: “Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic”. The principle of supremacy

was established in the case of *Costa v. Enel* more than fifty years ago, and it is also laid down in Declaration 17 attached to the Lisbon Treaty. Still, very few member states have acknowledged the primacy of EU law over national law in their constitutional documents. In this respect, Slovakia has gone further than most EU member states – new and old – by explicitly acknowledging the principle of supremacy. However, it should be noted that article 7(2) is generally interpreted as establishing the precedence of EU law over ordinary national laws, but not supremacy of EU law over the constitution and constitutional laws (Bobek and Kühn 2010, 358; Hoffmeister 2007, 85-86).

At the other end of the scale, we find a number of member states such as Poland and Estonia, which have been prone to use implicit rather than explicit constitutional change to handle the demands for constitutional reform that follow from EU membership. Estonia in particular stands out as the one country which has been relying almost exclusively on implicit constitutional change. In 1998, a constitutional expert commission did in fact suggest that the Estonian Constitution should be amended. However, in the end the government opted instead for another solution as it decided to supplement the Constitution with an “amendment act” (a constitutional law). The fact that this amendment act has come to be interpreted as being part of the Constitution does not refute the fact that required constitutional reform was achieved without any explicit changes being made to the wording of the constitutional document. How are we to understand this change of heart when it comes to how Estonia decided to bring about constitutional reform? More generally, what factors determine the use of explicit and implicit constitutional change to deal with the demands for reform that follow from EU membership? In the case study that follows below, we will address this question by comparing the trajectories of constitutional change in Estonia, Latvia, and Lithuania.

Before turning to the comparative case study, we should note that the data reveal that there are big differences in how constitutional change has been brought about when it comes to the aspects of EU membership, that is, sovereignty, representation and competencies. It is clear from the data in Table 1 that the new member states have been much more inclined to use explicit constitutional change to deal with the various issues linked with sovereignty (mean=2.58) than to deal with those linked with representation (mean=4.75), or with the exercise of EU competencies (mean=4.28).

The analysis thus far has identified a number of trends when it comes to how constitutional change induced by EU membership has been achieved in the EU member states in CEE. First, implicit change has been more common than explicit change as a method of bringing about constitutional reform. A second trend identified is that the countries in our study have been much more inclined to use explicit constitutional change to deal with various issues linked with sovereignty. Finally, the data clearly reveal that there is substantial variation between CEE member states when it comes to how they have gone about the business of dealing with EU induced constitutional change. This cross-national variation begs the question of how these differences may be understood. In other words, what factors determine the use of explicit and implicit constitutional change to deal with the demands for reform that follow from EU membership? The remainder of this article will be devoted to an attempt to get at this key question by conducting a comparative case study of the trajectories of constitutional change in Estonia, Latvia, and Lithuania. The Baltic states share many common features, which may lead us to believe that we would find similar patterns of constitutional change in these countries. However, this is not the case. As is shown in Table 1, Lithuania is among the group of countries which have been most keen to use explicit change, whereas Estonia stands out as the country most prone to engage in implicit constitutional change. Latvia, in turn,

occupies a middle ground between these two extremes. How may we make sense of the differences identified between the Baltic member states? What factors may account for the fact that they have chosen different methods to achieve EU induced constitutional change?

Trajectories of constitutional change: comparing the Baltic member states

The examination that follows seeks to improve our understanding of the various constitutional change processes that took place in Estonia, Lithuania and Latvia. However, comparing the trajectories of constitutional change in the Baltic member states may also generate more general insights regarding which factors explain why states facing the need for constitutional reform make different use of explicit and implicit constitutional change.

Estonia – constitutional change in the shadow of Euroscepticism

As noted above, Estonia places itself towards the extreme end of the spectrum of implicit change. For all of the three key dimensions of constitutional change examined above – sovereignty, representation and the exercise of EU competencies – implicit change has been the dominating mode for achieving constitutional reform.

