FROM THE RELATIVIZATION OF THE CONSTITUTION TO THE "AUGMENTED CONSTITUTION"

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1. INTRODUCTORY REMARKS

a. The Concept of the Relativization of the Constitution - Unrelated to Schmitt's Distinction between "Absolute" and "Relative" Constitution

THE beginning of the 21st century posed numerous new challenges to constitutional theory[1]. In my opinion, the most serious of these has been the complex phenomenon that could be called "relativization of the constitution". This does not refer to the concept of the "relative constitution", used by Carl Schmitt[2] who distinguished be-

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[1] Indicatively see DOREEN LUSTIG / JOSEPH H.H. WEILER, Judicial review in the contemporary world—Retrospective and prospective, 16 *I•CON*, issue 2, 315, (2018). PETRA DOBNER / MARTIN LOUGHLIN (eds), *The Twilight of Constitutionalism?* (2010). YANN LAURANS, *Recherches sur la catégorie juridique de Constitution et son adaptation aux mutations du droit contemporain*, Thèse, Université de Nancy (2009). EVANGELOS VENIZELOS, The New Youth of the Constitution *in: The Constitutional Revision in Today's Europe* 25-39 (GIULIANO AMATO / GUY BRAIBANT / EVANGELOS VENIZELOS eds., 2002).

[2] CARL SCHMITT, *Constitutional Theory* (Duke University Press 2008) (1928).

tween "absolute" and "relative" constitution. To be exact, he presented a fourfold typology between "absolute", "relative", "positive" and "ideal" constitution. For the purposes of our own conceptual clarification we could say that, in Schmitt's logic, the "relative" constitution is a constitution without ideological and historical unity, a sum of constitutional laws. In his view, the constitutional laws codified in a "relative" constitution lack something important. They lack an "idea", a "soul", a "pure" mission, a perception of history, *i.e.* the elements which comprise the "absolute" constitution, but which have nothing to do with legal positivism and the rule of law; they are related to an extreme voluntarist approach, which Schmitt, as a declared decisionist, expressed[3].

Therefore, when referring to the relativization of the constitution, I do not mean the Schmittian distinction between "absolute" and "relative" constitution. I refer to the questioning of fundamental features of the constitution as a product of history, shaped between the 17th and the 20th century[4]; most importantly, I refer to the question-

[3] CRISTI RENATO, Decisionism *in: The Encyclopedia of Political Thought* (M.T. GIBBONS *et al.* eds., 2014). MICHAEL HOELZL, Ethics of decisionism: Carl Schmitt's theological blind spot, 20:3 *Journal for Cultural Research*, 235, (2016). ANDREAS KALYVAS, From the Act to the Decision: Hannah Arendt and the Question of Decisionism, 32 *Political Theory*, no. 3, 320, (2004).

[4] See *supra* note 1 and JACKY HUMMEL, Histoire et temporalité constitutionnelles. Hauriou et l'écriture de l'histoire constitutionnelle *in: Comment écrit-on l'histoire constitutionnelle?* (CARLOS MIGUEL HERRERA / ARNAUD LE PILLOUER dir., 2012). JACKY HUMMEL (dir.), *Les conflits constitutionnels. Le droit constitutionnel à l'épreuve de l'histoire et du politique* (2010), and the book review from CYRIL BRAMI, Hummel J. (dir.), Les conflits constitutionnels. Le droit constitutionnel à l'épreuve de l'histoire et du politique, 2010, *Jus Politicum*, n° 6 (2011), who underlines the "*vanité du constitutionnalisme*", http://juspoliticum.com/article/Jacky-Hummel-dir-Les-conflits-constitutionnels-Le-droit-constitutionnel-a-l-epreuve-de-l-histoire-et-du-politique-2010-362.html. Also, the introduction by JEFFREY SEITZER / CHRISTOFER THORNHILL, in the English edition of CARL SCHMITT, *supra* note 2.

ing of the national constitution's supremacy by international conventions, such as the European Convention on Human Rights (ECHR) and the judicial review mechanisms it establishes, as well as by EU law, which functions self-referentially and claims for its entirety supremacy and priority of application in its field over the national constitutions of Member States[5]. I refer to the questioning of the national constitution's "monopoly" on its own regulative subject, as this was gradually formulated from the 18th to mid-20th century.

I am referring, consequently, to the questioning of the rigid nature of the national constitution through the international commitments imposed on the constituent power, primary and secondary[6], through

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[5] CHRISTINA ECKES, The autonomy of the EU legal order, 4 (1) *Europe and the World: A law review* (2020), doi: https://doi.org/10.14324/111.444.ewlj.2019.19. MASSIMO FICHERA, Securing the European Project: From Self-Referentiality to Heterarchy, 21 *CYELS*, 273, (2019) doi:10.1017/cel.2019.16

[6] DIETER GRIMM, Constituent Power and Limits of Constitutional Amendments, 2 *Nomos, Le attualità nel diritto*, (2016), http://www.nomos-leattualitaneldiritto.it/wp-content/uploads/2016/09/Grimm_Nomos22016.pdf. GÁBOR HALMAI, *Internal and External Limits of Constitutional Amendment Sovereignty*, https://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Halmai/Constitutional-Amendment-Power.pdf. ANDREAS KALYVAS, Popular Sovereignty, Democracy, and the Constituent Power, 12 *Constellations*, no 2, 223 (2005). For the restrictions arising from the participation of a member state in the European integration, see: MARIA CAHILL, Ever Closer Remoteness of the Peoples of Europe? Limits on the Power of Amendment and National Constituent Power, 75 *The Cambridge Law Journal*, Issue 2, 245, (July 2016). MONICA CLAES, The Validity and Primacy of EU Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union, 23(1), *Maastricht Journal of European and Comparative Law*, 151, (2016). LUIGI CORRIAS, Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity, 12 *European Constitutional Law Review*, Issue 1, 6 (2016). JÖRG GERKRATH, La figure de droit constitutionnel de 'l'Etat intégré': le cas du Grand-Duché de Luxembourg *in: Europe(s), Droit(s) européen(s), Liber Amicorum en l'honneur du Pro-*

the increase of informal constitutional changes[7] and through the expansion of the use of the interpretation of the constitution of a member state of the Council of Europe and the EU in accordance with the ECHR and EU law[8].

The relativization of the Constitution also goes through the field of other critical developments which are now considered commonplace in constitutional theory: the internationalization of the Constitution, the constitutionalization of international law, the emergence of forms of international private power that affect the regulatory power of the constitution, the tendency of separation of the form "Constitution" from the concept of state and sovereignty[9].

All these individual phenomena are linked to the changes in the nature of the nation-state and more specifically in its sovereignty, with the emergence of the "member state" of international organiza-

fesseur Vlad Constantinesco 271 (CHRISTIAN MESTRE ed., 2015). ANU MUTANEN, Towards a Non-sovereignist Constitution in Finland - The European Union Contributing to National Constitutional Change, *Constitution Making and Constitutional Change*, (June, 9, 2015), and fns 14, 44, 37, https://constitutional-change.com/towards-a-non-sovereignist-constitution-in-finland-the-european-union-contributing-to-national-constitutional-change/. MARCUS KLAMERT, A primer on Cooperation and Constitutional Conflict in the EU *in: The Principle of Loyalty in EU Law*, 211, (MARCUS KLAMERT, 2014). JOEL COLÓN-RIÓS, *Weak Constitutionalism: Democratic legitimacy and the question of constituent power* (2012).

[7] REIJER PASSCHIER, *Informal Constitutional Change: Constitutional Change Without Formal Constitutional Amendment in Comparative Perspective*, Dissertation (PhD thesis) Leiden University, (September 1, 2017), https://ssrn.com/abstract=3048211. MANON ALTWEGG-BOUSSAC, *Les changements constitutionnels informels* (2013).

[8] ANNA JONSSON CORNELL, In Search for a Theory of Constitutional Interpretation in Congruence with European Human Rights Law, *Uppsala Faculty of Law Working Paper 2* (2014).

[9] LUSTIG / WEILER, *supra* note 1, 326, and fns 52-55. EVANGELOS VENIZELOS, The influence of the 2012 restructuring of the Greek public debt, *European Law Review*, Issue 2, 267 (2020).

tions and especially regional integrations, as a special type of state[10].

b. The Proposal to Construct the Concept of "Augmented Constitution"

The question in this analysis is whether such a "member state", as a state of "reduced or shared sovereignty"[11], has a constitution of "reduced or shared supremacy", *i.e.* a less powerful constitution because its supremacy over EU law and the International Law (especially the ECHR) is disputed. Or if, on the contrary, said evolution leads, through the phenomenon that has come to be called "multilevel constitutionalism"[12], to an "augmented constitution".

I will argue for the position that the relativization of the national constitution does not diminish its regulatory content and significance, but leads to the phenomenon of an "augmented constitution"[13] through an interesting reverse flow of case law developments, mainly at national level. This is the case in Europe in particular, despite the not rare resistances of national courts, especially the constitutional and supreme courts, to the case law of the CJEU and the European Court of Human Rights (ECtHR). These resistances, as we know, appear, in particular, in the form of invoking

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[10] GERKRATH, *supra* note 6. ANNE WLAZLAK, *L'influence de la construction communautaire sur la constitution française*, Thèse, Université d'Avignon et des Pays de Vaucluse (2013). BELIGH NABLI, L'état membre: l'"hydre" du Droit Constitutionnel Européen, *VIIe congrès de droit constitutionnel*, AFDC, Paris, (25-27 septembre 2008), mainly paragraph II (Les "pouvoirs constitutionnels" de l'Etat membre) https://docplayer.fr/37453720-L-etat-membre-l-hydre-du-droit-constitutionnel-europeen.html

[11] See *infra*, 3.

[12] See *infra*, 5.

[13] The term "augmented constitution" has been inspired and molded after the concept of "augmented reality" (AR). For AR see, indicatively, in *Macmillan Dictionary* https://www.macmillandictionary.com/buzzword/entries/augmented-reality.html

national constitutional identity[14] or, more rarely, in the form of controlling the excess of EU jurisdiction and competences (*ultra vires* control)[15]. Both of these phenomena confirm and augment the regulatory content and legal supremacy of the national Constitution. However, this augmentation is achieved mainly through the interpretative assimilation of EU law and the international law on the protection of human rights by the national Constitution.

