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## Constitutional convergence of constitutional law

Although this issue is not complicated, the place of the Constitution in the normative order, in particular the priority of international law, is more delicate. In this sense, the position of the Constitutional Court of Ukraine is substantial. Consistently and decisively, he argues that internally, the Constitution stands at the top of the legal order. Even if the revision of constitutionality presupposes the supremacy of the Constitution, which is understood as a fundamental norm of state law, it must henceforth, like you, encompass fundamental external norms, especially those that are common to our continental space. To this end, great authors propose going beyond the traditional relations of systems, preferring the “network” of François Ost and Michel van de Kerchove over the “pyramid” of Hans Kelsen. The notion of subsidiarity, the field of assessment, national identity, and the methods of mutual payment of rights, in contrast to the absolute – “Simmental” – concept of prioritizing the two European orders, could inspire constitutional courts to adopt a restorative vision of fundamental rights. Between submission and indifference to international law, these authors propose a new dialectic based on a pluralistic interpretation of the Constitution<sup>1</sup>. Ultimately, it is a question of reconciling the universal vocation of fundamental rights with the diversity of legal cultures. The synthesis of the jurisprudential doctrines of our two courts could become a powerful vector of this revival through the hybridization of fundamental rights in Europe.

As M. Kozyubra aptly noted: “Revealing the nature of modern constitutional law, it is necessary to pay attention to its other essential feature – going beyond the purely national, internal law of the country”<sup>2</sup>. This idea provides grounds for discussing constitutional convergence. Constitutional convergence is the process of approximation (harmonization) of national constitutional systems under the influence of globalization, international law, supranational judicial bodies (such as the ECtHR and the Court of Justice of the EU), and the exchange of constitutional ideas. It does not mean complete unification, but leads to the emergence of common constitutional standards, principles, and doctrines.

Ukraine is a vivid example of convergence, borrowing the German-Spanish model of constitutional justice, directly applying the Convention for the Protection of Human Rights, and utilizing ECtHR decisions as a source of law.

<sup>1</sup> Canivet G. Convergences et divergences des jurisprudences de la Cour constitutionnelle belge et du Conseil constitutionnel français. « L'hypothèse d'une fraternité gémellaire » URL: [https://www.conseil-constitutionnel.fr/les-membres/convergences-et-divergences-des-jurisprudences-de-la-cour-constitutionnelle-belge-et-du-conseil#\\_edn96](https://www.conseil-constitutionnel.fr/les-membres/convergences-et-divergences-des-jurisprudences-de-la-cour-constitutionnelle-belge-et-du-conseil#_edn96)

<sup>2</sup> Козюбра М. Конституційне право: галузь права чи особлива базова підсистема – стрижень національної системи права. *Наукові записки НаУКМА. Юридичні науки*. Т. 3. 2019. С. 75. URL: <https://doi.org/10.18523/2617-2607.2019.3.70-76>

Constitutional convergence refers to the interaction of ideas between Constitutions, the acceptance of ideas, traditional values, morality, and legal norms.

The difference between one Constitution and another is facilitated by constitutional convergence. So, terminology embodies both the essence and the procedure. Thus, its aspects can be classified horizontally with respect to the essence and also vertically with respect to the procedure. The horizontal aspects, therefore, discuss the relevance, scope, and acceptance of the theory of constitutional convergence, while the vertical aspects include its tools and processes. The “hidden push” exalts convergence over legal transplantation. For example, the concept of dignity is widely accepted, but its expression varies in degree and approach. Interaction with foreign jurisprudence is another method of legal transplantation. This further leads to convergence. Legal convergence on institutions also reflects the emergence of a transnational model of governance and the confirmation by states of its compliance. One of the many accepted and plausible reasons for convergence is the use of legal grafts. However, it cannot be limited to one agency. Constitutions today must take into account a multitude of aspirations, both at the global and local levels, as well as at the individual, social, or group levels.

The Maastricht convergence criteria, established by the European Union, represent a significant step towards economic convergence and are fundamentally aligned with liberal economic principles.

“Convergence” is both a verb and a noun. As a verb, it denotes the action by which the ground of a cosmopolitan constitution is laid, and as a noun, it acts as the subject of global constitutionalism.

Constitutional convergence is also not a transplant of ideas and a simple transfer. It is rather a rational consensus on the ideas in the text of the Constitution. However, this cannot be called mutual acceptance. This is the result of a symbiotic process. Significant criticism of constitutional convergence comes from the theory of constituent power. Over the years, the theory has gained recognition and been implemented in the understanding and definition of democracy. While constitutional convergence develops around the basic principles of universalism that affirm democracy, democracy has given rise to a discourse of internal inclusion in modernity, fueled by the ideals of E. J. Sieyès<sup>3</sup>.

This established power recognizes the adoption of a representative entity for the emancipation of democracy in accordance with the will of the people.

Modern constitutions show a tendency towards transnationalism. Thus, bridging the gap between internal and external. The recognition of international law through treaties provides justification for this. The EU is a vivid example of such an association. It calls for cosmopolitan constitutionalism. This form of the Constitution corresponds to the convergence of values and rights.

Several authors trace the origin of fundamental and human rights in different legal traditions and thus speak of the universality of rights. The universality of rights is perceived not as an external factor, but rather as the acceptance of these rights as a fundamental principle.

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<sup>3</sup> Emmanuel Joseph Sieyès. *The Third Estate*. Praeger, 1963.

