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COMMISSION EUROPEENNE POUR LA DEMOCRATIE PAR LE DROIT

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Constitutional Courts and European Integration

Les Cours constitutionnelles et l'intégration européenne

TABLE OF CONTENTS / TABLE DES MATIERES

page

REPORTS AND REPLIES TO QUESTIONNAIRE

In a continent where a majority of states are members of the European Union, the supremacy of law can no longer be understood without respect for the supremacy of supranational law. The implementation of this basic principle, which derives from the Community legal order, poses problems from a constitutional point of view which have not been resolved in a uniform manner.

This is particularly true with respect to courts exercising constitutional jurisdiction. Their role in European integration is determined by the provisions of the constitution, but also by the nature of such courts and their openness towards norms other than those contained in the constitution.

The 17 contributions presented in this publication demonstrate how these questions have been dealt with within different legal traditions in Europe.

This publication contains the reports presented at the UniDem Seminar organised in Kosice on 19-21 September 2002 by the European Commission for Democracy through law in co-operation with the Constitutional Court of the Slovak Republic.

The European Commission for Democracy through Law (Venice Commission) is an advisory body on constitutional law, set up within the Council of Europe. It is composed of independent experts from member states of the Council of Europe, as well as from non-member states. At present, more than fifty states participate in the work of the Commission.

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Dans un continent dont la majorité des Etats fait partie de l'Union européenne, la prééminence du droit ne se conçoit plus sans respect de la primauté du droit supranational. La mise en œuvre de ce principe de base découlant de l'ordre juridique communautaire pose des problèmes d'ordre constitutionnel qui ne sont pas résolus de manière uniforme.

C'est particulièrement vrai dans le domaine de la juridiction constitutionnelle. Son rôle dans l'intégration européenne est déterminé par le contenu de la loi fondamentale, mais aussi par le type de juridiction constitutionnelle et son ouverture à l'application de normes autres que la Constitution.

Les 17 contributions présentées dans cet ouvrage montrent comment ces questions ont été abordées dans les diverses traditions juridiques européennes.

Cet ouvrage contient les rapports présentés lors du Séminaire UniDem organisé à Kosice les 19-21 septembre 2002 par la Commission européenne pour la démocratie par le droit en coopération avec la Cour constitutionnelle de la République slovaque.

La Commission européenne pour la démocratie par le droit (Commission de Venise) est un organisme consultatif en matière de droit constitutionnel, créé au sein du Conseil de l'Europe. Elle est composée d'experts indépendants d'Etats membres du Conseil de l'Europe, ainsi que d'Etats non membres. Plus de cinquante Etats participent aux travaux de la Commission.

INTRODUCTION

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Il faut saluer la Commission de Venise pour avoir choisi comme thème de séminaire « Les Cours constitutionnelles et l'intégration européenne ». Derrière, en effet, le caractère un peu abstrait et neutre de l'intitulé, se cache sans doute la question aujourd'hui la plus importante pour l'avenir de l'Europe. Cette question, si vous permettez à un universitaire de la reformuler moins diplomatiquement, peut s'énoncer de la manière suivante : « une Cour constitutionnelle peut-elle invoquer sa constitution nationale pour s'opposer à l'introduction de tel ou tel acte relevant du droit européen », ou, plus brutalement encore, « les Cours constitutionnelles peuvent-elles être ou non un frein à l'intégration européenne ? ». Bref, la question est celle des modes d'articulation possibles entre constitution nationale et traité européen. Si le sujet est important c'est que ces deux catégories de textes ont un statut particulier, chacun de ces textes étant le texte suprême dans son ordre juridique : la constitution est le texte suprême dans l'ordre juridique national, le traité européen, le texte suprême dans l'ordre juridique européen. Par ailleurs, chacun de ces textes possède des caractéristiques propres qui contribuent à en faire des catégories distinctes : si, selon une formule prêtée à Aristote, la constitution est le génie d'un peuple, le traité exprime la raison des Etats ; si la constitution exprime la volonté souveraine et unilatérale d'une nation, le traité exprime la coopération contractuelle des nations ; si la constitution est l'acte fondateur et organisateur des compétences souveraines d'un Etat, le traité est l'acte qui met en commun ces compétences.