An important reform undertaken in connection to *representation* was decided upon in 2002 when “The European Parliament Election Act” was passed. The election of members of the European Parliament is thus regulated by ordinary legislation rather than being stipulated in the constitution. Likewise, the appointment of judges to the CJEU and the European Commission has also been dealt with by implicit constitutional change without any changes being made to the constitutional text. According to the “Estonian Foreign Relations Act”, it is the responsibility of the Ministry of Foreign Affairs to organise Estonia’s representation in

international courts, including the CJEU. In connection to the *exercise of EU competencies*, the *Riigikogu* passed an amendment to its Rules of Procedure Act in 2004.

When it comes to the most important reforms, namely those concerning *sovereignty*, Estonia decided in 2003 to supplement the Constitution with the “Constitution of the Republic of Estonia Amendment Act”. This act was adopted in a referendum that actually addressed two separate albeit connected matters. First, and most importantly, Estonian voters had to decide whether or not Estonia should join the EU. At the same time, they were also charged with the task of deciding the fate of the Amendment Act. In fact, the two matters were fused into a single question which meant that anyone in favour of Estonia joining the EU also had to vote yes to the Amendment Act. The voters finally gave their consent on 14 September 2003 in a referendum where 67 per cent voted in favour of accession and the Act.

Thus, rather than engaging in explicit change by amending the constitutional text, Estonia chose to use implicit change by supplementing the constitutional text with the Amendment Act. This was by no means an obvious choice given Estonia’s legal tradition and when the issue of constitutional reform in light of EU membership first started to be discussed, since explicit change was highlighted as the main option for preparing Estonia for membership. In light of future membership, the Government put together a Constitutional Expert Commission in 1996 charged with the task of examining whether the Constitution needed to be changed. The Commission deemed that changes to the Constitution were in fact needed for Estonia to become a member of the EU. The main reason for the perceived need of constitutional amendment was Article 1 of the Constitution, which declares that “Estonia is an independent and sovereign democratic republic” and further adds that the “independence and sovereignty of Estonia are eternal and inalienable”. The recommendation issued by the expert commission

in the final report published in 1998 was quite clear: a new paragraph that allowed for Estonian EU membership needed to be added to Article 1 of the Constitution. Still, Estonia ultimately decided to go against the explicit recommendation of the expert commission and engage in implicit constitutional change rather than make changes to the actual wording of the constitutional text. How may this course of action be understood?

Three factors are crucial for understanding the Estonian reform process. First, we need to acknowledge the importance of public opinion as a determinant for the way the Estonian reform processes played out. As reported by the Eurobarometer opinion polls, public support for joining the EU was never as strong in Estonia as in many other candidate countries. In fact, Estonian voters were reported to be the ones least positive to EU membership (Eurobarometer 2001). In 2001 Euroscepticism peaked, and a clear majority of the Estonian electorate, between 54 and 59 per cent, were against Estonian membership in the EU (Albi 2006, 333; Viks 2002, 10). The fact that public support for EU membership was lukewarm at best provided the Eurosceptic movement with an excellent opportunity to politicise the issue of constitutional reform and the possible amendment of Article 1. As time progressed, the entire question regarding constitutional change in light of EU membership “became a political rather than a legal issue” (Albi 2006, 333).

A second factor that mattered in the Estonian case, and which in the end weighed in against engaging in explicit constitutional change, was the rather rigid amendment procedure which would have made it cumbersome to make changes to the wording of the constitutional text. Most importantly, any amendments made to Article 1 would have, according to Article 162 of the Estonian Constitution, required a referendum. Given the Eurosceptic sentiments held by a large proportion of the electorate, the government wanted to avoid holding a referendum on

proposed changes to the Constitution – changes which in a public debate could have been framed as Estonia being forced to compromise its sovereignty and independence. In the end, the Amendment Act also had to be put before the voters in a referendum, but that situation was very different from a referendum on amending Article 1. First, supplementing the Constitution with the Amendment Act meant leaving the symbolically important Article 1 untouched. Furthermore, the strategy to fuse the issues of EU accession and approval of the Amendment Act into one single question in the referendum made the price very high for those wanting to object to the proposed method for achieving constitutional change. The way the referendum was set up made it impossible in practice to be in favour of joining the EU and still argue the case for explicitly changing the Constitution.

