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"FROM A EUROPEAN TO A UNIVERSAL CONSTITUTIONAL HERITAGE?"

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The relationship between Europeanism and universalism – or globalism, as I would put it in this connection, for a reason which I will disclose at the end of my speech – in the work of the Venice Commission can be discussed at at least three levels:

- The membership and the scope of activities of the Commission
- The sources of the standards which the Commission applies in its opinions and reports
- The fundamental constitutional ideas which these standards express

I shall start with the membership and the scope of activities of the Venice Commission. The Venice Commission started as a European club. It was established under the auspices of the Council of Europe, although it has never been part of the organization of the Council but has enjoyed an independent status. During the first years of existence, the main focus of the Commission's activities was on the so-called new democracies, the post-socialist countries in Central and East Europe. The Commission played a significant role in assisting in the constitutional changes – issuance of new constitutions or amendments to the existing ones – which accompanied regime change in these countries. In sum, in the early years both the membership and the scope of activities of the Venice Commission were Europe-centred.

Gradually a modification both in the membership and scope of activities started to set in. From a quite early stage, interested non-European states - as well as the IACL - were invited as observers to the plenary sessions, where they also could take the floor and participate in the discussions. Through its sub-commission on constitutional courts, the Commission also began contribute to the work of the international, regional and language-based networks of constitutional courts, as well as the IACL, too. Finally, since some fifteen years ago non-European states have been accepted as full members of the Commission; this was made possible by the Commission not being a body of the Council of Europe but based on a partial agreement. So, at present, the Commission has 14 non-European members, from Asia, North-Africa as well as North- and Latin-America. With regard to its membership, the Commission has transformed from a European club into a global, transnational, constitutional forum.

Simultaneously, the scope of the activities of the Commission has widened. Not only have constitutional issues concerning so-called established democracies or old member states of the Council of European found their way to the agenda of the Commission – my own country was one of the West European countries requesting the Commission's opinion on a constitutional reform – but the Commission has increasingly been involved with constitutional issues and developments transcending the boundaries of Europe. Thus, in the 1990s, after the collapse of apartheid regime in South Africa, the Commission assisted in facilitating the constitutional change and establishing a supportive constitutional culture through, e.g., an extensive educational project, financed by the government of Norway. During the new millennium the Commission has adopted country-specific opinions on several non-European, mainly Latin-American and North-African, countries. In the wake of the Arab spring, the Commission has been involved in particular in the successful drafting of the new Tunisian constitution. And, of course, the human rights and international law issues raised by the CIA-flights or the status of the Guantanamo prisoners transcended a strictly European focus as well. Furthermore, the scope of the general surveys and guidelines, which the Commission has produced on, for instance, referendums, constitutional amendments and the democratic control of armed forces and secret services, usually exceeds the European perspective.

So both the membership and the scope of the activities of the Commission have grown over the boundaries of Europe and taken a global or inter-continental turn. What about, then, the standards the Commission applies in its country-specific reports and opinions or in its general guidelines? From what kinds of source does the Commission draw these standards? Traditionally, the Commission has referred to European standards. The sources of these standards display some variation in the three fields covered by the umbrella values of the Council of Europe; that is, human rights, the rule of law and democracy. The main source in the

fields of human rights and the rule of law consists of European, transnational, hard and soft law. The European Convention on Human Rights and the jurisprudence of the Strasbourg court constitute the most important hard law source. After the strengthening of the fundamental rights dimension in EU law, especially after Lisbon, even the EU Charter and the case-law of the Luxembourg court have played a growing role in the articulation of European standards in the areas of human rights and the rule of law. Yet, it should be noted that for the Venice Commission, European hard law functions merely as a base-line. To take one example, with regard to the abolition of political parties, the Commission has felt free to require stricter protection and to apply more rigorous standards than the Strasbourg court. In respect of human rights and the rule of law, hard law is complemented by abundant European soft law, generated in particular under the auspices of the Council of Europe but also by, for instance, the OSCE-ODIHR. Still, it should be emphasized that the Venice Commission is not only a consumer but also a producer of European and soft law. The Commission has adopted guide-lines, either on its own or together with the OSCE-ODIHR, especially in the fields of political rights, elections and referendums, and last March it adopted a comprehensive rule of law check-list. The Commission has also published summaries – so-called vademecums – of its country-specific opinions on particular issues, and in this manner, too, contributed to the growing body of European soft law.

