The Internationalisation of the Constitution and the "Constitutionalisation" of International Law on the Trajectory between Law and Politics

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1. The last decades of the 20th and the first decade of the 21st century are dominated by two related phenomena which cast doubt on the scholarly basis of public law: On the one hand, the internationalisation of the Constitution and of the national legal order of all states in general and, on the other, the "constitutionalisation" of international law, especially in the field of the protection of human rights and of the establishment and function of basic democratic institutions[2].

A particular version of this second phenomenon is *the "constitutionalisation" of European Community law*[3] through the formulation of the idea of the establishment of a European Constitution; more precisely of a Convention for the establishment of a European Constitution. The "constitutionalisation" of European Community Law, however, has been taking place for many years, without a typical or codified European Constitution, since another diffused and substantial European Constitution exists and operates for long[4]. Consequently, from this point of view, the adventures of the Convention for the establishment of a Constitution for Europe, the ratification of which must be regarded as practically impossible, after the negative outcome of the referendums in the Netherlands and in France, do not basically affect the tendency to "constitutionalise" the

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2 See Ev. Venizelos, The New Youth of the Constitution *in:* G. Amato / G. Braibant / Ev. Venizelos (eds.), *The Constitutional Revision in Today's Europe*, London, 2002, p. 25 et seq.; *id.*, The Durability of the Constitutional Phenomenon in the Post-modern Age, *in:* P. Häberle / M. Morlok / V. Skouris (eds.), *Festschrift für Dimitris Th. Tsatsos*, Baden-Baden, 2003, p. 690 et seq.; *id.*, European Constitution: A Challenge for Constitutional Theory, *ERPL/REDP*, 2004, p. 19 et seq.

3 See, for example, J. Ziller, *La nouvelle Constitution européenne*, Paris, 2004; B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty of Europe*, Firenze, 2003; Ev. Venizelos, The Relationship between National Constitution and European Community Law after the Signature of the Treaty for the European Constitution and the Revision of the 2001 Greek Constitution (in Greek), *in: RHellDE*, 2005, p. 1 et seq.

4 See J.H.H. Weiler, *The Constitution of Europe: Essays on the Ends and Means of European Integration*, London, 1999. See also, Ev. Venizelos, *The Maastricht Treaty and the European Constitutional Space* (in Greek), Athens-Komotini, 1994, p. 9 et seq.

European Community Law. Even after this negative development, the basic concept of the accession of the European Union itself to the notion of the Constitution remains cogent; the common constitutional traditions of the Member States with their institutional, interpretative and value-laden reserve, the fundamental provisions of the European Convention on Human Rights and the Charter of Fundamental Rights are basic components of the current, diffused European Constitution, which constitutes, in precise legal terms, a part of the Union's primary law. However, it is easy to discern a distinguished "layer" of basic principles and regulations in the primary law of the Union, which constitutes the foundation and the core of the European Community order, irrespective of their legal origin and basis. This layer cannot, in essence, be impeded even through the typical reform procedure of the Union's primary law; that is, through the amendments of the founding Treaties, even after having theoretically assumed that this can happen when a new Treaty is signed by the Member States. Its ratification by all Member States through the national constitutional procedures foreseen in each one of them must be regarded as impossible, due to the legal and political arguments that will be raised. But even in the extreme case of the adoption of such an amendment, there is the possibility of judicial control by the national courts, the ECJ, as well as the European Court of Human Rights, to which every individual within the boundaries of the EU Member States has access, since all of them accept the individual petition to Strasbourg.

2. This double motion ("internationalisation-constitutionalisation") is simultaneously conducted at all three levels, these of the national, the European and the international legal order, via numerous constitutional and legislative texts, international treaties, provisions of primary and secondary EU law, as well as texts of the so-called soft law. It is also conducted, to a great extent, through the case law of national, international and European jurisdictional authorities.

