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The International Constitutional Law Approach

An introduction to a new perspective on
constitutional challenges in a globalizing world

"In the increasingly integrated international legal order there is a co-existence of national, regional, and sectoral (functional) constitutional orders that complement one another in order to constitute an embryonic international constitutional order. This constitutional co-existence (Verfassungskonglomerat) has consequences for the relationship between international and national law".¹

1. INTERNATIONAL CONSTITUTIONAL LAW (ICL) APPROACH AS NEW PERSPECTIVE

What is International Constitutional Law? There are various aspects one might associate with this term. These include: public international law, discussion about the constitutionalisation of international law² or comparative constitutional law.³ The approach proposed in this paper integrates all of these perspectives and puts them together in one system of international constitutional law. From a European perspective, the developments regarding a European constitution also play a considerable role within this concept. In this way, the paper proposes a new perspective understood as an "International Constitutional Law (ICL) approach", describing the necessity and advantages of this concept in a changing legal world.

Presenting the results at the beginning, the International Constitutional Law (ICL) approach is about linking different systems of constitutional law regarding substantive and formal contemporary constitutional challenges within a network of constitutional law. The aim is to conduct an analysis of these legal interrelations in the constitutional network as well as to develop constitutional solutions in order to deal with constitutional challenges. To understand these linkages the pre-conditions of the ICL approach require further explanation.

1 Erika de Wet, 'International Constitutional Law' (2006) 55 ICLQ 51, 76.

2 Robert Uerpmann, 'Internationales Verfassungsrecht', (2001) 56 Juristenzeitung 565ss.

3 See Axel Tschentscher, 'International Constitutional Law' <<http://servat.unibe.ch/icl/index.html>> accessed 30 November 2007.

2. THE INTERRELATIONS BETWEEN DOMESTIC CONSTITUTIONAL LAW, INTERNATIONAL LAW AND EUROPEAN LAW

Two steps (preconditions) are necessary to understand the proposed approach. The first step within the ICL perspective, is to focus on the interrelations of domestic constitutional law, international law and European law.

From a formal perspective the interrelations between domestic constitutional law, international law and European law are an issue of specific legal clauses which regulate the options of a legal transformation of legal provisions from (other) legal systems (orders).⁴ National Constitutional Law provisions regularly have specific clauses in which they determine how to deal with international legal norms within the domestic legal system.⁵ From the opposite perspective, international law also refers to national constitutional law.⁶ One of the most prominent examples is the European Convention on Human Rights.⁷ As there are legal relations between national constitutional law and international law, there is also a relationship between national and international institutions.⁸

A special position in these interrelations is given to European Union Law.⁹ National Constitutional Law refers to European Union Law within special opening clauses.¹⁰ These constitutional provisions enable European Union Law to establish its special effects on national law. On the other hand, European Union

4 Regarding the monism/dualism debate see Malcolm Shaw, *International Law* (5th edn CUP, Cambridge 2003) 120ss; Robert Jennings and Arthur Watts (eds), *Oppenheim's International law. vol I. Peace* (9th edn, Longman, New York 1992) 52 et seq.

5 See e.g. Art. 25 Bonner Grundgesetz (German Constitution), Art. 15 Russian Constitution, Sec. 231 ss. Constitution of South Africa or Sec. 31 Argentinean Constitution. See Antonio Cassese, *International Law* (2nd edn, OUP, Oxford 2005) 217ss.

6 The legal order of international law is closely connected to national legal systems. See Rainer Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (Suhrkamp, Frankfurt a.M. 2003) 58; Juliane Kokott, 'Die Staatslehre und die Veränderung ihres Gegenstandes', (2003) 63 VVDStRL (Proceedings of the Annual Meeting of German Constitutional Lawyers) 34s.

7 See FC Jacobs, RCAWhite, *The European Convention on Human Rights* (4th edn, OUP, Oxford 2006).

8 The national representatives in international organizations are typically presidents or members of national governments. The regulation of the representation in international organizations is also sometimes an issue of national constitutional law. Moreover, international organizations are institutionalized in specific nation-states. Thus, particular treaties are organizing the relationship between the international organization and its member states. Regarding privileges and immunities see Malcolm Shaw, *International Law* (5th edn CUP, Cambridge 2003) 1205ss.

