

# CHANGES AND TRADITION IN EUROPEAN CONSTITUTIONALISM

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## **1. The continuity of law**

The regulatory character of law corresponds with its perpetuity. Its aim is to establish an order for pursuing determined political finalities. The abstractness of norms ensures equality of law application and makes it an instrument of impact on state and society. The establishment of the normative order is regularly based on the idea to keep it up for a certain time period, even perpetually. Order and perpetuity are linked together. This does not exclude political revision of the established order, making control of its usefulness or of its correspondence with new or different political perspectives. Social changes require the adaptation of the established solutions and therefore normative changes.

This control goes on permanently by politics and as a consequence of discussion in society. If legal solutions are confirmed by this political control for a longer time, normative *perpetuity* becomes *continuity*.

Constitutions are basic legal orders of State and society establishing an institutional system and a value order.<sup>1</sup> The element of normative perpetuity of the constitution is particularly distinct. As they regularly are people-made orders this element is inherently characteristic for them. The people establishes this order by a Constitution, expresses by this its general will, which shall be filled up by its specific will formulated by its representatives in Parliament in daily politics. General and specific will of the people are complementary. Perpetuity is therefore inherent in the constitution as a type of basic law, basic in the sense of regulation because it determines the major concepts of the State as well as in the sense of normative validity because it shall be is a normative basis for the Algerian war political process during a regularly undetermined period. It is obvious that this is the reason for making reforms of the Constitution more difficult than the change of ordinary legislation.

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<sup>1</sup> See Giuseppe De Vergottini, *Diritto Costituzionale Comparato*, Vol. I, 8<sup>th</sup> ed., 2011, p.253-254; see also p. 223-224.

## 2. Continuity and change in Constitutional Law

Making a new Constitution means to establish a new basic legal order of a State. This can be an act of transformation which is constitutive for the transition from the former system to a new order based on a new ideological, political and legal orientation. The transition Constitutions leading from dictatorships or authoritarian regimes to pluralistic democracies such as the German Constitution (1949), the Constitutions of Spain, Portugal and Greece in the 70s and the new Constitutions after the fall of communism fall within this category. They clearly interrupt continuity in the field of constitutional law and have a significant regulatory impact on other branches of law. However, civil law insofar as it does not reflect the former ideological convictions has much more chances for continuity than constitutional law. Even administrative law shows more endurance. Constitutional law is very close to the political system of a country and therefore highly dependent from basic political transformations. Ordinary law is in a continuous process of adaptation to the changing needs of the society, regularly without undergoing a radical transformation except in those fields which correspond to the former ideology.

Constitution-making can also be an act not of radical transformation but of evolution in constitutional thinking replacing mechanisms which have evolved to be not sufficiently satisfying new developments in society. Political processes of serious impact often give the ultimate impulse for a new start with a new Constitution of this type. A significant example is the transition from the Fourth to the Fifth Republic in France when the Algerian war gave the signal for a new Constitution strengthening the power of President and executive for further avoiding government instability.<sup>2</sup> The aim of this Constitution was not the complete replacement of the existing system, but to shift the powers from Parliament to the executive while other features remained essentially untouched. Continuity has been much more upheld than in real transformation Constitutions.

It seems that a twofold basic categorization can be made: Constitutions can interrupt continuity such as *transformative Constitutions* and can maintain continuity even if they make some changes, even of importance but do not affect the basic system. The second type of Constitution can be called an "*evolutive Constitution*". It is evident that the evolution of law is closely related to tradition. Tradition means continuity in legal thinking based on perspectives which have been experienced for long periods and have become an integral part of the society's convictions. Traditions are the fundamentals of evolutions. They are also elements of solidity in history opposing revolutionary processes and too fast, imprudent changes. Evolutions have a tendency to further develop the traditional framework adapting and actualizing it to the upcoming requirements.

