Common Legal Thinking in European Constitutionalism: Some Reflections

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1 Common Legal Thinking and the Integration Process

Common legal thinking in Europe is mainly a fruit of European integration. In general, legal thinking means the principal approaches to law which are reflected in the understanding of legal texts, which determine the value concepts and the balance of their conflicts, which influence the methodology of interpretation, which are relevant for the degree of acceptance of constitutional and international or supranational law in the interpretation of ordinary law, and which are the basis of the readiness to get inspired by conceptual solutions stemming from a different legal order and much more.

These principal approaches to law are significantly visible in jurisprudence but also in academic discussion and in political action, in particular in the processes of constitutional reforms and in basic ordinary legislation. It seems that jurisprudence, notably constitutional and "transnational" jurisprudence produced by national constitutional or supreme courts as well as by multinational regional courts, in Europe by the courts in Strasbourg and Luxembourg, is most important for the analysis of common legal thinking.

Constitutional law in a formal as well as in a functional sense is the main indicator of a common legal thinking. Functional constitutional law can also exist in multinational integration areas, in the form of international treaties, however with a substantially basic and therefore constitutional content. Common legal thinking in integration areas can therefore be sufficiently perceived only if the various layers of constitutional law are taken into consideration in a holistic view.[1]

Legal thinking in a national context, at least in the field of constitutional law, is to a great extent based on domestic traditions, rooted in the particular cultures and corresponding to the values of a society. In the era of regional integration and globalisation national systems have abandoned their isolation, voluntarily or in view of the indispensability of transnational cooperation, and "opened" their sovereignty

[1] Häberle 2011; Weber 2010, p. 1–4.

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relativising the exclusiveness of the national normative regime on their territories.[2] Common legal thinking develops with a significant intensity in integration areas where a *communitarisation* of politics, economy and other fields takes place. The more this process advances, the more law and legal thinking approximate. The model of such a far-reaching opening process is the supranational system of the European Union.

The EU as a regional integration area promotes common legal thinking to a high degree due to its supranational structure and its broad competence spectrum which potentially covers nearly all the fields related to a State. The harmonising mechanisms and processes within the Union are numerous: harmonisation or at least approximation of law, the orientation towards common values, the preliminary question system for uniform interpretation, the multinational decision process creating common law with participation of the various Member States, etc.

Legal thinking in this sense refers to the sphere of EU-related matters while the question of a *European* common legal thinking refers to a broader area which includes the purely national fields under the aspect of common national principles as well as the impact of the European Convention of Human Rights (ECHR).

Common principles based on a common value orientation can also be found on the universal level, in particular in the context of the Human Rights Covenants and of the Charter of the United Nations. These universal principles are recognised by the international community as a consequence of their outstanding importance for peaceful coexistence. Cooperation in the globalised world can only be assured if it is based on universal principles such as the respect of human rights or of the legal obligations resulting from international treaties and in particular from the UN Charter. If these principles are violated, globalised cooperation, namely in the economic field, is seriously hindered. Universal principles (as a fruit of common legal thinking) and international cooperation, which is also a sort of integration, albeit a loose one, are reciprocally connected.

It must be admitted that universal principles are much more exposed to relativism resulting from regional cultural diversity[3] than common regional principles in integration areas with a (relatively) coherent culture and tradition. However, divergences in legal thinking exist to a certain degree also in such consolidated areas.

2 The European Constitutional Area as a Basis of Common Legal Thinking

2.1 The European Constitutional Area: Definition

The identification of European legal thinking requires analysis of the European constitutional area as a whole. It seems that the various levels of constitutional law in Europe are interwoven and form a sort of normative and functional unit. This indi-

[2] German FCC, 2 BvL 52/71 (Order of 29 May 1974)–*Solange I* (in BVerfGE 37, 271 [280]).
[3] Arnold 2013.

cates a conceptual coherence of basic ideas in an institutionally connected system. The European constitutional area is not identical with the European Union but includes the ECHR. The EU forms the institutionalised integration area while the conceptual integration area, containing the basic values of constitutional law, fundamental and human rights as well as the rule of law, includes the signatories of the ECHR.

