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"Days of Law Rolando Quadri"

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Vladimir T. Mikić* **DOI: 10.56461/ZR_24.FNSTNS.17**

THE ONGOING INTERNATIONALIZATION OF CONSTITUTIONAL LAW IN EUROPE AND THE BOUNDARIES OF NATIONAL SOVEREIGNTY**

Abstract

Internationalization of constitutional law is in progress in Europe as it is in most of the legal systems throughout the world. It has been occurring in various practical forms, such as the inclusion of case law of international and regional courts into national legal systems. However, from the strictly constitutional point of view, other diverse manifestations of internationalization of constitutional law in Europe have appeared. In the first place, they include the implicit introduction of the particular normative standards set by the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols directly into constitutions. Although the tendency of limiting national sovereignty in the area of protection of basic rights and freedoms is not new, a dilemma remains whether this method, widely used, is the most appropriate one, taking into account the importance of protecting the concept of the dignity of the constitution.

Keywords: *Internationalization of Constitutional Law, EU Law, Boundaries of Sovereignty, Comparative Constitutional Law*

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INTERNACIONALIZACIJA USTAVNOG PRAVA U EVROPI I OGRANIČENJE NACIONALNE SUVERENOSTI

Apstrakt

U Evropi je na snazi internacionalizacija ustavnog prava, kao što je slučaj i sa većinom drugih kontinentalnih pravnih sistema. Ona se javlja u raznovrsnim praktičnim formama, kao što je uključivanje sudske prakse međunarodnih i regionalnih sudova u pravne sisteme država. Sa ustavnopravne tačke gledišta, javljaju se i drugi oblici internacionalizacije ustavnog prava u Evropi. Oni uključuju prećutno neposredno uvođenje pravnih standarda iz Evropske konvencije o zaštiti ljudskih prava i osnovnih sloboda i njenih protokola u ustave. Premda tendencija ograničavanja nacionalne suverenosti u oblasti zaštite temeljnih prava i sloboda nije nova, ostaje dilema da li je reč o odgovarajućem metodu, s obzirom na važnost zaštite koncepta dostojanstva ustava.

Ključne reči: *internacionalizacija ustavnog prava, pravo EU, granice suvereniteta, uporedno pravo*

1. Introduction

European states more and more formally regulate on the constitutional level the role of the European Union (EU) and the Council of Europe (CoE) – their institutions, values, principles, and legal norms. The same goes with the effects of the EU law (and the law of the CoE) on the constitutional law of many European states – whether they are members of the EU or not. Aiming at proposing an answer to the question to which degree the EU law and the law of the CoE represent binding legal sources recognised as such by the constitutions themselves, the analysis contained in the paper encompasses the extent to which these branches of law have inspired particular normative propositions in constitutions.

By frequently practicing borrowings of institutional models and precise dispositions one from another, constitution-makers have been contributing to deepening the problem of mostly unchecked internationalization (Europeanization, or globalization) of national constitutional law. Transnational or supranational law (better yet, "transnational constitutionalism",[1] or "the global convergence of constitutions"[2]) naturally sets limits to any state's aspirations for sovereignty, which is, by definition, manifested through its liberty to adopt its constitution and subsequent legal dispositions (laws). At the same time, comparative models assuredly represent a sort of *supplementary* source for anyone who seeks to find an optimal model for resolving any dilemma in the field of constitutional law.

Among the first forms of internationalization of constitutional law come the constitutional provisions in accordance to which the provisions of confirmed international treaties represent an integral part of internal law. The same goes with the principles of international law which determine the main directions of a country's foreign policy. Some states take upon themselves to apply international law within the framework of the domestic legal system. The transformation of the European constitutional heritage towards a deeply humanitarian direction (in the sense of placing the protection of human rights in its core) has been going on for numerous decades, and is characterized by constitutionalization of basic rights and freedoms protected by international treaties.

It is apparently true that "constitutional law is in the process of increasingly intense internationalization", although at the same time, the process of the *constutionalization of international law*.[3] The traditional pattern, in accordance to which national authorities manifest their constitution-making capacity fully and freely, has proved itself to be nearly over. Thus, the era of classical sovereignty in constitution-making process represents a part of the constitutional history, once a dominant feature in law-making, but nowadays only a fact of recent history. It appears today to be nearly impossible to

[1] R. Yeh, W.-C. Chang, "The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions", Pennsylvania State International Law Review, Vol 27 (2008), 89-124, 95 *et seq.*

[2] *Ibid,* 98.