A final factor important in the Estonian case is the key role played by the Supreme Court when it came to legitimising the way constitutional change was brought about. The choice to bring about constitutional reform by supplementing the Constitution with the Amendment Act rather than amending Article 1 of the Constitution was criticised for not fitting well into the Estonian legal system and several legal complaints were made against it (Albi 2006, 335-36). The thrust of the key complaints was that the Estonian Constitution may only be amended and not supplemented by way of approving a piece of legislation like the Amendment Act. The Supreme Court ultimately rejected all of the complaints, thereby helping to legitimise the reform process and acting in practice as a driver for implicit constitutional change. Had the Supreme Court rendered another verdict and ruled in favour of the complaints, then the legitimacy of the chosen constitutional reform process would have been seriously called into question. Furthermore, since the Amendment Act only contains four short articles, of which only two provide any substantive guidance on Estonian EU membership, it was necessary for the Supreme Court to step in and interpret the relevance of the Act. In an opinion delivered in

May 2006, the Supreme Court made it clear that the Act “should be read together with the text of the Constitution, so that those parts of the Constitution that are incompatible with Community law cannot be applied” (Hoffmeister 2007, 88-89). By this statement, the Supreme Court in practice acknowledged the supremacy of EU law over national law (cf. Albi 2007, 44-45). This shows that constitutional courts or supreme courts with judicial review competencies have an important role to play in order to bring about implicit constitutional change.

In conclusion, the reforms in Estonia induced by EU membership have almost exclusively taken the form of implicit constitutional change. The reform process played out against the backdrop of Euroscepticism and this had a huge impact on the outcome. The fact that EU membership was a hard sell to Estonian voters, in combination with amendment procedures demanding a referendum on the sovereignty clause of the Estonian Constitution, led the political elite to the conclusion that implicit constitutional change was a more secure route for paving the way for EU membership.

Lithuania – constitutional reforms under the radar

Lithuania is one of the new member states that have relied most heavily on explicit constitutional change in order to meet the demands for constitutional reform that follows from EU membership. However, there are striking differences in the Lithuanian case when it comes to the constitutional change carried out in connection to sovereignty, representation, and the exercise of EU competencies respectively.

When it comes to *representation*, no amendments were made to the Constitution and the reforms deemed necessary were instead carried out by way of implicit constitutional change.

The election of members of the European Parliament, for example, is regulated in the Law on Elections to the European Parliament, which was adopted by the *Seimas* on 20 November 2003 and subsequently amended in January 2008.

As for the *exercise of EU competencies* we find a mixed picture. On the one hand, we find implicit constitutional change that speaks to the exercise of EU competencies. The government's role and competencies are specified in an amendment to the Law of Government as well as in a Decree of the Government issued on 9 January 2004 which concerns the coordination of EU affairs. The legislature's competencies were specified by an amendment to The Statute of the Parliament (*Valstybes zinios*) in November 2004. The key part of said statute is Chapter XXVII on "Debate and resolution of European Union Matters" which covers both internal parliamentary procedures and the relationship to the government. Chapter XXVII "Debate and resolution of European Union Matters" is the relevant chapter, as it covers both internal parliamentary procedures and the relationship to the government. The Law on the Courts and The law on Administrative Procedures have both been supplemented with regulations that specify the rights and duties of the national courts in connection to the preliminary rulings procedure (Jarukaitis 2006, 401). Regarding the judiciary, the constitutional court also made a reference to the European Court of Justice for a preliminary ruling in 2007.

On the other hand, we also find explicit constitutional change that deals with the exercise of EU competencies. The key reforms in this aspect are found in paragraphs 3 and 4 of "The Constitutional Act on Membership of the Republic of Lithuania in the European Union" which was finally adopted by the parliament on 13 July 2004. The Constitutional Act which is an integral part of the Constitution regulates the executive's and the legislature's

competencies as well as the interaction between these institutions. A key concern in the debates preceding the adoption of the Constitutional Act was how to strike a proper balance of powers between the *Seimas* and the government (Jarukaitis 2006, 403). The Constitutional Act, paragraph 3 states that the government shall inform the parliament about proposals to adopt acts of EU law as well as assessing any recommendations or opinions submitted by the *Seimas* in connection to legislative acts.