An *international constitutional acquis*[5] is hence formed, which is historic, ideological, cultural, political, institutional, methodological, jurisprudential and, conclusively, normative. As a historical phenomenon, this constitutional *acquis* originated from the last three-century period (18th-20th centuries), it therefore covers the entire period of constitutionality, from the "statutory" revolutions of the 18th century (the American and the French) to the most recent wave of constitutionality, caused by the fall of socialist regimes, the

5 See Ev. Venizelos, The Universality of the Constitutional Civilization and the Necessity for a "Politicization of Globalization", *in:* Ev. Venizelos / A. Pantélis (eds), *Civilisations and Public Law*, London, 2005, p. 35 et seq.

dissolution of the Soviet Union and Yugoslavia, the creation of new states or the establishment of new governance regimes from Bosnia-Herzegovina, Kosovo, the former Yugoslav Republic of Macedonia, to Afghanistan and Iraq.

Therefore, this is an *acquis* that appears to have *ecumenical claims*, but it is *evidently western-oriented*, as the development of the international correlation of powers, from the end of World War II to the beginning of the 21st century (with the disruption of post-war bipolarisation and the emergence of the issue of international terrorism), has rendered the western constitutional tradition, practice and concept synonymous to the prevailing - and therefore not only internationally accepted but also necessary - approach of political and state organisation. This has to do, on the one hand, with the formation and exercise of political authority on the basis of the democratic principle and everything this entails, while on the other with the respect of human rights and the guarantees of the rule of law.

In this way, a system of administering state authority, the relations between national and international law, the control of the constitutionality of laws and the legality of state acts, and the protection of human rights, which was gradually formed in western Europe and North America, becomes an international standard, with which every state must comply in order to be regarded as complying with and incorporated into international legality[6].

3. The democratic principle, the multi-party system, the autonomy of citizen's society through the legal exercise of rights of collective expression and action, the respect of individual, political and at least some social rights, the separation of powers and the independence of justice, the existence of some independent authorities etc. form a network of institutions, functions, practices, concepts; in brief, *an entire system of "constitutional self-evidence"*, which was gradually imposed at the national level. This system, however, progressively raised demands and claims of international enforcement or, at least, recognition, through a network of international treaties, recommendations, declarations and in general procedures, some of which have typical legal force (as they belong to the Hellenic or European or international law), while others belong to the so-called soft law, which has a strong normative influence as a factor of interpretation. This happened at the level of the UN, of the OSCE, of the Council of Europe, of the European Union and other international and regional organisations such as the Organisation for the Co-

6 See L.A. Sicilianos, *L'ONU et la démocratisation de l'Etat: Systèmes régionaux et ordre juridique universel*, Paris, 2000.

operation between the Countries of the Black Sea.

In this way, the traditional subject matter of the national Constitution becomes the subject matter of international law (particularly of European Community law concerning the EU Member States), while reciprocally the national constitutional order is subject to the international legality (and particularly as concerns the Member States, to the European Community legality).

4. The phenomenon is also prevalent in the way some international organisations or hybrid subjects of international law, such as the European Union, are organised and operate, and mainly in the structure and *modus operandi* of different international or regional systems of political but also of judicial review of compliance of the states and their legal orders with the prerequisites set by this international constitutional *acquis*. A primary example of this is the European Convention on Human Rights, its mechanisms and its bodies[7].

Even the big regional systems, like the European, which place particular emphasis on the respect of democratic institutions and of human rights, are subject to serious, international limitations and controls, either in the form of legal measures or in the form of political pressure. For example, at the level of financial independence against measures of financial protectionism, at a regional - European level, the regulations which govern the World Trade Organisation are often opposed. Even when these are not actually regulations of the conventional or customary International Financial Law but intercessions, these are accompanied by sanction mechanisms, in the form of simple but effective countermeasures in connection with goods and services, which are exported to third countries, particularly to those which play an important role in the international economy[8]. In the field of human rights, the political and the legal element co-exist in several forms of "mutual supervision", within the so-called Western World, and not only in cases in which countries failing to meet the classic, western, institutional standards are examined. The USA compiles annual reports on the protection of human rights in European Union Member States, often focusing on issues such as the protection of religious freedom, in Germany or in France for example, or on minority issues. On the other side, the Member States of the European Union focus their interest on US detention and prison

