

## **Constitutional Identity in European Constitutionalism**

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### *1. Constitutional Identity as an Internationalized Concept*

Constitutional law in the contemporary world is essentially influenced by the process of globalization and of regional integration. The Constitution does no longer regulate the basic legal order of the State from an essentially *national* perspective but takes account, in a very significant way, of the strongly increasing international dimension of law. Constitutional law has widely “opened” to international law and is therefore an expression of “open statehood” (as the German Constitutional Court formulates it<sup>i</sup>); constitutional law has been, to a great extent, “internationalized”. The *identity* of the constitutional order of the State has changed from a national to an international, or better to an *internationalized* identity.

### *2. The Internationalization of Constitutional Law as a Characteristic of Contemporary Constitutionalism*

The internationalization and in Europe, even more significantly, the supranationalization of constitutional law are characteristics of modern constitutionalism which reflect the fact that States’ activities are regionally and even universally interwoven and to a high degree interdependent.

All important matters a State has to fulfill have an increasingly international dimension: Economy and finance, external and internal security, technology and science, telecommunication, energy, environmental protection, food and agriculture, and even the field of social support (for which in most countries the biggest part of the internal budget of the State is foreseen) is dependent from economic growth which is only reachable through international cooperation. We can see that the State of the 21st-century is no longer *introvert* in fulfilling its tasks, its functions are necessarily *transnational*.

Internationalization of constitutional law is manifold: the direct reception of international law within the national legal order, in many countries even with primacy over national legislation, the interpretation of national constitutional provisions, in particular on fundamental rights, in the light of international human rights conventions - very significant in European countries for the interpretation of national constitutional rights in accordance with the European Convention of Human Rights (ECHR)<sup>ii</sup>—or the increasing understanding that Rule of Law is not only State-oriented, but has an important international dimension<sup>iii</sup>.

It seems that the highest degree of internationalization of constitutional law is the possibility to transfer State competences to multinational organizations, in particular to the European Union. The Constitution allows to establish a supranational order which has direct normative effect in the member States and enjoys primacy over national law, in the perspective of the European Union also over the national Constitution<sup>iv</sup>.

### *3. The Beginning Constitutionalization of International Law*

Law has already reacted and is about to further react to these developments. Sovereignty of the State still exists but is significantly limited and relativized. International law, in particular the United Nations Charter, recognizes the “principle of sovereign equality” of all the States as members of the organization. At the same time it establishes a new world orders the basis for objective principles which the States cannot rule out by reference to sovereignty. These *jus cogens* principles are the first step for a sort of “*universal Constitution*” which, however, seems to be a utopian idea, with a place in *Immanuel Kant’s* philosophy<sup>v</sup> but not in contemporary politics.

Nevertheless, international law is, in part, converting from a horizontal coordination system to a vertical principle-based order. It is not erroneous to speak of a certain tendency of the “constitutionalization of international law”.

This tendency is even more significant in regional integration systems such as in the 49 Council of Europe member States where the European Convention of Human Rights (ECHR), the leading European fundamental rights document, has been qualified by the Court in Strasbourg, as a constitutional instrument of European public order<sup>vi</sup>. The ECHR is regarded, despite the fact that it is in its form an international treaty, as *functional constitutional law*<sup>vii</sup>.

The most striking example for the “constitutionalization” of international law is the multinational legal system of the European Union, a supranational order which is in its nature “constitutional”. EU law is multinational law, integrated with the national law of the member States, having normative force in the national internal legal orders, even with primacy over them.

While traditional international law is predominantly *coordination law*, based on the consent of sovereign States, even though it has already developed a set of objective constitutional principles, European Union law constitutes a State-like order where the sovereignty of the member States is substantially limited, much more than in traditional international law.

#### *4. Constitutional Identity in the Supranational EU System*

In the supranational legal order of the European Union it is of growing importance to keep intact the member States “national identities”. This is clearly expressed, as a basic principle, by article 4 EU Treaty. “National identity” in the perspective of EU law includes “constitutional identity” of the member States. European Union as a community of States needs to respect the identities of its members. The concept of a “Union” requires as a basic condition that all the members of the Union remain intact in their statehood identity, and this means above all intact in the nucleus of their legal orders, namely in the basic elements of their Constitutions. EU membership has as a consequence an adequate limitation of sovereignty, the integration of the national and supranational legal orders and the primacy of supranational law.

However, supranationality finds its limits in the member States constitutional identity. The identity concept is a mechanism of safeguard of the *functional existence* of the member States, defending them against a too far-reaching supranationalization.

The concept of national and constitutional identity has a double dimension: a supranational dimension, of which we have been just speaking, and a national one<sup>viii</sup>.