Of the three basic values of the Council of Europe, democracy is most problematic with regard to applicable European standards. This holds for instance for the choice between, say, a presidential, semi-presidential and parliamentary political regime. The Commission has emphasized that the choice is of a political nature and up to the country concerned. However, it has also stressed the importance of checks and balances, the independence of the judiciary and the consistency of institutional arrangements. In recent years – in, for instance, its opinions on Hungary and Poland - it has repeatedly warned of a winner-takes-all mentality, called for a loyal co-operation between constitutional bodies or cautioned against authoritarian tendencies and excessive power-concentration in the executive branch. In the absence of European hard or soft law, comparative constitutional law has constituted a vital resource. In certain issues, soft law might be appearing, partly due to the contribution of the Commission itself.

Even in respect of the sources of applicable standards, the Commission has increasingly exceeded a strictly European approach. European states are members of the UN and have signed UN human rights agreements. Even on formal legal grounds, the UN Covenant, the general commentaries and the country-specific findings of the UN human rights committee and council cannot be ignored in the articulation of European standards, either. The same goes for soft law documents originating from the UN or other international organisations, such as the ILO. Due to non-European members, the comparative material the Commission uses increasingly covers constitutional arrangements adopted on other continents, especially North and South America. Still, it should be stressed that at present, too, it is first and foremost European standards the Commission applies, even if the sources from which they are drawn, may be of a non-European origin as well. If, for instance, in a particular issue US or other non-European constitutional law contradicts the European convention, it cannot be included in the comparative material which contributes to the articulation of the standards of the Venice Commission. Here death penalty offers perhaps the most striking example.

Let me now turn to the third level at which the relationship between Europeanism and globalism in the work of the Venice Commission can be discussed: namely, the fundamental constitutional ideas or values which the European standards the Commission applies express. When the ideas of human rights and democracy were first articulated in Enlightenment philosophy, they were marked by a tension between what can be called a parochial, Western European origin and universalist aspirations. The ideas were supposed to be valid universally, regardless of time and place. Still not only because of their origins but also because of some of the methods used in their imposition in other parts of the world, a suspicion of Eurocentrism has stubbornly clung to them. Over the centuries and in particular after World War Two, the

foundational constitutional ideas of human rights and democracy, complemented by the rule of law as a somewhat later addition, have shed much, but perhaps not all, of the European parochialism of their origins. Contributions from other, non-European and – I might add – even non-Western cultures have found access to the ongoing transnational discourse where implications of foundational constitutional ideas are articulated and which recursively affects these foundational ideas themselves.

In recent decades, we have witnessed a globalisation of constitutional discourse, which has only intensified under the impact of technological development, such as the spread of the internet. Drafting international human rights treaties has become more transparent and granted a voice to NGOs and non-Western, including indigenous cultures; constitutional courts – among which I include national and transnational courts with constitutional jurisdiction as well as international human rights tribunals – have entered a phase of global discourse, with mutual cross-references and common data-banks, building up a global font of constitutional case-law; and in the academic world, the time when constitutional law was considered a national legal discipline is fading into the past. Global constitutional discourse can also rely on an organizational network, of which the Venice Commission too is part: the IACL, various organizations and networks of constitutional courts, journals of constitutional law with a transnational reach, transnational NGOs focusing on human rights, democracy or the rule of law. Of course, we should not exaggerate the results of these developments: remnants of national constitutional parochialism persist in different parts of the world; even globally influential courts with constitutional jurisdiction – or individual judges in such courts - may consider themselves so self-sufficient and so bound to national law that they deem cross-boundary references inappropriate; and even if post-colonial or indigenous cultures have gained access to the drafting of international human rights treaties, they have hardly been able to shake Western dominance. Still, I would venture to claim that manifestations of global discourse attest to genuine inter-legality in constitutional law; an inter-legality where European constitutional heritage is not only extending its influence but is also itself affected by influences originating in other constitutional cultures.

