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RULE OF LAW IN THE DEVELOPMENT OF CONSTITUTIONAL LAW

1. GLOBALIZATION AND CONSTITUTIONALIZATION

Two major tendencies exist in contemporary law: globalization and constitutionalization.

The worldwide interconnection of politics, economy, security, environmental protection, technology, etc. has contributed to the opening of the sovereign state; the State, formerly closed, is now opened, "open statehood"[1] is its new characteristic quality. Sovereignty has lost its effect of exclusiveness, has been essentially relativized and has nearly abandoned its genuine function. Law must respond to this phenomenon. Important steps have been made to internationalize internal law, in particular constitutional law. A significant example of internationalization is the order of the European Union, which is even of a supranational character[2]. State-like instruments and mechanisms are at the disposal of this multinational union, internal matters are europeanized in a far-reaching degree; this makes manifest the functional transition from the State to a multinational body.

Constitutionalization is a second phenomenon of great importance visible in contemporary law development which has an internal, State-related and an external, international law-related dimension[3].

The internal dimension of constitutionalization has various aspects:

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1 See Karl-Peter, Sommermann, Offene Staatlichkeit: Deutschland, in: Armin von Bogdandy/Pedro Cruz Villalón/Peter M. Huber (eds.), Handbuch Ius Publicum Europaeum, vol. 2:
Offene Staatlichkeit – Wissenschaft vom Verfassungsrecht, Heidelberg 2008, pp. 3-35.

2 Determined by the basic decision of the European Court of Justice (ECJ) in the case Costa/ENEL 6/64, Rep. 1964, 1253.

3 See Rainer Arnold, The External Dimension of Rule of Law, Essays in Honour of Giuseppe DeVergottini, 2015 (in print).

First of all the term of *constitutionalization* can be understood in a different way: the strongest form is the creation of a new Constitution itself; less significant but frequently used in many countries is the formal modification of an existing Constitution, the constitutional reform, which regularly requires the fulfilment of specific conditions such as a qualified majority in Parliament and/or a referendum.

Furthermore the most efficient and regularly applied instrument of constitutionalization is constitutional interpretation which adapts the constitutional text to the major social changes with regard to the fact that a constitution is a "living instrument"[4] which endures in time but shall be adequate in any moment so that adaptation by interpretation is indispensable. If this way of adaptation strengthens the constitutional impact of the given text by enriching and intensifying the constitutional concepts it is a form of constitutionalization by interpretation. The same can be said if ordinary law is interpreted "in conformity to the Constitution" which means that the constitutional concepts are expressed and implemented through ordinary legislation. By this the constitutional ideas penetrate into the fields of Parliament-made law and fill them up. Also this process is a process of constitutionalization.

Constitutionalization also goes on in international and supranational law. Significant examples are the creation of unwritten fundamental rights and elements of rule of law by the judges in the legal orders of the European Community and European Union[5]. Such judge-made constitutionalization has been the functional starting point for the emergence of written constitutional texts in these matters.

Also in traditional international law constitutionalizing processes are visible. The evolution of *jus cogens* as a set of principles which cannot be ruled out by state sovereignty can be categorized as such a process. Human rights, the prohibition of military force, and other principles of primordial importance for the international community are examples for a gradual transformation of the sovereignty-based horizontal coordination system as international law is by origin into a vertical principle-based legal order.[6] Such a transformation goes alongside with constitutionalization.

The strongest form of constitutionalization is the creation of new Constitutions.

In most of the new democracies after the fall of the communist bloc has taken place such a process. This category also includes "total revisions" of existing constitutions as in Switzerland in 1999 (the new Constitution being in force since 2000)[7] as well as fundamental revisions of a Constitution, such as in Austria[8], revisions which have impact on the basic principles of the Constitution in force .