It is evident that the institutionalised integration area of the EU characterised by supranationality is more consolidated and therefore a field of stronger *communitarisation* of the legal orders composing it. The integration process also leads to common legal thinking in the infrastructure of the ordinary legislation where harmonisation even creates uniform law. The consequence is not only common but uniform legal thinking in these fields.

2.2 Vertical Impacts and Horizontal Influences in the European Constitutional Area

A distinction can be made between *vertical impacts* and *horizontal influences*[4]. Vertical impact means the normative obligation to follow a superior legal order. The EU Member States have to respect the EU law primacy, and even more, by a transfer of internal competences to the supranational institutions they have opened their formerly closed legal orders and accepted the existence of EU law together with national law on their territories.[5] The vertical normative impact of supranational on national law is evident.

A similar vertical impact can be stated for the relationship between the Council of Europe Member States, among them all the EU members, and the ECHR. The Convention, in its form an international treaty but in substance constitutional law, is of binding force for the signatories. Even if the mechanisms of this relationship are basically international, they are functionally supranational.

The influence of Member States' concepts on legal thinking and shaping of EU law is significant. The general principles of EU law in the basic constitutional fields of fundamental rights and rule of law elements are based on a common constitutional tradition, as Art. 6.3 TEU says. This corresponds to a long tradition in community law which dates back to the origins of formulating fundamental rights by the European judges.[6] The EU Charter of Fundamental Rights which has been established as an autonomous part of the EU primary law, has not abandoned this connection. The mentioned Art. 6.3 TEU amalgamates national, supranational and conventional concepts by making reference to both national and conventional guarantees. Furthermore, the EU functionally connects the EU guarantees with national constitutional jurisprudence as well as with the interpretation of the ECHR by the Strasbourg Court (Art. 52.3 and 4 EUCFR). It results from this normative pivot that

[4] Arnold 1997, p. 673–694.
[5] German FCC, 2 BvL 52/71 (Order of 29 May 1974)–*Solange I* (in BVerfGE 37, 271 [280]).
[6] Rideau 2010, p. 248–251.

the vertical impact of national legal thinking as expressed in national constitutional concepts exists to a considerable extent.

It can be seen that the ECHR exerts influence on EU law which has a normative basis in the mentioned article even before the EU's formal accession to the Convention. Once accomplished, the accession will create full subordination and a vertical normative impact of the ECHR on the EU legal order. However, the influence of national concepts on the interpretation of the ECHR is less manifest as the same influence with regard to EU law.

It should be mentioned in this context that the accession has been severely threatened by the Court of Justice's negative opinion of 18 December 2014. The Court puts forward the argument that "the specific characteristics and the autonomy of EU law" are not duly safeguarded by the accession agreement in particular because there is no mechanism foreseen to coordinate the concepts of articles 53 ECHR and 53 EUCFR which threatens "primacy, unity and effectiveness of the EU law".[7] Furthermore the principle of mutual trust seems to be endangered; accession could "upset the underlying balance of the EU and undermine the autonomy of EU law".[8] In addition, the advisory opinion mechanism foreseen by Additional Protocol No. 16 to the ECHR could, in the Court's opinion, be contrary to the obligation of the Member States' courts to make requests for preliminary rulings to the Court of Justice of the EU.[9] Furthermore, the Court fears that its monopoly of deciding on controversies enshrined by Art. 344 TFEU could be undermined.[10] Additional doubts have been formulated by the Court concerning the co-respondent mechanism as well as to the prior involvement procedure.[11]

The Court's opinion has aroused[12] and will arouse in the future vehement debates on the question whether these arguments are well founded. The review mechanism of the ECHR is based on the control under European standards of rights and respects also a certain margin of appreciation of the Council of Europe's Member States. This will also be applied to the European Union. It seems that a solution to the questions raised by the Court will take a long time so that harmonization of fundamental rights protection in Europe will not be attained in the near future.

A *horizontal mutual influence* takes place, to a certain extent, between the States themselves, with significant intensity between the EU members through the intermediation in particular of the supranational jurisprudence, and, with less intensity but also to a considerable degree, with and between the other Member States of the Council of Europe. This latter process of transfer takes place in particular through the common impact of the ECHR on the national legal orders, institutionally reinforced by the individual complaint before the ECtHR.