## 3. European constitutionalism as a result of evolution

European constitutionalism can be defined as an interactive and interdependent body of three autonomous legal orders - the national, the supranational and the conventional order of the ECHR pursuing four main finalities: individualization, constitutionalization, internationalization, and differentiation of power.<sup>3</sup> This means that European

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<sup>2</sup> See Jean Gicquel/Jean-Éric Gicquel, *Droit constitutionnel et institutions politiques*, 25e éd., 2011, p.493 – 500.

<sup>3</sup> Rainer Arnold, *European Constitutional Law*, in: Nadežda Šišková (ed.), *The Process of Constitutionalisation of the EU and Related Issues*, Groningen/Amsterdam 2008, p. 41 – 49; idem, *Interdependenz im Europäischen Verfassungsrecht*, Essays in Honour of Georgios I. Kassimatis, Athens 2004, p.733 - 751

constitutionalism is characterized by the substantially and functionally efficient safeguard of fundamental rights, the assurance of the new value-oriented concept of Rule of Law based on the primacy of the Constitution, the due respect of international and supranational law and the horizontal and vertical separation of power.

The very nucleus of constitutionalism is Rule of Law which unites all the four mentioned tendencies: It is a value-oriented concept comprising fundamental rights based on human dignity. Furthermore it is not only related to the internal State law, but also refers to the external legal orders, international as well as supranational law the respect of which is a legal obligation and therefore an aspect of Rule of Law.<sup>4</sup> Separation of power is a traditional element of this concept which has obtained new dimensions in current constitutional law. For these reasons it seems useful to concentrate on rule of law in the following reflections, with the intention to show the traditional sources and historical roots of its modern concept and to demonstrate that the changes in European constitutionalism has undergone are well founded in traditions.

#### **4. Rule of Law and Constitutional Justice**

The modern concept of “substantive“ Rule of Law is deeply rooted in the 19th century idea of a “formal” Rule of Law developed by German authors such as Otto Bähr<sup>5</sup> and Rudolph Gneist<sup>6</sup>. Without this first achievement of the legality of executive action, the concept of today would never have evolved. The formal dimension of *Rechtsstaat* means that the executive power is dependent from Parliament which expresses the will of the people: in the 19th century the victory of Parliament over the monarch as the head of the executive branch. Legality as the core principle of the formal rule of law concept is ensured by the developing review of administrative action by courts. Administrative justice is about to be established in that period in some countries, first integrated into public administration, later becoming an independent institution but, for a long time, restricted in its function by limiting the fields of review.<sup>7</sup> Furthermore, the idea of separation of powers is seen as an element of Rule of Law and often considered by politics as a weapon against judicial interference. Formal Rule of Law is more an institutional concept and not yet connected with the protection of the individuals’ rights and freedoms. This corresponds to the historical situation which focuses on state power and not yet on the realization of fundamental rights. However, legality requires that public power interferences with the individual’s rights have to be justified by the existence of legislation giving a legal basis for the intervention. The essential step from the formal to the substantive rule of law concept is unthinkable without the ideological basis which has been built up by the formal Rule of Law. Fundamental developments in Constitutional law have transformed the formal into the substantive rule of law concept, now based on the idea of the primacy of the Constitution and closely associated with the fundamental rights protection system. The tradition of *Rechtsstaat* in Germany has been strongly consolidated so that it could be revived after the period of totalitarianism by the *Grundgesetz* of 1949.

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<sup>4</sup> See German Federal Constitutional Court, Decisions vol. 111, p. 307; [http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014\\_2bvr148104en.html](http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104en.html) /§ 47.

<sup>5</sup> Der Rechtsstaat. Eine publizistische Skizze, 1864

<sup>6</sup> Der Rechtsstaat, 1872

<sup>7</sup> See Gernot Sydow, Die Verwaltungsgerichtsbarkeit des ausgehenden 19. Jahrhunderts : eine Quellenstudie zu Baden, Württemberg und Bayern, 2000

Rule of Law is composed of a rather broad spectrum of elements such as separation of powers, access to justice, non-retroactivity, etc., which have evolved also in other countries notwithstanding the lack of a specific terminology for this concept as a whole. It is relatively late that in countries such as France the term of *État de droit* has been introduced in the second half of the 20th century<sup>8</sup>, probably under the influence of the upcoming transnational dialogue all over Europe. Nowadays this term is common in all the countries, even on the supranational level. We can state an evolutionary process which converts traditional orientations into a modern perspective.

