THE EUROPEAN CONSTITUTION AND THE TRANSFORMATION OF NATIONAL CONSTITUTIONAL LAW

by
Rainer Arnold, Regensburg*

I. The concept of transformation

1. The autonomy of national and supranational constitutional orders.

National and supranational constitutional law are separate, autonomous legal orders. As the entirety of fundamental norms of EC/EU primary law, European constitutional law has such autonomy, but in many ways is interdependent with national law. Furthermore, there are three bodies of constitutional law in Europe: national constitutional law, the EC/EU law and the European Convention on Human Rights (ECHR). For various reasons, the notion of constitutional law can be extended from the traditional national level to the supranational levels which include the Strasbourg Convention.[1] The main reason is that the functions of a state constitution are largely subsumed by the fundamental law of the EC/EU and, in part, also by the ECHR:

(1) to determine the basic values of a society which serve as a protection against state intervention into the sphere of fundamental rights; and
(2) to establish – insofar as the EC/EU is concerned – an institutional order to fulfil the substantial tasks of the Community.

Though there are three constitutional law levels in Europe, it must be stated that there are numerous mutual influences between these levels[2].

2. The process of transformation of national constitutional law by supranational law.

As to the subject of these reflections, it must be said that the EU member states' constitutions are under the strong influence of supranational law. "Transformation" means, first of all, *unilateral* influence on national constitutional law, by all sources

* Professor of Law, Jean Monnet Professor for European Law, University of Regensburg.

1 See R. Arnold, European Constitutional Law: Some Reflections on a Concept that Emerged in the Second Half of the Twentieth Century, Tulane European & Civil Law Forum, New Orleans, vol. 14 (1999), p. 49 – 64.

2 R. Arnold, The Different Levels of Constitutional Law in Europe and their Interdependence, in: Challenges of Multi-Level Constitutionalism, JVR, 21st World Congress (J. Nergelius/P. Policastro/K. Urata (ed.), Cracow 2004, p. 101 – 113.

of supranational law including the future "Constitution for Europe", once this document enters into force.

It is worth stressing that the relationship between national and supranational law is not limited to unilateral influence but also means *reciprocal* influence from one side to the other.

Influence is not only a certain impact on the interpretation of the law of the other level, but can – at least from the supranational to the national order – also be transformation in a narrow sense, i.e. real modification. The influence of national constitutional law on supranational law is an *indirect* one (the latter being a "source of inspiration for the former), while the impact of supranational, based on the principle of its supremacy on national law is a *direct* process, both in a functional and a substantial respect.

It should also be noted that the influence of the future EU Constitution must be seen in the light of the characteristics of this constitution: it is *evolutionary*, for a great part reformulating already existing law. By this, a certain conservative tendency, reflected in its primarily *codifying* function, is evident. This means, in the context of our discussion, that the transformation of national constitutional law by the concepts adopted by this Constitution has already been made during the long process of European law evolution. But the transformation process is now more evident with the existence of the EU Constitution.

In summary, it can be said that the three constitutional levels in Europe (national constitutional law, the supranational law of the EC/EU and the Strasbourg Convention) are autonomous orders but also reciprocally influence each other. The strongest form of influence is the modification of constitutional law, a process which is occurring from the EC/EU level to the level of national constitutional law in particular.

3. The three types of transformation

Three types of transformation can be distinguished: institutional transformation, transformation of values and, from a functional point of view, transformation by the supremacy of EU law.

The first type is necessary to make it possible for the member states to fulfil the integration goals through the required instruments. Therefore, this type has "serving functions". The second type has the task of realising common basic values in EC/EU and the member states. Homogeneity of basic values is of great importance and ideologically is a part of the integrational order as a whole. Article 6 § 1 of the EU Treaty is a normative expression of this requirement. The third type is dedicated to give effect, quite generally, to supranational primary and secondary law. This type of transformation aims at adapting national law including constitutional law to EC/EU law, on the basis of the supremacy of supranational law.

This third type of transformation has in part a 'responding function' because national constitutional law 'responds' to supranational prescriptions. The adaptation of national constitutional law can be *preventative* by adjusting the national constitution *in advance* (e.g. in order to fulfil the requirements of the common area of law, secu-

rity and justice by modifying the prohibition to extradite a national, as now provided for in Article 16 of the German Constitution). The adaptation can also be subsequent to a conflict of norms between both orders in a particular case, *a posteriori*, as happened in the well-known *Tanja Kreil* case[3].