[7] Opinion 2/13, *Accession to the ECHR* (ECJ 18 December 2014) para 189.
[8] Opinion 2/13, *Accession to the ECHR* (ECJ 18 December 2014) para 191, 194.
[9] Opinion 2/13, *Accession to the ECHR* (ECJ 18 December 2014) para 196.
[10] Opinion 2/13, *Accession to the ECHR* (ECJ 18 December 2014) para 214.
[11] Opinion 2/13, *Accession to the ECHR* (ECJ 18 December 2014) para 258, summary.
[12] See for example Fuchs 2015 and Michl 2014.

A direct State-to-State transfer of concepts occurs mainly by a "judicial dialogue" [13]or, in the legislative process, by a sort of "political dialogue" in the sense that models which are adequately experienced in other countries are integrated into the own legal order. The horizontal judicial dialogue is based on a transfer of the persuasive authority of foreign jurisprudence, a voluntary process which requires the existence of legal similarities in a relatively homogeneous context of legal tradition. Homogeneity in an integration area, particularly in a supranational system, is conducive to a conceptual transfer by dialogue. The interpretation of undetermined notions as regularly used in constitutions in their basic provisions can be enriched by such horizontal dialogue.

On a pluri-national level interpretation impulses can also arise from transnational texts such as the ECHR. Horizontal and vertical transfer possibilities can compete; the vertical transfer will be preferred in general because of the binding character of the transnational text. The horizontal state-to-state approach is subsidiary to the vertical approach; i. e. the former only applies if the interpretation of value-oriented provisions is left to the national sphere or the transnational text does not cover the case in question.

In conclusion it can be said that legal thinking in a pluri-level integration system has a tendency to converge by vertical and horizontal conceptual transfers. This occurs on the basis of institutionalisation (vertical transfer) or of persuasion (horizontal transfer).

2.3 Conceptual Transfer

The development of common legal thinking is a process of intellectual integration with varying velocity. It is a reciprocal, inter-cultural process with the result of a conceptual Europeanisation.

Transfer is the keyword for the development of common legal thinking. It is a process which regularly takes place between different legal orders, of states or of internationally determined entities (as the supranational EU) or normative systems (as the ECHR). Transfer within a legal order, e. g. within a State, is possible, in particular within federal systems from one of the constituent parts of the Federation to the other. This type of "internal" transfer has to be distinguished from the regular type of "external" transfer which is relevant in our context.

A transfer can lead to a total or partial reception of a foreign concept or can have a guiding function with a directive influence on the own interpretation of norms or on the balancing of conflicting values, in particular fundamental rights. The main examples are indefinite terms in constitutional provisions, predominantly fundamental rights and rule of law elements. Constitutional argumentation is to some extent result-related; the important aspects of the transfer refer in particular to the

[13] Judicial dialogue takes place also between the ECtHR and the national constitutional courts, Blanke 2012, p. 186.

definition of the terms which are at the basis of the concept, determining its contents and limits as well as to the results of balancing, such as for example to the balancing between freedom and security or personality rights and public interest.

The process of transfer can be clearly analysed when national concepts are transferred to the EU legal order. As normative concepts, they remain part of the law to which they originally belong. As soon as the concepts are integrated into a different legal order, they have to be adapted to its structure and finalities, an adaptation which potentially entails changes in content and function. The transferred concept is destined to form a functional unit with the rest of the new legal order. This methodological approach has been clearly defined by the *Internationale Handelsgesellschaft* decision of the ECJ[14] for the recognition of unwritten general principles of community law as fundamental rights or rule of law guarantees. What the ECJ has expressed in this decision is a general rule for the integration of a transferred concept into another legal order.

The transfer is carried out by the instruments of the receiving order (in case of a judicial transfer by the decision of a court of this order, in case of a normative transfer by shaping the own legislation in accordance to this concept). It is not a normative but an intellectual transfer. The judicial or normative process of reception is effectuated by the institutions and with the means of the receiving order and results in the judicial application or the creation of own law.