Closely connected with Rule of Law is Constitutional justice. Today the review of legislation by Constitutional Courts is seen as the “perfection” of Rule of Law. Also in this field the current situation is not thinkable without tradition as a basis from where constitutional progress has been made.

The year 1803 when the Supreme Court of the United States annulled a piece of federal legislation for incompatibility with the Constitution in *Marbury v. Madison*<sup>9</sup> has been distinctly taken into consideration by the European legal discussion. However, separation of power was too strong at that time in Europe to allow interference of the judges with Parliament. In a few countries, however, some beginnings of Constitutional justice can be stated, either in form of judgments on ministerial responsibility or in rare cases on the protection of the individual, by ordinary courts or by specific tribunals. It is commonly known that the year 1920 is most decisive for the review of legislation when the Austrian Constitutional Court was established. The judges of the German Supreme Court had the courage, already during the Weimarian period, in 1925, to refuse the application of a federal legislation for not being conform to the Constitution, invoking the *lex posterior* rule.<sup>10</sup> This was a new, surprising step, the first element for a new tradition which, of course, could come into effect only in the post-war period, with the German *Grundgesetz*. The example of the German Supreme Court was sufficient to influence the Constitution makers in 1949 for introducing the legislation review by judges. The existence of the Austrian Constitutional Court encouraged them to establish, also in Germany, such as specific Court and to attribute a large spectrum of competences to it. It can be said that tradition from the own country and also from other countries gives the impulses for changes in Constitutional law.

The example of the development of Constitutional justice in Europe shows a continuous evolution of the instrumental means for ensuring Rule of Law. The basic orientation starts with legality, the superiority of Parliament, that is of legislation, over the executive, and ends up with constitutionality, that is the review of legislation for the conformity of legislation with the Constitution. The Constitution as a concept has also been in development: from a political document, even with legal character, that gives political orientation to the government and the other state institutions for realizing its contents to a normatively strictly binding basic text<sup>11</sup> which requires conformity of the most important expression of state power, the legislation, with it.<sup>12</sup> The evolution of the

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<sup>8</sup> See Jean Gicquel/Jean-Éric Gicquel (note 2), p. 486 – 487.

<sup>9</sup> 5 U.S.137

<sup>10</sup> RGZ vol. 111, p.320, 323

<sup>11</sup> See Eduardo García De Enterría, *La Constitución como norma jurídica*, 1982.

<sup>12</sup> See the classic dictum of the French Conseil constitutionnel in its decision Déc. n.85 – 197 DC du 23 août 1985: "La loi n'exprime la volonté générale que dans le respect de la Constitution".

normative character of the Constitution goes parallel to the development of Constitutional justice.

A further evolutionary process can be seen in the growing internationalization of Rule of Law, of the concept of Constitution as well as of Constitutional justice. Globalization as well as, in Europe, supranationalization have transformed the traditionally "closed state" essentially based on its sovereignty into an "open state" <sup>13</sup>limiting its sovereignty in favour of multistate organizations. Rule of Law, as expressed clearly by the German Federal Constitutional Court in the Görgelü case<sup>14</sup>, is no longer an obligation of the State to obey in its actions exclusively the own national legal order but to respect also the legal duties resulting from the international sphere. Rule of Law therefore corresponds to the two dimensions of the modern Constitution, the internal as well as the external aspect, both expressing the basic orientation of State and society towards the respect of internal State law and external international law. Constitutional justice takes account of this evolution and opens to this external dimension of Constitutional law: it determines the details of the normative coexistence between internal and external law, it guards the due respect of the law from outside and makes the two legal orders compatible by interpretation in favour of the external law. This latter mechanism has been developed by European Constitutional Courts for reconciling internal and external law. A particularly striking example can be seen in the interpretation of the Constitution in favour of EU law which has been practiced by the Polish, Czech, German and other courts<sup>15</sup>. Constitutional justice is adapting to the requirements of international law in many respects.