[3] D. Simović, "Internacionalizacija ustavnog prava – primer Republike Srbije", *Zbornik radova Pravnog fakulteta u Nišu*, LVII/81 (2018), 15-29, 15 and 16.

promote constitutional national sovereignty and at the same time not to guarantee protections of human rights and fundamental freedoms in the manner declared by international (European) forums, i.e. gatherings of countries which agreed *in fact* that basic rights and freedoms need not only to be protected, but also that this protection needs to be recognized at the constitutional level.

In the first part of the paper, elementary types of internationalization of constitutional law are exposed. Supranational character of the constitutional law cannot be easily comprehended without the role of the EU and the CoE as the organizations providing mechanisms which have effectively been making progress in the field of limiting national sovereignty of their member states, and, thus, the second part is dedicated to that role and the effects they make on the (national) constitutional law. Finally, before the concluding remarks, the influence of the international law in the process of making European national constitutions follow more and more similar patterns is explained.

2. Basic forms of the internationalization of the constitutional law within the European constitutional heritage

At the beginning of the third millennium, as one Belgian author claimed, we were witnessing the process of "homogenisation of constitutions (*homogénéisation des Constitutions*)", and, "the emergence of a common constitutional law (*un droit constitutionnel commun*), founded on the shared legal principles (*principes juridiques partagés*)".[4] Most definitely, constitutions appear to be more and more similar one to another. This process is developed on the basis of more feasible access to other countries' constitutions, but it is also made easier by the adoption and subsequent ratification of relevant international treaties which have for their principal subject the protection of basic rights and freedoms.

The internationalization of constitutional law can verifiably be claimed to represent "the progressive submission of the activities and the reciprocal relations of the subjects of the international legal order to the principles of constitutionalism"[5] The product of a interchanges between different constitutional models had long ago been assessed as the one creating "constitutional cocktails" (as was assessed by Joseph Barthélemy).[6] Therefore, mutual similarities of constitutional norms point to direct inspiration from the Constitution of State A to the Constitution of State B. It is on the basis of profound and stable legal-historical proofs that one can claim that there is nearly a deeply manifest similarity between: the Constitution of Romania of 1991 and the Constitution of Moldova "written" three years later; the Constitution of Slovenia (1991) and the Constitution of

[4] M. Verdussen, *Introduction*, in: *La Constitution belge: Lignes & entrelignes*, Le Cri édition, Bruxelles 2004, 11-21, 17.

[5] S. Bartole, "International constitutionalism and conditionality. The experience of the Venice Commission", *Associazione Italiana dei Costituzionalisti Rivista* 4/2014, 1.

[6] M. Prélot, *Političke institucije: Opća teorija političkih institucija*, Zagreb, Politička kultura 2002, 109.

Serbia (2006), the Constitution of Italy (1947) and that of Malta (1964), the Constitution of Croatia (1990) and the Constitution of Montenegro (2007), the constitutions of Iceland (1944) and Denmark (1953) etc.

Another method of internationalizing the constitutional law is the one by which ratified international treaties are, by the express wording of the national constitution, legally obligatory within the domestic normative system, as is the case with Albania (Article 116 Paragraph 1 "b" of the Constitution of 1998), Poland (Article 87 Paragraph 1 of the Constitution of 1997), Portugal (Art. 8 Para. 1 of the Constitution of 1976), and the Russian Federation (Art. 15 Para. 4 of the Constitution of 1993). Similar provisions are contained in the constitutions of various other European countries.[7] This is particularly the case with the constitutions which imply the immediate implementation to ratified international treaties,[8] or the widely recognized principles of the international law,[9] which, in addition, form a fundament of the national foreign policy.[10]

With the time "speeding up, promoting a multitude of overlapping challenges to constitutional orders",[11] incorporation of international law in the internal legal order is accomplished primarily through international treaties. In addition, issues that have a direct connection with international law include: asylum and immigration and citizenship, European Union, human rights and fundamental freedoms, as well as international humanitarian law. International law is brought into a constitutional relationship with the delegation of national sovereignty to international organizations, collective security, and the EU law. The "internationalization of constitutional law refers to development international and in certain regions of supranational law that binds states to apply norms related to constitutional matter".[12]