Transfers can have a *genuine*, *primary* function, such as the interpretation of an own law concept according to the understanding of the parallel concept in a different legal order, or it can have a *secondary* function, a control or review function, if the interpretation of the own legal concept is to be controlled for its compatibility with guarantees established by a different legal order. An example for the former is the interpretation of national in accordance with supranational law, a widespread instrument for avoiding or diminishing conflicts between the two legal orders. An example for the latter is the impact of the ECHR on the interpretation of a national concept in a review case and the subsequent national interpretation in conformity with the Strasbourg solution. Common legal thinking in the sense of this second case also shows elements of the first category. It seems that the interpretation of German fundamental rights in the light of the Strasbourg jurisprudence as a general rule, developed by the German Federal Constitutional Court (FCC),[15] embodies an aspect of the primary as well as of the secondary transfer type: on the one hand, it responds to the control function of the ECtHR and expresses the readiness of national values as formulated by the German Basic Law (BL) to comply with the Convention. This is, according to the FCC, a consequence of the commitment to inviolable and inalienable human rights, as contained in Art. 1.2 BL[16], and of an internationalised concept of the rule of law. It includes a preventive reaction to a possible review by the Strasbourg Court.

[14] Case 11-70, *Internationale Handelsgesellschaft* (ECJ 17 December 1970) para 4.

[15] German FCC, 2 BvR 1481/04 (Order of 14 October 2004) para 62 et seq.–*Görgülü* (in BVerfGE 111, 307 [317]).

[16] Blanke 2012, p. 187, 190–191, also with reference to the Italian jurisprudence.

3 Common Tendencies in European Constitutional Law as a Reflection of Common Legal Thinking

There are four major tendencies in constitutional law in Europe: the individualisation, the constitutionalisation, the internationalisation and the (vertical and horizontal) separation of powers.[17] They find their expression mainly in jurisprudence and in constitutional reforms. Corresponding processes take place on various levels of constitutional law, i. e. the national, the supranational and the conventional level, and they are homogeneous, at least to a considerable degree. These developments are necessarily based on a common European constitutional thinking.

3.1 Individualisation on the National Level

One of the most striking tendencies is the growing importance of the individual not only in politics but also in law, especially in constitutional law.[18] The protection of the individual by fundamental rights is in the centre of modern constitutional law based on the idea of human dignity which is either expressly formulated in the Constitution or is an implicit element of it. In European constitutionalism human dignity has increasingly become a written fundamental guarantee with specific importance for the judiciary not only in Germany but also in Central and Eastern Europe[19]. It corresponds to this tendency that human dignity as a fundamental principle and right has been introduced into the EUCFR and placed, as in the German Basic Law, at the top of the fundamental rights list[20]. This seems to be an ideological signal for the "anthropocentric" character of modern constitutionalism and the indispensability of the complete and efficient protection of the individual's basic rights. Human dignity, notwithstanding the difficulties in defining it in all aspects, is the core value for the protection of the individual, thus being the basis of any other fundamental right. Without any doubt, dignity is also inherent in the ECHR even if the Convention text refers to it only indirectly by its Art. 3.

The protection of the individual by fundamental rights is a requirement of the common anthropocentric approach in European constitutionalism, and therefore an expression of common legal thinking. It is evident that the common conviction does not cover the details, but refers to the principle, i. e. the idea to protect the individual efficiently by constitutional guarantees, an idea which is linked to the respect of the person and therefore basically to human dignity.

[17] Arnold 2004, p. 733–751.

[18] The issue of substantive and functional efficiency of fundamental rights protection cannot be fully elaborated in this context due to its complexity. For a more detailed analysis see Arnold 2015, p. 3–10.

[19] Zakariás and Benke 2012, p. 44–67.

[20] See for an analysis of the European system of fundamental rights protection Blanke 2012, p. 157–232; Stern 2006, p. 169–184; with specific regard to the EUCFR see also Grabenwarter and Pabel, in Blanke and Mangiameli (2013), Art. 6 TEU, para 16–39.

It is common constitutional thinking in Europe that fundamental rights protection must achieve an optimal standard, both in substance and accessibility. All kinds of dangers, present or future, known or unknown, should be covered, a protection task which has to be fulfilled as far as possible by judicial interpretation. This task corresponds to the evolutionary, "living" character of the Constitution[21]. Furthermore, restrictions of fundamental rights, in particular from the legislator, must be prevented from becoming excessive. Proportionality, which in Europe has become a flexible, well operable instrument at the end,[22] even on a universal scale, and the guarantee of the essence of a fundamental right are mechanisms to satisfy the primordial principle of individual freedom.

