Anna Phirtskhalashvili

PhD of Law,
Professor at the Grigol Robakidze
University School of Law

FROM INTERNATIONALISATION OF THE NATIONAL LAW TO THE CONSTITUTIONALISATION OF THE INTERNATIONAL LAW

Abstract

The development of the states in the modern world happens in steps with the global processes and taking the national identity into consideration. Often times, it is difficult for the states to follow this process of development maintaining the balance. The law should be the tool ensuring the optimal correlation of both– international and national – values. The observation on the cold war, its following period and the ongoing processes demonstrates that the states within the current globalisation cannot develop independently from other states and peoples. The problems facing the world, such as, for instance, environmental protection, the fight against terrorism and other threats can only be defeated with unity. The supranational union of states serves primarily the goal of resolving these global problems. The states unite in such international communities through giving up portion of their sovereignty. Giving up this "portion" of sovereignty sometimes means limiting constitutional, national identity. The control of national identity is the barrier between the national and international. Nowadays the main challenge of the modern state is to be a dignified member of the international community and maintain national identity of its constitution.

INTRODUCTION

The law should develop in steps with the processes the society goes through. Like a living organism it should not be detached from the reality and the community, it should timely and reasonably react to all processes appearing in the society. The function of the law is, on the one hand, to fit the development of the society and, on the other hand, to carry the restraining function towards the negative trends of evolution.

Much like the evolution of international community, two trends are observed in the development of modern law: globalisation of the national law and constitutionalisation of the international law. These two processes unfold in parallel, frequently in harmony, however, sometimes in conflict. This article is a modest attempt to observe, analyse and evaluate these processes of interaction and development.

1. STRUCTURAL VARIATION OF THE POLICY OF INTERNATIONAL LAW

International law is one of the relevant elements of the global order. When the foundational values and order changes in the world, international law should be revised and new, different focuses should emerge of its policy priorities.[1] If this is not the case, the law will not be capable to respond to the challenges and demands of the society, which has historically accompanied the evolution of humanity. According to some part of the scholars in this field, the "acceleration" of the ongoing processes in the world is the one inducing the constitutionalisation of international law.[2] With this regard it is remarkable that in 2004 seventh Secretary General of the UN, Kofi Annan created special commission aiming at innovative amendments to the UN Charter and generally, the reform of the UN, this reform, in itself, served the strengthening of the elements of constitutionalisation of international law.[3]

It is a fact, that the modern era is remarkable with its globalism. The states can hold wars without leaving their territories through cyber means. The threat of terrorism is immense, added with the problem of total inequality between the states. For historic development of the international law the ongoing trend, that the human rights are not only collectively, as a "part" of a state, but also individually, as rights of single persons, have deserved to be internationally protected, is highly significant. This is also supported by that a person beyond the borders of his/her state holds the tool for protecting the rights individually, without the mediation from the state. A good example of this is the institute of an individual complaint to the international courts.[4] It strengthens the right of a person, as a separate individual on an international arena. A person is not seen as merely a part of a state, a citizen. A person carries the human rights because he/she is a human and not because he/she is a citizen of a specific state.

In order for the international law to play its role in the modern world and successfully resolve all problems existing in international relations, the new comprehension of international law is necessary. This is exactly why the discussions over the constitutionalisation of the international law have become more and more intensive in our century.

In the western democracies particularly interesting trends have been observed. On the one hand – the union between the states are becoming supranational, while on the other hand – as a result of globalization wave in the world it is notable that the nations have developed the instinct of self-preservation. The exit of the United Kingdom from the European Union, the

---

[1] G Nolte, *Strukturwandel der internationalen Beziehungen und Völkerrechtspolitik* in: Polis und Kosmopolis – Festschrift für Daniel Thürer (Giovanni Biaggini/Oliver Diggelmann/Christine Kaufmann Hg.), Baden-Baden (Nomos 2015). 557-563, S. 557.