Regarding *sovereignty*, Lithuania adopted The Constitutional Act on Membership of the Republic of Lithuania in the EU in order to deal with key issues like the transfer of competencies to the EU and the relationship between EU law and national law. The Constitutional Act is regarded as an integral part of the Constitution (Jarukaitis 2006, 392) and thus constitutes a clear case of explicit constitutional change. The chosen reform mode was, however, far from an obvious solution to the problem of how to prepare Lithuania for EU membership. In fact, many observers argued that the existing Article 136 which regulates Lithuania's participation in international organisations would be sufficient as the basis for membership in the EU. This was also the conclusion reached by the *Seimas* Commission on Constitutional Amendments in a report issued in 2002 (Jarukaitis 2006, 390). Still, after further debate, not least regarding the sovereignty clauses of the Lithuanian Constitution, the consensus shifted towards the view that the Constitution actually needed to be amended.

Much like its Estonian counterpart, the Lithuanian Constitution includes a number of articles which emphasise sovereignty and makes it rather restrictive when it comes to transfer of powers. According to Article 1, "The State of Lithuania shall be an independent and democratic republic", and Article 2 declares that "Sovereignty shall be vested in the People". Article 136 of the Constitution provides for membership in international organisations, but it

was finally decided that it was not feasible to reinterpret the meaning of this provision so as to cover EU membership. Hence, implicit constitutional change was deemed insufficient to deal with the challenges presented by membership in a supranational organisation like the EU. This conclusion was in part influenced by the work done by the Lithuanian delegation in the Convention on the Future of Europe. In light of the prospect of a Constitutional Treaty being put into place, it became all the more obvious that the EU could not be seen as simply an international organisation like any other (Jarukaitis 2010, 212).

When we look at the process leading up to explicit constitutional change and the adoption of the Constitutional Act in Lithuania, a key difference compared to Estonia was that the reforms could be undertaken in a setting where public support for EU membership was very strong. The upshot of this being that the “politically sensitive process” (Jarukaitis 2006, 395) of amending the Constitution could be dealt with by politicians without them having to fear a harmful public debate which could damage the government’s popularity and threaten future electoral success. It could be argued that constitutional reform in Lithuania was conducted under the radar, so to speak. In the absence of widespread Euroscepticism like the one present in Estonia, explicit constitutional change could be accomplished without the risk of the government having to pay a political price.

Another circumstance that made it possible to engage in explicit constitutional change without fear of a public backlash was the fact that a referendum was not required to amend the Constitution by adopting the Constitutional Act. If reforms had been made through an amendment of Article 1 of the Constitution, then a referendum could not have been avoided as according to Article 148 such an alteration requires direct support from three fourths of the citizens of Lithuania. However, by achieving the necessary reforms through adoption of the

Constitutional Act, the requirement of holding a referendum could be bypassed. This is an important difference with the Estonian case, where the holding of a referendum could not be avoided. The possibility of holding a referendum was considered an option early on in the process. However, this option was deemed a risky strategy. In light of “referendum fatigue” – seven referendums had already been held in Lithuania after independence (Albi 2005b, 99) – a low voter turnout could be expected and this would make the outcome more uncertain. In the absence of constitutional hurdles demanding the proposed amendments to be adopted by referendum, the reforms could instead be adopted by a parliamentary vote. The passing of the Act was unproblematic as only one party, the People’s Union Party, opposed it (Albi 2006, 334).

In conclusion, the reforms in Lithuania induced by EU membership have been brought about by a mix of explicit and implicit constitutional change. The Constitutional Act on Membership of the Republic of Lithuania in the European Union is an integral part of the Constitution which contains fairly elaborated provisions on a number of issues relating to sovereignty and the exercise of EU competencies. Compared to Estonia, the constitutional reformers in Lithuania did not have to fear that the issue of constitutional reform would be politicised and used by Eurosceptic forces as a weapon against the government. It is also noteworthy that it was possible to amend the Constitution without holding a referendum; this surely contributed to the fact that the constitutional reforms undertaken could slip under the public radar.

Latvia – less explicit change than expected

Latvia occupies a middle ground between Lithuania and Estonia when it comes to how constitutional change has been brought about in light of EU membership. We find big

differences when looking at the three different dimensions of constitutional reforms. In fact, the dominant mode is explicit constitutional change related to sovereignty, whereas all reforms connected to representation and the exercise of competencies has taken the form of implicit constitutional change.

