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**Thomas Giegerich, Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozeß: Wechselseitige Rezeption, konstitutionelle Evolution und föderale Verflechtung**

## Summary

**The European Constitution and the German Constitution in the Transnational Process of Constitutionalization: Reciprocal Reception, Constitutional Evolution and Federal Interweavement**

The book develops the constitutional perspective of a federal European Community/European Union within a larger non-federal Europe from the constitutional history, practice and theory of the first fifty years of European integration. It is written from a German background but includes federal conceptions from the United States of America, Switzerland and Austria and tries to take the discussion in other EU member states into consideration as far as possible. Proceeding from the example of the integration of Germany into the European Community I have tried to demonstrate that constitutionalism, once developed to reign in power on the national and subnational level, must have and indeed does have a future in a “globalized” world where decisions are increasingly taken on a transnational level. This globalization is due to the fact that the dimension of many present-day problems exceeds the problem-solving capacity of the individual sovereign state (*e.g.*, concerning the maintenance of international peace and security, the protection of human rights and of the environment, the regulation of international trade).

In the **Introduction** I outline the effects of globalization on constitutionalism: It has triggered a process of transnational constitutionalization with three components — a standard-setting component, a projection component and a reaction component. The standard-setting component describes the reception of national constitutional concepts and norms concerning the protection of human and civil rights as well as democratic governance by transnational law (*i.e.*, universal and regional international law and the law of supranational communities), as well as

their synthesization and transformation into obligatory minimum standards for all states subject to the transnational law. Examples can be found in the various human rights agreements concluded on the universal and regional level (*e.g.*, the European Convention on Human Rights). This standard-setting component has been of special importance to Germany, primarily in the process of German reconstitution-alization after 1945.

The projection component comes into play when transnational (*i.e.*, international and supranational) organizations are established and assume powers and responsibilities formerly exercised by sovereign states. This development raises questions concerning the constitutional structure of those organizations which can be answered by projecting constitutional concepts of democracy and the rule of law from the national level, where they have long been established, unto the transnational level where they promote a constitutional evolution of the organizations toward more democratic decision-making processes and a better judicial protection from decisions. The projection component tries to ensure that minimum standards of democracy and the rule of law are always observed, irrespective of the level on which the decisions are made.

The reaction component concerns the impact which the constitutional processes on the international and supranational levels have on the constitutional structure of the member states of the organizations. In the case of supranational organizations this impact will of course be much deeper and therefore require a more determined reaction. Member states' reactions can be threefold: They can either set minimum standards to trigger constitutional evolution on the organizational level in terms of democracy and the rule of law — here the projection and reaction components overlap. Or they can try to offset deficits of an organization with their own means (*e.g.*, by providing judicial protection through their own courts where the protection provided by the organization is insufficient). Finally, member states can and must make sure that faults in their constitutional structure (*e.g.*, a shift of power from the state level to the federal level in federal states or a shift of power from the legislature to the executive) which are caused by their integration into an organization are sufficiently compensated (*e.g.*, by otherwise improving the position of the constituent states or the legislature within their constitutional system). The European integration and the German participation in it provide a good example of an advanced transnational constitutionalization process with all its components.

My **First Part** briefly looks back on historical antecedents of the standard-setting component of transnational constitutionalization primarily in the Napoleonic and post-Napoleonic era in Europe. It then describes the outer circles of constitutionalization in post-war Europe (Council of Europe, WEU, OSCE etc.) which have set international legal and political minimum standards for the structure of member states' constitutions, in reaction to the Nazi and Communist dictatorships. These standards are primarily embodied in the European Convention on Human Rights of 1950 and the Charter of Paris for a New Europe of 1990. They form the European Constitution in a wider sense which functions as a quasi-constitutional framework keeping the constitutional evolution of the supranational European integration within the boundaries of constitutionalism, and in particular ensuring its compatibility with the requirements of democracy and the rule of law. The Council of Europe and the European Convention on Human Rights also serve as a gateway for candidates for membership in the EU.