I would dare make an even bolder claim: inter-legality is not limited to concrete manifestations of global discourse but reaches deeper. I have found it useful to examine law, including constitutional and human rights law, as a multi-layered normative phenomenon: first we have explicit constitutional speech acts participating in the ongoing and increasingly globalized constitutional discourse; speech acts, such as provisions on human rights in constitutions and international treaties, constitutional case-law, positions taken by NGOs or scholarly contributions in law reviews or in a monograph form. This is the surface level of constitutional law. But surface level constitutional speech acts are both made possible and manifest sub-surface, cultural layers, which in my view are an integral element of constitutional law. Constitutional culture is not something external or complementary to constitutional law but part and parcel of it; the turbulent surface level of constitutional law could not come into being or exist without its cultural supports. Surface level constitutional law is created, applied and assessed with the normative, conceptual and methodological resources provided by constitutional culture and largely functioning through the legal *Vorverständnis* of constitutional actors.

Now my bolder claim concerning present constitutional inter-legality can be specified: inter-legality is not restricted to the surface level of explicit constitutional speech acts, to explicit transnational constitutional discourse, but reaches the cultural layers of constitutional law. The borders of legal or constitutional cultures have always been more porous than those of surface level law. Only legal cultural commonalities and centuries-old cultural exchanges among European states can explain the at least limited success of such ventures as EU law or European human rights law and facilitated the emergence of something like a pan-European legal and constitutional culture, finding expression also in the work of the Venice Commission. Now, surface level speech acts not only are made possible and express cultural layers of law;

they also modify these sub-surface layers. Constitutional culture does not fall from heaven; it emerges and evolves through the sedimentation of ideas expressed in explicit, surface-level speech acts. So globalization of constitutional discourse is bound to affect the cultural layers of constitutional law, too. In spite of the undeniable dominance of Western ideas, the national constitutional cultures or the common European constitutional culture cannot have been insulated against transnational cultural inter-legality, as a diachronic reconstruction of these cultures would show.

In my proposal for a multi-layered view of law, I have made a suggestion of the existence of a deep culture, shared by diverse legal cultures and facilitating not only surface level but also cultural inter-legality. This legal deep culture would consist of most fundamental normative ideas; basic legal concepts making law talk possible in the first place; and basic legal methodology. Can we transfer the hypothesis of a deep culture to constitutional law as well? In constitutional law the hypothesis would imply that the most profound aspect of globalization concerns a gradual formation of a global constitutional deep culture, with shared fundamental normative ideas, as well as basic concepts and methodology. But here we must be very careful. Not only should we be aware of the jeopardy of once again generalizing parochial European or Westerns ideas and imposing them on the rest of the world. We should also be cautious about the pitfalls of universalism; a term figuring even in the title of my speech. Even if talk of a globalizing constitutional deep culture were justified, this would not entail that the normative ideas or basic concepts and methodology this deep culture involves were universally valid, independently from time and place. The process of sedimentation through which the cultural layers of law emerge and evolve ties even constitutional deep culture firmly into time and place. Even constitutional values with a universal aspiration – such as human rights, democracy and the rule of law – cannot bypass such a sedimentation process on their way to the deep culture underpinning temporally and spatially delineated constitutional cultures and their surface-level expressions.

Nor are such constitutional values immune to changes. Even at the foundational level or at the level of constitutional deep culture, the ideas of human rights and democracy have not remained unchanged since their articulation by European Enlightenment and their subsequent sedimentation through constitutional provisions, constitutional jurisprudence and scholarly contributions. In turn, the ideas of the rule of law and the *Rechtsstaat* which at present inspire drafters of international treaties, transnational soft law and national constitutional law certainly have roots in the writings of, say, the English constitutionalist A. V. Dicey and such German state and administrative law theorists as, to mention only two among many, Robert von Mohl and Otto Mayer. Still, even at the foundational level, these colleagues would probably have quite a lot to argue with the working party which drew up the rule of law check-list of the Venice Commission.