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EU integration: national v. supranational order?

The European Union is a supranational organization with great impact on the 28 member states. Supranationality is a phenomenon composed of three major aspects:

(a) The EU legal order is an autonomous body of law created by the transfer of member states competences; national politics areinsofareuropeanized. By this transfer the national legal order which has formerly been a closed system has "opened".[i] Sovereignty no longer admits the exclusivity of national law on the national territory; national and supranational law are both integral parts of the legal order of a member state.

(b) A further element of supranationality is the direct effect of EU law which enters the internal legal order of the member states without any legal barrier, a consequence of "opened statehood"[ii]. This aspect is in clear contrast to traditional international law which is based on equal sovereignty and coordination.

(c) The third aspect is the most incisive: primacy of supranational over national law. Here the crucial issue can be found. While primacy over ordinary national law is widely accepted, it is in discussion whether primacy extends to constitutional law. The perspective of the EU in principle is clear: whatever kind of constitutional law has to conform to the primacy principle, a principle which has been formulated by the European Court of Justice (ECJ) in a general way in the judgement Costa v. ENEL[iii] and in its absolute form in the case of InternationaleHandelsgesellschaft[iv].

The national perspective is divided in this respect. The Polish and the Lithuanian constitutional court consider national constitutional law as sacrosanct and not subject

[i] See German Federal Constitutional Court (FCC) vol.37,p. 271, 280
[ii]This termhasbeenintroducedintothe German constitutionaldebateby Klaus Vogel, Die Verfassungsentscheidung des Grundgesetzes für die internationale Zusammenarbeit, 1964, p.42
[iii] Case 6/64, ECJ Rep. 1964, p. 585 (english)
[iv] Case 11/70, Rep. 1970, p. 1125/3

to primacy.[i] Other constitutional courts accept primacy over constitutional law in general, but draw up clear limits. Core elements of the constitution, called "constitutional identity" in recent jurisprudence in France[ii], Germany[iii] and Poland[iv], may not be overridden by supranational law. Limitation of sovereignty is accepted by the courts but not allowed to trespass the barrier of identity. The discussion on this new term seems to replace the debate over national sovereignty as a shield against the impact of external legal sources on the internal legal order.

The identity problem focuses one of the fundamental questions of European integration: integration means that two or more legal systems enter into a specific relationship between them, either merging to one system or preserving basic autonomy of each part, but functionally linked one to the other. The degree of integration can be variable, based on common finalities with mechanisms of dynamic implementation. The European Union follows this second type. The functional interconnection of both systems, the member states and the EU as a legal personality, is mainly expressed by the principle of primacy of the EU law. This implies necessarily a high potential of conflict which shall be resolved by juridical means and in mutual acceptance. Preserving autonomy of the member states means to protect their identity. This is required by both systems, by the member states, on behalf of their constitutions, and by the European Union, by its respect of national identity as expressed by article 4.2 of the EU treaty.

The current debate refers to the member states identities, not to the identity of the European Union itself. This latter question is only scarcely taken into consideration but it is not superfluous. The EU has obtained an own supranational identity, which, indeed, could be threatened by member states reticence to accept the functional particularities of the supranational system. This specific issue shall not be

[i] K 18/04 and 32/09 (Poland); 17/02, 24/02, 06/03, 22/04 (Lithuania)
[ii]http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2008/2008-564-dc/decision-n-2008-564-dc-du-19-juin-2008.12335.html. ForFrancesee also Maja Walter,Integrationsgrenze Verfassungsidentität –Konzept und Kontrolle aus europäischer, deutscher undfranzösischer Perspektive,ZaöRV 72 (2012), 177–200, 184-189, http://www.zaoerv.de/72_2012/72_2012_1_a_177_200.pdf
[iii] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1 - 421), http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html
[iv]K 32/09

deepened here. However, it should be noted that the EU identity comprises also the respect of the national identity from side of the EU as laid down in the mentioned article 4 of the EU treaty. Therefore, EU identity includes the upholding of the member states identities, in other words: both components of the European Union as a multistate community, the supranational organization and the member states, respect and guarantee the existence, and with that the identity, of the other component. This is indeed the basic idea of a *union* which is necessarily composed of different components and not totally merged unit.

The reflections in our context concentrate on the problem of member states identity and the national as well as supranational mechanisms of ensuring it.