The second aspect of internal constitutionalization is, as already pointed out, not the creation of a new constitution but the reform of the existing constitution (if it does not fall within the category of a total revision) in

4 See Luzius Wildhaber, The European Court of Human Rights in action, http://www.asianlii.org/jp/journals/RitsLRev/2004/4.pdf.
5 See e.g. ECJ in the Hauer case 44/79,Rep.1979, 3727.
6 Text in English http://www.admin.ch/ch/e/rs/1/101.en.pdf.
7 See Arnold Koller, Verfassungserneuerung in alten Demokratien, www.humboldt.hu/HN24/28_35.pdf.
8 Art.44.3BVG:https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Bundesnormen&Dokumentnummer=NOR40045767.

order to make the constitution more efficient or to add an important issue to the constitutional document. An example could be the introduction of an individual constitutional complaint into the text of the constitution as it has been in Turkey[9]. These reforms have to be realized in accordance to the specific provisions of a constitution.

As it has been mentioned, there is a form of *functional* constitutionalization by constitutional jurisdiction. The judges' interpretation of the constitutional text is highly important for the further development of constitutional law. An example can be the German Constitutional Court jurisprudence on personality rights based on the guarantee of dignity of man and the free deployment of personality (articles 2.1 in connection with 1.1 BL)[10]. In this context we could also refer to the large body of constitutional law jurisprudence in other European countries.

A further aspect of constitutionalization is the crucial issue on the impact which law and in particular constitutional law has on the society. The idea and the concepts of constitutional law must be internalized by society, which has to identify with the basic constitutional structures and values in the country. Constitutionalization would be purely formal if it is not supported by the individuals. The finality of constitutional law is not only to establish limits of the exercise of public power, but also to give orientations to the public to be followed in their private actions. This corresponds to the fact that all branches of law are constitutionalized that means that they are altogether subject to the constitution which is the "supreme law of the land".

Society must be aware of the constitutional possibilities, the fundamental rights and the jurisdictional remedies against excessive state intervention the members of the society have. Society has to respect, accept and practice constitutional law so that the supreme values of the legal order are the ideological basis for the society's activities. Constitutional law initiates an identifying process with the individual and contributes essentially to the integration of the society.

Constitutionalization means to establish the rule of law. The constitution is the main expression of law. To recognize the primacy of the constitution over all other branches of law is a progress in the development of rule of law.

The *external* dimension of constitutionalization has a twofold meaning: first, it refers to the set of provisions in a constitution which regulate the relation of the State with the international community. In particular, the constitution says how international treaties are introduced into the internal legal order, by reception or by transformation.[11] The modern approach is to apply international treaties as such, directly, by the national institutions, that is to "receive" them within the internal legal order without converting them into internal law. This concept of reception or adoption of international treaties is often linked with the superiority of these treaties over national legislation. This entails the far-reaching practical consequence that ordinary judges

9 See Erdal Tercan, The Individual Application in Turkish Law, 2015.

10 See Friedhelm Hufen, Staatsrecht II.Grundrechte, 3rd ed., 2011, §11.

11 For the reception model which is nowadays predominant see e.g.Art. 91 of the Polish, Art. 10 of the Czech, Art. 5.4 of the Bulgarian or Art. 55 of the French Constitution and for the transformation model Art. 59.2 of the German Constitution.

have to apply, in case of conflict, the treaty and not the internal legislation. Most European countries have adopted this system while others, such as the German system, transform the international treaties into internal German law.

A constitutionalizing process can be seen in particular in reforms of the transformation systems converting them into monistic, reception systems, as it has occurred for example in Italy in 2001[12].

As to the rules of *general* international law, universal customary law or general principles, Constitutions regularly state that this type of international law is directly applicable within the internal legal order and has a rank superior to legislation. Despite the dualistic approach in Germany for treaties, general international law is accepted as a direct source of international law binding also the legislator[13].