II. Analysis of the transformation processes

1. The institutional transformation of national constitutional law

a. Integration norms

It is obvious that states intending to maintain membership of supranational organisations will realise this by means of specific constitutional provisions which can be called *integration norms.*

Even in the absence of such a provision a state could transfer sovereign power to multinational institutions, merely within the traditional system of international law. This is based on the fact that state sovereignty as such allows membership of organisations of a supranational type. If it is even possible for a state to relinquish statehood by incorporation into another state as occurred, for example, with the GDR in 1990, a partial surrender[4] of sovereign rights must for the same reason also be feasible.

The integration norms differ in their textual formulation but in substance must be interpreted in the same manner. They are the functional basis for incorporating the *acquis communautaire* as it results from primary and secondary EC/EU law. Thus, the supranational concept as shaped by the ECJ, particularly in Costa/ENEL[5] is the guide for the interpretation of the constitutional authorizations to create, develop and join supranational organisations.

Therefore the wording of the national provisions is, in this context, of minor importance. Some of the constitutional texts use the term 'limitation of sovereignty' (Italy, France)[6], others that of 'transfer' of sovereign rights or, more often, transfer of competence. Especially in the constitutions of the new member states[7], there have been specific indications in the integration norms employed that a transfer of a 'de-

3 C- 285/ 98, vol. 2000 I- 69.

4 There is no loss of sovereign rights but an 'opening' of the national order to let in extra-statal law (as is well explained by the German Constitutional Court, vol. 37, 271, 280.

5 6/64, vol.1964, 1251, 1269.

6 See Article 11 of the Italian Constitution as well as the Preamble of the French Constitution of 1946 which was the basis for the EEC Treaty; in France, for the creation of the EU, the Constitution of 1958 was amended by introducing the term 'transfer' of sovereignty, which had not been possible under the preceding text.

7 See Articles 90 of the Polish Constitution, 3.a of the Slovenian Constitution, 10a of the Czech Constitution and 2/A 0f the Hungarian Constitution.

termined', or 'some' competence from the member states would be allowed. Many of these constitutional authorizations have only made reference to 'international' organisations and not explicitly mentioned the type of supranational organisations which substantially differ from one another.[8] Some other texts indeed refer specifically to the European Union.[9] But also the more unspecific formulations using the word 'international' must be interpreted as including the European Union. The political context in which these provisions have been created is quite clear in this respect.

Furthermore, only a few constitutional texts contain safeguard clauses as they are termed in Article 23 of the German Grundgesetz. An example is Article 3.a of the Slovenian Constitution.[10]

Summarising, it can be said in this context that textual divergences as to the integration norms contained in the different member states' constitutions cannot have any substantial significance. The concept of a supranational order, as developed by the European Court of Justice in interpreting the Treaties, was accepted by member states as a constitutional basis for the ratification of those and future supranational treaties on their ratification of the Treaties so interpreted by the ECJ. This is a uniform concept valid for all member states.

Thus, supranational law is the source of external constitutional interpretation and in the case of a clear divergence between internal constitutional concepts and supranational law even a sort of 'constitutional reform from outside'.[11]

Therefore, a double transformation of national constitutional law has taken place: by the introduction of an integration norm (even if not yet existing from the period before the emergence of supranational organisations as in many of the 'old' member states) and by the interpretative shaping of this integration norm 'from outside' as described above. Whereas the relevant supranational concept was formulated in the initial period of European integration in 1964, the future Constitution will take up this concept and, insofar as the fundamental constitutional principles as a basis of a member state's identity (see Article 5 of the Constitution project) are concerned, will slightly modify it. So in this respect the proposed EU Constitution will have the effect of making a transformation within this field.

8 See for example the aforementioned provisions in the Polish, Slovenian and Czech Constitutions as well as many Constitutions of the 'old' member states. Also Article 24 of the German Grundgesetz uses the term 'zwischenstaatliche Einrichtungen', which is the equivalent of 'international institutions'.

9 See Articles 7 of the Slovak Constitution and 2/A of the Hungarian Constitution.

10 See R.Arnold, Constitutional Reforms in the new EU Member States, Commentary on the Enlargement Treaty (ed. F. Merli), 2005 (in print).

11 See R. Arnold, L'exposition des constitutions aux influences externes, in: Vingt ans de la Constitution portugaise (ed. J. Miranda), Coimbra, 1997, vol. II, 673.

b. Other institutional provision with reference to the supranational order

There are also other institutional provisions which have been inserted into the Constitution in order to adapt it to supranational requirements: the creation of EU committees in Parliament or the Second Chamber[12], the introduction of co-decision possibilities in various states such as Germany, Austria, Belgium, and also in some of the new members[13], the authorization of EU citizens to take part in local and European elections[14] and the transfer of the functions of the national Central Bank to the European Central Bank[15], to cite the most common transformations.