We can therefore define as an augmented Constitution, the national Constitution, primarily the written, rigid and codified one, which without changing the constitutional text, strengthens its regulatory content and ensures its legal primacy through its interpretation in accordance with the EU law and international human rights law.

The augmented Constitution is therefore the result of a constitutional strategy that ensures the coexistence of a plurality of legal orders and of rules that claim, in a self-referential way, legal supremacy and priority of implementation in their field. This strategy obviously includes some concessions in favor of EU law or the ECHR. In the vast majority of cases, however, it results in an augmentation of the guarantee content of the Constitution and the strengthening of democracy, the rule of law and the protection of human rights. It is certainly not ruled out that there may be marginal cases in which the need to protect elements belonging to the core of the national constitutional identity may be invoked. Such an invocation, however, makes sense when it aims to preserve national constituent elements that serve as guarantees of increased protection of democracy, rule of law and human rights. The achievable

[14] For a more global view of the phenomenon of invoking national constitutional identity that includes its evolution within the EU but goes beyond it, see LUSTIG / WEILER, *supra* note 1, 340 *et seq*.

[15] For a more detailed presentation of my views see EVANGELOS VENIZELOS, Passive and Unequal: The Karlsruhe Vision for the Eurozone, *VerfBlog*, (27 May 2020) https://verfassungsblog.de/passive-and-unequal-the-karlsruhe-vision-for-the-eurozone/

regulatory result is therefore part of the strategy of the augmented Constitution.

In the following paragraphs I try to look at the various aspects of this dual flow. First, the flow from the supremacy of the national Constitution to its relativization based on the relativization of national sovereignty (paragraph 2) and, second, the reverse flow from the relativization of the Constitution to the phenomenon of the augmented Constitution (paragraph 2). In the context of these two flows, I examine in particular how they relate to the internationalization of the Constitution (paragraph 4), to multi-level constitutionalism (paragraph 5), to the interpretative or even explicite harmonization of the Constitution with EU law and the ECHR (paragraph 6), to the constitutionalization of international law (paragraph 7) and to the phenomenon of informal constitutional changes (paragraph 8). Then I try to answer the question whether what is defined as "augmented Constitution" can be textually laconic (paragraph 9) as the position has emerged in the scientific debate that the so-called laconic Constitution is more resilient and associated with the highest level of quality of democracy and of the rule of law. In paragraph 10 I examine the convergence of the methods of interpretation of the Constitution, EU law and international human rights law (especially the ECHR) as a mechanism of convergence between the two phenomena, the relativization of the Constitution and the "augmented Constitution". In paragraph 11, I examine the resilience of the "augmented Constitution". The conclusion of the paper (paragraph 12) is that the two phenomena (relativization and "augmented Constitution") are twins and are in progress.

2. The Relativization of the Modern State as the Blueprint for the Relativization of the Constitution

The first great challenge that arises in relation to the constitution is the very challenge of the modern state as we know it, let us say,

since the Treaty of Westphalia, from 1648 onwards[16]. The constitution is historically linked to the emergence of the sovereign nation-state. However, the elements that make up the modern state as a historical phenomenon and an institutional entity are questioned[17]. Nowadays, for most of the member states of the United Nations, speaking of state sovereignty[18] is largely a theoretical and intellectual inaction, a canard, a pretence. Out of the 193 UN member states, few can be considered truly sovereign. That is, few can be considered as owners of both domestic and external sovereignty.

Given the current high level of international cooperation and interdependence, no such pure forms of sovereignty exist. Of course, it is one thing to speak about Luxembourg and a different thing to speak about the United States. It is different for the Russian Federation compared to Libya, which is an almost failed state. It is one

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[16] EVANGELOS VENIZELOS, *State Transformation and the European Integration. Project Lessons from the financial crisis and the Greek paradigm*, CEPS Special Report, No. 130, (4 Feb 2016) https://www.ceps.eu/ceps-publications/state-transformation-and-european-integration-project-lessons-financial-crisis-and/. From the recent literature, TANJA E. AALBERTS, *Constructing Sovereignty between Politics and Law* (2012), in particular pp. 10 *et seq.*, 56 *et seq.*, 62 *et seq.*, 79 *et seq.* In particular for the limitations of national sovereignty due to participation in European integration, see MICHAEL BURGESS / HANS VOLLAARD (eds.), *State territoriality and European integration* (2006). GLYN MORGAN, *The Idea of a European Superstate: Public Justification and European Integration* (2005), in particular chapters 6 (*A Postsovereign Europe*) and 7 (*A Sovereign Europe*).

[17] BURGESS / VOLLAARD (eds), *supra* note 16, especially the introduction and the conclusion of the editors. CLAIRE CUTLER, Transformations in Statehood, the Investor-State Regime, and the New Constitutionalism 23 *Indiana Journal of Global Legal Studies*, no. 1, 95 (Winter 2016). EVANGELOS VENIZELOS, Statehood and Sovereignty: The Difficult Equilibrium between European Union and Member States in Crisis Management - Refugee Crisis and Brexit, 1 *European Politeia*, 17 (2016).

[18] TANJA AALBERTS, *Constructing Sovereignty between Politics and Law* (2012). STEPHEN DAVID KRASNER, *Sovereignty: Organized Hypocrisy* (1999). VENIZELOS, *supra* note 16. VENIZELOS, *supra* note 17.

thing to be China and a different thing to be a pariah of international affairs, like Somalia or Yemen.

For the EU, such level of integration has involved a transfer of many more competences from Member States to the EU. For the Member States, conferring those competences to the EU has been synonymous to placing restrictions on their sovereignty that ultimately change the nature of the state, which is transformed from a sovereign, Westphalian-type nation-state into something different, which we can conventionally call the "integrated state", the "member state"[19]; not merely in the sense of a nation-state participating in a global or regional international organization, but as another category in the theory of statehood - another type of state. This novel form of state entity derives primarily from the nation-state's participation in regional high-level integrations, such as the EU, as well as from its participation in regional organizations, such as the Council of Europe or the Organization for Security and Co-operation in Europe.

At an international level, the UN appears to be very relaxed as to the sovereignty of its member states, but potentially, under the Charter, the Security Council has the option of overriding this limit by making resolutions that can utterly reduce the sovereignty of a nation-state. For instance, a resolution may be taken to legally carry out a military intervention: given that military action is the way by which the monopoly on violence is expressed in its most organized form, such a resolution inevitably affects state sovereignty at its core[20]. So even at UN level, the constraints of external sovereignty can be potentially transformed into constraints of domestic/internal sovereignty. This is all the more so when this actually happens, when various kinds of threats or assessments of threats lead, by

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[19] See *supra* note 10.

[20] ALEX J. BELLAMY / PAUL D. WILLIAMS, The UN Security Council and the Question of Humanitarian Intervention in Darfur, 5 (2) *Journal of Military Ethics*, 144, (2006). M.V. NAIDU, Security, Sovereignty, and Intervention: Concepts and Case Studies, 34 *Peace Research*, no. 1, 33, (2002).

decisions of one or more states that have the necessary military force, to take military and even lethal measures, against other states, violating or abolishing their sovereignty, even without a prior resolution by the Security Council.

In a simpler, everyday way, we see this kind of confinement of state sovereignty and shift into "member state" entities, first and foremost, in the very common practical issue of the direct effect of European Union law, even at the level of directives, when they meet the (relevant) prerequisites[21]. We observe this equally in the direct effect of the ECHR and its additional protocols to the member states which are bound by it and recognize the right of individual application to the ECtHR[22].

Said changes which have already taken place and continue to do so with regard to the concept of sovereignty and the characteristics of statehood, have a direct and immediate effect on the constitution in its classic form, as this has been formulated since the 18th century and risen to dominance during the 20th century; namely, on the formal constitution, which is written, codified and rigid and has legal supremacy. The question is how resilient is that which we define as constitution in continental Europe and North America (not in the United Kingdom) and how does it retain its resilience[23].

For deductive reasons, let us repeat some clichés: The very concept of the constitution is totally linked to the concept of the state

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[21] Indicatively, ALLAN ROSAS / LORNA ARMATI, *EU Constitutional Law. An Introduction* (3rd ed, 2018), chapter 6.II. ROBERT SCHÜTZE, *European Constitutional Law* (2nd ed, 2016), part I.3.

[22] ANDREA CALIGIURI / NICOLA NAPOLETANO, The Application of the ECHR in the Domestic Systems, 20:1 *The Italian Yearbook of International Law Online*, 125, (2010). ALEC STONE SWEET / HELEN KELLER, The Reception of the ECHR in National Legal Orders, Yale Law School Legal Scholarship Repository, (2008), https://digitalcommons.law.yale.edu/fss_papers/89/

[23] XENOPHON CONTIADES / ALKMINI FOTIADOU, Constitutional Resilience and Constitutional Failure in the Face of Crisis: The Greek Case, *in: Constitutions in Times of Financial Crisis* (TOM GINSBURG / MARK D. ROSEN / GEORG VANBERG eds., 2019).

and the concept of sovereignty[24]. The constitution has as its regulatory object (not only, but primarily) the formation and exercise of state power. Thus, when the nature of state power is modified, when the sovereignty of the state changes, when the notion of statehood itself is called into question, we need a redefinition of the notion of the constitution. Otherwise the constitution would have become an empty shell, lacking any substantial content whatsoever. There remains to be seen if there can be a constitution without a state, without sovereignty. We will see if the constitution as merely a specific form of legal rules, a legislative and normative mechanism or an epistemological paradigm, connected with a positivist conception, the gradual production of legal rules, and the pyramidal structure of the legal order, would be enough for it to exist. The truth is that although this could be the case to a great extent, in the end it would not be enough, because such a structure is the result of a subtraction. It consists in a skeletal and ultimately "anti-historical" approach to the concept of the constitution, while the constitution is predominantly a historical product, the outcome of very specific developments, which have their roots in the past three centuries[25].

The Constitution is the result of the effort made in the age of modernity to organize everything that was born from the womb of the Enlightenment and the Industrial Revolution, such as urban planning, large populations, social conflicts and the respective political conflicts, into a text, in writing. What always remains of the constitution, its first trace in history, its most "nuclear" feature, is the fact that it is a form of writing, which is always a form of power[26]. This fundamental textual feature of the constitution is ques-

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[24] ULRIKE MÜßIG, Juridification by Constitution. National Sovereignty in Eighteenth and Nineteenth Century Europe *in: Reconsidering Constitutional Formation I National Sovereignty*, Part of Studies in the History of Law and Justice, book series, vol. 6 (U. MÜßIG ed., 2016)

[25] See *supra* note 1.