Regarding matters related to *representation*, we do not find any instances of explicit change and the Constitution is silent on the election of members of the European Parliament as well as the appointment of commissioners and CJEU judges. These issues have been dealt with through implicit constitutional change and the key point of reform here is “The Law on Elections to the European Parliament” which was adopted by the *Saeima* on 29 January 2004.

Likewise, the necessary reforms in connection to the *exercise of EU competencies* have been achieved exclusively through implicit constitutional change; more specifically, by updating the legal acts that serve as the basis for the government’s role in the coordination of EU policy, by amending the *Saeima* Rules of Procedure, and by adding provisions to the Civil Procedure Law and the Administrative Procedure Law in order to clarify “the mechanics” of the preliminary reference procedure (cf. Zukova 2010, 269).

As we turn our attention to matters related to *sovereignty*, we find a different picture as the Latvian Constitution was indeed amended in order to deal with the constitutional grounds for membership and the transfer of powers to EU, and, to some extent, the relationship between EU law and national law. During the years preceding EU accession, there was an extensive debate in Latvia regarding how to best revise the Constitution in order to prepare for membership. Some argued in favour of extensive amendments, including drafting an entire new chapter on Latvian EU membership, whereas others claimed that it would suffice to

simply include a short paragraph which would state that Latvia was a member of the EU (Ušacka 2006, 373-74).

In the end, it was decided that Articles 68 and 79 of the Constitution were to be amended in order to allow for Latvian membership in the EU as well as laying the foundations for the transfer of competencies to the EU. The changes made to Article 68 have also been seen as relevant when it comes to defining the relationship between EU law and national law (Zukova 2010, 249). This aspect of EU membership, however, has also been the subject of important implicit constitutional change, not least in the form of decisions delivered by the Constitutional Court (Zukova 2010, 260-61).

When it comes to the preferred mode for carrying out the constitutional reforms needed for EU accession, we find Latvia, as noted above, in a position in between Estonia and Lithuania. Regarding issues linked to sovereignty we find a fair amount of explicit change in the form of the amendments made to Articles 68 and 79. However, none of the issues concerning representation and the exercise of EU competencies have been dealt with by use of explicit change. Now, given the fact that we find a fairly strong tradition of explicit constitutional change in Latvia where “numerous amendments, both minor and extensive, have been made to the Constitution of Latvia since its initial adoption” (Ušacka 2006, 369), we would perhaps expect to see even more explicit constitutional change than what we actually observe (cf. Albi 2005b, 95-96). How may we explain this, relatively speaking, modest use of explicit constitutional change?

Just like the constitutions in Estonia and Lithuania, the Latvian Constitution has a strong “sovereignist” character (cf. Albi 2005b, 24-25). Article 1 of the Latvian Constitution states

that “Latvia is an independent democratic republic”, and Article 2 goes on to claim that: “The sovereign power of the State of Latvia is vested in the people of Latvia”. The strong emphasis on sovereignty should be understood in light of Latvia’s difficult historical experiences of being forced to be a part of the Soviet Union. As a consequence, Articles 1 and 2 of the Constitution have a strong symbolic importance in Latvia which made constitutional reform to prepare for membership in a supranational organisation like the EU a politically sensitive matter. The work of proposing constitutional change in order to prepare for EU accession was thus guided by the insight that it would be difficult to find parliamentary and public support for a major overhaul of the Constitution, especially if any changes were proposed that would affect Articles 1 and 2.

The political sensitivity of the issue of constitutional change became exacerbated by the fact that Latvia, together with Estonia, had the weakest support for EU accession of all candidate countries. In October 2001, only 33% of people in Latvia regarded future membership to the EU a good thing (Eurobarometer 2001). Against this backdrop, the political and judiciary elite realised they had to tread carefully when dealing with the issue of constitutional change and avoid having to hold a referendum that could play into the hands of the Eurosceptic forces. In the end, what was agreed upon was – given Latvian political tradition – fairly limited amendments to the Constitution. Explicit constitutional change was used to open up for EU membership but no amendments were made that directly affected Articles 1 and 2. In this way the amendments could be approved by parliament without having to call a referendum, which would have been necessary had any amendments been made to Articles 1 or 2, and without provoking the Eurosceptic forces in Latvia. All courses of action that could potentially harm the chances of getting the people to vote yes to EU membership had to be avoided at all costs.