The ECHR has been accorded the status of the document of the immediate application in the Constitution of Bosnia and Herzegovina (Art. II Para. 1), but is also recognized as the source of law in constitutions of several European countries (Art. 17 Para. 3 of the Constitution of Albania, Art. 5 of the Constitution of Cyprus, Art. 1 Para. 3 of

[7] Art. 6 Para. 4 of the Constitution of Armenia of 1995, Art. 148 Para. II of the Constitution of Azerbaijan of 1995, Art. 10 of the Constitution of the Czechs of 1992, Art. 28 Para. 2 of the Constitution of Greece of 1975, Art. 138 Para. 3 of the Constitution of Lithuania of 1992, Art. 9 of the Constitution of Montenegro of 2007, Art. 16 Para. 2 and Art. 194 Para. 4 of the Constitution of Serbia of 2006, Art. 96 Para. 1 of the Constitution of Spain of 1978, and Art. 9 Para. 1 of the Constitution of Ukraine of 1996.

[8] Art. 122 Para. 1 of the Constitution of Albania, Art. 91 Para. 3 of the Constitution of Poland, Art. 8 Para. 3 of the Constitution of Portugal, and Art. 16 Para. 2 of the Constitution of Serbia.

[9] Art. 3 Para. 1 of the Constitution of Estonia of 1992, Art. 25 of the Constitution of Germany of 1949, Art. 28 Para. 1 of the Constitution of Greece, Art. 8 Para. 1 Sec. 11 of the Constitution of North Macedonia of 1991, Art. 194 Para. 4 of the Constitution of Serbia, and Art. 1 Para. 2 of the Constitution of Slovakia of 1992.

[10] Art. 9 of the Constitution of Armenia, Art. 24 Para. 1 of the Constitution of Bulgaria of 1991, Art. 135 Para. 1 of the Constitution of Lithuania, Art. 15 Para. 1 of the Constitution of Montenegro, Art. 10 of the Constitution of Romania, Art. 16 Para. 1 of the Constitution of Serbia, and Art. 18 of the Constitution of Ukraine.

[11] M. Belov, "Three Models for Ordering Constitutional Orders", *Pravni zapisi* XIII/2 (2022), 361-387, 363.

[12] Simović, 17.

the Constitution of San Marino of 1974). In Sweden, "not one law or any other regulation which would be contrary to the obligations of Sweden towards the [ECHR] can be adopted", as is stipulated in the Art. 19 of the Chapter 19 of the Instrument of Government, the main constitutional document in the Swedish legal system which does not know a strictly codified constitutional structure. These are some of the features of the internationalization of constitutional law in European countries.

3. Law of the European Union and law of the Council of Europe as a tool for limiting the national constitutional sovereignty

The mere existence of the international law cannot be distinguished from the states' relinquishment of their sovereign authority. That appears to be a *condition sine qua non* for establishing the community of mutually legally-binding inter-state (i.e. international, continental, or regional) agreements. Although the term *internationalization of the constitutional law* does not have a definite and perfectly understandable meaning,[13] it is obvious that whenever a constitution gives the full legal effect to the provisions of a ratified international treaty, it leaves a vast space for the constitutional matter to be filled by an international – not *national* – legal document.

Although it is logical that "when two constitutions say the same thing, they do not mean the same thing",[14] certain influences in the field of constitutional law are made by international legal documents. Thus, it appears that proper "international constitutional law" as well as of the "international constitutionalism"[15] is slowly taking place. In addition, it is quite probable that "the future" belongs "to a constitutional geometry of power", composed "not of exclusive jurisdictions but rather of webs, networks and a range of spheres".[16] This is particularly the case with the international human rights law and international humanitarian law, as the "sources of interpretation of the scope and limitations of constitutional rights", by the means of "providing sound criteria for the identification of constitutional rights which are not expressly included within the actual text of the Constitution".[17] However, because "any given constitution does not set up a normative *universum* anymore but is, rather, an element in a normative *pluriversum*",[18] "the trend globalization of constitutional law is not new", and, hence, "ever since the adoption of the first written documents constitution, established institutional

[13] *Ibid,* 15.