9 The specialty and exceptionality of the case of the European Union is the degree of intensity and the higher level of development of the constitutional interaction. The broad field of cooperation within the member states of the European Union has an extraordinary impact on the various constitutions. The foundation of this constitutional interaction can be found in European Constitutional Law. The concept of German Constitutional Court understanding the interaction of European Law and Domestic Constitutional Law as "Verfassungsverbund" (Constitutional Network) is part of the perspective of International Constitutional Law. See Pernice, 'Europäisches und nationales Verfassungsrecht', (2004) 60 VVDStRL (Proceedings of the Annual Meeting of German Constitutional Lawyers) 163ss; see also Christoph Grabenwarter, 'National Constitutional Law: Relating to the European Union', in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, Oxford 2006) 95ss.

10 See e.g. Art 117 Italian Constitution, Art 88 French Constitution, Art 23 German Basic Law.

Law refers to national constitutional law, most prominently in Art 6 Treaty of the European Union.¹¹ With regard to international law, the Law of the European Union provides the possibility of integrating international law into European Union Law.¹² Again, not only legal but also institutional relations exist at the European level. Constitutional authorities like governments or parliaments are participating in the institutional design of the European Union and European institutions like the European Commission are representing the European Union in the member states. The European Community itself is a member of International Organisations and various International Organisations are cooperating with the European Union.¹³ The particular institutional design of the European Union is shown in the possibility that the majority rules and that not every member state has to agree on each legal act.¹⁴

Besides these direct relations between domestic constitutional law, European law and international law, there are also relations between International Law and National Law mediated by European Law. This is exemplified in the way that the international obligations of European Union Law are affecting the EU member states.¹⁵ Thus, between all three legal areas, direct and indirect legal influences exist, regulated by one or more of the different legal systems.

The formal interrelations between the different legal systems have important implications, given that they open up each of the different legal systems to substantive influences. Although these influences can be formed in different ways (e.g. transformation of acts, direct effects, soft law, binding law, informal influences), each legal system is affected by other legal systems.¹⁶ Constitutional

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- 11 Art 6 TEU: "1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."
 - 12 See e.g. Art 310 EC, Art 24, 38 TEU. See also Robert Uerpmann-Witzack, 'The Constitutional Role of Multilateral Treaty Systems', in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, Oxford 2006) 145ss.
 - 13 E.g. WTO or FAO, See Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, Oxford 2004) 199ss.
 - 14 See e.g. TC Hartley, *The Foundations of European Community Law* (6th edn, OUP, Oxford 2007) 41s.
 - 15 See regarding the effects of international law on European Union Law Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, Oxford 2004) 274ss, 342.
 - 16 In particular, international human rights protection shows the interdependence between national constitutional law and international human rights law. See Robert Uerpmann, 'Internationales Verfassungsrecht', (2001) 56 *Juristenzeitung* 570. International human rights law, especially the European Convention on Human Rights, is setting standards and influencing the decisions of national constitutional courts. Brun-Otto Bryde, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts', (2003) 42 *Der Staat* 61, 68s; Thomas Fleiner and Lidija Basta-Fleiner, *Allgemeine Staatslehre* (3rd edn Springer, Berlin 2004) 198ss. The constitutional developments in Europe show a rising willingness to take the European Convention on Human Rights seriously, not obligatory with regards to its contents but with its formal importance at a domestic constitutional level. See also the discussion about the Human Rights

values are adapted to European or international standards.¹⁷ The developments of international and European constitutional standards are primarily influenced by domestic constitutional law of European states. The formal interrelations lead to a substantive (although in most of the cases indirect) influence between the different systems.

The reason for focussing on this development is due to the observable growth of these interrelations within the last 20 years. The quantity and quality of international co-operation is increasing tremendously all over the world. Integration within the European Union is still going further. Technical and economic globalisation together with the end of the Cold War had an important effect on legal developments in international law, European law, and national constitutional law.¹⁸ Thus, the interrelations described above spread in an impressive way and lead to remarkable influences in all areas of constitutional law.

