The Emergence of European Constitutional Law

Rainer Arnold

Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.


The first question to be dealt with is whether the notions of ‘constitution’ and ‘constitutional law’ as they are traditionally attributed to the nation state can also be used for non-state phenomena, in particular, the supranational order of EC law.

The national reports clearly indicate that the national doctrinal approaches towards this issue are divided. The orthodox view – which seems to be the majority, consisting predominantly of the national constitutionalists (outlined in particular by Tichý and Tirado) – reserves these terms for states whereas a growing number – mostly the EC lawyers – follow the line of the ECJ in attributing these terms to supranational entities as well (Quermonne).

What are the reasons for the new approach?

The main reason stems from the functional approach of what is understood by a Constitution:

1) an institutional function (to create institutions and to attribute competences and powers to them on the basis of a “complex institutional equilibrium” (Cruz Vilaça));

---

* Session IVB3. National reports received from: Bulgaria, E. Tanchev; Czech-Republic, L. Tichý; Estonia, A. Albi; Finland, L. Nieminen; France, J.-L. Quermonne; Germany, A. von Bogdandy & R. A. Lorz; Greece, N. Scandamis; Italy, A. Pizzorusso; Japan, A. Ejima; Poland, P. Policastro; Portugal, J. L. da Cruz Vilaça; Russia, M. Entin; Slovakia, J. Mazák; Spain, C. Tirado Robles; Sweden, J. Nergelis; Switzerland, S. Breitenmoser; UK, P. Birkinshaw; Ukraine, A. Lytvynuk; US, M. Kumm.

1 The present General Report gives references to the names of the contributors and the relevant pages of the national reports submitted to the XVIIth International Congress of Comparative Law, Utrecht 16-22 July 2006.

2 Analyzing the reasons for the hesitations in recognizing the constitutional character of EC primary law. See pp. 1-5 of his national report.

3 His answer 1 to the suggested Questionnaire.
2) the function to determine the fundamental objectives, principles and orientation of the institutions (in substantive and value-related dimensions such as the rule of law, democracy and social orientation);

3) the function of determining values, in particular fundamental rights.

All these functions of Constitutional Law have already been projected onto the supranational level where the EC has taken over the many spheres previously retained for the nation state (Scandamis).  

Thus, the majority of the reports emphasize that the EC/EU Founding Treaties, or at least the basic provisions thereof, are of a constitutional nature (Lorz, Pizzorusso, Tichý, Nieminen, Tirado “Constitution matérielle” or “Constitution fonctionnelle”). This, along with the ‘constitutional’ jurisdiction of the ECJ in the areas of fundamental rights and the general principles of the EC legal order, forms the unwritten constitution, similar to the model of the UK, which has a substantive and not a formal constitution (the latter will perhaps be created in the near future). The ECJ, as a Bulgarian report points out, is the vehicle driving the process of constitutionalizing Europe, making constitutionalism a phenomenon in a state of transition from an association of states governed by treaties to an association where states are bound by constitutional principles. Birkinshaw also confirms that the decision-making power is of a constitutional nature, a view which is also maintained in the Italian report by Pizzorusso where he explains quite clearly the ongoing constitutionalizing effect of the ECJ.

Pasquale Policastro speaks of the jurisprudence of the ECJ and the ECtHR as providing the requirements or at least some standards for this constitutional transformation.

Some reporters prefer the term ‘European Constitutionalism’, indicating the process of ‘constitutionalizing’ European law and “Europeanizing” national constitutional law. This process reflects the reality of “post-national constitutionalism” (Albi), or “neoconstitutionalism” (Lytvynyuk).

Such a process was essentially furthered by the enhancement of fundamental rights in Europe (Breitenmoser, Tirado, Pasquale Policastro).

---

4 See p. 2 of the national report.
5 See, for example, Tirado’s national report, pp. 10-11.
6 See Tanchev’s national report, in particular Annex I to his report, p. 12.
7 See Birkinshaw’s national report, p. 5.
8 Pizzorusso’s national report, pp. 3-4.
9 See Policastro’s national report, p. 4. He also uses the term “Les nouvelles tendences du droit constitutionnel”.
10 See Albi’s national report pp. 2-3.
11 See Lytvynyuk’s national report p. 7.
12 See Breitenmoser’s national report p. 1 &. 6
13 See, for example, Tirado’s national report on p. 16 & 20. She also elaborates at length on the question of public order as a limit to the existence of “constitutional” laws in Europe (See pp. 4-14 of her national report).
14 See Policastro’s national report A history from ‘Parallel Lives’: Constitutional Law and the Range of Public Obligations in the European Enlargement. Some Reflections on the Polish Case. He talks of the “new constitutional consciousness” after World War II and the “reconstruction of the international legal order” and, thus, the creation of “a legal transnational sphere” (p. 1)
This constitutionalism is characterized by “constitutional pluralism” (Albi) comprising various sources and levels of constitutional law. In this context a frequently used term is “multilevel constitutionalism” (Lorz, Albi) which is sometimes understood in the sense of various interacting autonomous legal orders, and sometimes in a more unspecific way along with the term of ‘complex multilevel governance’ across those levels.