1. National and supranational perspectives of constitutional identity

There are two terms which must be explained in the beginning: national identity and constitutional identity. The first term is used by EU law, by the first EU treaty in its article 6.3, which had entered into force in 1993, and by the second EU treaty, in force since 2009, in its article 4.2. The second term has undergone a Europewide diffusion, in constitutional jurisprudence and in academic debate. It seems difficult to define them, they share the problem of conceptual ambiguity with many other juridical terms. There is only in part a normatively binding definition to be found in article 4.2 of the second EU treaty, saying that European Union "shall respect…their (that is: the member states') national identities,inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." It seems that national identity of a member state includes its constitutional identity which is particular to the specific member state so that 28 national and therefore - seen from the EU perspective - constitutional identities exist. With regard to this definition the concept of national identity, in the eyes of article 4.2 of the EU treaty, refers to the fundamental structures,"political and constitutional". What the fundamental political structures of a member state really are and what the difference to fundamental "constitutional structures"is, remains unclear. Political structures are essentially determined by constitutional law; for this reason, political and constitutional structures, at least in part, coincide. The word "structures"

is too narrow to explain sufficiently national and constitutional identity. The functions of the political and constitutional structures as well as the results of the activities filling out the structures must be included. If the safeguard of identity shall be efficient, "structures" cannot be limited to the institutional dimension of politics or constitutional order; not only the institutional organization of the political and constitutional processes but also the concepts and the functioning of these institutions are covered by the meaning of identity.

A further question arises: who has the competence to define in general, what identity is, and to state an infringement of identity in a concrete case?

There are two answers: The member state has the right to define for its own constitutional order what identity is and to state the case of violation. This competence normally is up, in last resort, to the national constitutional or supreme court.

The European Union, in last resort the Court of Justice of the EU, is competent for defining the supranational perspective on identity of the member states, by interpreting article 4.2 of the EU treaty. It is manifest that the national perspective is not the same as a European perspective on identity and, furthermore, the national perspective of one member state may differ strongly from that of another member state.

It is important to underline that EU (secondary) law cannot be blocked up by the national constitutional (or supreme) court for being incompatible with national constitutional identity. This is the basic idea of the supranational order as it has been clearly expressed by the ECJ in the Foto Frost case[i]. It is exclusively up to the Luxembourg court to declare inapplicable or to annul EU secondary law. A national court is not at all competent even to declare such a law inapplicable on the national territory. However, this is the position of the German Federal Constitutional Court (FCC) with regard to supranational law considered ultra vires[ii] or incompatible with German constitutional identity.

[i] Case 314/85, Rep. 1987, p. 4199/17-20.
[ii] FCC vol.89, p. 155

It is a crucial issue to clarify which court can judge on what constitutional identity, whether it is violated by EU law in a concrete case and what the consequences are.

2. Constitutional identity from a national perspective: the example of Germany

National courts are competent to interpret and apply national law including national constitutional law. The supranational courts in Luxembourg have to do the same with EU primary and secondary law (Art.19.1 TrEU). While national courts are allowed, and even obliged to interpret (courts of last instance have to use the mechanism of preliminary questions to the ECJ, Art.267.3 TFEU) and apply supranational law. They have no competence to refer to national law; in other words: They have no judicial possibility neither to define national constitutional identity under the perspective of national constitutional law nor to decide on whether national constitutional identity as seen from the *national* perspective is affected by EU law. The courts in Luxembourg can exclusively define constitutional identity of the member states from a *supranational* perspective by interpreting article 4.2 EU Treaty. This will later be considered in more detail.

The German FCC has tried, in the Lisbon decision[i], to clarify the concept of constitutional identity in Germany. It refers essentially to the so-called eternity clause of article 79.3 Basic Law (BL). This clause enumerates the matters which do not underlie any constitutional reform: article 1 BL guaranteeing human dignity and article 20 BL laying down the basic state structure (Democracy, Republic, federalism, rule of law, social state). Federalism is considered so important that it is mentioned three times in the eternity clause: federalism in general, the participation of the member states in the legislation of the Federation, and the subdivision of Germany into member states. It shall be added that constitutional reform in the Federation (which has been made about 60 times since the creation of the BL in 1949) is effectuated by the consent of two thirds of the members of the Federal Parliament, the

[i] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr.(1-421), http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html

Bundestag, and of the Federal Council, the Bundesrat (Art. 79.2 BL). A further requirement is the express modification of the text of the BL, but no referendum is foreseen on the federal level (in contrast to constitutional reforms in the member states of the Federation[i]). The reason why the FCC has referred to article 79.3 BL in its argumentation in the Lisbon case[ii] is the reference to this provision made by article 23.1 BL, the integration norm which is the basis for the transfer of internal competences to the supranational organization.