[26] ARMEL LE DIVELLEC, Le style des constitutions écrites dans l'histoire moderne. Une esquisse sur les trois types de l'écriture constitutionnelle (XVIIe-XXe siècles), *Jus Politicum*, (2013) http://juspoliticum.com/article/

tioned past a point, because applied for as long as the supremacy of the constitution and its "monopoly" on its subject matter were unquestionable. On the other hand, the production of international or European legislative texts, claiming supremacy over the constitution, connects the inflation of legislative writing, the increase in the number and volume of legislative texts that demand immediate implementation (direct effect) and priority, with the constitution's relativization. This phenomenon applies also to countries such as the United Kingdom, which, although they lack a single codified constitutional text, have a constitution, however mild, textually scattered, and strongly influenced by the logic of common law[27], but which arises primarily from critical and fundamental written national sources with a long history[28].

3. THE CONSTITUTION OF A STATE OF SHARED SOVEREIGNTY IS NOT A "SHARED", BUT AN "AUGMENTED CONSTITUTION"

Following the transition to a "member state" of limited or shared sovereignty[29], the question is what kind of constitution matches this kind of state? We know what kind of constitution corresponded to the sovereign nation-state and this is what constitutional theorists examined from the 18th to the 20th century, formulating basic principles regarding such constitution's nature and function. How can

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Le-style-des-constitutions-ecrites-dans-l-histoire-moderne-Une-esquisse-sur-les-trois-types-de-l-ecriture-constitutionnelle-XVIIe-XXe-siecles-738.html

[27] JOHN LAWS, *The Common Law Constitution (The Hamlyn Lectures)* (2014).

[28] ROBERT BLACKBURN, Britain's unwritten constitution *in:* British Library, (13 Mar 2015) https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution

[29] GABRIEL REZNICK, Shared Sovereignty and the European Union: The Transition to Post-Westphalian Sovereignty, *Academia.edu*, (2013) https://www.academia.edu/2763366/Shared_Sovereignty_and_the_European_Union_The_Transition_to_Post-Westphalian_Sovereignty

the questioning and relativization of such basic assumptions be theoretically assimilated?

Macroscopically, the constitution of a state of shared sovereignty seems to be a "shared constitution": a constitution which, in order to ensure its regulatory, political, symbolic and ideological content, must explicitly provide or implicitly accept - by means of interpretation - the emergence of certain mechanisms that facilitate its coexistence and interface with the international and the European Union legal order. Notably, these are mechanisms that allow the protective content of the national constitution to remain intact with regard to democracy, the rule of law and human rights and, in addition, to be strengthened through rules, regulations and guarantees at an international and European level. In achieving this, the constitution of a "member state", the constitution of the era of shared sovereignty, in spite of having its supremacy and rigidity seemingly questioned, not only maintains, but further augments its regulatory content: instead of a "shared", it becomes an "augmented constitution"; a constitution that is reinforced by the provisions and mechanisms of EU law and international law in respect of its historical, institutional, ideological and legal functions.

I hasten to clarify that the "augmentation" to which I refer does not concern a multi-layered *bloc de constitutionnalité*, nor the ongoing constitutionalism but the national constitution itself, which ultimately incorporates this incremental phenomenon interpretively and normatively and turns into an "augmented" constitution. This is a constitution that is not undermined by international and EU law, but which re-assimilates elements that had their origins in them and were cultivated internationally and especially Europe-wide, in key areas of constitutional law, such as human rights (*e.g.* in the spheres of personal data protection, bioethics, environmental rights), the rule of law (*e.g.* on the subject of mechanisms for protecting judicial independence) and democracy (*e.g.* in the context of mechanisms for the protection of political participation, the validity of elections and referenda, and of institutions of representative democracy).

Of course, there are and, as long as the nation-state exists as an entity and plays a decisive role, there will always be individual is-

sues of conflict between the national constitution and international law, such as the ECHR, or with rules of EU law, primary or derivative. These conflicts, in the vast majority of cases, are resolved gently, through the phenomenon of co-inherence of legal orders we will talk about (*infra*, 5), while in rare cases they lead to invoking the limit of national constitutional identity[30] or, reversely, to recognition of a margin of appreciation to Member States[31]. This is because all rules claiming supremacy or priority of application, converge on the same guarantee goal (teleology) in relation to human rights, the rule of law and democracy. They are governed by the same concept and the same value system that is reflected in all the legal orders that coexist. Disputes that remain open concern the distribution and delimitation of competences between member states, the EU or international bodies and, essentially, some symbolically critical issues of sovereignty.

The national constitution - let us repeat it - works as an organization, protection and legitimization factor. When potential conflicts over the supremacy or priority of application do not affect but respect or possibly enhance the constitution's protective operation, overcoming them is easy because the end result is creating an en-

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[30] See *supra* note 14.

[31] In the field of the EU legal order and the margins of autonomy of the member states, HANS-W. MICKLITZ / BRUNO DE WITTE (eds), *The European Court of Justice and the autonomy of the member states*, (2012), especially the contributions of PAUL CRAIG (11-34) and FABIAN AMTENBRINK (35-44). In the field of the ECHR, JANNEKE GERARDS, Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights, 18 *Human Rights Law Review*, Issue 3, 495 (2018). DOMINIC MCGOLDRICK, A Defence of the Margin of Appreciation and an argument for its application by the Human Rights Committee, 65 (1) *International and Comparative Law Quarterly*, 21, (2016). FRANCISCO MENA PARRAS, Democracy, Diversity and the Margin of Appreciation: A Theoretical Analysis from the Perspective of the International and Constitutional Functions of the European Court of Human Rights, 29 *Revista Electrónica de Estudios Internacionales*, (2015) doi: 10.17103/reei.29.10

hanced and multi-level protection framework. When possible conflicts concern the distribution of competencies, then the criterion (depending on whether we are moving in the realm of the competencies of political organs, that is, the legislature or the executive, or in the realm of the judicial power) is reference, respectively, to the democratic principle or the principle of separation of powers and especially judicial independence.

When, through the legal order of the EU or the ECHR and the judicial review mechanisms at their disposal (CJEU, ECtHR), the democratic principle and the rule of law, as well as judicial independence are protected and strengthened at Member State level, then the relativization of the national constitution ends in increasing the normative content of a national constitution, which is or wants to appear as democratic and liberal. This is evident from the cases of attempted interventions to judicial independence that have been noted in Poland and Hungary[32].The ECHR and EU law, in effect the relevant case law of the CJEU and the ECtHR, substitute and strengthen the national constitution. International judicial review (mainly that of the ECtHR) operates in a similar way regarding the validity of national electoral processes and referenda and, in general, in matters of political participation.

4. The Internationalization of the Constitution: A Means of Relativization, or a Conduit for Channeling the "Augmentation" of the Constitution?

The broadest phenomenon related to the constitution's relativization is internationalization of the constitution[33]. On the one hand,

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[32] Peter Van Elsuwege / Femke Gremmelprez, Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice, 16 (1) *EuConst*, 8, (2020).

[33] Richard Albert / Xenophon Contiades / Alkmene Fotiadou (eds), *The Law and Legitimacy of Imposed Constitutions* (2020). Roumpini Michaloudi, *L'internationalisation des constitutions des Etats en crise.*

the constitution is a basis that establishes, symbolizes and confirms (self-referentially) the state's and the national legal order's very existence. Furthermore, the constitution operates as a blueprint, organizing the legislative procedure; the procedure for producing all the other rules of the national legal order. On the other hand, the constitution is also the crown set on the entire legal order at the top of this pyramid. Still, in spite of being the A to Z of the legal order of any given state, the constitution is now largely dependent on developments beyond the state structure, which take place in the field of international law or in regional legal orders, such as the EU legal order and the legal order of the ECHR.

It is useful to remember that the phenomenon of the constitution's internationalization has been manifest mainly after the Second World War, by the very act of exercising the primary constituent power. In many cases, the founding constitutions, carrying the special significance of a state's first constitution, symbolizing statehood, sovereignty and independence, are products of an international process and international acts. One of the most typical examples is again the Constitution of the Republic of Cyprus. The Republic of Cyprus was born from the Treaties of Zurich and London in 1959 and the 1960 Constitution is an annex to these Treaties[34], which is the reason why it has an enormous core of unamended provisions. In the case of Cyprus, some international correlations were the causes for implementing a constitution. It is no coincidence that

L'encadrement du pouvoir constituant originaire par le droit international (2014). WEN-CHEN CHANG / JIUNN-RONG YEH, Internationalization of Constitutional Law *in: The Oxford Handbook of Comparative Constitutional Law*, 1166, (MICHEL ROSENFELD / ANDRÁS SAJÓ eds., 2012). KEVIN FERDINAND NDJIMBA, L'internationalisation des constitutions et la revalorisation du droit constitutionnel des Etats, 22 *Politeia, La revue de l'AFAAIDC*, (2012). KEVIN FERDINAND NDJIMBA, *L'internationalisation des constitutions des Etats en crise. Réflexions sur les rapports entre droit international et droit constitutionnel*, Thèse, Université Nancy 2 (2011).

[34] ACHILLES EMILIANIDES, *Beyond the Constitution of Cyprus* (2006), (in Greek).

the most famous example is that of the Japanese Constitution after the overwhelming defeat of the country in WW II. The Japanese Constitution[35] was ordered by General MacArthur, the US commander of the occupying forces. A third more recent example is the enactment of the Bosnia-Herzegovina Constitution by way of an international treaty (Annex 4 to the General Framework Agreement for Peace in Bosnia and Herzegovina). This, too, is a typical example of the internationalization of the constitution, which is drawn up through an act of international law and not by an endogenous and indigenous primary constituent process[36].

This most obvious and absolute form of internationalization of the constitution, *i.e.* the exercise of primary constituent power - in the founding constitution even - should not make us underestimate mild forms of internationalization that apply to all states. It is interesting to see how national sovereignty, both external and internal, is subordinated to international correlations and in fact to its ultimate expression of constituent power. The constituent power - the primary first of all - is the highest expression of the internal sovereignty of the state. Nevertheless, when the state is born and has a founding and emblematic constitution that is identified with the existence of the state, the constitution and its establishment are - as already noted - a manifestation of external sovereignty. This is because it is an element on the basis of which the recognition of the state by the international community, according to international law, can take place[37].