7 See Ev. Venizelos, The Relationship..., *op. cit.*, p. 28 et seq.

8 See H. Ruiz Fabri, La contribution de l'organisation mondiale du commerce à la gestion de l'espace juridique mondial, *in:* E. Loquin / C. Kessedjian, *La mondialisation du droit*, Dijon, 2000, p. 347 et seq.

establishments, such as Guantanamo, having as a criterion the respect to the principles and rules of the western constitutional civilisation, as it is codified *e.g.* in the European Convention on Human Rights[9].

These phenomena, when they concern states outside the corpus of the western constitutional tradition, from states originating from the former Yugoslavia to Iraq, are not easily discernible to their full extent, by the western legal community, as a whole, as they occur in the name of "democracy and freedom", that is in the name of a "democratic, humanitarian" intervention. However, these reactions are differentiated, since various and often serious limitations are imposed on fundamental rights of the European citizens, such as the protection of personal data, or the confidentiality of the communication, in the name of international security, of the USA security and of the struggle against international terrorism. The recent decision of the ECJ, by which the agreement between the European Union and the USA on the transmission of personal data concerning the passengers travelling from Europe to the USA was cancelled - typically due to illegitimate grounds - depicts what kind of problems and reactions this phenomenon - and procedural framework - provokes, at a pan-European level[10].

The international protection of human rights thus appears as an international limitation of rights, in the name of security, which undoubtedly constitutes a fundamental right. It is a right, however, which within the European constitutional tradition is guaranteed by the entire system for the protection of fundamental freedoms. The balance between freedom and security is imprinted in the European constitutional *acquis* within the system itself of the protection of the basic rights and liberties. Consequently, the equilibrium concerning the relationship between freedom and security has been historically and constitutionally realised and expressed in the European constitutional texts and in the European Convention on Human Rights. Should an amendment be required, this should be done in the same thorough way, and within the institutional equilibrium of the entire network, of national and international regulations, and not in a circumstantial or fragmentary way[11].

9 For the American approach to terrorism after the September 11th event, see S. Less, Country Report on the USA, *in:* C. Walter / S. Vöneky / V. Röben / F. Schorkopf (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Berlin / Heidelberg / New York, p. 633 et seq. But see the recent decision of the Supreme Court's *Hamdan v. Rumsfeld* (29/6/2006) holding that the Bush administration's decision to try detainees at Guantanamo by a military was tribunal is illegal.

10 See the Judgment of the Court of Justice in *PNP/USA* case (30/5/2006).

11 For futher discussions see C. Walter / S. Vöneky / V. Röben / F. Schorkopf (eds.), Terrorism as a Challenge..., *op. cit.*, *passim*.

5. In the core of such developments, the *radical reform of the phenomenon of domination* is found, that is the drastic limitation of the internal and external domination of the states, and the formation of new concepts, but also of new institutions and new practices of international intervention in the states' internal affairs. The formation of the international system of power is based on new correlations, new factors, new procedures and practices and not solely or partly on the Westphalian-character states or the classical international organisations. The media, non-governmental organisations, forms of organised crime, terrorist groups, international and regional organisations, universities, foundations, research centres and think-tanks form an entire system of mutual influence, in which the forms of military intervention dominate in the name of international legality, of security, of democracy, of human rights, of the control of the spread of nuclear weapons etc.[12].