[2] J Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft* (KJ 2005). 222-247, S. 237; C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, General Course on Public International Law, Receuil des cours 281 (1999), The Hague 2001. 163 f; A.v. Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany' (Winter 2006) 47 Harvard International Law Review, Number 1.

[3] B. Fassbender, *UN-Reform und kollektive Sicherheit* (Heinrich Böll Stiftung, Global Issue Papers No. 17, April 2005); On May 31, 2005 Kofi Annan talked about the need of this reform in his speech 'Larger Freedom: – Towards Development, Security and Freedom for All (LF)'.

[4] A Pirtskhalashvili, 'The Theory of Universality of Human Rights' (2014) #2(41) Scientific Journal Justice and Law. 72.

results of the US Presidential Elections, just as the victory of strong right conservative in the French Presidential Elections, the entry of a right-wing party, which is the largest opposition party in German Parliament, in the Parliamentary Elections of Germany with rather large number of votes, have been unexpected to the experts in politics. Observations on the ongoing processes supports the idea that the political elites of the developed democracies are although ready for cultural globalisation and transformation of national law, they are not ready to accept the imported culture, to give up their national identity. Once the latter is under threat, the "nationalism immunity" enhances. The instinct of self-preservation and strive for globalisation provides counter-effect.

2. FROM NATIONAL TO GLOBAL – CONSTITUTIONALISATION

The world was chaotic before state was created. Primitive humans were not aware of each other's rights. They constantly fought within each other for existence. Our ancestors soon realised that the society was in need of a certain order, such order, which would be obeyed by all – the strong and the weak. The order that, on the one hand, would protect them, while on the other hand, would force them to respect each other. The idea of creation of a state is backed by strive towards establishing security and peace. Creating certain order within the state without binding rules and principles – without establishing legal provisions, – is impossible. Establishing the scope of and maintaining the law and the state governance is conditioned by the existence of constitutionalism.

In classic sense, the constitutionalism envisages the ambit of state power, which provides for the duties of government entities, scopes of their authorities and functions, on the one hand and the rights of a person, on the other hand.[5] The content of constitutionalism formally is strengthened by the creation or reform of the Constitution. While in modern sense, the constitutionalism reaches into the international and supranational legislation. The evidence of this, for instance, is the creation of unwritten fundamental rights and basis within the rule of law in the order of European community and European Union and raising other national values to the level of supranational by the judges.[6]

The historic development has demonstrated that the interstate order could not be the guarantee for personal security. World peace is necessary for its achievement. The postulates of world peace are read in the *"Perpetual Peace" written by Kant in 1795*.[7] *Pursuant to the "democratic peace" theory of Kant*, democracies do not have war with each other. Democratic regime, in Kant's opinion, ensures the peaceful foreign affairs policy of a state. Kant proposed three prerequisites to the states for establishing and maintaining peace: 1. all states have to be democratic republics. According to Kant, unlike absolute feudal monarchies,

[5] A Haywood, *Political Ideologies: An Introduction* (Georgian translation, 3rd edition, 2004, Logos Press) 432.
[6] R Arnold 'Rule of Law in the Development of Constitutional Law' (2015) VIII Constitutional Law Review 15, 18.
[7] I Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (Königsberg 1795); Additionally it should be noted that Kant was not the first to touch upon the problem of peace. Perpetual peace was the subject of thought during the reformation epoch also, The works of Desiderius Erasmus, *The Complaint of Peace*, Sebastian Franck *Book Fighting for Peace* (1539), American Willian Penn's Essay *Towards the Present and Future Peace of Europe* (1693), Bernardin de St. Pierre's letter *For Perpetual Peace* (1712) and *The Plan for Perpetual Peace* and Rousseau's *Project for Perpetual Peace in Europe* are noteworthy (1782).

western type, democratic governance has significant advantage. In his view, within republican system people become decision maker, thus the government acts within the mandate granted by the people, while war is seen as devastating for people's wellbeing, the wish to start war decreases; 2. International law should be based on federal unity between free states; 3. International law shall become the world citizenship law and all should be loyal towards it. Kant establishes the theory of world state and underlies the fact that the world state will be the guarantee of perpetual peace and will be the type of state union, which limits the possibility of wars between its member states.[8]