My **Second Part** explains the constitution of the supranational European Community (Community Constitution) forming the federal core of the European Constitution in the wider sense. The other two pillars of the European Union do not follow the supranational model of integration but rather the international model of cooperation so that the EU as such can not yet be understood as a federal constitutional body in the proper sense. In its first fifty years the European integration has undergone a constitutional evolution promoted not only by the EC's constitution-making power (*pouvoir constituant*) and constitutional amendment power but also by the practice of the European institutions, primarily the European Court of Justice's progressive jurisprudence. Under the Community Constitution the Court has the power and duty to ensure that the law is observed (Article 220 of the EC Treaty). This includes the power and duty to interpret and develop Community (constitutional) law in such a way that remaining structural deficits of the Community Constitution are reduced as far as possible.

The steady progress of European integration is based on the following foundations: the constitutionalization of the founding treaty, which originally was an international treaty but can today be properly comprehended and explained only in constitutional terms, as well as the European Community's federalization, democratization and consolidation with regard to the rule of law.

The European Community is a federal body *sui generis* quite similar (but not equal) to a federal state for it maintains direct legal relationships with the citizens of its member states but does not have interna

tional legal personality in its own right. Its supranational constitutionalism is characterized by the autonomy and interweavement of several constitutional layers combined with a reciprocal reception of constitutional values that guarantee the homogeneity of the constitutional structures of the EC and its member states, similar to the constitutional situation in federal states. From the very beginning of the European integration process only states with a democratic and rule-of-law system of government could become members of the E(E)C, by virtue of an unwritten norm of the Community Constitution. This norm was made explicit by the Maastricht Treaty on European Union in 1992 and further clarified and extended by the Amsterdam Treaty and lately the Treaty of Nice in the wake of the "Austrian embargo" (Articles 6, 7 and 49 of the Treaty on European Union). It is based on the fundamental insight that a federal system of government will not survive unless its members agree on basic political values.

The EC's constitutionalism is further characterized by the binding effect of the Community Constitution on the Community's *pouvoir constitué*, including its constitutional amendment power, as well as on the member states. The two final characteristics of supranational constitutionalism are the exhaustive character of the Community Constitution which prevents the member states from returning to international law within its scope of application and the permanent nature of the Community Constitution which excludes unilateral withdrawals from the Community by individual member states. The only legal way for a member state to leave the EC is by constitutional amendment agreed upon by all the member states in accordance with Article 48 of the Treaty on European Union. There is just one rather theoretical exception to this permanency of Community bonds: If the constitutional structure of the EC deteriorates to a point where it is no longer compatible with fundamental concepts of democracy and the rule of law in the sense of the European Constitution in the wider sense, and if no improvement seems possible, the *clausula rebus sic stantibus* comes into play. But it is not the *clausula* of the international law of treaties but a much more restrictive *clausula* which is an unwritten rule of the Community Constitution. Only such a fundamental change of constitutional circumstances will allow individual member states to leave what had been a Community of laws but has become a Community of lawlessness.

A further topic treated in my Second Part concerns the autonomy and superiority of the Community Constitution with regard to public international law and especially the constitutional law of the member

states. Both concepts are nowhere expressly laid down in the Community Constitution but as they are essential features without which the Community cannot function they must be considered as unwritten norms that were discovered as such early on by the European Court of Justice. The Community Constitution is the *Grundnorm* of the supranational EC. Its superiority over the member states' constitutions is counterbalanced by the EC's obligation to pay due regard to the constitutional orders of its member states as part of their national identity expressly protected by Article 6 (3) of the Treaty on European Union. As they must be constitutional states to be eligible for membership in the first place it would be odd if the Community were not as a matter of principle required to protect their constitutionalism. On the other hand, the member states are obliged to adapt their constitutions to the requirements of an ever closer supranational integration. The proper balance between these conflicting demands must ultimately be struck on the Community level by the European Court of Justice and not on the national level by national (constitutional) courts, otherwise the unity of the Community Constitution would be jeopardized and with it the survival of the EC as a community of laws.