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[35] KEIGO KOMAMURA, *Legitimacy of the Constitution of Japan: Redux. Is an imposed constitution legitimate?* An occasional paper presented at the Constitutional Revision Research Project, Reischauer Institute of Japanese Studies, Harvard University (11 February 2010) https://sites.fas.harvard.edu/~rijs/crrp/papers/pdf/Komamura_Constitution.pdf

[36] IOANNIS PREZAS, L'internationalisation structurelle des systèmes constitutionnels nationaux: les cas de la Bosnie-Herzégovine et du Kosovo *in: L'ONU, entre internationalisation et constitutionnalisation* (P.-F. LAVAL / R. PROUVEZE dir., 2015).

[37] GRÁINNE DE BÚRCA, Internalization of international law by the CJEU and the US Supreme Court, 13 *I•CON*, Issue 4, 987, (2015). VLADLEN S.

Let us take a look at how internationalization works in a more everyday, "gentler" and "milder" way, through the constraints or mandatory choices imposed internationally on the secondary constituent power, in the exercise of the amendment power. This is done in accordance to provisions of international conventions, or the rules of EU law. Such provisions limit the options for initiative in exercising the constituent power, or impose certain choices in the exercise of the amendment power, which have been agreed upon by the state internationally before it turns them into domestic rules.

A prominent example of this is what happened with the relatively recent Treaty on Stability, Coordination and Governance (TSCG) of 2012, which establishes institutions of economic governance of the Eurozone, along with the Treaty Establishing the ESM, the European Stability Mechanism. The TSCG stipulates that its member states (all of which are member states of the Eurozone, along with some of the other EU Member States), are under an obligation to enact the so-called golden fiscal rule either in their constitution or in their budget law. However, even in the latter case, such enactment, as a result of the state complying with an international obligation, would still amount to an amendment of the state's constitutional rules, given that in European constitutions, in the US Constitution and in most constitutions around the world, the basic provisions of the budget law are normally also provisions of the state's constitution[38].

After all, historically, constitutional rules are established to regulate the process of imposing taxes; thus the "fiscal constitution" is at the core of the historical meaning of the constitution[39].

Participation in the European integration as such, when there are insufficient provisions in the national constitutions, leads to the need for amendment of the constitutions of Member States.

VERESHCHETIN, New Constitutions and the Old Problem of the Relationship between International Law and National Law, 7 *EJIL*, 29, (1996).

38 VENIZELOS, *supra* note 16.

39 SIMINA TANASESCU, *Constitutional Law and the EU Balanced Budget Principle* (2019).

The internationalization of the constitution is a different issue from the classic and ever-pending issue of the relationship between the constitution and international law, *i.e.* it is different from the dispute over the supremacy of the international law and the compliance of national bodies (ultimately the national courts) with the resolutions of international organizations (*e.g.* the UN Security Council and ultimately the judgments of the International Court of Justice or other international judicial bodies). It is obviously different from the much milder issue of the use of international law by national courts, especially the supreme or constitutional ones, for the interpretation of the national constitution. The two classical perceptions of the relationship between national and international law, monism and dualism, continue clashing[40].

In relation to the direct effect and primacy of EU law, there are now examples of national constitutions that accept a monistic perception and therefore the supremacy of EU law, not only because it is self-referentially established, but also because it is expressly provided for in the national constitution. The Constitution of the Republic of Cyprus after amendment - and it is a nice "laboratory" question when and how the Cypriot Constitution is formally amended and when it is changed by invoking the law of necessity[41] - explicitly provides for (Article 1A) the supremacy of EU law.

The recent (in the so-called *Kadi I-IV saga*) judgments of the CJEU[42] regarding the "constitutional" conditions that must be met

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[40] DAVID H. MOORE, Constitutional Commitment to International Law Compliance?, 102 (2) *Virginia Law Review*, 367, (2016). ANNE PETERS, Supremacy Lost: International Law Meets Domestic Constitutional Law, 3 *ICL Journal*, 170, (2009). EILEEN DENZA, The Relationship between International and National Law *in: International Law*, 412-440, (MALCOLM EVANS ed., 4th ed, 2006). A.F.M. MANIRUZZAMAN, State Contracts in Contemporary International Law: Monist versus Dualist Controversies, 12 *EJIL*, No 2, 309, (2002).

[41] See *supra* note 34.

[42] LUSTIG / WEILER, *supra* note 1, p. 346 *et seq*, and fns 132-142. ANTONIOS TZANAKOPOULOS, Kadi Showdown: Substantive Review of

for the compliance of the EU with decisions of the UNSC on the imposition of sanctions, and the Italian Constitutional Court judgment (238/2014) that refused to comply with the well-known decision of the International Court of Justice in The Hague (ICJ) on state immunity in the case of war reparations[43], rekindled this discussion[44]. In addition, they have shown how similar the perceptions on both sides of the Atlantic actually are on this issue[45]. Moreover, it is worth noting that the CJEU essentially invokes the "European constitutional identity" against the UNSC, but is not ready to accept as self-evident the invocation of the national constitutional identity by the supreme or constitutional courts of the Member States, *e.g.* the Italian Constitutional Court in the *Taricco* cases or in the case of retroactive extension of the length of the statute of the limitations period[46]. The theoretical debate increases concerning the decision

(UN) Sanctions by the ECJ, *EJIL: Talk!*, (2013), https://www.ejiltalk.org/kadi-showdown/

[43] RICCARDO PAVONI, Simoncioni v. Germany: Italian Constitutional Court Decision on Law Implementing Immunity of Foreign States from War Crimes Compensation Claims in Accordance with 2012 ICJ Judgment, 109 (2), *AJIL*, 400, (2015).

[44] Summarized in the publisher's note, 129 *Harvard Law Review*, 1362 (2016) https://harvardlawreview.org/2016/03/constitutional-courts-and-international-law-revisiting-the-transatlantic-divide/

[45] ANDRÉ NOLLKAEMPER, The Duality of Direct Effect of International Law, 25 (1) *EJIL*, Issue 1, 105 (2014).

[46] TÍMEA DRINÓCZI, Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach, 21 (2) *German Law Journal*, 105, (2020). MATTEO BONELLI, The Taricco Saga and the consolidation of judicial dialogue in the European Union: CJEU, C-105/14 Ivo Taricco and others, ECLI:EU:C:2015:555; and C-42/17 M.A.S., M.B., ECLI:EU:C:2017:936 Italian Constitutional Court, Order no. 24/2017, 25 *Maastricht Journal of European and Comparative Law*, issue 3, 357, (2018). GIACOMO RUGGE, The Italian Constitutional Court on Taricco: Unleashing the normative potential of 'national identity'?, *Question of International Law*, (Mar 31, 2017) http://www.qil-qdi.org/wp-content/uploads/2017/03/03_ICC-Taricco-Order_RUGGE_FIN.pdf. FEDERICO FABBRINI / ORESTE

of 05.05.2020 of the German Federal Constitutional Court and the exercise of so-called *ultra vires* control on both the actions of the European Central Bank / European System of Central Banks over the quantitative easing program (PSPP) and the relevant decision of the CJEU based on the German national constitutional identity[47].

5. The Multi-level Constitutionalism as a Means for Augmenting instead of Relativizing the Constitution

A phenomenon related to the relativization of the constitution is what is called by many "multi-level constitutionalism"[48], in the sense that there are many levels of rules of increased legal force, which sometimes come into conflict with each other over their supremacy or even their priority of application, but still coexist. Through various schemes, a single space is formed, which, many years ago, I had attempted to call "a single European constitutional space". This space is formed through a phenomenon, which, borrowing the relevant theological term, I had proposed to be called "*αλληλο-περιχώρηση*" / "alleloperichoresis"[49], a term that unfortunately is not

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Pollicino, Constitutional identity in Italy: European integration as the fulfilment of the Constitution, 06 *Working Paper, EUI Law*, (2017). Verica Trstenjak, National Sovereignty and the Principle of Primacy in EU Law and Their Importance for the Member States, 4 (02) *Beijing Law Review*, 71, (2013).

47 Venizelos, *supra* note 15.

48 Kaarlo Tuori / Suvi Sankari, *The Many Constitutions of Europe* (2016). Armin von Bogdandy, Common Principles for a Plurality of Orders: A Study on Public Authority in the European Legal Area, 12 *I•CON*, Issue 4, 980, (2014). Matej Avbelj / Jan Komárek, *Constitutional Pluralism in the European Union and Beyond* (2012). Neil Walker, Le constitutionnalisme multiniveaux *in: Traité International de droit constitutionnel*, 441, (Dominique Chagnollaud / Michel Troper dir., 2012). Ingolf Pernice, The Treaty of Lisbon: Multilevel Constitutionalism in Action, 15 (3) *CJEL*, 349 (2009).

49 Evangelos Venizelos, *The Treaty of Maastricht and the Single European Constitutional Area* (1994) (in Greek).

easily translated, but could be rendered in English as co-inherence. It consists in a kind of mutual respect[50] shown between courts: the CJEU and the ECtHR, on the one hand, and the national constitutional or supreme courts on the other. One court is careful of the judgments of the other. There are moves of courtesy and dialogue between the judges, in order to form a single space. But in the end, one side has to retreat, while the other does not retreat or retreats less, through an ongoing "negotiation".

Each of the above courts claims that the field in respect of which it is the competent judicial body, is related to a system of rules that are superior and have priority of application. As far as the field of jurisdiction of national courts is concerned, the constitution prevails. Nonetheless, national courts also function as EU courts; they further function as judicial bodies for the purpose of implementing the ECHR in the context of the principle of subsidiarity. Yet, EU law claims supremacy also in relation to the national constitution, and it does so irrespective of the status of the relevant piece of legislation in the EU legal order. Thus, not only the EU's primary legislation, but its secondary legislation, too, claims supremacy over the national constitution.

This is true also for the ECHR and its interpretation. In this sense it is of particular importance for the national courts that are required to apply first in order (due to the subsidiarity principle and the procedural requirement to exhaust internal legal remedies as prerequisite for the admissibility of an individual application) the *res interpretata*, not only the *res judicata* produced by the ECtHR[51].