Based on the theory of Kant Michael Doyle and Francis Fukuyama brought attention to the theory of democratic peace in the 80s, in their opinion, countries with liberal democracies are remarkable with their peace, since in such countries, as a rule, middle class interested in maintaining peace, so that they can be engaged in sales, production and accumulation of wealth, is extremely strong. Therefore, if democratisation and liberalisation of the world will take place, peaceful world can be created.[9]

This theory has a lot of critics, since it is considered utopic by the neorealism for several reasons.[10] The followers of neorealism criticise the theory of perpetual peace, on the one hand, because they doubt the Kant definition of democracy and, on the other hand, they have their own explanation for the reasons of peace between the democratic states. The realism and neorealism propose different versions of understanding the peace.[11] These positions doubt democracy having the essential function for peace and focus on other values, for instance, the cultural similarity between the western states.[12] Critics are mainly based on the existence of super-states in the world, since in reality, they are defining international relations, their actions, particularly their wars, have massive impact on international system, unlike other weaker states. The Kant's theory of democratic peace combines both large and small states, while critical position of neorealism has the following point of view in this regard: actions of large and small states cannot be defined with equal measurement, since small states have much limited choice.[13] The counterargument for the theory of neorealist scholars is empirical evidence of the theory of democratic peace, specifically that between the democratic states (in republic sense of Kant) there has been no armed conflict for the past two centuries. If we take into consideration the fact that as a result of democratisation trend taken during the past century in the world, the number of autocratic states have decreased and

[8] Kant, *Zum ewigen Frieden* (n.7). 43.
[9] M Doyle, 'Kant, Liberal Legacies and Foreign Affairs' in R J Art and R Jervis (eds) *International Politics: Enduring Concepts and Contemporary Issues* (translated into Georgian Ilia State University 2011) 115-130; F Fukuyama, *State-Building: Governance and World Order in the 21st Century* (Ithaca, NY: Cornell University Press 2004).
[10] J Habermas (n.2). 246; The strongest critique of Kant was reflected in the article of Christopher Layne: C. Layne, *Kant or Can't: The Myth of the Democratic Peace in Debating the Democratic Peace* (Cambridge & London: The MIT Press 1994).
[11] See the analysis of Peace Theories by the representatives of Realism and Neorealism John Mearsheimer and Kenneth Waltz in A Rondeli, *International Relations* (third edition Tbilisi 2006); also the works of mentioned authors: J J Mearsheimer, *The False Promise of International Institutions*, *International Security* (Winter 1994/1995) Vol. 19, No. 3. 5-49; K Waltz, *Structural Realism after the End of the Cold War*, *International Security* (2000) 25(1), 5-41; J.J. Mearsheimer, *Back to the Future: Instability in Europe After the Cold War*, *International Security* (Summer 1990) Vol. 15, No. 4. 5-56.
[12] E Kodua et al (eds.) *Dictionary-Directory of Social and Political Terminology* (Logos-Press 2004). 351.
[13] See C. Layne, *Analysis* (n.11).

Kant's "democratic peace", despite its critique, is one of the basis of the foreign policy rationale in the West, we may think that in a certain period of time, world peace is achievable.

Some scholars consider that Kant's perpetual peace theory is not at all unachievable utopia, instead it is the ideal that the educated humanity should eternally strive towards.[14] Kant's realism towards perpetual peace is also demonstrated in the fact, that he does not consider the possibility of realisation of this ideal is instant. He discusses the steps, which, in case they are made, could bring the humanity to strongly take the path of achieving this ideal.

The issue of world peace became most relevant after World War II, as it demonstrated that protection of the rule of law and human rights merely at a national level, within a state is not sufficient for world security. Today, with the international terrorism, massive human rights violations and global inequality, considering the cultural and economic globalisation, discussions over the "constitutionalisation of international law" has become particularly topical.