Furthermore it shall be noted in this context, that the process of internationalizing constitutional law is significantly manifest in interpretation. Constitutional courts have developed the method of interpreting internal law, even internal constitutional law, in conformity with international law[14] and, as far as the European Union is concerned, with EU law[15]. This is seen as a consequence of "open statehood", the new mighty tendency of European and universal constitutionalism which has led to a far-reaching relativization of national sovereignty.

The second meaning of the external dimension of constitutionalization is the phenomenon that even in the international community elements are spreading which have been known formerly only in national constitutional law: fundamental rights, rule of law aspects, basic principles such as the principle of peace and the prohibition of military force as an instrument of international interrelations, etc. We can distinguish in this context a formal and substantial constitutionalizing process: the emergence of objective values constituting *ius cogens* is the main formal aspect of this process; international law, by its nature a law of coordination, essentially based on national sovereignty and equality, has been converting in some fields from horizontal into vertical law relations. This means that the values established in these fields cannot be derogated by horizontal coordination of the subjects of international law. The normative hierarchy which has appeared in these fields resembles the relation between legislation and constitution. This aspect of *formal* constitutionalization has been complemented by elements which have their origin in national constitutional concepts. They have already been pointed out above. It can be said that the more individual-related elements are guaranteed not only in national constitutions but also on the level of international law, the more international law undergoes a process of constitutionalization.

12 *Gazzetta Ufficiale* n. 248 del 24 ottobre 2001; see also Giuseppe Bianchi, L'efficacia dei trattati internazionali alla luce dell'art. 117, c. 1 della Costituzione, http://www.altalex.com/index.php?idnot=40084.

13 See Art. 25 BL.

14 See for Germany FCC vol. 123, 267, http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html/340.

15 http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html/241.

2. RULE OF LAW AS THE HEART OF CONSTITUTIONALIZATION

Rule of law is a very basis of the constitution, it is the *Grundnorm* of constitutional law. Rule of law means that public power acts in conformity with law. Law is constitutional law and legislation.

Both are results of politics, politics in the sense of intentional action in order to obtain a result with impact on society. The constitution is the result of the people's will to create a basic legal order by setting up an institutional system and by determining values. If politics is action for a "good polis", a good community, the people's act of creating a basic legal order is an act of politics by its nature. The creation of a constitution is the first and most important act of democracy realizing people's sovereignty. Legislation expresses the specific will of the people by its representatives in Parliament. By this, political action is transformed into law. People's *basic* will expressed by the constitution and people's *specific* will expressed by legislation must be complementary and not conflicting. Democracy requires that legislation is conform with the constitution. The specific will of the people cannot contradict its basic will [16].

We can therefore state that democracy comprises rule of law; both principles form a unit. Democracy without rule of law, more precisely without rule of constitutional law – "totalitarian democracy", "the tyranny of the majority" (Alexis de Tocqueville[17]) – is unthinkable. Rule of law without democracy is impossible. If we recognize that the constitution is the basic democratic act, both principles presuppose one the other.

Modern rule of law can no longer be understood as purely legality, as exclusively conformity of the executive action with legislation. It is, furthermore, constitutionality of the legislation[18].

Rule of law in modern constitutionalism is value-oriented. It necessarily comprises the protection of human dignity, autonomy and freedom. Fundamental rights are an integral part of rule of law.

There is a formal argument to support the interconnection between rule of law and fundamental rights: if primacy of the constitution is characteristic for rule of law, the protection of the individual as the primordial finality of the constitution is part of it. However, a more substantive understanding of rule of law leads to the recognition of fundamental rights as necessarily being the part of rule of law: law has the function to establish a normative order, which makes possible a peaceful coexistence of the individuals as members of a society. Furthermore, law has the function to serve the individual, to assure its existence, to promote its intellectual, emotional, social, etc. welfare; in other words law is primarily anthropocentric. For this reason rule of law as a substantive concept is necessarily linked with the protection of the individual[19].