The constitutional structure of the EC is built on these foundations. It combines federalism, democracy and the rule of law in forms and with functions that are adequate to the Community level and thus not necessarily identical to the constitutional concepts realized on the national level but *mutatis mutandis* adaptations. The Community's federalism rests on its dual character as a community of constitutional states and of their peoples which are, both in their entirety, joint bearers of the *pouvoir constituant* of the EC. This *pouvoir constituant* wields the supreme power (internal sovereignty) and the *Kompetenz-Kompetenz* of the EC. The constitutional amendment power of the Community is entrusted to the member states alone by Article 48 of the Treaty on European Union. This provision presupposes, however, that the member states' internal decision-making process will involve a directly elected legislative body. The theoretical distinction between the bearers of the *pouvoir constituant* and of the constitutional amendment power makes the assumption possible that the former has set certain extreme limits to the latter, which is a delegated power only, preventing it from completely reversing the basic structural features of the Community Constitution permanently laid down by the *pouvoir constituant*. Thus, the Article 48 TUE procedure must not be used to abolish the democracy and rule of law elements of the Community Constitution nor to turn away from

supranational integration as such toward mere intergovernmental cooperation.

One distinctive aspect of Community federalism is the way in which the conflicting principles of absolute equality of the member states (confederal element) and of relative equality of the member states' peoples (democratic element) are conciliated in the Community's decision-making process. A compromise between the member states' claim to equal representation irrespective of their population figures (absolute equality) and of their peoples to equal representation in accordance with their respective numbers (relative equality) can only be found in a two-chamber legislature, the model being the U.S. Congress. In the Community legislature neither the Council nor the European Parliament are organized according to only one of the two principles of equality in its pure form, as are the Senate and the House of Representatives in the U.S.A. Rather, both principles are reflected to varying degrees in the composition and operation of each of them. The weighted voting in the Council is closer to the confederal one-state-one-vote concept (absolute equality) than to the democratic concept of equal representation of the peoples (relative equality) but it goes a certain way toward the latter as the more populous states have more votes (*i.e.*, they are overrepresented by the standards of absolute equality). The composition of the European Parliament is closer to the democratic concept of equal representation of the peoples but it goes a certain way toward equal representation of the states as the smaller peoples are overrepresented by the standards of relative equality.

From a democratic perspective the dual federalism of the EC is reflected in the dual direct and indirect democratic legitimation of the Community power by the peoples of the member states, directly via the European Parliament and indirectly via the Council consisting of representatives of the member states governments which are in turn responsible to the national parliaments. As the Council is still more powerful the indirect legitimation yet prevails even though the intransparent decision-making process in the Council cannot be properly controlled by national parliaments. Apart from this indirect legitimation cannot alone sufficiently support majority decisions in the Council whose increasing frequency calls for the transformation of the European Parliament into an equal second chamber, with a co-decision procedure as the ordinary method of decision-making. Proposals to include the national parliaments directly in the decision-making process on the Community level might improve the input legitimacy of Community acts but could at the same time diminish the output legitimacy because they tend to compli

cate decision-making. These proposals could also shift the balance between the Community interests and the national interests that is so thoroughly struck in the institutional make-up of the EC. To avoid these pitfalls one could add an equal number of representatives of national parliaments to the representatives of national governments in the Council delegations of the member states. This combination of the *Bundesratsprinzip* (the German federal council model of a representation of state governments on the federal level) and the *Senatsprinzip* (the U.S. senate model of a representation of state electorates on the federal level) was embedded in the German *Paulskirche* Constitution of 1849 which, however, never entered into force so that the workability of the combination model could never be tried in practice.

The rule of law on the Community level consists of the Community-wide unity and effective implementation of Community law. As a Community of laws with no political power of its own the EC's political existence is coextensive with the practical enforcement of its legal order. Core components of the rule of law are the Community law's direct effect and superiority over national law, both products of the progressive jurisprudence of the European Court of Justice. The member states have submitted to these implicit postulates when they ratified the EC Treaty. In consequence merely of their acts of ratification these postulates take effect within the legal orders of the member states giving rights to and imposing duties on their inhabitants and requiring the national authorities to enforce both. The Community law's direct effect and superiority does not additionally depend on a national norm of acceptance which could be subject to the national authorities' and the national courts' powers of restrictive interpretation and even revision, thereby jeopardizing the unity of Community law.