Two world wars of the 20th century have brought the states to the idea of international community. The community of states – on the level of international organisations – is an attempt at reaching the global peace and security. The topic of "constitutionalising" international law has emerged in the international society. In other words, the constitutional principle the states should be based on in classical sense, should also strengthen the order between the states or, more specifically, between the peoples. This very discourse has become the subject of scholarly discussions within the Western European scholars for the past decade.[15]

The processes of constitutionalisation are also obvious in the traditional international law. The evolution of *jus cogens* can be attributed to this type of process, which cannot be avoided by the power of a state in any way, as they provide imperative normative principles. The human rights, the prohibition of use of armed force and other principles relevant to the international society demonstrate the gradual transformation of the international law – legislative norms based on the vertical principles.[16] This very kind of transformation causes acceptance of constitutional-law principles by international law and their reinforcement. A good example of it is the *World Trade Organisation or the European Union, as supranational organisations. Although the adoption of the Constitution of the EU formally failed as a result of the referenda in France and the Netherlands in 2005, European Law in terms of material law is a clear example of the constitutionalisation of the international law. It is well visible where the line between the national and supra-national law is drawn when looking at the political-legal processes developed in Europe.*

On the first stage of development of the international law the goal of the international community was limited to the fight for the justice and democracy. International Courts were created, which more or less were capable of reaching success in safeguarding these values

[14] G Tavadze, *Perpetual Peace: Unreachable Utopia or Political Ideal? Thoughts on Immanuel Kant's Work 'Perpetual Peace'* 3 available at <www.academia.edu> accessed on 30 May 2018.
[15] See articles in G Biaggini, O Diggelmann and C. Kaufmann (eds), *Festschrift für Daniel Thürer, Polis und Kosmopolis* (Nomos Verlag, Baden-Baden 2015); J Habermas, 'Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?,' in: ders., *Der gespaltene Westen* (Frankfurt/M. 2004), S.113 ff.
[16] Arnold (n.6). 18.

within the internal affairs of the states, as well as in disputes between the states. The efficiency of such tools, their execution is frequently debatable, but it is undoubted that the values agreed by the states – the principles of democracy and justice, - are the subject of attention for the international community. The exceptional function in the international law was taken by the constitutional-law principle, the notion of proportionality (Verhältnismäßigkeitsgrundsatzes). In the German literature it is subject of wider discussions within the context of constitutionalisation of the international law.[17]

The implementation of the above mentioned principles serves global security and peace. It has been several decades when on the third level of mankind development the state has taken on a social function. It is undoubtable that in case of inability to work, sickness or old age, a person needs support. The social order of the state is a priority for a developed state. Even though some of them care for establishing social system more and others less, it is relevant to confess that a person is a part of society and when vulnerable, needs support from the government.

It is interesting that the same trend is demonstrated in the evolution of social state as in the development of democratic and rule of law state principle. Fair distribution of welfare envisages not only distribution between specific persons or citizens, but also between the states. It is noteworthy that it has reached beyond the frontiers of statehood and has already adopted international meaning. It is confirmed not only through the regulations of regional organisations (i.e. the European Union), but also by the regulations of wold communities (UN). It is becoming vivid day by day that achieving equal development and wellbeing of member states of the European Union is its one of the most relevant goals. Within the scope of social solidarity between the states UN Sustainable Development Agenda – 2030 is of particular significance. The goal of eradicating social problems of the world is set as a goal in this very agenda. Out of its 17 principles social problems have highest priority. The first three goals set are the eradication of poverty and hunger in the UN member states (192 countries) and creation of efficient healthcare system.[18] The Agenda also stresses out that equal education, dignified work conditions, economic growth and elimination of inequality within and between the states shall be achieved through partnership. This document has particular social weight as the developed states recognise that they have "social responsibility" towards other, "poorer" states. Historic development demonstrates that the mankind has reached the stage where it has become obvious and irreversible that not only the commonwealth of states, but also the international commonwealth has taken on certain social responsibilities.