#### *5. The Concept of National and Constitutional Identity as Developed in European Constitutionalism – Some Remarks.*

The debate on constitutional identity has spread all over Europe. The term of national identity has already appeared in 1993 in the first EU Treaty but did not arouse particular interest at that time. This has significantly changed with the explicit reference to national identity in the text of the (failed) *Constitution for Europe* and now in the new *EU Treaty*. In addition, the jurisprudence of European Constitutional Courts, in particular of the French Conseil constitutionnel<sup>ix</sup> as well as of the German *Bundesverfassungsgericht*<sup>x</sup> and the Polish Constitutional Court<sup>xi</sup> in their Lisbon Treaty decisions of 2009 and 2010. It seems that also other courts, in particular the Czech Constitutional Court<sup>xii</sup>, have used similar argumentations without making explicit reference to the term of constitutional identity.

Constitutional identity is a conceptual instrument of defense against her too far-reaching supranationalization of the States’ legal orders, a defense of the substantive and functional existence of the State, which finds its particular expression in the basic political decisions and the core elements of its legal culture which is the value basis of the State's Constitution. This defense mechanism is dual: it is an instrument of the European Union as

well as an instrument of the member States, each of them developed in its own perspective, in the supranational *and* in the national perspective.

The identity problem focuses on the question which is vital for the 29 EU member States and the EU itself. It is the core question of supranationality: Is EU law able to overrule the national Constitution, in particular the core elements of the Constitution?

The identity concept does not deny supranationality as such, does not deny a limitation of sovereignty for the purpose of multinational integration, does not refuse primacy of EU law over national law but wants to find the adequate *equilibrium* between supranationality and nationality. Absolute primacy of supranational law is moderated by the safeguard of national and with it of constitutional identity of the member States.

The defense of identity is primarily a matter of EU integration but not exclusively. It is a more general concept of safeguarding national identity in the sense of plurality against centralizing tendencies.

This question can, in a less dramatic way, also arise in the context of traditional international law, in particular connected with the problem of how far conceptions elaborated by international courts can be binding. Specifically: Can the Court of Human Rights in Strasbourg completely overrule the solutions found by the national constitutional courts? Or must a basic margin of appreciation of the States be accepted?

The Strasbourg Court has repeatedly declared its readiness to accept, to a certain extent, own national solutions left to the appreciation of the Signatory States.<sup>xiii</sup> What corresponds to an internationally and Europe wide recognized value standard, must be respected by the States. This results evidently from the important control function of the Convention. However, in a multilevel fundamental and human rights guarantee system as it exists in Europe the principles of efficiency of European values on the one side and of value subsidiarity and national autonomy on the other side must be both adequately realized.

The more national constitutional identity integrates international concepts, what happens through the current convergence process in European constitutionalism, the less the defense character of the identity mechanism comes into function.

## 6. Conclusion

We can therefore conclude that national and in particular constitutional identity is currently a central subject in jurisprudence and scientific debate in Europe. In the context of European integration the identity concept intends to uphold an adequate equilibrium between supranational and national power and to safeguard plurality and autonomy of the constitutional core elements of States in Europe. The ongoing convergence process in the

field of values (fundamental rights, rule of law elements) is likely to lead to common concepts which will be the starting point for the emergence of a *European constitutional identity*.

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<sup>i</sup> Vol. 123, p. 267.(FCC)

<sup>ii</sup> See for Germany the jurisprudence of the Federal Constitutional Court vol. 111, 307 (Görgülü) and [http://www.bverfg.de/entscheidungen/rs20110504\\_2bvr236509.html](http://www.bverfg.de/entscheidungen/rs20110504_2bvr236509.html)(Security Detention)

<sup>iii</sup> See. Rainer Arnold, The external dimension of Rule of Law, Essays in Honour of Giuseppe De Vergottini (in print)

<sup>iv</sup> See ECJ case 11/70, Rep. 1970, 1125/note 3

<sup>v</sup> Zum ewigen Frieden, Ein philosophischer Entwurf, 1796

<sup>vi</sup> Loizidou (Preliminary objections) ECtHR 23.3.1995 Series A 310, Z. 75

<sup>vii</sup> See R. Arnold, The concept of European constitutional law, in: The emergence of European constitutional law, XVIIth Congress of the International Association of Comparative Law, Utrecht 2006, National reports, Athens 2009, p. 15 – 23

<sup>viii</sup> See also R. Arnold, Identité constitutionnelle, un concept national et supranational, in: La Cour Constitutionnelle – Garant de la Suprématie de la Constitution, Table ronde internationale organisée par le Centre francophone de droit constitutionnel de l'Université Mihail Kogalniceanu et l'Association Roumaine de Droit Constitutionnel, Iasi le 24-25 mai 2013, Genoveva Vrabie (dir.), Iasi : Institutul European, 2014, pp. 207 – 218 and R. Arnold, La Cour de Justice de l'Union Européenne comme gardienne de l'identité constitutionnelle des États membres, in : Longcours, Mélanges en l'honneur de Pierre Bon, Paris Dalloz, 2014, p.49 - 56

<sup>ix</sup> See CC 2006-540 DC Rec., p.88

<sup>x</sup> CCF vol. 123, p. 267

<sup>xi</sup> K 32/09

<sup>xii</sup> Pl. ÚS 19/08

<sup>xiii</sup> See Anne Peters, Einführung in die Europäische Menschenrechtskonvention, 2003, p. 25-26.