A further institutional impact on national constitutional law can be seen in an enlarged field of application of internal provisions such as the lawful judge guarantee. Here both the value and institutional dimensions come into effect. Originally destined to guarantee jurisdictional equality and impartiality before the national courts, an integration-related interpretation of this constitutional principle has now included the European Court of Justice. The reason for this is the connection between national and European jurisdiction as it results from Article 234 EC Treaty.[16]

c. Conclusion

In conclusion, the institutional transformation of national constitutional law already took place at the beginning and during the process of integration. The integration norms were introduced into the constitutions in part before the creation of the supranational organisations, in part later, before the entrance of new member states. Transformation in this context also means that the diverging concepts of the different integration norms must be adapted to the concept of supranationality as developed by the ECJ. The future Constitution will not require essential constitutional reforms from the institutional perspective. The already existing provisions of the member states constitutions will be sufficient and can also be used under the Constitution. This will confirm the institutional system existing on the supranational level and the corresponding provisions on the national level.

Furthermore, institutional concepts in national constitutional law originally with a national dimension are often extended to the supranational dimension, such as the guarantee of lawful judge in Germany, Italy and Spain shows.

12 See e.g. Article 45 a of the German Grundgesetz.
13 For these countries see R. Arnold, European Constitutional Law as an Emerging Concept (note 1).
14 See e.g. Article 28 § 1 3rd phrase of the German GG.
15 See Article 88 2nd phrase of the German GG.
16 See German Constitutional Court, vol. 75, 233; 82, 192.

2. Value transformation

a. Developments in Fundamental Rights protection

In its second part, the future EU-Constitution embodies a catalogue of fundamental rights. This part almost completely incorporates the text of the EU Charter of Fundamental Rights, proclaimed in December 2000 at Nice[17]. Thus the Constitution determines the values which form the ideological basis of the supranational order. This corresponds to the structure of a modern state constitution which regularly contains a set of provisions establishing an institutional system as well as provisions embodying values. Fundamental rights constitute the major part of these values, but there are also principles such as the rule of law and democracy. These latter principles also have an institutional dimension, but essentially are based on values.

Regarding values, it is commonly known that the supranational organisations have not, until now, had a written fundamental rights system. The Nice Charter, as part 2 of the future Constitution, is a decisive step towards a written system. An earlier step, the introduction of Article 6 §2 into the EU Treaty, was obliging all EC/EU institutions to respect the European Convention of Human Rights as well as the member states' constitutional traditions. But this was not combined with substantial freedoms. For this reason, the future Constitution will complete the fundamental rights protection.

b. The requirement of common values

The question arises as to whether the member states' constitutions will be influenced by the Nice Charter, i.e. by the fundamental rights contained in the Constitution.

In our context, Article 6 § 1 of the EU Treaty is of particular importance. This provision recognises the fact that values are an integral part of the EU as a supranational order composed of states integrated into this order. As values are fundamental tenets of a state society, they are of the same importance for a multi-state association of a supranational character. Institutions are the framework, values and activities based on these values are the substance which fills up this framework. At least in their fundamental concepts, the values in an association must be common to all its members if they wish to achieve real integration.

Thus it can be said, that values expressed in fundamental rights must be common all over the Union. The constituent and integrating character of values (institutional values such as democracy, the rule of law etc. and individual values such as fundamental rights) must be clearly recognised.

From this character ascribed to values results the fact that even in the case of the lack of an explicit provision, like Article 6 § 1 EU Treaty, the requirement of com-

17 Text in OJ 2000, C 364/1; see also Pernice/Mayer, in: Grabitz/Hilf, annex to Article 6 of the EU Treaty.

mon values is inherent in an autonomous legal body. This is because efficient integration, an indispensable condition for supranational organisations, must be based on common values being present throughout the body.

c. The competence to define values

If values must be common, it is necessary to know who is competent to define these values. It is the aforementioned Article 6 of the EU Treaty and it will also be the future Constitution where these values are enumerated. Therefore, it is up to the supranational body to determine the value concepts, or at least their basic contents. Integration would not be possible if the competence for definition remained exclusively in the hands of the 25 or more member states. Being competent to define values also means competence to impose values on members of the common body. Insofar it seems possible to speak of 'value transformation' of national constitutional law in this context. Of course, this can only occur if there are serious divergences e.g. between the fundamental rights protection in individual member states and the Union standard.