[14] P. Häberle, Peter, *Ustavna država*, Zagreb, Politička kultura 2002, 233.

[15] Bartole, 3.

[16] Belov, 381.

[17] M. J. Cepeda, "The Internationalization of Constitutional Law: A Note on the Colombian Case", *Verfassung und Recht in Übersee*, 2008, 61-77, 64-65.

[18] A. von Bogdandy, "Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law", *International Journal of Constitutional Law* 6(3-4) (2008), 397-413, 401.

arrangements served as a model models for states that were yet to undergo the process of constitutionalization."[19] The process of internationalization of constitutional law has been spread throughout the world by the means of imitating the national constitutional law of the colonizer,[20] enriching at the same time the "globalisation of the constitutional culture".[21]

Various European states integrate particular provisions of the supranational documents in their constitutions. Because there is no space for any type of selection of provisions of the European Convention on Human Rights and Fundamental Freedoms (ECHR), they are mainly incorporated in the constitutional documents of particular European states. The same is applicable to certain provisions of the Treaty of the European Union, although indirectly. The Treaty of Maastricht, "which is probably the most important constitutional change of a generation",[22] found its way in the constitutional documents of some European states, whether member-states of the EU, or not. The increase in mutual constitutional "borrowings" between European countries obviously manifest the reducing capacities of the national constitution-making.

The tendency to make the association into the EU a constitutional matter contains several elements. One refers to the issue of European unification at the level of principles, as an aim and political tendency of the creators of the constitution, the other to the transfer of powers from the sphere of state affairs to the EU, while the third implies the role and distribution of powers of public authorities in the process of shaping the policy of the EU and its implementation. However, fulfillment of these values represents the legitimacy basis for the transfer of state powers to the European Union.

The role of European Court of Justice (ECJ) and of the European Court of Human Rights (ECtHR) cannot be dismissed in the regard of enriching texts of the constitutions of European countries,[23] because "the immediate impact of its decisions, in the case of a conviction of a state for violating fundamental freedoms and rights, consists in pointing out the weaknesses of national law", particularly by the means of national courts adopting decisions by which basic rights guaranteed by the ECHR are reaffirmed.[24] The role of the ECtHR is particularly important because this court and the ECJ are "in fact functioning as humanitarian sovereigns, taking sovereign decisions related to human rights without real democratic empowerment".[25] The unique nature of the ECHR as a legal document "lies in the objective character of human rights, which has the effect of overcoming state interests and establishing common solidarity both in terms of the

[19] Simović, 17.

[20] *Ibid,* 17.

[21] M. Verdussen, *Introduction*, in: *La Constitution belge : Lignes & entrelignes*, Le Cri édition, Bruxelles 2004, 11-21, 17.

[22] A. Adonis, *Parlament danas*, Unireks, Podgorica 1996, 19.

[23] Bartole, 2.

[24] G. P. Ilić, M. Marković, "Doprinos Ustavnog suda Srbije vladavini prava", in: *Uloga Ustavnog suda u izgradnji vladavine prava*, Miločer 2015, 59-72, 61.

[25] Belov, 377.

enjoyment of rights and in terms of their exercise",[26] no matter the sovereignty is constitutionally defined as "inalienable",[27] "non-transferrable",[28] "indivisible",[29] "unlimited in time",[30] and "the foundation of the government".[31]

The process of "Europeanization" of the constitutional law has gained a particularly strong impact in the second half of the 20th century, leading to "the formation of the international constitutionalism by supporting the adoption of the constitutional legislation in the new democracies".[32] A truly composite, new, normative order has been created in the context within which "the EU, despite its nature as the first well-developed form of supranational constitutionalism and thus of constitutionalism beyond statehood".[33] In the decision adopted in the case of *Loizidou v. Turkey* (1995), the ECtHR "emphasized that the ECHR is a "constitutional instrument of the European public order".[34] In addition, there is a strong argument that lies behind the suggestion that the *Constitution* for the European Union of 2007[35] "tested our traditional notion that only nation-states could write Constitutions",[36] particularly because "the making of the European Constitutional Treaty for the first time disconnected the relationship between constitutions and nations", in the sense that "a constitution now can be made upon something other than a nation".[37] Also, European constitutional heritage is particularly developed by the means of the opinions delivered by the Venice Commission.[38]

The constitutional enforcement of human rights and fundamental freedoms is reinforced by the process of the internationalization of human rights. The prevailing model is the implementation of the International Covenant on Civil and Political Rights of 1966, but, as well, of the regional documents protecting human rights, such as the ECHR.[39]

In the desire to ensure the most complete protection of basic rights and freedoms, authors of the constitutions invoke specific international legal acts as sources of human rights law. The first such source is the Universal Declaration of Human Rights, adopted by the United Nations General Assembly. According to the words of four constitutions

[26] Ilić, Marković, 60.