Article 79.3 BL preserves the nucleus of the BL from being reformed; of course, a new constitution could trespass the barrier of the eternity clause except human dignity which has to be regarded as obligatory also for the constituent power.

The eternity clause does not exclude "inherent" modifications of the protected issues (except dignity which is absolutely untouchable), as the FCC says[iii].

It is doubtful to some extent whether German constitutional identity can really be explained by the eternity clause. Constitutional identity is a dynamic concept as the constitution itself is a "living instrument"[iv]. What might have been constitutional identity in 1949, the year of the BL creation, is not necessarily identical with what constitutional identity is 60 years later, in 2009, the year of the FCC Lisbon decision. What has not been included from the beginning on, is for example the large German constitutional justice system, in particular the existence of the individual constitutional complaint, animportant instrument for the fundamental rights protection (foreseen first in the ordinary Act on the FCC 1951, then constitutionalized[v] in 1969in order to ensure its intangibility by emergency measures). Furthermore, constitutional jurisprudence has elaborated the concept of "open statehood"[vi], a principle of enormous importance which is the expression of the

[i] See fo example Art.75.2 of the Bavarian Constitution
[ii] See Judgement (note 11), Abs.-Nr. 332,339.
[iii] Vol. 30, p. 1, 24.
[iv]Expression used by the European Court of Human Rights to characterize the ECHR, expression which is transferable to a constitution;EuGHMRUrt. 25.4.1978, Tyrer, Sér.A26, Z.31: Urt. 13.6.1979, Marckx, Sér. A 31, Z. 41 Urt. 9.10. 1979, Airey, Sér. A32, Z. 26; Urt.17. 10. 1986, Rees, Sér. A106, Z. 47; Urt.27.9.1990, Cossey, Sér.A184, Z. 35,41 Urt. 23.3.1995, Loizidou(PreliminaryObjections), Sér. A310, Z.71; Christoph Grabenwarter, Europäische Menschenrechtskonvention, 3. Aufl. 2008, §5 (=p.39), N. 32.
[v]See Art. 93.1 n.4a BL
[vi] See note 2

readiness of the state to conform with international law, to participate fully in the activities of the international community, and even to transfer internal sovereign rights to supranational organizations. The fact that Germany can be a member of supranational organizations whose law has primacy over the internal German law is the result of open statehood and part of the constitutional identity. The relativization of sovereignty and the impact of supranational law on the BL is one of its elements. However, the principle of open statehood is not covered by the article 79.3 BL.

It seems evident that these two features of the constitutional order certainly belong to the constitutional identity of Germany without being named by the eternity clause. Thus, constitutional identity must be understood in a broader sense, according to the developments of the constitutional order as a result of constitutional reforms and constitutional jurisdiction[i].

Supranational law with its particular dynamism is able to change the member states constitutional identity until a certain limit. We can distinguish between relative and absolute constitutional identity, the first being changeable, the second beingthe nucleus of constitutional identity, normatively ensured by article 79.3 BL. As it was underlined above, this eternity clause does not exhaustingly enumerate all the elements of absolute identity.

Furthermore, it is not yet clear in which way constitutional identity can be preserved. There are two approaches possible, the substantive and a functional one. The first means that certain elementary structures of the constitutional order may not be eliminated or essentially weakened; otherwise, the absolute nucleus of identity would be infringed. The second approach means that the preservation of the institutional structure in the national constitutional system is not decisive, if the *function* which is connected with this institution is upheld. The example is the well-known "Solange" concept developed by the German FCC[ii]: it is not decisive whether the protection of the individual's fundamental rights is effectuated by the national or

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[i] See also Rainer Arnold, La Identidad constitucional y el poder supranacional: la relativización de la soberanía estatal en la integración europea, in Libro homenaje a Antonio Torres del Morral, vol. III, 2012, p. 2997 – 3009.

[ii] Vol. 73, p. 387

by the supranational constitutional order in the case of the implementation of supranational law by national institutions. Important is that the protection of the individual is guaranteed either on the national or on the supranational side. With regard to this approach we can speak of *functional* identity, which is important in our context; substantive or institutional identity is not necessary if the relevant *function* is fulfilled at the supranational level. Value-oriented institutions such as fundamental rights protection, rule of law, social state, open statehood can be functionally satisfied by the supranational order, even if the national institutions are replaced. However, state-related qualities such as the federal structure of the state cannot be functionally replaced by federal or quasi-federal structures of the supranational organization.