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16 See R. Arnold, Les moyens constitutionnels susceptibles d'assurer la démocratie et de prévenir les changements anticonstitutionnels: la perspective de l'Allemagne(avec des références comparatives à d'autres pays européens),Rafaa Ben Achour (dir.), 2014.

17 «Within these limits the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies." Democracy in America, Book I, Chapter V: Necessity Of Examining The Condition Of The States—Part III Legislative Power Of The State. Translated by Henry Reeve. 1831.https://www.gutenberg.org/files/815/815-h/815-h.htm.

18 See the famous formulation of the French Conseil constitutionnel, Décision n° 85-197 DC du 23 août 1985 : « La loi n'exprime la volonté générale que dans le respect de la Constitution».

19 See R. Arnold, Constitution and Justice, Essays in Honour of Stanislaw Sagan, in print.

Law is the instrument for realizing justice. Justice is essentially based on equality but it goes beyond: it requires that public power makes laws that give the individual what is adequate for it. This is not only what the society owes to the individual for its work contribution to the society's welfare but also what corresponds to the individuality of the person. Dignity, autonomy and freedom are the basic elements of individuality which law must protect and ensure. If the State shall be the reign, the rule of law, it must satisfy the needs connected with individuality. Rule of law must be understood as an instrument of guarantee of these values.

We can therefore conclude that rule of law, democracy and fundamental rights form a functional unit which cannot be separated. The progress in rule of law is a progress in democracy and fundamental rights protection and vice versa. Rule of law is therefore the basic criterion for the progress of constitutionalism.

3. RULE OF LAW AS AN INTERNATIONAL PHENOMENON

Rule of law is not only a characteristic of a State constitutional order; it is also a phenomenon to be found at the international level, in particular in the legal order of the European Union[20] and of the Council of Europe[21]. Furthermore, as it has already been mentioned, even in the community of sovereign states, the international community, rule of law finds a growing significance[22].

This statement leads to the idea that constitutionalism today can no longer be understood as being restricted to legal orders of the State but has to include the multinational organizations in particular in integration systems. It has been widely accepted that the concept of constitutional law exists also outside the State. There is no serious obstacle to deny the extension of the term of constitution and constitutional law to supranational and even international organisms.

The European court of justice has developed in an early phase of the European integration elements of rule of law, together with fundamental rights, as unwritten community law in form of general principles. On the basis of a comparative – selective method the judges formulated numerous rule of law aspects[23].

This jurisprudence was the basis for a continuous normativization which led to article 6.2 of the EU Treaty of 1993, obliging the EU institutions to conform with the judge-made general principles, and later to the drafting of the EU Fundamental Rights Charter destined to be a part of the Constitution for Europe, a text which failed to enter into force. With the creation of the new European Union in 2009, the Charter became normatively binding. The Charter does not only stipulate fundamental rights, but also rule of law elements.

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20 See Paul Craig, EU Administrative Law, 2006, pp. 270-273.

21 See Geranne Lautenbach, The Concept of the Rule of Law and the European Court of Human Rights, 2013.

22 See Simon Chesterman, An International Rulfe of Law? American Journal of Comparative Law, Vol. 56, pp. 331-361, 2008; NYU Law School, Public Law Research Paper No. 08-11: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081738.

23 See ECJ case 11/70, Internationale Handelsgesellschaft, Rep. 1970, 1126 ECLI:EU:C:1970:114. http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d2dc30ddf6c41fb25aeb4f0a8a0da17b59c5eaf3.e34KaxiLc3qMb40Rch0SaxuPbxr0?text=&docid=88063&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=933540.

A striking example is article 41 of the Charter embodying the right to "good administration" which is, by its nature, more an objective rule of law guarantee than a real fundamental right. Nevertheless, the charter has subjectivized this guarantee and transformed it into a fundamental right. It shall also be mentioned that the preamble of the Charter makes reference directly to rule of law and demonstrates by this the interconnection with the rights protection[24].