The concentration of competence to define values upon the supranational power seems, in particular in such a field of great sensibility, threatening to member states' autonomy. Indeed, value concepts emerging in a certain culture, are linked to a specific history and reflect a particular society. This means that values are normally a matter of evaluation in a state and are expressed and reflected by the state's constitution. Within the state, the people as creator of the Constitution are entitled to decide upon values, even if *de facto* this power of creation is bound by tradition to some extent. Thus, principally, states are *autonomous* to define values.

d. The imposition of foreign values

A consequence of integration is that the supranational power has obtained the right to define the values of the supranational community. But it must be taken into account the possible tension which can be created if a foreign value, incompatible with an internal concept is imposed upon member states. It flows from the 'principle of loyalty' that the supranational power must be cautious and respect the autonomy of the state when defining values. It must limit itself to a definition of a very basic concept leaving wide margins of discretion to member states in maintaining their specific structures and details in their understanding of values. Only the very essence of a concept defined on the supranational level can be made obligatory for a member state. Within this wide margin the member state can exercise the competence to define inherent in a state.

The obligation of the EU to respect this *relative* autonomy of the member states in defining their values flows from the 'principle of loyalty' and the principle of subsidiarity, and corresponds to the further obligation to respect the member states' identity (now expressed by Article 6 § 3 of the EU Treaty, and to be expressed in future, by Article 5 of the Constitution).

Art. 5 of the proposed Constitution gives more details to answer the question of what identity means. It becomes clear that fundamental constitutional structures belong to this identity. This includes the specific structures and details of value concepts but does not eliminate the supranational competence to define insofar as the basic value concept itself is concerned.

e. The convergence of value concepts in Europe

The problem arising from the tension between supranational competence to define values and member states' autonomy is not too serious because the value concepts in Europe are more convergent in their basic principles than divergent. Democracy and the rule of law, as well as the fundamental rights concepts show common features. In the past, the weight upon the European Convention on Human Rights seems to have strongly furthered this convergence. The ECJ has also contributed to develop common, Europe-wide concepts in the field of values which influenced national concepts. Thus, at present, no major divergence seems to exist in the field of values.

f. Values as a field of potential transformation

It results from this that the supranational institutions have the function of *safeguarding* the common levels of the value standards. The competence to control and safeguard is of lasting importance and is rooted in Article 6 of the EU Treaty. From this perspective, the *transformation* of national constitutional law in this field is rather a *potential transformation* becoming necessary in case of evident divergence in the basics of a value concept.

g. The protection optimum

In the field of fundamental rights a particular mechanism should be mentioned. On the one hand there is the common value concept as analysed above, on the other hand a specific principle exists: that of the *'protection optimum'.*

This corresponds to the anthropocentric approach of the Charter that in a particular case the best protection norm should be applied. The highest principle is no longer that of EC/EU law supremacy but that of the individual's highest protection. This idea is reflected in Articles II-112.3 (second phrase) and II-113 of the Charter. This principle can cause the result that the national concept, not the supranational, will apply. But there is no contradiction of Article 6 § 3 because this refers to an abstract control and accepts that where the national concept may accord more protection than the supranational, then it is the former which shall apply.

h. Conclusion

Concluding, it can be said that the Union exercises a right to *control* fundamental national value concepts, on the basis of Article 6 § 1 of the EU Treaty. This control

is linked to a supranational competence to define the basics of these values (in particular of the concepts of democracy, the rule of law and fundamental rights protection). In practice the competence is irrelevant in view of the great convergence of these concepts in Europe. In the field of fundamental rights the *'protection optimum' principle*, based on the anthropocentric approach of the Nice Charter which will be contained in part 2 of the future EU Constitution, is applicable.