6. The internationalisation of the Constitution is consequently manifested in various ways, direct and clear at times, and indirect and vague at other times. *Therefore, a scale is formed*, commencing from the internationalisation itself of the constituent authority, which imposes the Constitution in a state, and ending in the voluntary recognition of the supremacy of international law (and of course of the European Community law as concerns the Union's Member States) over the national constitutions. The former incident happened *e.g.* in Cyprus, in 1960, while it was repeated in Kosovo, in Afghanistan, in Iraq and elsewhere. The latter applies to the constitutions of almost all the Member States of the European Union.

Irrespective, however, of the stance a national Constitution adopts towards the extent of power of International Law (as well as the European Community Law), as long as a state participates in a regional legally organised system and is under the jurisdiction of international courts, such as the ECJ and the European Court of Human Rights, the same national constituent authority (primary or more often secondary) even of European Union's Member States is subject to international judicial control[13]. At times, this control is conducted thoroughly and without any inhibitions that might be caused to the national judge by the fact that a constitutional reform is most often democratically ratified, directly by the electorate or indirectly by the

12 See, for example, S. Sassen, *Losing Control? Sovereignty in an age of Globalization*, New York, 1996; S. Strange, *The Retreat of the State. The Diffusion of Power in the World Economy*, Cambridge, 1999.

13 See, for example, J.-P. Costa, La protection de l'homme par le juge européen, *in: ERPL/REDP*, 2001, p. 69 et seq.

parliament, through an enhanced majority or qualified vote.

7. Irrespective of the formal way in which the internationalisation of the Constitution is manifested, it is a fact that *the acceptance of the international* acquis *is a prerequisite for the legitimisation of state authority and for the guarantee of the state's position in the international power system, unless there are stronger grounds which ensure its respective position*. Such grounds are the international and regional correlation of powers, which may lead to the acceptance of internal regimes, which in turn, may be poles part from this international institutional, political, ideological, and legal *acquis* and from the respective ideological and political "admissions" incorporated in them.

However, this arbitrary differentiation in the stance of the international community towards the domestic constitutional order of each state on political or military grounds, that is on grounds of expediency without a legal or axiomatic frame, is related to the deeper and always existent "realistic" nature of the international law, which portrays (in a more specific way than that within the domestic law of constitutional states) the real correlation of powers. This of course does not mean that the moral, value-laden, and even more legal and institutional argumentation, as well as the case law of the international competent authorities, are lacking importance. This importance is often limited, however, to the level of political argumentation and does not produce any specific normative, thus practical, outcome.

8. The aforementioned international constitutional acquis *is miles part from the historically defined and institutionally guaranteed content of the domestic constitutional order of states which have reached a high level of constitutional maturity*. In Europe, however, this is not discernible, as there is a general prevalent belief that the European Community Law and the European Convention on Human Rights offer a totally comparable "constitutional" protection, even superior, at times, to that offered by national constitutions. However, this does not occur in an automatic and self-evident way, when the international law or practice function as a source of additional limitations to the fundamental rights or as a control mechanism of political beliefs, and not as a source of temporary guarantees.

It is, therefore, evident that the "constitutionalisation" of the international law and the internationalisation of the constitutional law are manifested in a different way in the USA than in the European Community countries or the accession candidate states, in a different way in the member states of the Council of Europe, than in countries

such as Iraq, Afghanistan, the countries of former Yugoslavia, the Russian Federation, Belarus and Turkmenistan and in a different way certainly in countries like India or China, or even Egypt, Saudi Arabia and Turkey.

Consequently, these are phenomena whose factual and political aspect is clearly more powerful than their institutional and legal aspect. However, this constitutes a serious deficit, as far as the national constitutional *acquis* is concerned. The latter raises most of the arguments regarding its core, outside the fields of political flexibility and political negotiation, rendering them subject matters of judicial authorities or of independent authorities. Such authorities, even when they act on the basis of political criteria, they act on the grounds of legal arguments, there always being of course fields in the national constitutional order and in the respective *acquis* which always belong to the judicially independent competence of political organs. On the contrary, at the level of the "constitutionalisation" of international law, the political element, the interventions and the differentiations are common and intense phenomena. The degree of institutional settlement is substantially lower than that occuring during the last two centuries, at the level of national constitutional order or at least within the European Union.