3. WHAT IS A CONSTITUTION? FROM A STATE-RELATED TO AN OPEN CONSTITUTIONAL UNDERSTANDING

In a second step towards an ICL approach, the interpretation of the term constitution will change from a state-related definition towards a more open understanding of constitutional law.¹⁹

In this context, the meaning and relevance of constitutional law shall be reconsidered. In the traditional perspective, constitutional law is related to the development of the nation state. A formal and general understanding of constitutional law is that it is the highest legal level in a state. Constitutional law

Act in the UK (AW Bradley and KD Ewing, *Constitutional and Administrative Law* [14th edn, Pearson, Harlow 2007] 425, 432ss.

- 17 The relevance of international law for national constitutions is also rising in an economic context. See Daniel Thürer, *Kosmopolitisches Staatsrecht: Grundidee Gerechtigkeit* (Vol. I, Berliner Wissenschaftsverlag, Berlin 2005) 7, 35ss. International Organizations, like the World Trade Organization, (Thomas Fleiner and Lidija Basta-Fleiner, *Allgemeine Staatslehre* [3rd edn Springer, Berlin 2004] 309.) the International Currency Fund, The World Bank, are establishing legal guidelines e.g. on good governance, which are adopted by the States (See Ernst-Ulrich Petersmann, 'Theories of Justice, Human Rights, and the Constitution of International Markets', [2003] 37 *Loy. L.A. Law Rev.* 407, 425, 437, 456; Thomas Fleiner, 'Comparative Constitutional and Administrative Law', [2001] 75 *Tul. Law Rev.* 938s.) The transformation of international democratic standards is much more progressive nowadays. The democracy-related aspects of interventions from international organizations or communities of states (like in Afghanistan or Iraq) show the influence on national constitutions and strengthen the influence of globalization of international constitutional law (See Michael Schoiswohl, 'Wo Theorie zur Praxis wird: Internationales (Verfassungs-)Recht und das Entstehen einer Verfassung für das Nachkriegs-Afghanistan', in Harald Eberhard, Konrad Lachmayer, Gerhard Thallinger [eds], *Reflexionen zum Internationalen Verfassungsrecht* [facultas.wuv, Vienna 2005] 21-47).
- 18 The impact of these developments is certainly even stronger in other fields of law. Nevertheless, it is possible to observe the impact on constitutional law too. Constitutional Law as a framework of a legal systems is also effected by contemporary challenges to legal systems.
- 19 See Christoph Möllers, *Staat als Argument* (C. H. Beck Verlag, München 1999) 257-271, comes to the result that a state is not necessarily a precondition of a constitution.

determines the way of producing legal acts within a state. In the Pure Theory of Law, the state and the Law were equalized and, thus, constitutional law was considered the highest normative level in the legal system.²⁰ Nevertheless, the understanding of constitutional law in a historical perspective also requires the consideration of the substantive aim of constitutionalism. That is, it aims to limit the power of a sovereign leader (e.g. a monarch) by guaranteeing fundamental rights to, and democratic participation of citizens. In this historical perspective, a constitution is the result of the constituting process to establish democratic states in the United States and Europe considering the rule of law and civil liberties of their citizens.

The developments of the 20th century tell a story of failure but also of success of the constitutional idea. On the one hand, the worst regimes were established in the 20th century partly within the concept of constitutional law. They denied the initial meaning of ideas of constitutionalism in all ways but (partly) worked under formal constitutional law. On the other hand, constitutional ideas, like democracy, rule of law and human rights, spread all over the world.²¹ Nearly every country currently has a written constitution,²² guaranteeing in many cases fundamental rights and democratic participation. This argument is made with full recognition of the neglect of democracy and human rights faced by citizens of many countries.²³

Even within the context of these historical and contemporary developments, the constitutional order is associated with the sovereign national state. The state is established by the national constitutional law. Why then is it necessary to change the perspective on constitutional law? Two reasons shall be proposed in this article: a formal perspective and a substantive argument.