In the most utilitarian sense a person, who has a lot of material wealth, prefers to live in the environment where there are no extremely poor around, since when minimal living conditions are absent, his/her property and security is under threat. This threat is frequently represented by a person living on the verge of poverty and hunger, as in the event of exigencies he/she does not have the means to work and earn living honestly. In the process of

[17] J Rauber, 'Verhältnismäßigkeit und völkerrechtliche Systembildung, Überlegungen zur einheitsbildenden Funktion des Verhältnismäßigkeitsgrundsatzes im Völkerrecht der Konstitutionalisierung' (2015) ZaöRV 75 Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht,), 259-298.

[18] A/RES/70/1 *Transforming our world: the 2030 Agenda for Sustainable Development* Available here: <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf > accessed 30 May 2018.

globalisation the number of so called economic migrants is rather high, seeking for shelter in rich states of the world. Therefore rich, developed states, pragmatically, of course prefer to "care" for development of other states proactively.

Therefore in the 21st century the world has reached the stage of development where together with democracy and the rule of law principles, social solidarity is recognised as well. The extreme inequality established in our century creates fertile ground for forging these values along with the globalisation.[19]

3. FROM GLOBAL TO NATIONAL – NATIONAL IDENTITY OF THE CONSTITUTION

The globalisation processes ongoing in the modern world have somewhat "restraining" function. This serves the goal of ensuring the cultural globalisation does not become the threat of destruction for national self-being. In this regard the theory of dividing states into "cultural nations" and "nation-states" is of particular relevance.

German historian, Friedrich Mainecke defined two types of nations at the end of the 19th century: cultural nations and nation states.[20] If the self-consciousness of nation states was linked to their statehood, cultural nations existed regardless from the statehood and their national integration was defined not through being the subject of international law, or formally speaking, through having a Constitution, but through the national culture, language, religious, spiritual and material cultural traditions instead. Thus the cultural nations have their own legal identity as well.[21]

This process is not homogenised and cannot be resorted to a specific ethnic group or its traditional existence or beliefs and understandings. On the quite contrary, cultural nation is not based on origins or blood ties, but on the unity of cultural elements. These elements are achieved through exchanged and synthesis with other cultures. In such situations it is frequent when cultural investments are made from other cultures; hence what is given in the existing culture or is created from within is imported and admitted from abroad. An attempt of bringing a similar model to Georgia was made by Ilia Chavchavadze and Tergdaleulebi, who had the project of creating cultural nation of Georgia.[22]

Based on the above mentioned, the threat of losing cultural identity is not eminent, if the state is established as a cultural nation. It has relevant immunity, which only receives what is acceptable for its national identity. The same goes for the national law, which is seen even historically, with large readiness towards the reception of European law.[23] According to Besarion Zoidze Georgia has never been a closed country with its national values; it has

[19] See in more details A Phirtskhalashvili, *Social Justice, New Order for 21st Century World* available here:<http://european.ge/socialuri-samartlianoba-axali-tsesrigi-xxi-saukunis-msopliosatvis/> accessed on 30 May 2018.
[20] F Meinecke, Werke: *Weltbürgertum und Nationalstaat Gebundene Ausgabe* (1 January 1962) H. Herzfeld (ed).
[21] ibid.
[22] G Maisuradze *From 'Cultural Nation' to Narcissism,* Internet-platform, Radio Freedom, available here:<https://www.radiotavisupleba.ge/a/blog-giorgi-maisuradze-cultural-nation/25245883.html> accessed on 30 May 2018.
[23] B Zoidze, *The Reception of the European Private Law in Georgia* (Tbilisi 2005). 19- 23.

always shown high interest towards progressive cultures. In his opinion the art of reception does not envisage mirroring the law of other states. The observations of scholars demonstrate that when translating foreign law, whole effort was directed to avoiding something threatening for national law or damaging Georgian consciousness to sneak into Georgian reality.[24]

Very interesting examples and at the same time relevant cases with regards to controlling legal identity are two judgements of the Federal Constitutional Court of Germany. The mentioned case is known as "identity control" (Identitätskontrolle and so called Solange III)[25] and covers the European Arrest Warrant. The Federal Constitutional Court of Germany adopted judgment 2 BvR 2735/14 on December 15, 2015. This Judgment of the Court confirmed the type of the link that has to be between the German constitutional law and the European Union law. This link is viewed through the lens of German national law. The Federal Constitutional Court of Germany took the case for consideration so that it could more clearly delimit the contours of material-law and procedural-law, which review the conformity with European Union Law and the German Constitution.