4. RULE OF LAW IN A THREE-LEVEL PERSPECTIVE: A EUROPEAN "BLOC DE CONSTITUTIONNALITÉ".

With regard to a further constitutional document in Europe, the European Convention of Human Rights (ECHR), rule of law is also considered to be in a very close connection with fundamental rights. The EU Charter as well as the ECHR are documents of European constitutionalism. When analyzing the basic constitutional structures in Europe, we have to take into consideration the interconnection not only of democracy, fundamental rights and rule of law but also the existence of a European "bloc de constitutionnalité"[25]. Rule of law is internationalized in the same way as the fundamental rights protection.

The relationship between the three constitutional levels in Europe, the national constitutional law, the EU provisions on fundamental rights and rule of law as well as the ECHR requires a three level consideration also for the elements of rule of law. Proportionality for example, which is the most important particular aspect of the rule of law concept, has been developed in Germany by the jurisprudence of the constitutional court, later transferred to the supranational level of the EC/EU and spread over Europe by the ECJ[26]. In contemporary constitutionalism proportionality is of a worldwide importance[27]. The conceptual transnationality of this principle shows clearly that its essence cannot be understood only from a national perspective and the interpretation of the courts of the other constitutional levels, the EU level and the ECHR, has to be involved. The same methodology must be applied for the other aspects of rule of law, such as the protection of legitimate expectations, the prohibition of retroactivity, security of law, etc. Isolated interpretation from only a national standpoint is no longer possible, but, vice versa, the interpretation of multinational courts regarding rule of law and other constitutional principles have also to take into account what the member states courts say in their own interpretation processes. Constitutionalism is based on cross-fertilization[28] and mutual respect and has to pay due attention to the phenomenon of transnationality and the tendency of conceptual universalism. However, it should be accepted that the perspective of the courts on each of these levels has an own conceptual approach which is proper to the legal culture of the

[24] See Margrét Vala Kristjánsdóttir, Good Administration as a Fundamental Right, skemman.is/stream/get/1946/.../a.2013.9.1.12.pdf.

[25] This term is mainly used for the body of constitutional law in France consisting of different sources, the 1789 Declaration, the principles defined and recognized by the Republican laws, the preamble of the 1946 Constitution and the 1958 Constitution; see Décision no. 71-44 DC du 16 juillet 1971, Rec.,p.29. It shall be expressed, with this term, more generally, the existence of various fundamental rights sources constitute a "functional unit".

[26] See Paul Craig, EU Administative Law, 2006, pp. 655-715.

[27] R.Arnold, El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional, together with J.I.Martínez Estay, F. Zuniga Urbina, in: Estudios Constitucionales 2012, Santiago de Chile, pp. 65-116.

[28] See Francis G. Jacobs, Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice, in:http://www.tilj.org/content/journal/38/num3/Jacobs547.pdf.

particular level. This approach should not disappear by external influence but be upheld in the sense of subsidiarity[29]. Internal and external approaches within the interpretation of concepts such as fundamental rights and rule of law elements shall be harmonized, without eliminating the core idea of each of them.

5. CONCLUSIVE REMARKS

Rule of Law has become the conceptual "*Grundnorm*" in modern constitutionalism. It constitutes a functional unit with the principles of democracy and individual freedom. Rule of law has an internal and external dimension. This latter aspect is correlative with *open statehood*.

Rule of law has been developed as a concept also in the supranational EU legal order and in the framework of the ECHR. This process is significant for a Europewide constitutionalization at a multinational level and strengthens the current tendency of constitutional law convergence. It seems indispensable to apply a comprehensive perspective of constitutional issues, in particular in the field of fundamental rights and rule of law, which considers the parallel concepts at the various levels as a constitutional unit.

[29] R. Arnold,Fundamental Rights Review in Europe: Substitution or Standard Control? In: F. Palermo/G. Poggeschi/G. Rautz/ J. Woelk (eds.), Globalization, Technologies and Legal Revolution, Nomos, 2012, pp. 189-198.