The same is true for the most part concerning the obligation of national courts (as courts of the EU legal order) to comply with the case law of the CJEU, which has the authority to ensure the single and uniform application of EU law. I will not refer here to the *ultra*

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[50] MARTA CARTABIA, Europe as a Space of Constitutional Interdependence: New Questions about the Preliminary Ruling, 16 *German Law Journal*, no 06, 1791, (2015).

[51] CHRISTOS GIANNOPOULOS, *L'autorité de la chose interprétée des arrêts de la Cour Européenne des Droits de l'Homme* (2019).

vires decision of 05.05.2020 of the German Federal Constitutional Court on the ECB's quantitative easing program, which has become the cause for a major and intense debate regarding the very legal and institutional foundations of European integration[52].

Thus, the ECtHR potentially reviews all aspects of a national constitution. In other words, it reviews both the democratic and the liberal part of the Constitution. Objects may intertwine at all times, after all. Fields cannot be strictly delimited. Of course, there is a problem with the fundamental constitutional principle to which one refers each time. Because it is one thing to refer to the democratic principle and another to refer to the rule of law, although they can both intertwine as well. For example, vote equality is a crucial parameter of the democratic principle, but its safeguarding through judicial control of the validity of elections and referenda is an element of the rule of law, and so on. The same, of course, applies as we shall see to the CJEU and the protection of liberal democracy, that is, the democratic principle and the rule of law, and in particular judicial independence in Member States.

The difference between a "multi-level constitution" and an "augmented constitution" is that the first concept describes a phenomenon that takes place through international and regional cooperation and, above all, through European integration. While the second concept attributes a strategy of adaptation of the national constitution. This strategy sacrifices a significant part of the legal supremacy of the Constitution, but gains the strengthening of the guarantee content of the Constitution and maintains the criticality of the scope of the Constitution in which it tries to incorporate elements and dimensions of other legal orders claiming their legal supremacy in their field. The distance between description ("multilevel constitution") and interpretive and regulatory strategy ("augmented Constitution") reflects the added analytical value of the concept of augmented Constitution.

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[52] EVANGELOS VENIZELOS, *supra* note 9.

6. The Interpretative or Even Explicit Harmonization with the ECHR and European Union Law Does Not Undermine, Rather it Augments, the National Constitution

At this point we can see how from the well-known discussion of the relationship between the national constitution, EU law and the ECHR and from the always open dialogue between the national constitutional or supreme courts, the CJEU and the ECtHR, we can move to the phenomenon of "augmented constitution" especially through the interpretation in accordance with EU law and the ECHR.

I am not referring here to those cases where the text of the national constitution itself explicitly addresses the issue of the relations of the national constitution with EU law and, more often with the ECHR, by accepting their supremacy[53]. In a format similar to that governing the relationship between the EU Charter of Fundamental Rights and the ECHR[54], this form of explicit harmonization

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[53] Report on the Implementation of International Human Rights Treaties in domestic law and the Role of Courts, adopted by the Venice Commission at its 100th plenary session (Rome, 10-11 October 2014), on the basis of comments by Veronika Bílková / Anne Peters / Pieter van Dijk, CDL-AD (2014)036, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e

[54] Martin Kuijer, The challenging relationship between the European Convention on Human Rights and the EU legal order: consequences of a delayed accession, 24:7 *The International Journal of Human Rights*, 998, (2020). Frank Emmert / Chandler Piché Carney, The European Union Charter of Fundamental Rights vs. The Council of Europe Convention on Human Rights and Fundamental Freedoms – A Comparison, 40 *Fordham International Law Journal*, Issue 4, Article 1, 1047, (2017). Koen Lenaerts, La vie après l'avis: Exploring the principle of mutual (yet not blind) trust, 54 *Common Market Law Review*, Issue 3, 805, (2017). Stephen Brittain, The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an

between the national Constitution, EU law and the ECHR, or just the ECHR, has the irresistible advantage of the simplicity and clarity of a written constitutional rule that chooses to maintain its supremacy by accepting the supremacy of the ECHR or/and the EU law because these legal orders are identical in value with the national one. But the theoretical interest is obviously greater when there is no such explicit harmonization and the solution is left to interpretation and case law.

In the field of the relationship between the national Constitution and EU law, there are certainly national constitutional or supreme courts that react to some decisions of the CJEU invoking national constitutional identity or even the *ultra vires* control concerning the respect of the limits of the conferral competences of the EU and its organs, including the CJEU. The reactions of the national courts depend on their judicial traditions, self-confidence, or national priorities and sensitivities. As for the soundness/validity of their reaction, this is an altogether different question each time.

It is one thing for a national court to react because the CJEU prevents the national government and the majority of the national Parliament from interfering in the composition itself of the constitutional or supreme court, in violation of its independence[55]. It is a different thing when a national court reacts by invoking, as an element of the national constitutional identity, the principle of non-retroactivity of the rules of substantive criminal law, as the Italian Constitutional Court did on the occasion of the extension of the limitation period, or in the chain of judgments of the so-called "Tarrico saga"[56]. It is quite another thing for a national constitu-

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Originalist Analysis, 11 (3) *European Constitutional Law Review*, 482 (2015).

[55] See *supra* note 32.

[56] CHIARA AMALFITANO / ORESTE POLLICINO, Two Courts, two Languages? The Taricco Saga Ends on a Worrying Note, *Verfassungsblog*, (2018) https://verfassungsblog.de/two-courts-two-languages-the-taricco-saga-ends-on-a-worrying-note/. BONELLI, *supra* note 46. RUGGE, *supra* note 46. FABBRINI / POLLICINO, *supra* note 46.

tional court, such as the German Federal Constitutional Court, to react to issues of monetary and economic policy, raising an issue of *ultra vires*, that the ECB went beyond its powers[57] in setting up the PSPP mechanism.

Such modifying influence on the national constitution is also exercised by the ECtHR, which possesses mechanisms for international judicial review of the national constitution[58]. The ECtHR treats the national constitution as if it were a common national legal rule. In spite of a certain degree of restraint shown in order to avoid disputes with the national supreme or constitutional courts, the ECtHR rules with ease if a constitutional provision of a Member State is contrary to a provision of the ECHR. The counterweight to this attitude of the ECtHR is obviously the resistance of the national constitutional or supreme courts to the implementation of the judgments of the ECtHR which they place under their own judicial control to the extent that compliance entails the overthrow of a national court. This attitude of the national constitutional or supreme courts towards the ECtHR shows an interesting common denominator in various countries from the Russian Federation to Greece. Obviously, the ECtHR and the Commitee of Ministers of the Council of Europe do not have the parallel mechanisms of economic, financial, budgetary and trade pressure that the CJEU and the EU have[59].

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[57] Bundle of decisions on the *Gauweiler/Weiss* case, with the last one being that of the BVerfG on 05.05.2020, among many others, VENIZELOS, *supra* note 15.

[58] CHRISTOS GIAKOUMOPOULOS, La contribution du Conseil de l'Europe aux réformes constitutionnelles: l'action de la Commission de Venise *in: The Constitutional Revision in Today's Europe / La révision constitutionnelle dans l'Europe d'aujourd'hui* (GIULIANO AMATO / GUY BRAIBANT / EVANGELOS VENIZELOS eds., 2002).

[59] GLEB BOGUSH / AUSRA PADSKOCIMAITE, Case Closed, but what about the Execution of the Judgment? The closure of Anchugov and Gladkov v. Russia, *EJIL: Talk!*, (October 30, 2019) https://www.ejiltalk.org/case-closed-but-what-about-the-execution-of-the-judgment-the-closure-of-anchugov-and-gladkov-v-russia/. BILL BOWRING, Russian cases in the ECtHR and the question of implementation *in: Russia and the European*

In this respect the national legislature is often faster and more flexible than the national judge. The strategy of the "augmented constitution" does not allow national courts to invoke the national Constitution in order to resist the implementation of judgments primarily by the ECtHR, but in some cases also by the CJEU.

Court of Human Rights: The Strasbourg Effect, 188 (LAURI MÄLKSOO / WOLFGANG BENEDEK eds., 2018). JULIA LAPITSKAYA, ECHR, Russia, and Chechnya: two is not company and three is definitely a crowd, 43 *NYU JILP*, 479 (2011). In Greece the repetition of the procedure in the Council of State (Supreme Administrative Court) is provided by the Greek law (Article 16 par. 1 of Law 4446/2016) in cases where the European Court of Human Rights has ruled that a previous decision of the Council of State constitutes a violation of the right of the person concerned, as happened in this case. With decision 2208/2020 the Plenary Session of the Council of State accepted a relevant request but interpreted the provision of the national law in such a way as to put the judgment of the ECtHR under the control of the Greek Council of State, as had previously done the second section of the Court. The Court held that Greek law reserves the possibility for the Council of State to assess the content of the decision of the ECtHR and not to accept the request for repetition, *inter alia*, if its acceptance would be contrary to a specific purpose of public interest or would violate another international obligation of the country, or if the decision of the ECtHR is manifestly incomplete and unsubstantiated or, finally, if it has mediated an act of a public body that removes the consequences of the violation of the right of the person concerned. In the present case, however, it was judged that none of the above reasons was met, which would impose the rejection of the application of the victim, in whose favor a judgment of the ECtHR had actually been issued. This judgment had ruled that a previous decision of the CoC had violated the right of the person concerned, which is guaranteed by the European Convention on Human Rights.

7. The Constitutionalization of International Law as Counterweight to the Relativization of the Constitution

We have already referred to the internationalization of the constitution, through various examples ranging from very mild to very strong aspects of this phenomenon. Obviously, the reverse phenomenon, *i.e.* that of constitutionalization of international law, exists, too.