[27] Art 1 Para. 2 of the Constitution of Estonia, Art. 1 of the Constitution of North Macedonia, Art 2. Para. 1 of the Constitution of Croatia.

[28] Art. 1 of the Constitution of North Macedonia, Art 2. Para. 1 of the Constitution of Croatia.

[29] Art. 1 of the Constitution of North Macedonia, Art 2. Para. 1 of the Constitution of Croatia, Art. 3 Para. 1 of the Constitution of Portugal.

[30] Art. 1 Para. 2 of the Constitution of Estonia.

[31] Art. 1 Para. 2 of the Constitution of Greece.

[32] Bartole, 5.

[33] Belov, 383.

[34] Ilić, Marković, 70.

[35] Underlined by the author of this paper.

[36] Yeh, Chang, 89.

[37] *Ibid*. 101-102.

[38] Simović, 19.

[39] Ilić, Marković, 59.

in Europe, it is recognized as an auxiliary tool for the interpretation of constitutional provisions on fundamental rights, and according to the fifth - it also has a binding legal effect. Thus, "constitutional provisions on human rights and freedoms are interpreted and applied in accordance with the Universal Declaration of Human Rights and other conventions and treaties to which the Republic of Moldova is a party" (Art. 4 Para. 1 of the Constitution of Moldova). Likewise, "constitutional orders relating to fundamental rights must be interpreted and implemented in accordance with the Universal Declaration of Human Rights" (Art. 16 Para. 2 of the Constitution of Portugal). In Romania, "constitutional provisions related to the rights and freedoms of citizens are interpreted and applied in accordance with the Universal Declaration of Human Rights, as well as conventions and treaties to which Romania is a signatory" (Art. 20 Para. 1), while in the Constitution of Spain "the provisions relating to the fundamental rights and freedoms recognized by the Constitution are interpreted in accordance with the Universal Declaration of Human Rights and with international treaties on the same issues that Spain has ratified" (Art. 10 Para. 2). Finally, and most *explicitly*, "the Universal Declaration of Human Rights is binding on Andorra" (Art. 5 of the Constitution of Andorra).

4. Conclusion

Constitutional identity cannot easily be defined without recoursing to international sources of legal authority. A new type of constitution-making has been taking place. However, for this process to succeed, it is in the best interest of its creators to manifest the will to respect the proper boundaries of the constitutional regulation and that of the dignity of the constitution.

The pace of globalization of constitutional law represents a tendency which cannot be put aside, but, still, national constitutions remain a gravity centre when it comes to the assessment of the very core of the constitutional matter. Constitutional cross-border exchange is welcome when it does not confront the liberty of the constitution-writers to determine the scope of their intervention, and it cannot be reasonably argued that much of the text of ECHR should be contained in any constitution. This does not mean that constitutional acculturation between various models of governments is inappropriate, but only that dignity of the constitution *in theory* prevails the highest national legal act from intrusions suggested by the solutions contained in the authoritative international documents. Modern constitutional theory is rich in notices of comparative law, but that does not mean that constitution-makers need to follow one another in the game of "rewriting" the solutions already put in place somewhere else, for this confronts most directly the integrity of the national constitutional law.

The strict separation between international law (or, as for that matters, EU law) and national constitutional law has been reduced, as the state-centered constitutionalism has shown that there should be no ill-will between the constitution-making process and the recognized and strongly enforced regional (international) legal standards.

However, a certain re-maping of the constitution-making needs to represent a synergy between the two, and not the domination of the one (the international part of the puzzle). In the horizon of the comparative constitutional developments a benefit should arise for all the actors involved if a particular space could be enabled for authentic constitution-making, which would deliver a very special sort of contribution to the theory and practice of comparative constitutional law.

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