3.2 Individualisation on the Supranational and Conventional Level

The same basic ideas and the same methodological orientation can be found on the supranational and conventional level. The principle of "effet utile" is well known through the jurisprudence of the European courts[23] and the judicial task to ensure a comprehensive coverage of the protection by interpretation is clearly recognised. The judicial approach to both the EUCFR and the ECHR, is dynamic and therefore takes account of the ongoing evolution. In particular, the recent jurisprudence on data protection is significant for this[24].

Furthermore, proportionality and the guarantee of the essence of fundamental rights are well implemented on these two levels. The express limits for restrictions of fundamental rights in Art. 52.1 EUCFR correspond to the current standards in European constitutionalism. These limits have already been formulated in the jurisprudence of the ECJ, notably in the *Hauer* case.[25] With regard to proportionality, the jurisprudence of the Strasbourg court has developed a detailed system for the balancing of conflicting values using formula such as "pressing social need", etc.[26]

3.3 Constitutionalisation: Common Legal Thinking in the New Rule of Law Concept

The rule of law is the core of constitutional law, a sort of constitutional *Grundnorm*. It corresponds to common legal thinking in Europe that the constitution is

[21] Berti 1990, p. 234 et seq.
[22] Institut Louis Favoreu 2010; Meyer-Ladewig 2012, p. 239–240.
[23] Potacs 2009, p. 465–487; Appl. No. 15318/89, *Loizidou v Turkey* (ECtHR 23 March 1995) para 72.
[24] Case C-131/12, *Google* (ECJ 13 May 2014) para 68 et seq., 98.; Case C-212/13, *František Ryneš* (ECJ 11 December 2014) para 28.
[25] Case 44/79, *Hauer* (ECJ 7 February 1973) para 23.
[26] Meyer-Ladewig 2006, Art. 8, para 42–43a.

recognised as the "supreme law of the land", the basic legal order of the State, with primacy over all branches of public power, including the legislator.[27] This new, substantive rule of law concept[28] embraces not only legality of executive and judicial action, the attributes of the original formal rule of law concept, but also *constitutionality*. It is value-oriented and fundamental rights are necessarily linked to it. Law is conceived as the instrument to achieve justice. The Constitution being the basis, legislation puts it into effect in detail. Public power shall not only be bound by the law (i. e. any law whatsoever, as it was meant under the former "formal" rule of law doctrine), but by constitutional law and legislation which is conform to it. This is how the rule of law encompasses a requirement of justice, not to mention that constitutional law consists of written norms and unwritten values and principles inherent in it.

The new approach has been clearly expressed by the French *Conseil Constitutionnel*: "La loi n'exprime la volonté générale que dans le respect de la Constitution"[29]; i. e. only legislation which conforms to the Constitution can be regarded as the expression of the will of the people pronounced by their representatives in Parliament. Primacy of the Constitution is accepted by common legal thinking in Europe.

In a significantly growing number of States primacy is safeguarded by constitutional courts. The development of constitutionalism since the second half of the 20th century demonstrates the triumph of the Austrian model of constitutional justice, the creation of constitutional courts, distinct from ordinary supreme courts, with the power to declare legislation unconstitutional in case of non-conformity with the Constitution. This is based on an advanced concept of rule of law the necessity or desirability of which seems to correspond with a widespread conviction in Europe. The emerging judicial review of compatibility of ordinary law with the Constitution is characteristic for the new democracies in Central and Eastern Europe, countries which all (with the exception of Estonia) have implemented the Austrian model of constitutional justice.[30] The review of legislation is its core element and of high importance for transformation. Also in more traditional systems in Europe, judicial review of legislation is increasing, sometimes, as in Scandinavian states, through the initiation of ordinary courts not willing to apply legislation which they qualify as unconstitutional. The new Finnish Constitution of 1999 gives, against a long-lasting tradition, the courts the competence not to apply legislation in case of "evident conflict" with the Constitution. The Swedish Instrument of Government permits a decentralised judicial review of legislation by its revised Art. 14 of Chap. 11, even if conflict with the Constitution is not evident. Norway has been carrying out such a review for a long time.[31] On the basis of an increasing common perception of how the primacy of the Constitution shall be put into effect,