Constitutionalization of international law[60] in my perception of the concept means that international law (but also the EU law) enters into the substance of the national constitution in the context of the general phenomenon of multi-level constitutionalism, abovementioned. There is a large number of international conventions and texts of the so-called soft law (reports, decisions, declarations

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[60] Andrzej Jakubowski / Karolina Wierczyńska, *Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry* (2016). Lando Kirchmair, Who has the final say? The relationship between international, EU and National Law, *EJLS - 10th Anniversary Conference Special Issue*, 47, (2018). Rossana Deplano, Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry, 6 *EJLS*, Issue 1, 66 (2013). Erika De Wet, The Constitutionalization of Public International Law *in: The Oxford Handbook of Comparative Constitutional Law* 1209 (Michel Rosenfeld / András Sajó eds., 2012). Julian Arato, Constitutionality and constitutionalism beyond the state: Two perspectives on the material constitution of the United Nations, 10 *I•CON*, Issue 3, 627 (2012). Jeffrey L. Dunoff / P. Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance*, (2012). Thomas Kleinlein, Non-state actors from an international constitutionalist perspective: Participation matters! *in: Participants in the International Legal System*, 41, (Jean d'Aspermont (ed.), 2011). Vicki C. Jackson, Paradigms of public law: transnational constitutional values and democratic challenges, 8 *I•CON*, issue 3, 517, (2010). Anne Peters, Supremacy Lost: International Law Meets Domestic Constitutional Law, 3 *ICL Journal*, vol. 3, 170, (2009). Joseph H.H. Weiler, The Geology of International Law – Governance, Democracy and Legitimacy, 64 *ZaöRV*, 547, (2004).

or recommendations of international organizations) concerning the formation and operation of the democratic system of government, the guarantees and quality of democratic institutions, transparency, the validity of elections, the functioning of the representative democracy. Thus, the fundamental subject of the constitution has since long moved beyond the limits of the national constitution and into the domain of international law.

This movement has been shown most prominently in the field of protection of human rights. Constitutional protection means a lot, but international protection means much more. Human rights protection has been internationalized since decades through a number of conventions, instruments, reports, decisions on the subject, carrying special weight.

Above all, however, lies the ECHR, which establishes the most organized regional protection system. Furthermore, in respect of individual rights, there are many more specialized conventions, either at the UN level or at the level of the Council of Europe or at that of other international organizations. At the same time, the regulation of these objects at the level of European Union law has now being completed, especially after the incorporation of the Charter of Fundamental Rights into the primary EU law[61]. It is therefore necessary that the provisions of the national Constitution and international law in the field of human rights coexist and are aligned, with the objective of achieving the greatest possible level of protection[62].

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[61] CLARA RAUCHEGGER, National constitutional rights and the primacy of EU law: M.A.S, 55 *Common Market Law Review*, 1521, (2018). CORNELL, *supra* note 8.

[62] EYAL BENVENISTI / ALON HAREL, Embracing the tension between national and international human rights law: The case for discordant parity, 15 *I•CON*, Issue 1, 36, (2017).

8. The Informal Constitutional Changes as a Pathway towards the "Augmentation" of the National Constitution

The phenomenon in which the relativization and the augmentation of the national formal Constitution coexist in the most intense and clear way are the so-called informal constitutional changes. An informal constitutional change is a change in the regulatory / normative content of the constitution without altering the letter, the constitutional text, and, therefore, without following the formal procedure for constitutional revision[63]. However, the absence does not imply that such processing of the Constitution is unlimited; on the contrary, there is strong support of the view that any amendment of the constitution is also subject to judicial review of its constitutionality, with respect to the procedural and substantive limits of the revision of the constitution.

The difference is that the formal revision of the Constitution falls within the competence of political bodies (parliament or the electorate itself) under judicial control in marginal cases, while informal constitutional changes take place mainly through the judicial interpretation of the Constitution, very often in the context of the judicial review of constitutionality.

Although the constitutional revision has not lost its value as a formal procedure, this formal procedure does not apply in all countries and to all issues. In the United States, for example, the formal procedure for amending the constitution is not easily activated; in fact, it is very difficult to complete this complex constitutional procedure.

Take, for instance, the rule of balanced budget: contrary to the EU, which has introduced it with the Fiscal Compact through the Treaty on Stability, Coordination and Governance, in the US, that great country of capitalism, the rule of balanced budget has not

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[63] See *supra* note 7 and Lina Papadopoulou, Die implizite Änderung der griechischen Verfassung durch das EU-Recht, 74 *ZaöRV* no. 1, 141, (2014).

been introduced into the Constitution, although there have been many attempts to carry out the relevant amendment. In fact, in the US there are many believing that the amendment procedure should not be initialized and that it may have become unnecessary[64].

In Greece, a revision procedure was initiated in 2019, after ten years of economic crisis, without the revision addressing any of the critical fiscal issues. The relevant process was launched on the issues of the process for electing the President of the Republic, the ministerial accountability, the vote of citizens outside the territory, as if nothing has happened in the field of the economy. The fiscal constitution, the fiscal adequacy clause, the fiscal awareness, the budget, the relations with the EU - none of those were the subject of the debate on the revision.

On the other hand, the phenomenon of informal constitutional changes is widespread and potent. An interesting theoretical discussion on the intensity of the phenomenon of informal constitutional changes is taking place around the world. Surprisingly, there is an equally heated debate concerning revisions in general; not just the revision process, but also the substantial limits of revision, the unamendable core of constitutions. In fact, a strong theoretical trend has been formed in favor of the position that there is a hard core of non-amendable provisions, whether the constitution explicitly provides for it or not. In that respect, Greece is a "pioneer", as it has always had and still has a core of non-amendable provisions.

The big lever for such informal changes is the judicial review of the constitutionality of laws. Where there is extensive judicial control and such strong judicial interpretation of the constitution with

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[64] DAVID A. STRAUSS, Not Unwritten, After All?, 126 *Harvard Law Review*, no. 6, 1532 (2013). AKHIL REED AMAR, *America's Unwritten Constitution: The Precedents and Principles We Live By* (2012). BRANNON P. DENNING / JOHN R. VILE, The Relevance of Constitutional Amendments: A Response to David Strauss, 77 *Tulane Law Review*, 247, (2002). DAVID A. STRAUSS, The Irrelevance of Constitutional Amendments, 114 *Harvard Law Review*, no. 5, 1457, (2001).

the judge expressing what he/she believes the constitution to be, he/she certainly "shapes" the constitution to a large extent.

But there are other mechanisms for informal changes as well. These are mainly the mechanisms of regional integration, such as participation in European integration. As we have seen (*supra*, 6), in Europe, the coexistence of national constitutions with EU law and the ECHR, and the jurisdiction of the CJEU and the ECtHR, have made the phenomenon of the interpretation of the national Constitution in accordance with the EU law or the ECHR a commonplace. This interpretation shall be carried out by the competent national bodies, first the legislator and then the courts, or directly by the national courts. Once the interpretation of the national constitution in accordance with EU law or the ECHR is consolidated and widely accepted, then we can say that there is an informal change of the national constitution: a change of its regulatory content without a revision of the constitutional text.

The confession of a very important scholar and federal judge, Richard Allen Posner, is characteristic of the amending force of the judicial interpretation of the constitution in the USA. Near the end of his judicial term, Posner presented the essence of his experience and theoretical reflections and concerns[65]. One of the main issues he addressed, was that of judicial interpretation of the constitution and the limits of the judicial review of the constitutionality of laws. According to Posner, in the end the judge interprets the constitution as he/she deems fit, based on his/her perception and conscience,

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[65] RICHARD A. POSNER, Richard Posner clarifies his views on the Constitution, *Slate*, (July 1, 2016) https://slate.com/news-and-politics/2016/07/supreme-court-breakfast-table-for-june-2016-richard-posner-clarifies-his-views-on-the-constitution.html. JOSH BLACKMAN, Judge Posner on Judging, Birthright Citizenship and Precedent, *Josh Blackman's Blog*, (Nov 6, 2015) http://joshblackman.com/blog/2015/11/06/judge-posner-on-judging-birthright-citizenship-and-precedent/. For the French approach, see DIDIER RIBES, Le réalisme du Conseil constitutionnel, *Cahiers du Conseil constitutionnel*, n° 22 (Dossier: Le réalisme en droit constitutionnel), (Juin 2007) https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/le-realisme-du-conseil-constitutionnel

always subject to there being a constitutional provision so explicit, categorical or arithmetic, that would conflict with his/her interpretive scheme.

If the constitution stipulates that the President of the United States must be at least 40 years old, the judge cannot interpret the Constitution to say that a President may be elected at the age of 35. If the Constitution stipulates that each State has two Senators, the judge cannot interpret the Constitution to say that the State has three senators. However, with few exceptions, the judge's room for discretion is rather extensive. Posner's said farewell remarks sparked heated debate, with theoretical interventions, book reviews and interviews following, as he is an emblematic representative of a liberal conception of constitutional pragmatism[66].

The debate over the margin of the judicial interpretation of the constitution intersects with the debate on informal constitutional changes, and perhaps the proponents of the theory that there is no need for an amendment are discouraged because almost everything can be done through judicial interpretation.

9. CAN THE "AUGMENTED CONSTITUTION" BE "LACONIC"?

The supporters of the "laconic" constitution argue that "good" constitutions are constitutions of "few words"[67]. However, the less "wordy" the constitution, the more "talkative" the judge is, therefore, this way, material that is removed from the constitution simply goes to amplify the judge's interpretative power.

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[66] MARK KENDE, Constitutional Pragmatism, the Supreme Court, and Democratic Revolution, *Drake University Law School Research Paper No. 12-36*, 635, (2012). FRANK H. EASTERBROOK, Originalism and Pragmatism: Pragmatism's Role in Interpretation, 31 *Harvard Journal of Law & Public Policy*, no 3, 901 (2008).

[67] GEORGE TSEBELIS / DOMINIC J. NARDI, A Long Constitution is a (Positively) Bad Constitution: Evidence from OECD Countries, 46 *British Journal of Political Science*, issue 2, 457, (2016).

In federal systems the size of the texts of state constitutions must, in principle, be added to the size of the text of the federal constitution. There is not only the federal constitution in the USA and Germany, there are also the constitutions of the states or of the *Länder*. In any case, the Greek Constitution is not one of the lengthier, the Portuguese one is larger and the same goes for the German and the Indian constitutions.

In India, a great debate on the limits of revision, the judicial review of ongoing revisions that threaten the hard core, an interpretive core, is now open[68]. This was true of Greece, until the 1952 Constitution. The corresponding provision of current Article 110, Article 108, stated that the "fundamental provisions" are not subject to revision. What constituted a "fundamental provision" was determined by the interpretation. This changed in 1975, when we have explicitly defined principles and provisions that make up the hard core: The provisions defining the form and basis of the regime as a Parliamentary Republic and the provisions of Article 2 (1) on the value of human being, Article 4 (1) and 4 (3) on the principle of equality, Article 5 (1) and 5 (3) on the principle of liberty and the right of all persons to freely develop their personality, Article 13 (1) on the liberty of religion, and Article 26 on the separation of powers. Thus we have a clear view, more or less[69].