As a summary it can be said that constitutional identity of a EU member state has been defined by the state itself, regularly by its constitutional (or supreme) court. The definition is based on the interpretation of the national constitutional order. Each member state has the right to define its own constitutional identity, which may be different from that of another member state. Constitutional identity is variable, exposed to the constitutional dynamism which is the result of constitutional reforms and constitutional jurisdiction. Constitutional identity is relative or absolute. Supranational law can impact on constitutional identity of a member state until a certain limit (within the area of *relative* identity), but is not allowed, from the standpoint of the national perspective, to trespass the area of *absolute* identity.

3. Constitutional identity seen from the European Union perspective

Article 4.2 EU treaty obliges the European Union to respect the national identity of each of the member states. As underlined above, national identity in this sense includes constitutional identity. This concept is a EU concept whose interpretation is up to the Court of Justice of the EU. It is manifest that this term has to be interpreted in a uniform way for all the member states. The reason is that the term of national identity which includes, as pointed out above,constitutional identity is used in the EU primary law. As the EU treaty is the binding document for all the member states it cannot be interpreted separately for each of them.

Article 4.2 EU treaty cannot be understood in the way that the European Union has automatically to accept the definitions of constitutional identity which are established by national constitutional (or supreme) courts. This would not be compatible with the finality of the EU to create a common legal order on the basis of EU law primacy over the laws of the member states. A member state cannot unilaterally block up the application of EU legal acts. For these reasons article 4.2 EU Treaty has to be interpreted by the supranational courts in a European Union sense. This means that this provision cannot be understood in a very different, nationally split up way but has to be based on a common concept.

The coherence of constitutional law in Europe permits to find *common constitutional structures* which constitute a framework of constitutional institutions and values commonto all the member states, perhaps not in their institutional structure but in their functions. This is a framework which can be used for defining constitutional identity of the member states from the supranational perspective.

As to the methodology, the definition of this "European framework identity" can be realized accordingly to the comparative-selective method applied by the European judges to develop common supranational principles[i]. By a*comparative* view, the elements on which constitutional identity is based in the member states can be found. The *selective* step will draw out from the totality of these elements those which are to be considered as relevant for the *supranational "framework test".*

EU secondary law should be examined whether it impacts one (or more) of these elements. If this is the case, it should be asked whether this impact is a justified limitation of national/ constitutional identity of a member state, a limitation that would be possible in the area of *relative identity*. If the supranational legal act impacts the area of *absolute identity* an infringement of national (including constitutional) identity of the member state would occur. As it has been pointed out, this last mentioned area is that of the very essence of the constitutional order, of its core elements which have to be regarded as untouchable. It seems that the principle of proportionality and the guarantee of the very essence of the constitutional elements establishing the constitutional identity are of great importance in this context.

[i] See for example ECJ Case 11/70 [1970] ECR 1125/4

it is difficult to define how the EU test on constitutional identity can work. First of all, there is a catalogue of fundamental structures which are common to all the member states; they constitute the framework of constitutional identity. If one of these structures is affected by EU law, national identity is involved also from the EU perspective. These fundamental structures are democracy, form of state (Republic or parliamentary monarchy), territorial subdivision (federal, regional or sub regional - provincial, departmental, local structures), rule of law, social state orientation, orientation towards international community ("open statehood"); furthermore, the existence and the adequate, efficient functioning of the state institutions, values as they are foreseen on the national constitutional level, that means fundamental rights as an expression of human dignity.

This first step means to verify whether the alleged violation of national constitutional identity is connected with one of these generally recognized basic structures of a state. If EU law affects such a basic structure of a member state, constitutional identity is concerned.

Next step is to verify*how far* the impact of the EU legal act on this basic structure of the member state goes. As it has been pointed out above, there is a relative and an absolute constitutional identity. *Relative* constitutional identity means that identity can be modified and relativized - by reforms or national or supranational legal acts, including legal acts of the EU. *Absolute* constitutional identity cannot be modified as long as the constitution exists. It guarantees the very essence of the core elements of the constitution and is therefore not variable except after the creation of a new constitution.

After it has been clarified whether relative or absolute constitutional identity is concerned, the principle of proportionality must be taken into consideration. The impact on constitutional identity by EU law is not legitimate if it touches the very essence of identity, if it trespasses the barrier of absolute identity. Insofar as relative identity is concerned, it is legitimate only if this impact is proportional. This means in particular that the interest of the EU to realize its legal act must be weighed out against the interest of the member state to keep up its (relative) identity. To some

extent the impact on national constitutional identity by supranational law must be accepted.

It is important to remind that the national courts, in particular, the national constitutional courts are legitimated to define national constitutional identity and also to declare this identity to be affected or even violated by supranational law. A different question, which must be strictly separated from what the national constitutional court can do, is to annul or to declare inapplicable a supranational legal act. This falls into the exclusive competence of the Court of Justice of the EU.