20 Kelsen, *Allgemeine Staatslehre* (Verlag Julius Springer, Berlin 1925) 47-94; Kelsen, *Reine Rechtslehre* (2nd ed, Verlag Deuticke Wien 1960) 289-320.

21 The end of the Cold War in the late 1980s enabled transitions in Eastern Europe from a communist regime to a democratic order including fundamental modifications of economic concepts (Ioannis Kyvelidis, 'State Isomorphism in the Post-Socialist Transition', [2000] 4 *European Integration online Papers* [EIoP] 2 <<http://eiop.or.at/eiop/texte/2000-002a.htm>> accessed 30 November 2007), but also promoted to a certain extent the resignation of the apartheid regime in South Africa resulting in the adoption of a new constitution; at the same time the democratization in several South American countries also had important constitutional implications. Thus, the 1990s formed a "decade of constitution-making around the world". (See the aspects of the IACL/AIDC Roundtable "Constitutionalism after Transition", 9-11 April 2006, Cape Town <<http://web.uct.ac.za/depts/pbl/iacl.htm>> accessed 30 November 2007). In the last few years the wars in Afghanistan and Iraq brought along complete constitutional reforms with entirely new constitutions. In all these constitution-making processes there is not only an involvement of international law (See Harald Eberhard, Konrad Lachmayer and Gerhard Thallinger, 'Approaching Transitional Constitutionalism' in H Eberhard, K Lachmayer and G Thallinger (eds), *Transitional Constitutionalism* [facultas.wuv and Nomos Pub, Vienna 2007] 9ss; Michaela Salamun, *Democratic Governance in International Territorial Administration* [Nomos Pub, Baden-Baden, 2005] 13ss) but also an important influence of traditions and concepts of domestic constitutional law.

22 As an exemption see the concept of constitutional law in the United Kingdom; see AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th edn, Pearson, Harlow 2007) 12ss.

23 See e.g. the recent developments in Burma, Thailand, Malaysia, Russia or South America (Venezuela and Bolivia) and the permanent situations in China, Iran and the Arabic countries.

From a formal perspective, constitutional law is not necessarily connected to a state. Constitutional law only refers to the highest legal hierarchies²⁴ in a legal system which determines the way of producing legal acts and the organisation of the legal entity. Thus, different legal systems can have their own constitution. The European Union has a legal system of its own and its own hierarchy, in which for example some parts of the basic treaties (EU-Treaty and EC-Treaty) can be seen as constitution in this formal sense.²⁵ The treaties build the highest legal level which provides the set up of institutions as well as procedures of how to establish legal acts in this legal system. As far as international or supranational organizations can be considered legal systems of their own, it is possible to identify a constitution in this formal sense.²⁶

The substantive argument is related to the development of the nation state. It is about the legal transformation of the constitutional aspects.²⁷ As presented in the first step, the interrelations between domestic constitutional law, European law, and international law are steadily increasing. These legal developments lead to a transfer of powers from the national constitutional level to both supra- and international level. Thus, the traditional elements of constitutional law as seen in constitutions all over the world are also influenced and changed by the interrelations of the various legal systems.²⁸ These constitutional elements are not only the rule of law, fundamental and human rights, or democracy, but also the institutional framework and the separation of powers. Moreover, European and international organisations today are facing similar questions of democratic legitimation, the consideration of human rights or the necessity of legality, judicial review and limitation of discretionary power (as aspects of the rule of law).²⁹ The transfer of powers from the nation state to international organizations created the demand of substantive constitutional provisions within these legal systems.³⁰ Furthermore, the substantive influence of European and international organisations on domestic constitutional law, shows the constitutional relevance of these legal systems.

On the basis of these two arguments the ICL approach integrates as a second step a broader (scientific) perspective of constitutional law. In a functional understanding of constitutional law the concept of "constitutional law" is used by different legal systems to describe basic legal provisions of the structure, the

24 Constitutional law itself may consist of different legal hierarchies. See for example Art 44 of the Austrian constitution.

25 See Otto Pfersmann, The new revision of the old constitution (2005) 3 I.CON, 383ss.

26 E.g. the United Nations, the World Trade Organization or the Council of Europe.

27 See Stefan Leibfried and Michael Zürn, Transformations of the State? (CUP, Cambridge 2005).

28 E.g. Human Rights Regimes all over the World, Malcolm Shaw, *International Law* (5th edn CUP, Cambridge 2003) 257-366.