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[68] DAVID LANDAU / YANIV ROZNAI / ROSALIND DIXON, Term Limits and the Unconstitutional Constitutional Amendment Doctrine: Lessons from Latin America, *FSU College of Law, Public Law Research Paper No. 887*, (2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3208187. YANIV ROZNAI, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (2017). YANIV ROZNAI, Negotiating the Eternal: The Paradox of Entrenching Secularism in Constitutions, *Michigan State Law Review*, 253, (2017). GÁBOR HALMAI, Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective, 13 *Wake Forest Law Review*, no. 38, 101, (2016). KEMAL GÖZLER, *Judicial Review of Constitutional Amendments: A Comparative Study* (2008).

[69] EVANGELOS VENIZELOS, *The limits of the Revision of the Constitution 1975* (1984) (in Greek).

It is an interesting fact that the main representative of the theory of the laconic constitution, claims[70] that what happened in Greece during the last revision procedure (2019) with the amendment of Article 51 through Article 54, with the addition of a paragraph on the vote of expatriates with the result that this issue is now regulated by both Article 51 (4) and Article 54 (4), is analogous to what is happening in Colombia and India, and that the Greek people should normally revolt and resist the violation of the constitution. However, both Article 51 and Article 54 of the Greek Constitution are extensive and detailed, and the issue of the vote of citizens outside the territory is regulated meticulously by the Constitution. In the perception of the laconic constitution, reference to this issue would not be needed. A general reference to the right to vote and a referral of all other matters to the legislative power would suffice. Referring to the constitution and its regulatory content, we can say that the well-known Lavoisier's principle in chemistry applies to it metaphorically. Just like nothing is lost from the various physical transformations of mass, nothing is lost from the constitution's regulatory energy, in case its text is shortened. Whatever the constitution loses in words, it is replenished by the judge and if the judge does not do it, the common legislator will.

Besides, nowadays, countless European and international "legislative" texts claim supremacy over the text of the national constitution. Even derivative EU legislation is potentially superior to the constitution, by operation of the principle of supremacy of European Union law. So what is the point if the constitution has 30,000 words or 25,000 words, when we are talking about a few million words of EU law that are potentially superior to the constitution, or claim priority of application over it. To give an illustrating example, in implementing a directive regulating issues related to the production of electricity through using sawdust residue, the answer to the question of whether the latter can be considered as biomass and be included in RES, may affect the interpretation of Article 24 of

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[70] GEORGE TSEMPELIS, Unconstitutional constitutional amendment, *To Vima*, Athens, 3 November 2019 (in Greek).

the Greek Constitution, thus informally changing its regulatory content.

By the 2001 revision of the Greek Constitution three paragraphs of Article 24 became more detailed in their wording and an interpretative clause was added on the definition of forest and forest area, according to the case law of the Special Supreme Court. Article 24, however, is linked to a colossal set of provisions of derivative EU law, that claim superiority, and it cannot be interpreted independently from them. Nearly every topic that is addressed in the context of special administrative law, energy law, environmental law, urban planning law, forest law, forest maps and land registry legislation, relates not only to Article 24 of the Greek Constitution, but also to respective EU legislation.

10. The Convergence of Methods of Interpretation between National Constitutions, ECHR and EU Law as Convergence between Relativization and Augmentation of the Constitution - The American Influence

All of the above are linked to the clash of interpretive methods in the field of constitutional interpretation[71]. Whichever method of interpretation the interpreter and implementer of the constitution

[71] Michael Rosenfeld, Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts, 2 *I•CON*, Issue 4, 633, (2004). Aix Marseille Université / Université de Toulon / Université de Pau et des Pays de l'Adour, *XXXIII^e Table Ronde Internationale, Juge Constitutionnel et interprétations des Normes*, Aix-en-Provence 8 au 9 septembre 2017, (Grèce: C. Yannakopoulos, 271-325, Etats-Unis: C. Vroom, 235-270, Allemagne: R. Arnold, 41 *et seq.*). Lustig / Weiler, *supra* note 1. Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (2014), mainly chapter 6 (*Testing and Remedying Unconstitutionality*) p. 281 *et seq*. Pierre Brunet, Le juge constitutionnel est-il un juge comme les autres? Réflexions méthodologiques sur la justice constitutionnelle *in: La notion de 'justice constitutionnelle'*, 115, (Olivier Jouanjan / Eric Moulin / Patrick Wachsmann dir., 2005).

chooses, whether he/she declares it or not, whether he/she is aware of its effects or not, whether he/she is a follower of an interpretation which he/she elevates into an ideology, whether such ideology is governed by pragmatism, multiculturalism, empiricism or eclecticism, the result is the same: depending on the choice he/she makes, the interpreter is either an "activist" (a representative of judicial activism) or a "self-restrainer" (an advocate of judicial self-restraint). By using either of these methods, one ends up leaning towards one position or the other concerning the intensity of judicial review of the constitutionality of laws and the judicial interpretation of the constitution.

Of course, the chosen method of interpretation of the constitution is one thing; the reasoning of a court judgment is another thing, and the basic choice made by the judge in resolving the dispute before him is yet another. Very often the latter precedes the immediate former; the judge very often first decides how to resolve the dispute and then drafts the rationale of its judgment. This reality is reflected in the criminal courts' judgments of some European countries like Greece, where an extremely concise reasoning is usually given - if at all. The accused is convicted or acquitted and the relevant reasoning is provided in writing months later. The major premise of such reasoning consists in an interpretation of the crucial penal rule, usually in the context of the relevant case law of the criminal section of the Supreme Court. Naturally, the assessment of the facts of the case and their subjection to the relevant legal rule is important, however, the above are also performed in the context of the interpretive assumptions that have already been made in formulating the major premise of the relevant judicial reasoning. This shows how important it is to move from the level of adopting interpretation methods to the level of developing rules of interpretation, which are included in the constitution.

It turns out that the internationalization of the constitution significantly contributes to forming rules of constitutional interpretation. International law possesses a great asset in the form of explicitly established rules of interpretation (although they may not always be respected in practice). The Vienna Convention on the Law of Treaties includes rules on the interpretation of treaties. The ECtHR, as

an international court, uses the Vienna Convention on the Law of Treaties as a starting point, and proceeds to establish its own evolutionary interpretation, the *interprétation évolutive*, of the text of the Convention[72]. The ECtHR explores the existence of a pan-European consensus on this crucial issue, often recognizing the margin of appreciation of each member state.

The above explain why in the 2001 revision of the Greek Constitution, we tried to establish clearer rules regarding its interpretation. In my opinion, these rules are mainly found in the most important constitutional provision that is Article 25 (1)[73]; it contains the principle of the effective implementation of human rights, the principle of the obligation of state bodies not only to respect but also to facilitate the implementation of human rights, the principle of *in dubio pro libertate*, the *Drittwirkung* (third party effect - the horizontal effect of rights), and the principle of proportionality as the extreme limit of any restrictions imposed on protected human rights, *i.e.* the major "restriction of restrictions". Interpretation and case law have formed an earlier rule of interpretation, that of the equity of the legal force of constitutional provisions. This does not accept that there are unconstitutional constitutional rules and everything is subject to practical harmonization and systematic interpretation. Therefore, there are not only methods but also rules of interpretation that we must refer to.

There is, of course, a significant difference between European continental law and American law mainly, in their approach to interpreting the constitution. This is because in Europe there are constitutional texts that, in many cases, are newer to the classic text

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[72] ANTOINE GARAPON, Les limites à l'interprétation évolutive de la convention, 3(1) *RECHTD*, 25, (2011). KANSTANTSIN DZEHTSIAROU, European Consensus and the Evolutive Interpretation of the European Convention on Human Rights, 12 *German Law Journal*, no. 10, 1730, (2011).

[73] EVANGELOS VENIZELOS, The European Constitution as an 'intergovernmental' Constitution and the political deficits of the European Union, *in: A New Constitutional Settlement for the European People*, 33, (G. DIMITRAKOPOULOS / G. KREMLIS eds., 2004).

that is the US Constitution. In continental Europe revisions are quite frequent; on the contrary, in the United States they are rare. Most importantly, in Europe there exists a significant influence of EU law on national constitutions: on a weekly basis, the EU bodies produce texts upon texts that affect the interpretation of the national constitution. We also have the ECHR, which constantly influences the interpretation of the national constitutions. Thus, we have conditions of multi-level constitutionalism and a "multi-level constitutional text" as a first step toward the "augmented constitution".

The United States, on the other hand, have the classic - rather simplistic for European standards - methodological conflict between originalism and the living constitution, which is interpreted with greater ingenuity and adaptability[74]. Of course, many ramifications have been formed: There is authentic originalism, which is textualism, so the interpreter is limited to the letter of the provision. There is new originalism, which seeks to find how the content of the relevant provision was generally perceived at the time of its adoption. Intentionalism, which seeks the original intention of the historical legislator; not that of society at the time the provision was adopted, but that of the legislator through historical interpretation. This is, perhaps, a subjective historical interpretation, based on continental data[75].

Regardless of the choice of the methodological version to be followed in interpreting the constitution, the judge or any interpreter, in general, can reach conclusions showing either self-restraint or judicial activism conclusions. They may well consider a law allowing abortions to be constitutional, through a living constitution approach. Likewise, they may also consider a law permitting firearms possession to be constitutional, citing originalism. Both said findings can be turned into facets of interpretative self-restraint in deter-

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[74] See in parallel, JACK M. BALKIN, *Living Originalism* (2011).

[75] BRANDON MURRIL, Modes of constitutional interpretation, *CRS Reports* (Congressional Research Service 7-5700), (March 15, 2018). APOSTOLOS VLACHOGIANNIS, *La Living Constitution: Les juges de la Cour suprême des Etats-Unis et la Constitution* (2014).

mining the constitutionality of the respective law under consideration. What actually happens each time is that the person's moral, social or political beliefs are dressed with the suitable methodological coat. In case that person happens to be one of the nine justices of the US Supreme Court, it is not just his/her personal beliefs that are channeled through use of the relevant methodological approach in determining the constitutionality of a given provision; such beliefs become vested with the power of his/her vote and potentially become case law[76]. This is not the case in Greece, due to the diffusion of influence among a large number of judges - members of the three supreme courts.