A further commonly debated question in this respect is that of legitimacy (légitimité). How is European Constitutional Law legitimated?

The answer is manifold.

This question is connected to the qualities of a Constitution as the ‘supreme law of the land’. People’s sovereignty linked to European ‘demos’ as a classical pattern is often invoked and challenged as being the prerequisite for a European Constitution (Scandamis). Due to the supranational governance, a new, post-national approach (Scandamis) has to be taken. According to a modern English approach as expressed by Lord Hope in R (Jackson) v. Attorney General [2005 UKHL 108], “the rule of law is the ultimate controlling factor on which our constitution is based.” This citation by Birkinshaw can also be applied to the debate concerning the legitimacy of the EU Constitution. And as the American report states: “‘legitimacy’ is drawn from the Republican principles [liberty, democracy, and respect for human rights], thus from rule of law. Legitimacy in this sense is not necessarily based on the European “we the people” (Kumm).

If the Treaty on a “Constitution for Europe” is ratified, the term ‘constitution’ will be transferred to the supranational level by the fact of ratification by each Member State. This will be a sort of legal definition of the supranational document as a constitution.

If a new term is found for this constitution, such as ‘Basic Law for Europe’ or even ‘Fundamental’ or ‘Basic Treaty for Europe’ as has been proposed, this would be a strong counter-argument to the notion of a Constitution on the EU level.

Notwithstanding the fact that this Constitution might be adopted under Public International Law the text will not be deprived of its constitutional substance.

As for the political effect of a future Constitution for Europe which will be a “‘quasi-revolutionary act’ of creating Europe anew”, it can be said (as Lorz does) that it will be a “qualitative leap forward in the direction of a federal state or at least a quasi-federal system.”

---

15 See Lorz’ national report pp. 18-19. The “multilevel constitutional system” is also referred to on p. 15.
16 Albi’s national report, p. 6.
17 See Scandamis’ national report p. 4.
18 Id.
19 Birkinshaw’s national report p. 15.
20 See Kumm’s national report pp. 4-7.
21 Lorz’ national report p. 15.
2. The European Convention on Human Rights (ECHR) as a Part of a European Constitutional Law?

The principal question is whether it is possible to extend the notion of constitutional law to the ECHR, which is an international treaty in form, but presents a Fundamental Rights Charter (with further rights established by additional protocols) as its substance. This question is much debated by the lawyers of the many member states of the Council of Europe and their willingness to identify it as constitutional law varies greatly (Cruz Vilaça, Entin). However, the great majority of the national reports do support such a qualification as constitutional law (Tichý, Tanchev, Birkinshaw, Albi, Lorz, Nergelius, Nieminen, Skandamis, Tirado).

What is the logic behind such conclusions?

The main aspect is that the national constitutions are subject to ‘the reservation’ of the ECHR so that their jurisprudence has to comply with that of the ECtHR. National constitutional jurisprudence is to be in conformity with Strasbourg jurisprudence. Fundamental rights protection is administered by both national constitutions and the ECHR – there is a functional unity of the two, one can even call it a functional identity which, in turn, does not exclude that the solutions found by both courts are different (Ejima).

In this context a frequent question is what the mechanism to link the ECHR to the national constitutional orders is: being a formal part of the national constitutional order as in Austria (the most far-reaching solution); being the essential criteria for the interpretation of internal fundamental rights as in Spain (Constitution Art. 10.2); being a normative layer between ordinary legislation and the Constitution as in France and the new democracies of Central and Eastern Europe; or, being equal to ordinary laws such as, for example, in Germany.

Sometimes authors derive the constitutional character of the ECHR from its internal legal status, but sometimes for this characterization they refer to its functions and substance.