29 The realization of basic legal principles like democracy, rule of law, human rights and the separation of powers are not special questions of states any more but general constitutional challenges in a globalizing world. See Michel Rosenfeld, 'Constitutional Migration and the bounds of comparative analysis', 58 N.Y.U Ann. Surv. Am. L. 82, 83 (2001).

30 It is mentioned as the internationalization of constitutionalism see Robert Uerpmann, 'Internationales Verfassungsrecht', (2001) 56 *Juristenzeitung* 565-616; Bardo Fassbender, 'The United Nations Charter As Constitution of The International Community', (1998) 39 *Colum. J. Transnat'l L.* 529-619.

principles and the values of a given entity. Thus, constitutional law refers to basic legal provisions understood to be fundamental for the legal system in a formal and substantive way. This also considers the hierarchic dimension of legal systems, leading to a fundamental legal act and providing legality for the entire system of norms.

The perspective is not restricted to formal aspects as it includes a substantive dimension, like the fundamental principles or values, but still in an abstract manner. The proposed understanding of constitutional law does not limit constitutional law to democratic or human rights based systems.³¹ The idea of constitutionalism, as described above and with regard to the limitation of sovereign power and the democratic participation of the people concerned can be qualified as a central problem for all constitutions, but is not a limitative criterion for constitutional law itself.³²

4. PERSPECTIVE ON A NETWORK OF INTERNATIONAL CONSTITUTIONAL LAW

After broadening the perspective of constitutional law by analyzing the increasing interrelations between domestic constitutional law, international law and European law, the main aspects of the ICL perspective are already developed. Thus, what does the new constitutional picture look like when seen from this different point of view? First of all, there are many constitutions. There are still domestic constitutions but also a European constitution and various constitutions on an international level, like the constitution of the United Nations or the constitutions of the WTO, the constitution of the Council of Europe etc. The field of constitutional law is thus broadened in a significant way.

Furthermore, the unveiled constitutional law itself is not standing alone. There are still multiple interrelations between the different legal systems and certainly also between different constitutional law systems. Thus, a legal network of constitutions is visible in this broader perspective.³³ The interaction between the different systems cannot be explained by one hierarchic system anymore. The different constitutions are related to some extent (e.g. EU law supremacy, rule of primacy in Art 103 UN charter) in a kind of hierarchic dimension but there

31 See as a different opinion Soria Martinez who thinks that it does not make sense to consider constitutional orders without a minimum standard of democracy. See Jose Soria Martinez, *Die Bedeutung der (Verfassungs-)Rechtsvergleichung für den europäischen Staaten- und Verfassungsverbund: Die Methode der Rechtsvergleichung im Öffentlichen Recht* (2006) 48 Göttingen e-Working Papers on European Law 6s <<http://www.europarecht.uni-goettingen.de/Paper48.pdf>> accessed 30 November 2007.

32 Thus, authoritarian and dictatorial regimes are not excluded from the constitutional perspective. The broad scientific approach shall not exclude the problematic constitutions by changing the constitutional perspective.

33 This constitutional network is a legal one with regard to the reciprocal interdependencies of the different legal systems. It does not only refer to informal networks of persons as Anne-Marie Slaughter is suggesting; see AM Slaughter, 'AALS Annual Convention Plenary Panel: Impact of Globalization on Human Rights', (2003) 4 *GermanLawJournal* 391–394.

is no legal pyramid, in which every constitutional act would fit into.³⁴ There are both hierarchic and non-hierarchic relations³⁵, and some constitutional systems are not related at all. Thus, describing these interrelations as a constitutional network is more appropriate than trying to establish one singular hierarchic system.³⁶

International Constitutional Law means all these different constitutional systems and their interdependances. It is constitutional law not only at the national level, but also includes transnational, supranational and international constitutional law. International constitutional law is in this perspective the umbrella under which all the various forms of constitutional law are grouped together. The ICL perspective is the broader look at these various forms of constitutional law, especially in their interrelations, thus a perspective on a network of International Constitutional Law.