Things are different in Europe: Interpretive methods are not filtered through an ideological prism. The self-placement of judges in camps that are methodologically and ideologically invested ("I am a conservative, therefore, I am an originalist" or "I am progressive, therefore, I am a living constitutionalist") does not exist. Almost no one professes methodological allegiancies; eclectisism is practiced.

The ECtHR declares that the text of the ECHR is a "living instrument", but does not declare that it favors a given interpretive school, neither does the CJEU. Nor do, in most cases, the constitutional courts, most of which are rather taciturn on the subject.

With regard to the Greek Council of State (the Supreme Court for administrative cases), its flexibility in the line of constitutional interpretation adopted may be seen in the curve of the case law produced over the period of the economic crisis, during which judicial self-restraint was interchanged with judicial activism.

This stance is indicative of an approach of self-restraint being adopted in respect of the judicial review of the constitutionality of laws, which suggests that this is a marginal review, one to be used in extreme situations; one cannot set aside a law as unconstitutional simply because they disagree with its content, or because they have concerns over the completeness of the law's reasoning. At the same time, it also shows marks of intensive judicial review, according to which for a law to be constitutional its reasoning must be complete,

[76] See *supra* note 65.

the legislator must have performed a differential diagnosis and excluded, using detailed technical studies, the possibility of a milder intervention[77].

We can therefore observe that the convergence that is actually developing between the methods of interpretation of national constitutions, the ECHR and EU law, leads to a convergence of the phenomenon of the relativization of the Constitution, which is supposed to coexist harmoniously with the ECHR and the EU law with the least possible friction, with the phenomenon of the "augmented Constitution" as we try to define it. In this context, the influence of the American controversy over the methods of interpreting the Constitution extends to the interpretation of national constitutions, the ECHR and EU law, but the European judge is not trapped in declared self-placement regarding interpretative methods. He/she remains fundamentally committed to his/her practical mission of resolving litigations rather than theoretical conflicts.

11. THE RESILIENCE OF THE AUGMENTED CONSTITUTION

Resilience is an inherent element of the constitution[78], as the latter, by definition, has the ambition to regulate issues of major importance, with rules of superior legal power that aspire to a long duration. The constitution's relationship with the long historical time renders its adaptability to the fluctuations of circumstance (or, rather, its ability to accept in its field and regulate new and evolving

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[77] EVANGELOS VENIZELOS, *The economic crisis as a judicial challenge. The curve of judicial review of adjustment measures* (2006) (in Greek).

[78] CONTIADES / FOTIADOU, *supra* note 23. ANTONIS MANITAKIS, The impressive resilience of the Greek Constitution in the current financial crisis in Europe, *in: Legitimacy Issues of the European Union in the Face of Crisis*, 217 (LINA PAPADOPOULOU / INGOLF PERNICE / JOSEPH H.H. WEILER eds., 2017). EVANGELOS VENIZELOS, The Durability of the Constitutional Phenomenon in the Post-Modern Age *in*: *Festschrift für Dimitris Th. Tsatsos*, 690, (PETER HÄBERLE / MARTIN MORLOK / VASILIS SKOURIS eds., 2003).

political and social situations and different power correlations) a distinctive feature of its identity. If the Constitution were not sustainable and viable, it would not perform its functions (organizational, protective, legitimizing etc.) and could not be imposed as a fundamental component of legal positivism, the basis and topmost point, at the same time, of the national legal order and as a legal form, identical with the sovereignty of the nation-state, as well as, the institutional and values' *acquis* of modernity.

The quality of resilience which the constitution possesses largely explains the endurance and duration, or rather, the durability of constitutional texts of the 18th century, but also the revision mechanisms that the constitutions provide to ensure strictness and superiority, bringing the procedure of their texts' modification under control. However, it also explains the constitution's ability to incorporate the so-called informal changes in its content through its (primarily judicial) interpretation, through the participation of the "member state" in regional integrations that constitute their own self-referential legal orders and claim superiority in their field, and through the subordination of the national constitution to international judicial review.

The process of relativizing the constitution actually maintains and strengthens, under more complicated and demanding circumstances, the constitution's inherent resilience of the constitution. The resilience deficits of the constitution that appeared during the period of the sovereign nation-state, and even more so during the period of the "member state" as a state of limited or shared sovereignty, can transform any interpretive problem into either an internal constitutional crisis or, at least, into a dispute over the judicial review of constitutionality; even into an issue related to the participation of the state in international organizations and regional integrations, particularly in the European integration.

The transition through this process to the "augmented constitution", as I propose that we define it, allows the national constitution to "communicate" with its time and ensure that its functions are carried out in the most efficient way.

12. Final Remarks - The Relativization of the Constitution and the "Augmented Constitution": A Twin Phenomenon in Progress

The third decade of the 21st century finds the constitution facing a plethora of challenges, as all the fluctuations of the nation-state and its sovereignty are recorded in the body of the constitution and in the field of its interpretation. All the developments around the organization and operation of the international community - the level at which regional integrations, such as the European integration, are now taking place - are being recorded. New challenges and threats to democratic values, human rights and the guarantees of the rule of law are now emerging due to natural causes (such as the Covid-19 pandemic) or anthropogenic causes, technological causes (such as the fourth industrial revolution, artificial intelligence and open biotechnology challenges), social causes (such as the escalation of inequalities, or radical changes in labor relations), or political causes (such as the rise of the phenomenon of authoritarian or non-liberal democracy). These are emerging and are recorded next to old and new challenges related to internal and external security. New versions of globalization and new forms of risk create the need for new arrangements at international and national level. The market and its entities at the international level continue to establish their own rules, even on matters related to critical issues of state sovereignty, such as public debt and the access of states or regional economic entities, such as the ESM or the EU itself, to markets. In the global digital/online public space, which often gives the illusion of privacy, there are powerful global providers and administrators who practically enforce their own rules, in many cases independently from most states and their national constitutions, or even from international organizations such as the Council of Europe or even the UN.

The landscape is complex, contradictory and uncoordinated on an international and European scale. The pace at which developments occur and the pressure of individual problems vary from continent to continent, from state to state, not only on the basis of the level of development and security, but also on the basis of the existing level

of institutional "maturity", *i.e.* the level of the relevant democratic and liberal tradition, or even on the basis of just random events, such as natural disasters.

In this complex environment, it is more than obvious that the national constitution cannot continue with a self-complacent or phobic insistence in its superiority or rigidity. The "co-inherence" of the national constitution, the ECHR and EU law, and the dialogue between national supreme and constitutional courts, on the one hand, and the ECtHR and the CJEU on the other, is an important development and a major chapter in the phenomenon of the relativization of the constitution. This is an evolving phenomenon that is, in fact, at the forefront of theoretical discussion with immediate practical implications.

By presenting indicative aspects of said phenomenon, I hope that the main criterion for evaluating these developments has been showcased. This criterion is the maintenance and reinforcement at all times of the function of the constitution as a factor for guaranteeing democracy, human rights and the rule of law. Every aspect of the relativization of the constitutional phenomenon that leads to maintaining and reinforcing said guarantee function, can be said to be part of the constitution's historical and legal rationale and leads to what I propose we define as "augmented constitution". On the contrary, any aspect of the relativization of the constitution that leads to reducing or challenging this guarantee function, operates outside the historical and legal rationale of the constitution. The criterion must be substantial and vigilance must be constant. The "augmented Constitution" turns the pressures in the direction of its relativization into a normative advantage, in strengthening the regulatory content and its guarantee function. Based on these criteria, the "augmented Constitution" is the type of constitution that has the flexibility and ability to function despite the trials of sovereignty of the nation-state and despite the emergence of the "member state".

ABSTRACTS / RÉSUMÉS

The question in this analysis is whether a "member state", as a state of "reduced or shared sovereignty", has a constitution of "reduced or shared supremacy", *i.e.* a less powerful constitution because its supremacy over

EU law and the International Law (especially the ECHR) is disputed. I argue for the position that the relativization of the national constitution does not diminish its regulatory content and significance, but leads to the phenomenon of an "augmented Constitution" through an interesting reverse flow of case law developments, mainly at national level. We can therefore define as an augmented Constitution, the national Constitution, primarily the written, rigid and codified one, which without changing the constitutional text, strengthens its regulatory content and ensures its legal primacy through its interpretation in accordance with the EU law and international human rights law. The augmented Constitution is therefore the result of a constitutional strategy that ensures the coexistence of a plurality of legal orders and of rules that claim, in a self-referential way, legal supremacy and priority of implementation in their field. This strategy obviously includes some concessions in favor of EU law or the ECHR. In the vast majority of cases, however, it results in an augmentation of the guarantee content of the Constitution and the strengthening of democracy, the rule of law and the protection of human rights.

Dans cette analyse, la question est de savoir si un "Etat membre", en tant qu'Etat à "souveraineté réduite ou partagée", a une Constitution à "primauté réduite ou partagée", à savoir une Constitution moins forte parce que sa primauté sur le droit de l'Union et le droit international (en particulier la CEDH) est contestée. Je défends la position selon laquelle la relativisation de la Constitution nationale ne rabaisse pas son contenu réglementaire et sa signification, mais conduit au phénomène d'une "Constitution augmentée" par le biais d'un intéressant courant inverse de développements jurisprudentiels, principalement au niveau national. Nous pouvons donc définir comme Constitution augmentée la Constitution nationale, principalement écrite, rigide et codifiée, qui, sans modification du texte constitutionnel, renforce son contenu réglementaire et assure sa primauté juridique par son interprétation en accord avec le droit de l'Union et le droit international des droits de l'homme. La Constitution augmentée est donc le résultat d'une stratégie constitutionnelle qui assure la coexistence d'une pluralité d'ordres juridiques et de règles qui revendiquent, de manière autoréférentielle, la primauté juridique et la priorité d'application dans leur domaine. Cette stratégie comporte évidemment quelques concessions en faveur du droit de l'Union ou de la CEDH. Cependant, dans la grande majorité des cas, elle se traduit par une augmentation du contenu de garantie de la Constitution et par un renforcement de la démocratie, de l'Etat de droit et de la protection des droits de l'homme.

F. Vogin