[27] Tanchev 2013, p. 261–256.
[28] For the philosophical and historic foundations of Rule of Law, of "imperium legis" (p. 49) see Sellers 2014, p. 3–13 as well as Kirste 2014, p. 29–43.
[29] French Constitutional council, Decision n°85–197 DC (23 August 1985) para 27.
[30] Brunner 1993, p. 819–826; Luchterhand 2007, p. 259–356; Arnold 2003, p. 99–115; Arnold 2006, p. 1–21.
[31] Smith 2000, p. 11–13.

existing constitutional justice has been consolidated or enlarged (see France with the introduction of an *a posteriori* review of legislation[32], Belgium where the *Cour d'arbitrage* was converted into a constitutional court[33]) or even a constitutional court was created (as in Luxembourg[34]).

In the United Kingdom, the supreme constitutional dogma of sovereignty of Parliament[35] is the traditional theoretical barrier against the challenge of Westminster legislation by courts, but in the last decades this doctrine has been considerably weakened. The processes responsible for the beginning transformation of this extremely restrictive dogma are in particular: devolution with the establishment of parallel powers to Westminster Parliament[36], installation of the mechanisms of the Human Rights Act,[37] and *Factortame* jurisprudence[38]. It has to be noted that in the UK, in contrast to the continental constitutional systems, there is no written constitution in a single document, but functional constitutional law does exist and consists of legislation, jurisprudence and (not normatively binding) conventions. Parliamentary legislation is at the top of the internal normative hierarchy. Legislation with basic contents cannot be made unchangeable by successive legislation because, in view of the sovereignty doctrine, Parliament cannot bind its successor. Judicial review of legislation as it has developed on the continent is therefore not compatible with the UK doctrine.

Despite this exceptional situation, common legal thinking in Europe clearly adheres to the new concept of rule of law accepting the primacy of the Constitution over the legislator and promoting judicial review, preponderantly through particular constitutional courts in accordance with the Austrian model which has developed towards a "European" model.

Constitutional justice is not only taking place on the national level but also within the EU. Supranational legislation, as it is well known, is reviewed, on submission, by the Court of Justice of the EU. Primary law is "the basic constitutional charter", as the court formulated in an Opinion.[39] Secondary law has to conform to it, otherwise it could be declared void. National courts when applying EU secondary law and esteeming it incompatible with EU primary law have to initiate preliminary ruling proceedings according to Art. 267.2 lit. b TFEU. The modern concept of the rule of law is rooted in the supranational order and has been specified by the jurisprudence of the ECJ[40] under the influence of the constitutional tradition in the Member States. The connection between fundamental rights and the rule of law is clearly expressed by both the preamble of the EUCFR and the ECHR.

[32] Ardant and Mathieu 2010, p. 129–132; Fabbrini 2008, p. 1297–1312.
[33] Verdussen 2012.
[34] Kill 2005.
[35] Dicey 1967, p. 39–85.
[36] Deacon 2012.
[37] Kavanagh 2009.
[38] Jowell and Oliver 2011.
[39] Opinion 2/13, *Accession to the ECHR* (ECJ 18 December 2014). See also Balaguer 2012: "(pre)constitutional nature of the EU" (p. 258), "material constitutionalisation of the Union" (p. 267); more sceptic, D'Atena 2012, p. 12: "the existence of a 'constitution' in Europe was (and is) undeniable, despite the absence of a constitutional Charter".
[40] Pech 2009.