Thus, the inclusion of norms relating to the rights of women and children in most modern constitutions explains the process of constitutional convergence. The Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention on the Rights of the Child (1989) are two such conventions. Even the laws that are being developed reflect the basic principles of these conventions. Constitutional convergence must be further distinguished from preventive and *jus cogens* norms of customary international law. Convergence will be stripped of the element of *opinio juris* and recognized state practice. It is more significant.

The universal principles of the rule of law, the separation of powers, control over the administration of power, the development of the human rights regime, the application and implementation of international law, the development of the principles of customary international law and the strengthening of liberalism are external principles that are intertwined with internal ones. F. Fukuyama states: "What we can observe... it is the universalization of Western liberal democracy as the final form of human government"<sup>4</sup>. This definition, reflecting historical coherence, becomes a fundamental idea to understand convergence from a liberal perspective. Fukuyama employs the Hegelian concept of historical dialectics when formulating his arguments. However, he differs from Hegel in his definition of the summary of history.

Globalization is a continuous process. It can be both localized globalization and globalized localism<sup>5</sup>.

In the field of public law, convergence is observed in the constitutional law of human rights and norms that ensure dignity and freedom. Convergence in relation to private law can be observed through discussions on freedom of contract, antitrust law, commercial law, and similar areas of law.

In the international sphere, constitutional convergence has become a primary topic of comparative constitutional law, particularly in relation to global constitutionalism<sup>6</sup>, facilitating the harmonization of constitutional principles across different jurisdictions and reflecting the need for mutual legal borrowing among legal traditions<sup>7</sup>. As G. Frankenberg argued<sup>8</sup>, convergence goes beyond simple transplantation, embodying the "diffusion of norms", where legal systems, while preserving their traditional individuality, integrate globally recognized constitutional values<sup>9</sup>.

This phenomenon, driven by the demands of globalization and the norms of *jus cogens*, exemplifies the convergence of constitutional tendencies as a form of global constitutionalism. Where heterogeneity gives way to functional equivalence in areas

<sup>4</sup> Francis Fukuyama. *The End of History? The National Interest*. 1989. № 16. P. 3.

<sup>5</sup> Boaventura de Sousa Santos, César A Rodríguez-Garavito, *Law, Politics, and the Subaltern in Counter-Hegemonic Globalisation in Law and Globalisation from Below*. CUP, 2009.

<sup>6</sup> Anne Peters. *The Merits of Global Constitutionalism*. *Indiana Journal of Global Legal Studies*. 2009. № 16(2). P. 397, 411.

<sup>7</sup> Abdulqawi Yusuf. *Diversity of Legal Traditions and International Law: Keynote Address*. *Cambridge Journal of International and Comparative Law*. 2013. № 2(4). P. 681.

<sup>8</sup> Günter Frankenberg. *Order from Transfer: Comparative Constitutional Design and Legal Culture*. Edward Elgar, 2013.

<sup>9</sup> Günter Frankenberg. *Constitutional Transfer: The IKEA Theory Revisited*. *International Journal of Constitutional Law*. 2010. № 8(3). P. 563.

such as human rights, power-sharing, and judicial independence, integrating traditional principles of constitutional identity into constitutional pluralism<sup>10</sup> is beneficial.

Constitutional convergence is also viewed as a strategic judicial and political project – a “raison d’être” – where courts consciously participate in a transnational dialogue to legitimize decisions and enhance democratic resilience<sup>11</sup>.

Such *volonté générale* (general will) to adopt congruent rules exists in jurisdictions<sup>12</sup> that develop doctrines such as proportionality and due process<sup>13</sup>. Similarly, Dixon explains convergence through the lens of constitutional design<sup>14</sup>, arguing that developers, guided by the principle of *comparatio juris*<sup>15</sup>, often incorporate successful foreign models to mitigate systemic risks. This strategic imitation leads to adaptation *mutatis mutandis*.

Constitutional convergence between states means the gradual harmonization of norms through transnational influence and shared values. The judiciary is involved in global dialogues to strengthen legitimacy, as reflected in the adoption, for example, of the concept of proportionality from Germany. Convergence can be understood as a form of constitutional evolution, rather than a process of unifying world constitutions that lose their separate constitutional identities. France and Germany have demonstrated convergence in their approach to international law. These states, stemming from the same legal tradition, defined and formulated their constitutions in accordance with the principles of fundamental rights, the rule of law, power limitations, and political checks and balances.

<sup>10</sup> Gary Jeffery Jacobsohn. Constitutional Identity. *The Review of Politics*. 2006. N° 68(3). P. 361, 397.

<sup>11</sup> Ran Hirschl. Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales. *Texas Law Review* 1819. 2004. N° 82; Ginsburg (n 19).

<sup>12</sup> Barak A., Proportionality: Constitutional Rights and their Limitations. CUP, 2012.

<sup>13</sup> David S Law, ‘Generic Constitutional Law. *Minnesota Law Review*. 2005. N° 89(3). P. 652; Vicki C Jackson, ‘Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse. *Montana Law Review*. 2004. N° 65(1). P. 15; Rosalind Dixon. Partial Constitutional Amendments. *University of Pennsylvania Journal of Constitutional Law*. 2011. N° 13(1).

<sup>14</sup> Rosalind Dixon and Anika Gauja. Australia’s Non-Populist Democracy?: The Role of Structure and Policy. *Mark A Graber, Sanford Levinson, Mark Tushnet (eds), Constitutional Democracy in Crisis?* OUP, 2018.

<sup>15</sup> Rosalind Dixon. Partial Constitutional Amendments. *University of Pennsylvania Journal of Constitutional Law*. 2011. N° 13(1). P. 643.