In this respect the impact of the ECHR on the supranational order of the EC/EU should also be mentioned. As is commonly known, supranational fundamental rights are essentially based on the ECHR concepts. The Community judges hold the ECHR to be an important source of inspiration for the formation of general principles of EC law, and one which has become even more important in the fundamental rights jurisprudence of the ECJ than the prior frequent reference to the national constitutional traditions. Furthermore, the importance of the ECHR is also reflected in the EU Fundamental Rights Charter which in large parts has taken over the Strasbourg acquis.

22 With reference to the Loizidou case, 1995 “Constitutional instrument of European public order” (p. 20 of his national report).
23 Lorz uses the term “accessory Constitution” in his national report on pp. 16, 18.
24 Ejima explores in more depth the necessity to identify the common principles of both the ECHR and the EU legal order as well as the national constitutional orders for the better protection and enhancement of fundamental rights. See her national report on pp. 7-8.
3. Transnational Principles as the Nucleus of the Three-Level European Constitutional Law

From the above-mentioned analysis it is possible to derive the following concept of European Constitutional Law. The three levels to which the notion of Constitutional Law can be applied are: the national constitutions, the supranational order and the ECHR. They are normatively autonomous but interdependent and interacting which results in the emergence of the transnational general principles of constitutional law (von Bogdandy,25 Mazák, Tanchev,26 Birkinshaw, Lorz, Nieminen, Pizzorusso, Skandamis, Cruz Vilaça,27 Policastro28).

These principles stem from the convergence of the concepts and legal solutions, in particular in the fields of fundamental rights and the rule of law. Another source from which these principles are drawn is the further convergence of the concepts and solutions of the constitutional jurisdictions (national and supranational). Some of the principles may also be derived from regionalism/federalism.

Important examples of such transnational principles are: the anthropocentric approach of constitutional law – the paramount position of the individual in comparison with state interests, culminating in the recognition of dignity as a supreme value;29 the efficiency of fundamental rights based on this value, and the limitation of public power, including that of the legislator, to restrict the guarantee of these rights.30 Of particular importance are the intangibility of the fundamental rights essence and the principle of proportionality.

The further aspects to be considered in this regard are the common understanding of the rule of law as a value-orientated principle connected to the anthropocentric approach, and the recognition of the primacy of constitutional law over the legislator as ensured by the state’s constitutional jurisdiction.

Worth mentioning in the field of regionalism is the principle of the differentiation of central state power by attributing competences to territorial subentities.

An important question arises: what is the legal basis for these transnational principles of European Constitutional Law?

25 See von Bogdandy, Constitutional Principles for Europe, in particular Part II on the “Founding principles of supranational authority” (equal liberty, rule of law, democracy and solidarity), pp. 7-35.
26 Referring to “a common European legal heritage” (p. 5).
27 However hesitating: “… on ne peut pas, à mon avis, parler d’un ordre constitutionnel unique incorporant également l’ordre de Strasbourg.” (p. 7)
28 He acknowledges the existence of transnational legal principles that coordinate the law of the different polities (p. 1 of his national report).
29 Policastro, in his national report for example, talks of the significance of European law in overcoming discrimination; he refers to this phenomenon as “a true progress in the achievement of the evolutionary paradigms of constitutionalism” (p. 2 of his national report).
30 Id. Policastro here underlines the existence of the “concentric levels to implement such a ‘transnational principle of law’ as the protection of human rights” (p. 2 of his national report).
It is not easy to find a solution. Article 6 (2) TEU seems to be a starting point for further reflection in this respect (von Bogdandy,31 Tirado). This provision refers to the general principles of Community Law as well as the general principles of the ECHR, thus it refers to these two separate orders, and by doing so comprises the mentioned three levels of Constitutional Law (the national orders being indirectly implicated by the reference in the EC general principles to national constitutional traditions).

To answer the original question of whether there is an emerging European Constitutional Law we can state that those rules that refer to the three-level co-governance are the body of European Constitutional Law, and that within these rules transnational principles of European Constitutional Law are about to be shaped.

In conclusion, a growing three-level co-governance is the basis for a new legal order which can be called European Constitutional Law. Within this order transnational constitutional principles can be found, which express the converging normative concepts and legal solutions.32


31 Von Bogdandy, in his study, only refers to EU constitutional principles, not to those stemming from the other two levels. But he confirms that the mentioned principles, together with national constitutional law, form “a European Constitutional Space”, whereas in the opinion of the General Reporter this notion also comprises the ECHR level and that of the national constitutions.

32 With regard to the levels’ interaction, Pascuale Policastro talks about the development of ‘a new generation of constitutional jurisdiction’ which will be “centred upon the development of ‘constitutionalism’, as well as the transnational principles” (p. 6 of his national report).