Conclusions

The present study has provided a thorough systematic description of constitutional change in light of EU accession in new member states in CEE. A first observable trend is that implicit constitutional change has been the more commonly used mode for constitutional reform in these member states. The mean value for all countries in the study is 3.68 on the five-point scale. So while implicit constitutional change is the more common mode for achieving constitutional reform, explicit constitutional change has no doubt played an important role in a majority of the new member states.

A second visible trend is that there exists considerable variation between the different aspects of EU membership examined in this study. The countries in the study have in fact been much more inclined to use explicit constitutional change to deal with the various issues linked with sovereignty (mean=2.58) than to deal with those linked with representation (mean=4.75) or with the exercise of EU competencies (mean=4.28). In other words, what we find is that new member states are far more likely to resort to explicit constitutional change when dealing with the most fundamental aspect of EU membership, that is, those matters linked to sovereignty, compared to matters concerning representation and the exercise of EU competencies.

A final important trend is that we find substantial cross-national variation among the 12 new member states when it comes to the predominant mode of constitutional reform. We find, at the one extreme, countries where the written constitution has been amended fairly extensively so as to include regulations bearing on many aspects of EU membership. Slovakia stands out as the only country where explicit constitutional change has been the more commonly used mode for constitutional reform. However, in member states like Lithuania and Hungary, we also find that explicit constitutional change has played an important role when dealing with

the need for constitutional reform in light of EU membership. At the other extreme, we find countries which have relied almost exclusively on implicit constitutional change, and whose constitutions are more or less silent on all aspects of EU membership. Estonia is the one member state which stands out as the prototypical case in this respect.

The cross-national variation identified in this study begs the question of which factors may help explain the varying degree to which the new member states have made use of explicit and implicit constitutional change. While an exhaustive answer to this question is beyond the scope of this article, the comparison between the constitutional reform processes in the Baltic countries have revealed a number of factors that seems to be important for explaining the varying use of different methods for achieving constitutional reform.

The close examination of constitutional reforms in the Baltic countries clearly suggest that public opinion work as a factor determining the choice of would-be reformers to engage in explicit or implicit constitutional change. The presence of widespread Euroscepticism in Estonia and Latvia convinced the government that it would be preferable to seek to achieve constitutional change by means which attracted as little public attention as possible. Rather than taking the risk of setting in motion a highly visible constitutional amendment procedure that would threaten to fuel Eurosceptic sentiments and possibly endanger future membership in the EU, constitutional reformers opted to bring about constitutional change through less visible means. The situation in Lithuania was very different and, in the absence of widespread Euroscepticism, explicit constitutional change could be pursued without fear of challenging public opinion.

A second important factor is what we may label constitutional rigidity, that is, how difficult it is to amend the constitutional document. In the absence of constitutional hurdles requiring a referendum to be held, the proposed amendments to the Lithuanian Constitution could be adopted by a decision in parliament. In Estonia, it would not have been possible to amend the Constitution without holding a referendum, and this was something the political elite wanted to avoid in light of widespread Euroscepticism. So, the more difficult it is to bring about change by formally amending the constitutional text, the more likely are we to see the use of implicit constitutional change.

Finally, we should note that constitutional courts or supreme courts with judicial review competencies may act as drivers for implicit constitutional change. In the Estonian case, it was evident that the Supreme Court played an important role in legitimizing the reform process by confirming the status of the Constitutional Act as a supplement to the Constitution, but also in delivering statements containing interpretations on how different aspects of EU membership should be understood, for example, the relationship between EU law and national law.

On the basis of the comparison between the Baltic states, it thus seems as if three factors — public opinion, constitutional rigidity, and court action — are important for understanding the chosen mode of constitutional change. However, we must certainly be careful with drawing any strong conclusions based on the case studies conducted in this article. Much more research aimed at systematically testing what explains cross-national variation in the use of different methods for achieving constitutional change is clearly needed. Still, the current study has hopefully been instructive in indicating the direction future research should take in order to learn more about factors explaining constitutional change.

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