#### 5.The Core Elements of European Constitutionalism

Rule of Law, Constitutional justice and the protection of fundamental rights are the core elements of modern European constitutionalism. The fundamental rights idea is rooted even in the beginnings of constitutionalism in the 18th and 19th century. The impact of the French 1789 Declaration of Human and Citizen rights as well as in particular the Belgium Constitution of 1831 on the further developments of the idea of the fundamental rights protection in Europe has originated a widespread protection system first on the State level, later also on the international level. The multiplicity of rights protection systems in Europe of today can only be understood in the context of these origins. Tradition is the vehicle of evolutionary progress. Constitutionalism is exposed to social changes within and also without the field of its application. Progress in Constitutional law has the tendency to develop further the foundations already existing by tradition.

If Rule of Law is not respected and individual freedom is neglected, evolution of Constitutional law in a positive sense is interrupted. This can lead to a revolution which establishes a new order. Revolution breaks up with a shorter or longer tradition, insofar as the former impugned orientation is concerned. Other traditions, for example in civil law, are regularly held up and only modified in crucial points which reflect the former situation. Political transformation often is connected with economic transformation. Civil law, which

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<sup>13</sup>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, 2008, p. 3-35.

<sup>14</sup> Vol.111, p.307; see also Gertrude Lübke-Wolff, <http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php?artikelid=135>

<sup>15</sup> See BVerfG (Lisbon Decision), 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), , [http://www.bverfg.de/entscheidungen/es20090630\\_2bve000208.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html) Abs.-Nr. 225;

constitutes a steady factor in the legal systems, can therefore be strongly affected as it has occurred with the transition of socialist to free-market systems.

In the field of fundamental rights, the modern tendency is to guarantee them in a highly effective way, using a broad interpretation of the constitutional text and covering all the possible dangers threatening the individual's dignity, autonomy and freedom. Effectiveness of protection in substantive and functional way is characteristic for the modern European approach. Fundamental rights constitute, besides their character of subjective rights, objective values which build up a comprehensive value order without any gaps. Rights are written or unwritten, exposed to the interpretation by the judges, in particular, the constitutional judges. They have the task to find out, through interpretation, the adequate protection even from new dangers which have not yet been expressly mentioned in the Constitution. Functional efficiency of fundamental rights means in particular that the legislator is not allowed to restrict them without any limitation. The principle of proportionality as well as the guarantee of the very essence of the fundamental rights are safeguards for the rights, well known today all over Europe. This is an important new characteristic of European constitutionalism, as a result of a long period evolution. The existence of fundamental rights is based on tradition since the beginnings of constitutionalism, their functional efficiency has developed later, favoured in particular by the progress in Rule of Law.

#### 6. Tradition and Changes: Progress in European Constitutionalism

Tradition in law can be a basis for progress by evolution but can also be opposed to the necessary adaptations to changes in legal thinking, basic political orientation and social conditions. A variety of factors determine in which direction developments will go: internal and external factors, consequences of political processes, changing convictions of the society, progress in technology with emancipation effects for the individual, economic growth or, as external factors, legal and social impacts from transnational integration systems, influences by globalization, results of a transborder judicial dialogue, etc. These factors can initiate innovations in legal and constitutional thinking and exercise the corresponding influence on the shaping of new Constitutions or on the judicial interpretation of the existing law. In European constitutionalism traditional concepts such as the very basic idea of Rule of Law have been modernized and, under the impact of supranational and regional international, europeanized. The political, economic, technological and legal emancipation of the individual, the growing respect of the Constitution as the supreme legal order and the integration of the States into the European and international community have set free ideological forces which have overcome the barrier effect of tradition and have succeeded in using tradition as a solid basis for changes. European constitutionalism is combines open-mindedness for changes and respect for tradition.

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