# NATIONAL RESPONSES TO SUPRANATIONAL CONSTITUTIONALISM IN THE EUROPEAN UNION[*]

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**Abstract**

*The European Union is perhaps the only organization in the world that managed to introduce constitutionalization on the supranational level. The EU Member States adopted the approach of what is described as constitutional tolerance. In short, this approach assumes the resignation from certain attributes of sovereignty that were historically reserved for national bodies in return for the reassurance that some actions are not to be accepted within the Community.*

*The supranational nature of the European Union was confirmed by the Court of Justice of the European Union in Les Verts-Parti Ecologiste v. Parliament in which the EU founding treaties were described as a basic constitutional charter of the Community. The supranational character of the European Union affects the national legal systems in various ways.*

*Most importantly, it was commonly accepted by the national governments and judiciary that the Court of Justice of the European Union possesses extraordinary judicial power which is among others exercised by the creation of legal rules directly effective on the national level. Furthermore, the supranational character of the European Union is visible in the creation of strong human rights guarantees that often go beyond the boundaries of the Member States' legal systems.*

**Keywords**: *supraconstitutionalism, national law in EU, supranational constitutionalism, supranational law, Les Verts-Parti Ecologiste v. Parliament*

**JEL Classification**: [K33]

## 1. Introduction

It is widely acknowledged that the European Union founding treaties go beyond classic international treaties. In 1986, the Court of Justice of the European Union for the first time in history referred to the Treaty as "the basic constitutional charter." In *Les Verts-Parti Ecologiste v. Parliament* (1986) Case

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294/83, [1986] ECR 1339, the Community was described as "a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."

It clearly shows that according to the Court of Justice of the European Union the Treaty has superior legal status when compared to national law, including national constitutions.

This self-proclaimed superiority of the EU treaties has profound impact on national legal systems. Most importantly, the EU supranational governance may threaten the existence of liberal constitutionalism that is adopted by the majority, if not all, of the Member States.

There are two fundamental discrepancies between the EU supranational constitutionalism and liberal constitutionalism adopted by the EU Member States that require constant attention from national and EU legislative bodies.

Firstly, according to the dogmas of liberal constitutionalism "constitutional law finds its origin with the people as the only legitimate source of power" (Grimm, 2010, p. 13). Due to this fact it is sometimes highly problematic to accept within the frameworks of national legal systems the fact that the law not finding its origin directly with the people may be superior to national constitutions.

There are many attempts to account for this discrepancy. One of such attempts was undertaken by Wojciech Sadurski who argued that statehood legitimacy (based on electoral democracy) is not necessarily incompatible with supranational legitimacy (based on public reason).

Sadurski argues that "the proliferation of supranational authorities in our post-Westphalian world helps us appreciate the richness of the concept of legitimacy, and the corresponding shallowness, both empirically and normatively, of an exclusive focus on democratic legitimacy in national statehood" (Sadurski, 2015, p. 425).

While in some cases reasoning along this line may be successful, in the case of countries that are more attached to the direct legitimization of government through elections we are likely to face constitutional crises.

Secondly, in liberal constitutionalism "the [constitutional] regulation is comprehensive in the sense that no extra-constitutional bearers of public power and no extra-constitutional ways and means to exercise this power are recognized" (Grimm, 2010, p. 13).

By its nature the EU supranational legal order makes national regulations not comprehensive as various EU organs have power to introduce legislative, administrative and judicial acts enjoying primacy over domestic law.

Although the states remain "masters of the treaties", when certain powers are transferred they are freely executed by the EU organs.

This discrepancy between EU supranational governance and fundamental assumption of liberal constitutionalism also must be constantly addressed by national and EU agents and ultimately may lead to constitutional crises or for instance the decision to leave the union expressed in national referendum – *vide* Brexit (de Burca, 2018, p. 337ff).

It is clear that due to the inherent discrepancies between the supranational and liberal constitutionalism the EU Member States must respond to the challenges arising from the membership in the EU.

The next section of this paper outlines the most important characteristic features of EU constitutionalism that define the scope of these responses. In section 3 it is shown what strategies are employed by the EU Member States in order to respond to challenges arising from the discrepancies between state and EU constitutionalism. Finally, in section 4 conclusions and future perspectives on the relation between national and supranational constitutionalism are presented.

## 2. Supranational nature of EU constitutionalism

The European Union does not have a written constitution but due to its special characteristics we may conclude that it developed its unique form of supranational constitutionalism (Avbelj, 2016).