10. Consequently, the way in which *the relationship between law and politics* is structured, at the level of the national Constitution and the national legal order, is even today remarkably different to the way in which this relationship is structured at the level in which the nation-state is adjacent to the international legal order. This, in a way, also sets the *de facto* limit of the internationalisation of the constitution and the "constitutionalisation" of international law, in an ever-changing world, therefore, overruling any legal, institutional and scholarly admissions. Unfortunately, nothing is manifest or self-evident. This scholarly and interpretative uncertainty is an alarming indication for the European constitutional democratic rule of law, which is the most valuable chapter of the European *acquis*.

Abstracts/Résumés

The last decades of the 20th and the first decade of the 21st century are dominated by two related phenomena which cast doubt on the scholarly basis of public law: On the one hand, the internationalisation of the Constitution and of the national legal order of all states in general and, on the other, the "constitutionalisation" of international law, especially in the field of the protection of human rights and of the establishment and function of basic democratic institutions. This double motion ("internationalisation-constitutionalisation") is simultaneously conducted at all three levels, the

national, the European and the international legal order, via numerous constitutional and legislative texts, international treaties, provisions of primary and secondary EU law, as well as texts of the so-called soft law. It is also conducted, to a great extent, through the case law of national, international and European jurisdictional authorities. An international constitutional *acquis* is hence formed, which is historic, ideological, cultural, political, institutional, methodological, jurisprudential and, conclusively, normative. This is an *acquis* that appears to have ecumenical claims, but it is evidently western-centred. The internationalisation of the Constitution is manifested in various ways, direct and clear at times, and indirect and vague at other times. Therefore, a scale is formed, commencing from the internationalisation itself of the constituent authority, which imposes a Constitution on a state, and ending in the voluntary recognition of the supremacy of international law. Irrespective of the formal way in which the internationalisation of the Constitution is manifested, it is a fact that the acceptance of the international *acquis* is a prerequisite for the legitimisation of state authority and for the guarantee of the state's position in the international system.

A. Pottakis

Les dernières décennies du XX^{ème} siècle et la première décennie du XXI^{ème} siècle sont dominées par deux phénomènes liés qui mettent en doute le fondement scientifique du droit public: d'une part, l'internationalisation de la Constitution et de l'ordre juridique national de tous les Etats en général et, d'autre part, la "constitutionnalisation" du droit international, en particulier dans le domaine de la protection des droits de l'homme et de la mise en place et du fonctionnement des institutions démocratiques de base. Ce double mouvement ("internationalisation-constitutionnalisation") est mené simultanément à trois niveaux; dans l'ordre juridique national, européen et international, par le biais de nombreux textes constitutionnels et législatifs, traités internationaux, dispositions de droit communautaire primaire et dérivé, ainsi que textes de la "*soft law*". Il est également mené, dans une large mesure, par le biais de la jurisprudence nationale, internationale et européenne. Ainsi se forme un acquis constitutionnel international, qui est historique, idéologique, culturel, politique, institutionnel, méthodologique, jurisprudentiel et, enfin, normatif. Cet acquis semble avoir un but œcuménique, mais est bien évidemment centré sur l'Occident. L'internationalisation de la Constitution se manifeste de diverses manières, parfois directe et claire, d'autres fois indirecte et vague. C'est pourquoi une graduation s'est formée, commençant par l'internationalisation même de l'autorité constituante, ce qui impose une Constitution pour un Etat, et finissant par la reconnaissance volontaire de la suprématie du droit international. Sans tenir compte de la forme sous laquelle se manifeste l'internationalisation de la Constitution, il est établi que l'acceptation de l'acquis international constitue un pré-requis à la légitimation de l'autorité étatique et la garantie de la position de l'Etat dans le système international.

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