3. The supremacy of supranational law as an instrument of transformation.

The strongest influence of supranational law on national ordinary and national constitutional law is due to its supremacy over domestic law. The proposed Constitution will establish this principle explicitly in Article 10. The ECJ regards the principle as absolute, overriding even national constitutional law.[18]

This view has been made relative by national constitutional courts which developed their own solutions. These solutions are varying in their acceptance of integration. The German Constitutional Court developed a perspective rather favourable to integration but not without reservations. As is well-known, in the field of fundamental rights, the Court has accepted, in its 'Solange II' decision[19] of 1986, the primacy of EC Law over German Constitutional Law. But this is under the condition that the supranational protection of fundamental rights is equivalent to that of the German Grundgesetz. This condition is also embodied in Art. 23 § 1 of the Grundgesetz introduced in 1993 for Germany's membership of the EU. When the decision 'Solange I'[20] was given in 1974, no sufficient protection of fundamental rights existed at the Community level; thus German rights were applied. But even at that time the Court accepted the idea that the integration process could lead to a shift in the individual's protection by fundamental rights from the national to the supranational level. In fact, recognizing the autonomy of the supranational order also involves the acceptance that this order itself will develop its own protection system. It is inherent in an autonomous legal order, such as Community Law, that the composition is of ordinary and, with a higher rank, 'constitutional'[21] rules and principles which together fulfil all functions which are necessary in such an autonomous order. Until 1986, the supranational order had developed a jurisdictional charter of fundamental rights, unwritten principles derived by the Community judges from a common constitutional tradition of the then member states as well as from the European Convention on Human Rights. The latter was considered to be a common body of rights obligatory for all member states. The German solution is that of a 'functional

18 See case 11/70, vol. 1970, 1125, Internationale Handelsgesellschaft.
19 Vol. 73, 339.
20 Vol. 37, 271.
21 The classification as "constitutional" is not decisive; by their nature these rules and principles determine the basic structure of a legal order (state, supranational order), establish institutions and indicate values as an orientation for the direction of institutions and society.

substitution'[22]: Certain functions are indispensable, in particular the protection of the individual through fundamental rights. If competence (in the terminology of the Grundgesetz 'sovereign rights') is transferred from Germany to a supranational organisation, this transfer must not lead to the loss of indispensable functions which the national constitution has previously exercised. The exercise of these indispensable functions of the constitutions by the supranational order, even with its own means and concepts, such a 'functional substitution', has been accepted by the Court.

It seems that other Constitutional Courts in Europe are even more reticent: the Spanish Tribunal Constitucional stated in 1991 that Spanish public institutions when applying EC Law are not freed from the obligation to respect the Spanish Constitution.[23] This view seems to be in conflict with the future Constitution insofar as its field of application also covers member states activities in execution of EU Law. The Italian Corte costituzionale denies supremacy over the fundamental principles and human rights principles as embodied in the Italian Constitution.[24] The French Conseil constitutionnel[25] delivered an unexpected decision in July of this year: it refrained from examining a French law adopted by the French Parliament in order to fulfil a EU directive. Explicitly, it accepted the supremacy of supranational law and made an exception only in cases of evident incompatibility of such a law with the French Constitution. As a very recent development it can be noted that the Spanish Tribunal Constitucional allowed the recent bid to modify the Spanish Constitution so as to provide the means to hold a referendum on the EU Constitution project.[26] This referendum which took place a short while ago, produced a positive acceptance of the EU Constitution. In France, a constitutional reform was made, following the opinion of the Conseil constitutionnel, to enable a referendum on the Constitution project.

A problem arises from these explanations with reference to the national constitution: The future Constitution determines its own field of application. This includes member states executing EU law. Does this mean that whenever EU law is executed by a national organ the EU Constitution is exclusively applicable, and not the national Constitution as well? It seems that it is going too far to admit exclusive application of the EU Constitution when member states institutions are concerned by EU law. As national institutions they are also bound by the national constitution (as well as by the ECHR). But the possible conflict between these two constitutions will be resolved by the aforementioned supremacy principle.

However, it must be kept in mind that there will be a limit upon the absolute supremacy of supranational law: as a contribution to institutional equilibrium, neces-

22 See R. Arnold, Teze k otázkám konstitucionalizace a demokratizace Evropské unie, in: Meziná rodní a srovnávací Právní Revue 9 (2003). 41 – 51.
23 STC 64/1991, FJ 46; see also STC 236/1991, FJ 9.
24 Ccost.1984, n. 170.
25 Déc. du 1 juillet 2004 ainsi que du 19 novembre 2004 (Déc. n° 2004-505).
26 See Déclaración de 13 de diciembre de 2004.

sary in the Community for maintaining stability, Article 5 of the EU Constitution project obliges the EU to respect national identity. This obligation, already laid down by Article 6 § 3 of the EU Treaty, will be elaborated in the proposed Constitution. Identity of a member state includes the fundamental structures of the national constitutional order, as it is made evident in Article 5 of the project. Absolute supremacy of supranational law will be thus converted into a relative supremacy in the field of constitutional law.