This chapter mentions four important characteristics of EU supranational constitutionalism that were chosen on the basis of their applicability to the further elaborations in the subsequent parts of the paper and in no way should be treated as a comprehensive analysis of EU supranational constitutionalism.

If we understand constitutionalism in a formal way as an existence of a constitution setting the norms within a legal order that stand at the apex of the legal hierarchy (Schütze, 2014, pp. 72–73), it is possible to argue that the EU constitutionalism is not yet fully developed.

According to national perspective (as opposed to EU perspective described later in this chapter) we can only acknowledge the existence of "the 'relative' supremacy of EU law over some national law; yet this bounded supremacy is seen as granted and limited by national constitutional law" (Schütze, 2014, p. 74).

The EU perspective on this matter is different. The European Court of Justice in its landmark case *Van Gend en Loss v. Nederlandse Administratie der Belastingen* (1963) Case 26/62, ECLI:EU:C:1963:1, concluded that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields and the subjects of which comprise not only member states but also their nationals.

Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.

These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community."

According to this view it is clear that EU law should enjoy supremacy over national law (not relative supremacy and not over some national law as the supporters of national perspective suggest).

The first important characteristic of EU constitutionalism that can be derived from *Van Gend en Loss* is that EU law (EC law at the time of delivering the judgment) may have a direct effect on citizens.

This brings us to another important characteristic of EU constitutionalism which is the existence of judicial policymaking by the Court of Justice of the European Union. Not only *Van Gend en Loss* is a good example of the such policymaking but there are also many other similar cases.

Another notable and relevant case is *Costa v. Enel* (1964) Case 6/64, [1964] ECR 585, in which the European Court of Justice insisted on the precedence of EC law over national law.

The Court stated that "as opposed to other international treaties, the Treaty instituting the E.E.C. has created its own order which was integrated with the national order of the member-States the moment the Treaty came into force; as such, it is binding upon them. In fact, by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the member-States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves.

The reception, within the laws of each member-State, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the member-State, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity. [...] It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question."

This clearly shows that the Court did not refrain (and nowadays does not refrain) from the creation of important legal rules and policies (see Cichowski, 2004).

Third important characteristic of EU supranational constitutionalism is the existence of exclusive competences in certain areas. Perhaps the best example of

such area is a monetary union – for those Members whose currency is the Euro the European Union retains formally exclusive competences (Waibel, 2017).

Although it can be argued that "despite formal allocation of monetary policy competence to the Union, […] the practice of monetary policy decision-making reflects the EU's nation-state structure", it is widely acknowledged that monetary policy competence is reserved for EU agents. One of the aims of the introduction of the EU monetary policy was the depoliticization of money (Bellamy, Weale, 2015).

While it can be argued that this aim was achieved to some extent, the existence of exclusive competences was particularly well visible during the crisis of the Euro zone that started in 2010.

Some argue that this crisis happened because of the very fact that the introduction of exclusive competences in this area was successful – "the problem with this construction [the construction of the single currency and its management], we argue, is that, when applied to EMU, it neglects the normative logic of two-level games.

According to this logic, when governments make commitments to one another about their future behaviour, they *simultaneously* need to be responsible and accountable to their domestic populations in order to retain their political legitimacy.[…]

The neglect of the normative logic of two-level games in the construction of EMU is compounded by a second problem within legal constitutionalism: namely, its disregard of the existence of reasonable differences in political judgement over the principles that should govern a monetary union made up of different sovereign states, each with their own traditions of economic and monetary policy.

Indeed, even within the broadly neoliberal tradition of thinking about economic constitutions, there are important differences of substance as well as emphasis. When the conditions for continuing contestation over policy measures and organization exists, the putative political legitimacy of EU legal constitutionalist arrangements, such as those underlying EMU, the SGP and the TSCG, reinforce the practical contradiction of the two-level game implicit in the economic constitution." (Bellamy, Weale, 2015).

This example shows that within EU supranational constitutionalism there are some areas of EU exclusive competences that exist both formally and substantively.

The last element of EU supranational constitutionalism mentioned in this paper concerns direct guarantees of human rights on the EU level and the implementation of EU citizenship.

Interestingly enough, it seems that the human rights were not of primary importance at the early stage of European development (Weiler, 1986). "Unlike

municipal legal orders, which are comprehensive in scope, the legal system of the European Communities (now, Union) was largely tailored to the goal of the common market" (Perju, 2017) and the protection of human rights have been consigned to the national level (also to the European Convention on Human Rights).