The ECHR has primordial importance for the evolution of the rule of law and its value-oriented dimension. It has evolved into a "constitutional instrument" and has established a "European public order"[41] and therefore essentially contributed to a common European rule of law thinking. It is manifest that its enforcement mechanism is characterised by international law and does not allow it to intervene directly into the internal sphere of the signatory States with annulment verdicts. However, in many signatory States (France, Art. 55 Const., Poland, Art. 91 Const., Slovenia, Art. 8 Const., Czech Republic, Art. 10 Const., etc.) the ECHR has primacy over ordinary legislation with the consequence that the national courts apply the conventional guarantees and not the contradicting national legislation. This is a sort of functional legislation review under the aspects of the European constitutional order of the Convention. This has a significant effect on the implementation of the rule of law which does not only mean the rule of national law but also of international law. It can also be stated that even in a traditional system where legislation review by constitutional justice has not or not fully accepted the primacy of the ECHR, international orders have propulsive force towards the judicial control of the legislator.

3.4 Internationalisation

The third basic tendency in European constitutionalism is *internationalisation*. Common legal thinking in the era of globalisation is rooted in the awareness that political and economic action is no longer predominantly nation-centred but embedded in the international community, which is reflected in the internal legal order in many ways. The modern state is an "open state" which is willing to cooperate with other subjects of public international law. Sovereignty is no longer a shield to defend the national sphere against the impacts from outside but has become a bridge to the global forum. *Transnationality* replaces nationality in more and more respects and promotes *integration* which is a step further towards institutionalised cooperation in varying intensity. The members of the EU have opened their statehood[42] to a far-reaching degree and established *supranationality*, a specific form of internationalisation.

3.4.1 International Law in the Internal Order

The national constitutional order reflects in many ways the need for adaptation to international law. The respect of general and specific international law is clearly expressed by the Constitutions. In a majority of countries international treaties prevail over ordinary legislation. In countries with a transformation system as in Germany,

[41] Appl. No. 15318/89, *Loizidou v. Turkey* (ECtHR 23 March 1995) para 70 et seqq.
[42] German FCC, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (Judgment of 30 June 2009) para 220, 225, 240, 340 – *Lissabon-Vertrag* (in BVerfGE 123, 267).

international treaties only have the rank of ordinary federal legislation (cf. Art. 59.2 BL). Interpretation in favour of international law helps to maintain primacy of the treaty over national law. This is particularly significant in the field of human and fundamental rights. According to constitutional jurisprudence German fundamental rights have to be interpreted in the light of the ECHR and the jurisprudence of the Strasbourg court.[43]

3.4.2 Supranationality and Constitutional Identity

The supranational character of EU law comprises three elements: the autonomy of the EU legal order established by a transfer of national competences, the direct effect of this law in the internal national order and finally the primacy of EU law over national law.[44]

The basis for a transfer of competences is enshrined in the Constitution itself which allows and fosters it. However, primacy over national constitutional law is, according to widespread legal thinking in the Member States, not without limits. Supranational law must not be incompatible with the national *constitutional identity*.[45] The core elements of the national constitutional order as an authentic expression of the fundamental legal culture of the society shall be kept untouched. This corresponds to an adequate understanding of what a union, a community, is and complies with the principle of "unity by diversity". The jurisprudence seems to define constitutional identity as the rights and principles which cannot be changed even by constitutional reform. This is at least the approach of the German and the Czech Constitutional Court (referring to Art. 9.2 Const.)[46]; similar limits can be found in the jurisprudence of other countries if they do not generally deny EU law primacy over national constitutional law, as in Poland[47] and Lithuania[48].

These limits are not contrary to the idea of inter- and supranationalisation but contribute to harmonising the national and multinational order and to establishing an adequate equilibrium between both. This is in line with the obligation of the EU and its institutions to respect the national identities of the Member States (Art. 4.2 TEU). The identity concept of the EU includes the national "fundamental

[43] German FCC, 2 BvR 1481/04 (Order of 14 October 2004) para 62 – *Görgülü* (in BVerfGE 111, 307), German FCC, 2 BvR 2365/09 (Judgment of 4 May 2011) para 86, 88 et seqq.– *Sicherungsverwahrung* ("preventive custody") (in BVerfGE 128, 326).

[44] Case 6/64, *Costa/E.N.E.L.* (ECJ 15 July 1964).

[45] German FCC, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (Judgment of 30 June 2009) para 216, 218 et seq., 228, 235, 240–242, 331 et seq., 336, 339 et seq., 364, 369 – *Lissabon-Vertrag* (in BVerfGE 123, 267). See also Blanke, in Blanke and Mangiameli (2013), Art. 4 TEU, para 18–34; 50–61 (national jurisprudence); 65–71 (position of the ECJ). For the development of a European identity see Lepsius 2006, p. 23 et seqq.