The European Community's supranational constitutionalism that is structured along the lines of federalism, democracy and the rule of law can serve as a blueprint for the peaceful integration in constitutional forms of other world regions and ultimately the globalized world as such where its realization will of course meet much higher obstacles. Under the conditions of globalization which tends to erode state sovereignty and require decision-making on a transnational level the future of constitutionalism as a model of political order depends on the European Community's success of transforming constitutional diversity into a federal constitutional unity without destroying the diversity.

My **Third Part** takes a closer look at the German constitution (Basic Law of 1949) in its role as a constituent part of the European Constitution. It considers the German constitutional state as a receptor and

projector of constitutional values. In Germany this reception has a tradition which dates back several centuries and includes, *e.g.*, the Peace of Westphalia of 1648. It sometimes took the form of an *octroi* by foreign powers the constitutional situation in Germany having long been an important aspect of the “German question”, *i.e.*, the question of how to integrate Germany into the European balance of powers without disruption. As a matter of fact, constitutional progress in Germany has often needed an impetus from the outside. This was so even at the drafting of the Basic Law of 1949 which is the result of common efforts by the (West-) Germans and the western Occupation Powers (Britain, France and the U.S.). After 1945, and even beyond the reunification of Germany, the reconstitutionalization and European integration of the Federal Republic of Germany have been a matter of common concern for the Germans, their neighbours and allies as well as the Main Allied Victorious Powers. Its constitutional stability, its re-emergence as an equal partner after 1949 and its reunification are not the least due to the firm integration of Germany into the federal Europe of the EC and the wider Europe of institutionalized cooperation, with their network of legal and political safeguards against constitutional instability.

The Basic Law has always been open and friendly toward the European integration of Germany which it considers as a way to safeguard its own structural essentials. But the Basic Law is also aware of, and eager to defuse, the dangers posed to these same essentials, in particular the vertical and horizontal separation of powers, democracy and fundamental rights, by the integration of Germany in the federal EC with its directly applicable and superior laws. It is the Basic Law’s concern to safeguard the structural principles of the Community Constitution and of the German constitution jointly, and not the ones at the expense of the others. They must be considered not as antagonistic but as symbiotic. The foregoing statements are the results of a proper interpretation of the Basic Law’s preamble, Article 24 (1) and — since 1992 — Article 23. These provisions are the expression of a fundamental change in the German concept of statehood — the definite break with the concept of the sovereign state engaging in unilateral power politics and the definite abandonment of Germany’s special ways in terms of constitutional structure and political philosophy. As an original German contribution to the reconstruction and self-assertion of Europe in the competition of the world powers they have given European integration a major impetus. Because the openness of the Basic Law toward European unification follows from a deliberate and fundamental decision of the *pouvoir constituant*, even the structural principles of the Basic Law which the

same *pouvoir constituant* has declared unalterable by Article 79 (3) of the Basic Law must be interpreted in such a way that conflicts with Germany's Community law obligations are avoided as far as possible.

In the light of the EC's steadily evolving constitutionalism with its federal, democratic and rule-of-law structure, Article 23 of the Basic Law paves the way for European unity and escorts Germany on this way but does not serve as a bulwark to defend German constitutionalism thereby obstructing European integration. Article 23 of the Basic Law provides two different mechanisms for the protection of constitutional essentials in the federal Europe — the structure protection clause in paragraph 1 clause 1 which concerns the constitutional structure of the European Union and the constitution protection clause in paragraph 1 clause 3 in conjunction with Article 79 (3) of the Basic Law which concerns the constitutional structure of Germany<sup>1</sup>. Both clauses ultimately adopt standards set by the Community Constitution that has bound the member states constitutions to protect its basic constitutional structure as well as their own and thus ensures the constitutionalism of the federal Community on all its levels.