A citizen of the USA filed a complaint to the Federal Constitutional Court of Germany, who disputed the constitutionality of the Judgment of the Supreme Court of Dusseldorf Land of November 7, 2014 (OLG Düsseldorf). The Supreme Court of the Land based its reasoning on the European Arrest Warrant. A claimant, a citizen of the USA, was sentenced to 30 years of jail time after he was arrested based on the European Arrest Warrant in Germany pursuant to the Judgment of the Florence Court in Italy for being a member of criminal gang in 1992, which was responsible for importing and selling cocaine in the country. The claimant requested his extradition to Italy to be ceased. The European Arrest Warrant, which was issued in Italy but had to be executed in Germany, in the opinion of the claimant contradicted the principle of culpability guaranteed by the Constitution of Germany *(nulla poena sine culpa)*. The latter pursuant to the Basic Law and national law of Germany envisages that the arrest warrant in absentia contradicts the principle of responsibility based on culpability (apart from for several exceptions, which was not characteristic to the case at hand). Article 79, paragraph 3 of the Basic Law of Germany establishes the "guarantee of perpetuity" of the Basic Law itself, according to which: "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible". The mentioned provision establishes the characteristic principle to the Basic Law of Germany, without which this institution would be stripped from its identity. Therefore it declares such provisions unchangeable until the Basic Law exists. The Federal Constitutional Court of Germany considered the judgment of the Supreme Court of Dusseldorf Land in contradiction to the Constitution. It declared that in this particular case the principle of culpability was infringed so much that the dignity of a person, guaranteed by Article 1 of the Constitution and declared unchangeable by Article 79, paragraph 3, was not sufficiently protected by the state. The dignity of a person is highest, unchangeable value of the Constitution of Germany, which in turn is characteristic to the Basic Law of Germany.

[24] ibid 23.

[25] Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ("Solange III"/"Europäischer Haftbefehl II"), See the analysis of the judgment in D Burchardt, ZaöRV 76 (2016), 527-551 *Die Ausübung der Identitätskontrolle durch das Bundesverfassungsgericht* – Zugleich Besprechung des Beschlusses 2 BvR 2735/14 des BVerfG vom 15.12.2015 ("Solange III"/"Europäischer Haftbefehl II").

The argumentation given by the Constitutional Court is rather interesting.[26] Primarily the argument of the Court regarding the control of the cultural identity is based on the issue, that it does not contradict article 4, paragraph 3 of the Treaty on European Union, which envisages sincere cooperation of the member states. It focuses on the fact that the identity control of a state is not substantial threat to the common legal system of the European Union due to two reasons. Primarily, this is because the identity control is rare, secondly – the control shall always be restrained and favourable towards the system of the European Union.

In its argumentation the Federal Constitutional Court of Germany bases its argument on article 23, paragraph 1 of the Basic Law of the country, which prescribes: "*With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79".*

According to the principle *nulla poena sine culpa* there is no punishment without culpability. It is not only the foundation principle for criminal law, but also provides for the elementary requirement of constitutional principle of rule of law to establish the culpability. Violation of this principle causes violation of the fundamental value guaranteed by the Basic Law of Germany, minimal standards for guarantees of human dignity.[27] Review of the minimal standards for guarantees of human dignity is the most relevant criterion for the test of identity control.

It is also significant that the Federal Constitutional Court of Germany discusses the Charter of Human Rights of the European Union. It indicates towards the article 47, paragraph 2 and article 48 of the Charter and concludes, that in view of German national law the judgment of German court (OLG Supreme Court of Dusseldorf Land) does not respond to the requirements of article 47, paragraph 2 and article 48 of the Charter.