[46] Czech Constitutional Court, Pl.ÚS 19/08 (Decision of 26 November 2008) – *Lisbon*, para 59.

[47] Polish Constitutional Court, K 18/04 (Decision of 11 May 2005).

[48] Lithuanian Constitutional Court, 17/02–24/02–06/03–22/04 (14 March 2006); Lithuanian Constitutional Court, 30/03 (Decision of 21 December 2006) para III/9.4; Lithuanian Constitutional Court, 47/04 (Decision of 8 May 2007) para II/3.

constitutional structures" and therefore comprises the constitutional identity of each Member State. It has to be noted that supranationality expresses the *EU perspective* of national and constitutional identity of a Member State, however not that of the Member State itself. The competence to define it and to assert an infringement by a *national* authority remains within the national constitutional court while the exclusive competence to declare EU secondary law incompatible with constitutional identity in the *EU perspective* and to annul it or to stop its application belongs to the supranational courts. National constitutional courts have to initiate preliminary ruling proceedings before the ECJ for the review of EU secondary law on its incompatibility with Art. 4.2 TEU.

The supranationalisation of large fields of national competences on the level of ordinary law has been well accepted. The same process for the constitutional order is more in dispute. It seems to be a predominant opinion that safeguarding core elements of the national constitutional order is necessary in order to maintain national statehood and a basic constitutional culture.

In conclusion it can be stated that legal thinking in Europe is highly influenced by European integration and the acceptance of the societies regarding the supranational structure of the EU which is state-like in its instruments.

The more societies are integrated, the more they develop a common legal thinking. The state as the most integrated political system homogenises legal thinking by the existence of a normative hierarchy with the Constitution at the top. To a large degree, the EU assumes the functions of the Member States and is, in this respect, similar to a state. The EU is based on common values as they are enshrined in the TEU and the EUCFR. It is manifest that this considerably fosters the evolution of common convictions in the field of law. The own legal traditions of the Member States compete with the emerging supranational legal thinking. It is a question of *subsidiarity* how far particular national approaches are recognised. This problem concerns common legal thinking in a multinational community as such, i. e. in the EU as well as in the ECHR. To which extent margins of appreciation must be admitted to the national legal cultures is a question of the adequate equilibrium between common and particular legal thinking. Both are necessary in a multinational community.

3.5 Separation of Powers

Separation of powers in a vertical and horizontal sense is a further tendency of European constitutionalism. It cannot be treated here in detail. Subnational territorial organisation in federal and regional systems is a widespread phenomenon in Europe. In its different aspects the structures vary considerably. Vertical separation of powers and strengthening of democracy also on the subnational levels are the main impulses. For this reason self-governing bodies elected through universal suffrage are typical. The degree of autonomy varies; however, it can roughly be said that matters which genuinely concern a subnational territorial entity (region, province,

local community, etc.) are regularly attributed to this entity for autonomous decision, that means without interference by the state or another subnational territorial entity. Control of legality often remains centralised.

Horizontal separation of powers encompasses various phenomena, in particular the shift of decision-making competences from the traditional institutions such as Parliament to (transnational) administrative bodies or the privatisation of public authority. As common principles have not yet been clearly developed on this nevertheless important subject, it shall not be enlarged upon in this context.

4 Conclusion

Common legal thinking in Europe is progressively developing. This process is mainly value-oriented: the increasing importance of fundamental rights on the basis of human dignity, of the rule of law in an advanced form which focuses on the constitutional review of the legislator, and of the intensive and multiple impacts of inter- and supranational law as the basis for integration into an "ever closer union" in Europe.

Manifold vertical and horizontal transfer processes between the different legal orders in Europe are the instrumental framework for this convergence process in legal thinking. The inherent dynamics can give impulses for the evolution of a common European legal and constitutional culture. However, as in every integration process, advancement has to be adequately balanced with respect for individual tradition and particularity. Subsidiarity consolidates integration. Common legal thinking has always been aware of the particular cultural sources at its base; this is an enrichment and not a deficit.

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