On this background the often-mentioned limits to European integration drawn by Article 79 (3) of the Basic Law do not put insurmountable obstacles in the way toward an "ever closer union among the peoples of Europe" (preamble of the EC Treaty) if two conditions are met: (a) the constitutional evolution of the federal European Community continues to move towards democracy and the rule of law, steadily reducing remaining deficits at a rate which has a reasonable relationship with the intensification of the integration; (b) the basic constitutional order in Germany with its federal, democratic and rule-of-law components remains intact. In the course of European integration Article 23 (1) 3 read together with Article 79 (3) of the Basic Law permits and perhaps requires considerable modifications even of the basic structural

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<sup>1</sup> Article 23 (1): "With a view to establishing a united Europe the Federal Republic of Germany shall participate in the development of the European Union, which is committed to democratic, rule-of-law, social and federal principles as well as the principle of subsidiarity, and ensures protection of basic rights comparable in substance to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by law with the consent of the Bundesrat. The establishment of the European Union as well as amendments to its statutory foundations and comparable regulations which amend or supplement the content of this Basic Law or make such amendments or supplements possible shall be subject to the provisions of paragraphs (2) and (3) of Article 79." (Official translation published by the Press and Information Office of the Federal Government, Bonn 1994) Article 79 (3) of the Basic Law prohibits constitutional amendments affecting human dignity, democracy, the rule of law or federalism in Germany.

principles of the German constitution, provided that these modifications remain within the general framework of the German constitutional system (and provided of course that they are compatible with the minimum standards set by the European Constitution in the wider sense). As long as the two above-mentioned conditions (a) and (b) are met Germany may even give up its independent international legal personality (external sovereignty) and join a European federal state. Such a European federal state would certainly not be as unitary as the German federal system but even more decentralized and dualistic than the U.S. and the Swiss models.

With regard to the condition (a) temporary structural deficits of the Community Constitution (such as the deficit concerning the democratic legitimation of Community acts) must not be externalized but need to be internalized. In other words, they must not be used as a justification for the non-participation by Germany in new steps taken in order to advance European integration, or even serve as a pretext for the non-fulfilment of legal obligations flowing from the Community Constitution already in force. Rather, they must be compensated as far as possible by measures taken within the German jurisdiction (*e.g.*, by improving the participation of the German parliament in the decision-making process defining the position to be taken by the German representative in the Council). The same applies within the scope of application of the condition (b) with regard to shifts in the German governmental structure brought about by the European integration (*e.g.*, shifts in the vertical separation of powers from the states to the federal government or shifts in the horizontal separation of powers on the federal level from the parliament [*Bundestag*] to the executive [*Bundesregierung*]). Shifts in the vertical separation of powers must be compensated by measures which strengthen the autonomous statehood of the *Laender* (constituent states of Germany) in other respects, *e.g.*, by cutting back the extensive catalogues of federal legislative powers in favour of the *Laender*. Shifts in the horizontal separation of powers on the federal level must be compensated by measures which strengthen the Federal Diet (*Bundestag*) *vis-à-vis* the federal executive (*Bundesregierung*) in other respects. The obligation to internalize and not to externalize these faults in the German constitutional structure caused by Germany's integration into the EC must be taken seriously. It will not always be possible to fulfil this obligation by minor amendments to the Basic Law. It may go much further, necessitating far-reaching reforms of the Basic Law's system of government even if such reforms would require major revisions of the constitutional doctrine in Germany

which has so far been too introverted, *i.e.*, too much geared to the German nation state. Thus, neither the pre-eminent role of the federal executive (*Bundesregierung*) in the process of making foreign and European policy decisions nor the *Bundesratsprinzip* nor the constitutional doctrine that the right to vote in state and federal elections be reserved for Germans can ultimately be sacrosanct if changes in these principles or doctrines should become necessary either to implement future Community law standards or to counterbalance the effects on the German constitutional structure of further steps toward a unified Europe.

The book is being published at a time when the enlargement of the EU is imminent and the post-Nizza debate on a European Constitution is raging inside and outside the Convention on the Future of Europe currently in session. With the establishment of the European Coal and Steel Community fifty years ago a utopian dream has begun to take shape in Europe — now major further steps toward the gradual realization of this utopia may be imminent.