Again, the question shall be raised: which perspective can be useful? In many cases, domestic constitutional law, European law and international law are examined without considering their interrelated position within the international constitutional network. This limited view reduces the possibilities of understanding how each of these constitutional systems has been developed and is working. Often, important implications of other legal systems are not sufficiently considered. In other cases, the application of different terminologies at the different levels of law leads to a too narrow analysis.

The aim of an ICL perspective is to develop a general perspective on constitutions – considering the different aspects of different constitutions, but within one constitutional framework. The ICL perspective can accomplish a more suitable approach to common challenges which have to be faced on an international level in a globalizing world. Understanding how constitutional law today can deal with the challenges of information society, the fight against terrorism, biotechnological limits to research, environmental issues, constitutional limits to

34 Its function is to regulate basic principles and primary values. They cannot be understood only as the vertex of a pyramid in a hierarchic sense, but also as one of different legal center of reference. See Mark van Hoecke, *Law as Communication* (Hart Pub, Oxford 2002) 113; Francois Ost / Michel van de Kerchove, *De la pyramide au réseau?* (Publications des FUSL, Bruxelles 2002) 23, 69; Fleiner and Basta Fleiner say that the conception of the world ("Weltbild") has changed, Thomas Fleiner and Lidija Basta-Fleiner, *Allgemeine Staatslehre* (3rd edn Springer, Berlin 2004) 16. Constitutions do not only determine other laws and legal relevant acts, but are also influenced by them. Therefore, a theory on international constitutional law also has to consider influences from other legal acts in a complex multi-level legal network

35 For example the particular (hierarchic) role of the UN within international law, especially regarding the use of force, see Christine Gray, *International Law and the Use of Force* (2nd edn, OUP, Oxford 2004) 204ss; Erika de Wet, 'International Constitutional Law' (2006) 55 ICLQ 64 ss.

36 See Francois Ost / Michel van de Kerchove, *De la pyramide au réseau?* (Publications des FUSL, Bruxelles 2002). The problem of a multi-level approach is the indication of some kind of hierarchy between the levels. Furthermore, there is not only one single international level. Thus, there are different legal arrangements in international organization. This is not a homogeneous level on its own in the same way there exists no homogeneous national level, but national legal order in each state. As a consequence of Europeanisation a competition between the national legal systems develops without hierarchic relations between them. See Rainer Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (Suhrkamp Verlag, Frankfurt am Main 2003) 431.

economy, the establishment of democracy and rule of law etc, the ICL perspective offers a more complete approach. It can deal with constitutional questions in a way that allows problems to be solved, not only on a national level, but within an ICL network. Traditional research would make a difference between national levels, the European level or at the level of international law. The ICL approach proposes to integrate constitutional problems in a network perspective on constitutional law. The specific relation between the different constitutions (whatever level is concerned) within the particular constitutional challenge is under consideration. The development of constitutional solutions requires the integration of all levels of constitutional law and this is only possible because of a broader understanding of constitutional law. Thus, as the understanding of constitutional law has to be broadened, the constitutional terminology and perspective have to be reconstructed within the perspective of International Constitutional Law-leaving the state-focused perspective behind.

5. CONCLUSION

Finally, it is necessary to come back to the result of the ICL approach presented at the beginning: the International Constitutional Law (ICL) Approach is about linking different systems of constitutional law regarding substantive and formal contemporary constitutional challenges within the network of constitutional law. The aim is to reach an analysis of these legal interrelations in the constitutional network (description) as well as to develop constitutional solutions to approaching constitutional challenges (prescription). This paper tries to explain this shift of perspective and provided justifications of the usefulness of it.

Understanding and analyzing different constitutional legal systems and their interrelations requires comparisons of these systems. Thus, the most important method within this International Constitutional Law approach is the comparison of various constitutional laws. It is not the task of this article to answer the questions of the purpose and the method of comparing constitutional law. Nevertheless it is a crucial aspect in dealing with the ICL approach. The establishment and the understanding of this ICL Approach itself are permanently in discussion.

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