In this context, it shall be underlined again that the national courts apply the national perspective of national constitutional identity while the supranational courts apply the supranational perspective of identity. The first perspective results from the national constitutional order itself, the second perspective from the EU law, in particular from article 4.2 EU Treaty.

The EU "framework test" by the supranational courts is based on article 4.2 EU Treaty. The respect of national identity by the European Union does not imply the complete and unreviewed acceptance of the national constitutional (or supreme) court's view.

The supranational courts (EU Tribunal and EU Court of Justice, according to their competences) examine whether the alleged identity violation refers to an identity element which can be recognized, in the perspective of the EU, as an element in identifying the constitutional order of a member state. Such an element can be a state institution whose function is essential for a state system and it can be a value considered as basic in the state system such as fundamental rights. This is the first step of the test and can be called the test on the identifying elements.

The second step of the test refers to the functional impact of supranational legal acts on these identifying elements. Insofar as state institutions are concerned, their adequate functioning must not be hindered by these legal acts. It will be therefore examined whether the functioning of these institutions is no longer upheld in a normal way. This can be seen also from the EU perspective. Insofar as values, in particular, fundamental rights, are concerned, the question is whether the supranational impact, reduces essentially the guarantee given by these rights. The

criteria for evaluating an essential functional reduction of the guarantee can be drawn from the EU value system as it is expressed in particular by the EU fundamental rights charter. It seems that in this respect national concepts have to be accepted as they are expressions of the national constitutional culture, in particular in the context of personality rights and morality-related matters. Here the idea of the subsidiarity of values is of importance and limits the review competence of the supranational courts. Margins of appreciation have to be accepted by the EU. This is not only a requirement for the relation between the ECHR and the Council of Europe's member states, but also for the relation between the EU and the member states value systems. The constitutional value concept of a member state is particularly sensitive and is of more autonomous character than state institutions which have typical structures and functions in all the member states. Therefore, the EU "framework test" based on article 4.2 EU Treaty is stricter in the field of institutions than in the field of values.

As a summary of this point it can be said that the European Union has to respect the national identity of each of the member states which includes, according to the definition of article 4.2 EU Treaty, the elements of constitutional identity. As this obligation results from EU primary law, it refers to the safeguard of member states identity in the EU perspective. National and constitutional identity in this sense is a concept common to all the member states, therefore a supranational, a European concept. It is based on common principles on the identifying elements as they are defined by the comparative-selective method. EU law is able to impact on national constitutional identity, restricting and even modifying identity. This is only justified if proportionality is observed and the very essence, the area of *absolute* identity of a member state, is not trespassed.

4. Conflict of jurisdictions?

The integration of national legal orders and the supranational EU system implies a potential conflict between the two jurisdictions: national constitutional (or supreme) courts are the guardians of the national constitution and in particular of the national constitutional identity while the supranational courts interpret and apply the EU law. The safeguard of the member state's constitutional identity by the national courts raises the question how to defend against supranational law threatening this identity.

As it has already been pointed out, the annulment of a EU legal act falls within the exclusive competence of the supranational courts and cannot be effectuated by national courts. This is the clear position of the ECJ to which the German FCC is in open contrast. This national court stated, in the Lisbon decision, that it clearly falls within its own incompetence to decide whether EU (secondary) law infringes German constitutional identity and, affirmatively, to declare it inapplicable on the German territory. The FCC denies its obligation to give the final word in this matter to the ECJ, underlining the existence of its absolute, inalienable competence to do this. In the opinion of the FCC this power has not been transferable to the supranational level, being the power inherent in statehood.

The FCC denies by this the application of the preliminary question mechanism of article 267 Treaty on the functioning of the EU (TFEU). This does not mean that the court refuses generally to use this mechanism; the obligation of the FCC to do this has clearly been confirmed in the Mangold decision. However, also this decision, the court attributes to itself the final word.

It is only conform to EU law to strictly observe what article 267 TFEU prescribes. The FCC as to involve the CJEU if it considers a piece of EU secondary law incompatible with the German constitutional identity. Both interpretation and annulment or suspension of application of EU law is exclusively up to the supranational court. This court has to examine whether the EU legal act infringes national constitutional identity applying article 4.2 EU Treaty. The supranational court is not able and not allowed to interpret national constitutional law but has to review the EU legal act in question under the supranational perspective of constitutional identity in the above mentioned sense. The Court, in case that it finds out an incompatibility,has to annul or to oblige the EU legislator to amend the legal act.