It is noteworthy that the Federal Constitutional Court of Germany in its judgment establishes the necessity of cultural identity as a special requirement for its own future case-law – the identity control should be favourable towards the law of European Union (Europarechtsfreundlichkeit).[28] In the view of the Court, the constitutional provisions are directly applicable law for the Government, which is obliged to safeguard human dignity both with and without the European Law.[29]

---

[26] BVerfG, Beschluss 2 BvR 2735/14 vom 15.12.2015, Rn. 36.
[27] BVerfG, Beschluss 2 BvR 2735/14 vom 15.12.2015, Rn. 39.
[28] The above mentioned approach is criticised by the German scholars since the positive attitude towards European Union Law is merely imaginary and the Court only declares this approach. See Burchardt (note 25), 527-551.
[29] BVerfG, Beschluss 2 BvR 2735/14 vom 15.12.2015, Rn. 41 ff; It should also be noted that soon after the Federal Constitutional Court of Germany adopted this Judgment the European Court of Justice interpreted in its Judgment C 404/15 on April 5, 2016 that the guarantees of the human dignity enshrined in the Charter of

The pre-requisites of the identity control test for the Court was the "Mangold Judgment" of the European Court of Justice.[30] The Constitutional Court of Germany has responded it in its judgment of July 6, 2010 with so called "Honeywell" judgment.[31] The Court stated in this judgment so called *ultra-vires-Kontrolle* criteria for the test. This envisages the Constitutional Court checking the law of European Union considering if the relevant institutions of the European Union had the authority to adopt relevant legal act, if they infringed formally into the authorities of German Government with regards to the exercise of state governance.

Federal Court of Germany in its so called "Honeywell" judgment stated that the Mangold case, which was rather disputed in Germany, was formally adopted with correct direction within the European Union law and passed the test of *ultra-vires-Kontrolle*. Unlike the judgment of Identitätskontrolle, so called Solange III,[32] where in this case the Federal Court within the dispute at hand, checked the material conformity of the European Arrest Warrant with regards to the provisions of the Basic Law of Germany establishing its unchanged and perpetual basis.

CONCLUSION

The globalisation process ongoing nowadays in the world is necessary for achieving world security and peaceful cohabitation. Despite the trend in our century demonstrating the development of legal, cultural and value-based globalisation, it is not irreversible. We also see the unequivocal paths towards both global and national directions. This very process is the challenge for the legal scholars, on the one hand the reception of international law principles and values agreed with western society, while on the other hand, meticulous checks conducted on them, comparing and assessing them with the national values.

The assessment of the case-law of the Federal Constitutional Court of Germany analysed above allows us to state that the national Constitutional Court has preserved two "exit doors". One takes it from the supranational union law so that it does not assume the competences of state government, even if it is supranational European Union law, while the other serves safeguarding fundamental and perpetual provisions of the national Constitution and legal system.

In this situation it is remarkable how national and global can coexist in harmony. Remaining in the global legal system is possible through maintaining the national foundation. It is noteworthy that if the judiciary in this case does not take the role of the institution responsible for checking the power, the globalisation of the law will be under threat. A good example of this could be the exit of the United Kingdom from the European Union.

European Union, is the basis for measurement of the basic human rights in general. However the Court did not make direct reference, that this test can be used by the national court when checking the identity control.

[30] Case C-144/04 *Mangold-Urteil* [2005] so called "Mangold Judgement".

[31] Honeywell-Entscheidung 2 BvR 2661/06, 6. 07.2010.

[32] BVerfGG (n.25).

It is natural, that offering anything “foreign” in overdose, however positive and attractive it might be, always causes reversal to the “own”. The state should be the one choosing the correct dosage, regardless to which branch of power it is – the common values, culture should be taken in relevant amount, and reflected in the law. Otherwise the globalisation, which in itself has the perspective of achieving perpetual peace and has no alternative in modern world, will be a failed project for the world.