The shift (at least formally) in the perception of human rights and the status of individual in general within the European Union took place along with the introduction of Maastricht Treaty when the idea of EU citizenship was introduced. On this basis EU citizens were granted certain rights, freedoms and legal protections additional to those guaranteed on national level.

The concept of EU citizenship gained particular prominence along with the introduction of the Charter of Fundamental Rights of the European Union proclaimed in 2000 and fully adopted in 2009 by the Treaty of Lisbon.

The fact that certain political, social and economic rights for citizens were to be guaranteed on the European level raised objections of some Member States, most notably the United Kingdom and Poland.

Those two countries "were so worried about the effect of the Charter that they put over a special protocol annexed to the Lisbon Treaty which should limit any unwanted impact of the Charter in their legal systems" (Jirásek, 2008).

It was clear from the beginning that some rights included in the Charter (if implemented in a legally binding manner) would visibly change the legal system of the United Kingdom (perhaps the most notable example concerns the right to strike that is restricted in the UK since the 1980s).

These discrepancies may be seen as one of the reasons of Brexit as the British Government proposes to exclude the Charter from domestic law (Deech, 2018).

## 3. National responses to EU constitutionalism

As it was indicated in the introduction, due to the inherent discrepancies between the supranational and liberal constitutionalism the EU Member States must respond to the challenges arising from the membership in the EU.

This paper argues that the strategies employed by Member States in order to make these responses are analogous to the constitutionalist responses to globalization that can generally take three different forms: "first, what one might call 'constitutional closure', based on an argument about the national democratic legitimation of state-based constitutions; second, an approach that one might term 'limited mutual constitutional opening' or also 'constitutional tolerance' in the circumstances of dense supranational cooperation or even a free-standing supranational constitutionalism (with the EU and its *de facto* supranational constitution as the prime example); and, finally, a global constitution proper as the *prima facie* most consistent response to the fact of global interdependence." (Müller, 2010, p. 240).

The most widespread response employed by EU Member States is constitutional tolerance. It assumes that there is a cross-fertilization between constitutional spheres of both EU and Member States. On one hand the Member States are the "masters of the treaties" and in this way shape the constitutional sphere of EU and on the other they must respect the law created by EU bodies.

One of the ways in which this cross-fertilization may take place is through internal transformation. "Such transformation would be, for example, the effect of internalizing into the normative DNA of each municipal order the existence of other orders on equal footing, and hence a commitment to the preservation of the plurality of distinct political identities." (Weiler, 2003, p. 17).

Some scholars indicate that the European Union as a whole is a good example of the approach called constitutional tolerance (Weiler, 2003, p. 12). While it is true when we look at the bigger picture and try to point to the general trends, when it comes to EU constitutionalism it is clear that Member States also sometimes adopt constitutional closure and "global constitution" approach.

Constitutional closure is an approach that assumes some degree of "normative non-engagement" – states are selective when it comes to their engagement with international law and cultivate a sense of exceptionalism often "pointing to a sense of confidence that domestic constitutionalism has a long track record of actually protecting individual rights and effectively limiting government, whereas possible constitutionalist devices beyond the nation-state might yet have to prove their capacity to do so" (Müller, 2010, p. 245).

There are two clear examples of this approach adopted by EU Member States mentioned in the section concerning the supranational characteristics of EU constitutionalism: the rejection of some parts of law created by the CJEU and the rejection of certain provisions of the Charter of Fundamental Rights of the European Union.

While it is true that the judicial policymaking of the Court of Justice of the European Union is generally accepted among Member States, it may happen that a certain judgment of the Court is not implemented in a particular state because of the fact that it may affect the domestic legal order in an unwanted way.

There are some examples when Member States did not comply with the CJEU judgments and were punished with fines.

In *Commission v. France* (2005) Case C-304/02, CURIA, France was ordered to pay both a penalty payment of EUR 57 761 250 for each period of six months, from the 12 July 2005 onwards and a lump sum of EUR 20 000 000 for non-compliance with a 1991 judgment. Similarly, in *Commission v. Spain* (2003) Case C-278/01, CURIA, the ECJ imposed a penalty payment of EUR 624 150 per year and per 1% of bathing areas in Spanish inshore waters which had been found not to conform to the limit values laid down under Directive 76/160 for the year in question.

In this case Spain had not taken all the measures necessary to comply with a 1998 judgment.

Finally, in *Commission v. Greece* (2000) Case C-387/97, CURIA, the ECJ imposed on Greece a periodic penalty payment of EUR 20 000 for each day of delay in implementing the measures necessary to comply with a 1992 judgment.

While in those cases the facts did not explicitly concern the constitutional spheres of the Member States, mere non-compliance with the CJEU judgment (be it intentional or not) is a sign of constitutional closure towards EU constitutionalism as the judicial policymaking of the CJEU is its important part.

The second example of the Member States' actions that illustrate the practical adoption of constitutional closure is the rejection of certain provisions of the Charter of Fundamental Rights of the European Union. This approach was embraced by the United Kingdom and Poland by adopting a special protocol that was aimed at limiting any unwanted impact of the Charter in their legal systems.

Although the states made reservations concerning different provisions, their motivation was similar – they both believed that there are certain valuable developments in their legal orders that should be protected and chose to cultivate a sense of exceptionalism over the cultivation of the unity of EU constitutional sphere.

Another form of a national response to EU supranational constitutionalism that is *prima facie* the most consistent with the supranational character of the EU assumes that there should be a formal constitution binding all of the Member States which should prevail over national legal orders. In this case the unity of EU constitutional sphere is the priority value.

Although the Treaty establishing the Constitution for Europe was effectively rejected in national referenda in France and the Netherlands, the Treaty itself was signed by political figures from 25 Member States and then was backed by the resolution of the European Parliament.

It clearly shows the political will of the representatives of Member States to introduce the Constitution for Europe, thus adopt a locally binding non-state constitution.

Although the Treaty establishing the Constitution for Europe was not introduced, many of the aspects of the Treaty were subsequently incorporated into the EU constitutional sphere by the Treaty of Lisbon. Most notably the Charter of Fundamental Rights of the European Union was introduced as a legally binding act – it is an example of the sphere of EU constitutionalism that was explicitly regulated on the EU level (although with exceptions mentioned above).

The last and most common paradigmatic response to EU supranational constitutionalism can be described as constitutional tolerance. As it was mentioned above, it assumes the existence of cross-fertilization between

national and supranational constitutional spheres. It is a dominant approach adopted by Member States towards EU constitutionalism.

As most of the cases of the cooperation within the EU can be regarded as an example of this approach, it is inexpedient to provide specific examples of constitutional tolerance.

Although constitutional tolerance is a dominant approach within the EU, an important reservation should be made concerning this approach. It must be noted that it seems to be only a temporary solution.

After the Second World War, due to deep distrust towards popular sovereignty that was regarded as complicit in the cycles of war and aggression in the 20th century, "European states sought to delegate powers to unelected actors domestically and also to supranational bodies in order to 'lock in' liberal-democratic arrangements and to prevent a back-sliding towards authoritarianism" (Moravcsik, 2000).

The European states developed the EU in a direct response to the fragile political systems of nation-states. While constitutional tolerance served the purpose of "locking-in" liberal-democratic arrangements, new challenges within the EU raise serious questions whether this approach can successfully serve as a basis for EU cooperation.

**Conclusions and future perspectives**

Within the EU we can observe the three different paradigmatic responses of nation-states to supranational constitutionalism: constitutional tolerance, constitutional closure and "global constitution" approach.

While the EU was built on the principle of constitutional tolerance and for a long time it was virtually the only response to EU supranational constitutionalism, nowadays we may observe new trends in this area as nation-states more and more often act along the lines of constitutional closure and "global constitution" approach.

The constitutional closure is an option usually chosen in order to protect the specific values on which the domestic constitutional system is constructed. This isolationist approach stands in opposition to the "global constitution" approach that advocates for the adoption of one constitution for all Member States – this way the EU supranational constitutional sphere would consist of comprehensive constitutional regulations and effectively would replace national constitutional orders.

If we agree that the constitutional tolerance is only a temporary approach, then it is only a matter of time when one of two other paradigmatic responses to EU supranational constitutionalism will gain prominence.

On the basis of the analysis of the supranational nature of EU constitutionalism it is possible to argue that all of the characteristics of

supranational constitutionalism mentioned in section 2 eventually lead to a crisis of some kind.

This can be attributed to the inherent discrepancies between the supranational and liberal nation-state constitutionalism that must be constantly addressed both by EU and state agents.

Provided that one wants to maintain the prevailing role of constitutional tolerance within the EU, it may be instructive to use heterarchical constitutional model as opposed to hierarchical one.

The use of heterarchical constitutional structures may ensure flexible functioning of national legal orders and EU supranational legal order as it does not require any predetermined hierarchical relations between the orders (Huomo-Kettunen, 2013, p. 48).

Finally, when it comes to the perspectives of EU supranational constitutionalism, it is not yet clear neither whether constitutional tolerance will still be a prevailing paradigmatic response of Member States, nor which of the remaining two responses could potentially become dominant in this field. There are some signs, however, acting in favor of the "global constitution" approach.

As nowadays there are numerous legal issues that are not regulated in national legal orders (such as the legal status of artificial intelligence), it may be an opportunity for EU bodies to introduce the binding legislation in such fields.

This may ultimately lead to the more and more constitutional aspects regulated on the supranational level and eventually to the adoption of formal EU constitution.

## Bibliography

1. Avbelj, M., (2016), *Transformation of EU Constitutionalism.* [Blog] VerfBlog. Available at: https://verfassungsblog.de/transformation-of-eu-constitutionalism [Accessed 12 Jul. 2018].
2. Bellamy, R, Weale, A., (2015), Political legitimacy and European monetary union: contracts, constitutionalism and the normative logic of two-level games. *Journal of European Public Policy*, [online], Volume 22(2). Available at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4745610 [Accessed 12 Jul. 2018].
3. Cichowski, R.A., (2004), Women's Rights, the European Court, and Supranational Constitutionalism. *Law & Soc'y Rev*. 38.
4. de Burca, G., (2018), Is EU Supranational Governance a Challenge to Liberal Constitutionalism. *U. Chi. L. Rev.* 85.
5. Deech, R., (2018), *Why the UK Should Not Retain the European Charter on Fundamental Rights by Baroness Deech*. [Blog] BriefingsForBrexit. Available at: https://briefingsforbrexit.com/uk-should-not-retain-the-european-charter-on-fundamental-rights [Accessed 12 Jul. 2018].
6. Grimm, D., (2010), The Achievement of Constitutionalism and its Prospects in a Changed World. In: P. Dobner, M. Loughlin, ed, The Twilight of Constitutionalism?, 1 st ed, Oxford University Press.

7. Huomo-Kettunen, M., (2013), Heterarchical Constitutional Structures in the European Legal Space. *European Journal of Legal Studies*, [online], Volume 6(1). Available at: http://cadmus.eui.eu/bitstream/handle/1814/28729/Huomo_Vol6_1_146UK.pdf?sequence=1 [Accessed 12 Jul. 2018].
8. Jirásek, J., (2008), Application of the Charter of Fundamental Rights of the EU in the United Kingdom and Poland according to the Treaty of Lisbon. Available at: https://www.law.muni.cz/sborniky/cofola2008/files/pdf/evropa/jirasek_jan.pdf [Accessed 12 Jul. 2018].
9. Moravcsik, A., (2000), The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe. *International Organization*, [online], Volume 54(2). Available at: https://www.princeton.edu/~amoravcs/library/origins.pdf [Accessed 12 Jul. 2018].
10. Müller, J.W., (2010), Three Constitutionalist Responses to Globalization. In: J.K. Tulis, S. Macedo, ed, The Limits of Constitutional Democracy, 1 st ed, Princeton University Press.
11. Perju, V.F., (2017), On Uses and Misuses of Human Rights in European Constitutionalism. Boston College Law School Faculty Papers, [online]. Available at: http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2083&context=lsfp [Accessed 12 Jul. 2018].
12. Sadurski, W., (2015), Supranational public reason: On legitimacy of supranational norm-producing authorities. *Global Constitutionalism*, [online], Volume 4(3). Available at: http://journals.cambridge.org/abstract_S204538171500012X [Accessed 12 Jul. 2018].
13. Schütze, R., (2014), Constitutionalism and the European Union. In: C. Barnard, S. Peers, ed., European Union Law, 1 st ed, Oxford University Press.
14. Waibel, M., (2017), Monetary Policy in the EU: An Exclusive Competence Only in Name? In: S. Garben, I. Govaere, ed, The Division of Competences in the EU Legal Order – a Post-Lisbon Assessment, 1 st ed, Hart Publishing.
15. Weiler, J.H.H., (1986), Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the European Legal Order of the European Communities. *Wash. L. Rev.* 61.
16. Weiler, J.H.H., (2003), In defence of the status quo: Europe's Constitutional *Sonderweg*. In J.H.H. Weiler, M. Wind, ed., European Constitutionalism Beyond the State, 1 st ed, Cambridge University Press.