En d'autres termes, ces deux catégories de textes expriment des logiques philosophiques, politiques et juridiques distinctes qui cependant touchent l'une et l'autre à deux questions fondamentales au carrefour du droit et de la politique : la question du dualisme ou du monisme de l'ordre juridique et la question du caractère national ou supra national de la souveraineté. L'ordre juridique interne des Etats, en effet, n'est plus seulement construit par les normes produites par les pouvoirs publics nationaux ; il comprend désormais des normes issues de traités négociés entre les Etats et de normes issues d'instances supra nationales. Dès lors, inévitablement, se pose la question de l'articulation, au sein de l'ordre juridique des Etats, des normes nationales et des normes supra nationales ; et, tout aussi inévitablement, ce sont les juges, et en particulier les juges constitutionnels, qui se trouvent en situation d'avoir à gérer cette articulation quand ils ont à connaître d'affaires qui relèvent à la fois de normes nationales et de normes européennes et/ou communautaires.

D'une certaine manière, l'avenir du droit européen est entre les mains des juges constitutionnels. Soit ils initient, encouragent ou participent à une « révolution » du droit national contre le droit communautaire et ce dernier se décompose ; soit ils favorisent son intégration et c'est alors l'avenir du droit national, du droit expression de la souveraineté d'une nation, qui est posé. Formidables enjeux dont, évidemment, les Cours constitutionnelles sont parfaitement conscientes et à l'égard desquels elles adoptent une attitude pragmatique, souvent habile, mais aussi peut-être, toujours « à la limite ». Même si elles n'entrent pas directement dans les querelles doctrinales opposant dualisme et monisme, il apparaît bien se dessiner ce que

j'appellerai un « monisme d'horizon » (I), et, même si elles font comme si les traités actuels étaient de nature constitutionnelle, il apparaît bien que seule une « véritable » constitution européenne serait de nature à remettre en cohérence les ordres juridiques (II).

I. L'enjeu juridique : le monisme d'horizon.

La nature de l'enjeu : la pyramide des normes

Le processus d'intégration européenne conduit implicitement mais nécessairement à mettre en cause la représentation classique de l'ordre juridique. Qu'elle soit moniste ou dualiste, la représentation dominante de l'ordre juridique est celle de la pyramide. Ici, les textes juridiques s'emboîtent les uns sous les autres de manière verticale avec au sommet, pour assurer la validité de l'ensemble normatif, la constitution ou le traité.

Le processus d'intégration européenne ouvre sur une représentation de l'ordre juridique différente. Matériellement, il se construit par des « foyers » normatifs concurrentiels, non organiquement reliés et défendant chacun la « qualité » de ses produits. Sous ce rapport, tous les cas de figure peuvent être envisagés : au sein d'un même Etat de l'Union, la Cour suprême d'un ordre juridictionnel peut « dégager » un principe – le principe de sécurité juridique, par exemple – qui ne sera pas reconnu comme « principe » par la Cour suprême de l'autre ordre juridictionnel ; un même principe peut être reconnu par toutes les Cours suprêmes d'un Etat mais non par celles d'un autre ou d'autres Etats de l'Union ; un décret, soumis en principe au respect de la loi qui lui est hiérarchiquement supérieure, peut cependant prévaloir sur elle s'il est conforme à un texte communautaire ; une Cour suprême d'un Etat peut se réserver la possibilité d'un contrôle de constitutionnalité du droit communautaire dérivé alors que la Cour de l'Union européenne a, depuis longtemps, posé le principe de la primauté du droit communautaire y compris sur le droit constitutionnel des Etats ; etc…

Le paysage juridique est aujourd'hui, si on prend pour référence la représentation qui en est proposée par le paradigme kelsénien, en désordre. Désordre dans chacun des espaces juridiques nationaux mais aussi désordre dans l'espace juridique supra national où se concurrencent plusieurs traités et plusieurs Cours. Evidemment, cette situation, qui affaiblit les vertus de sécurité et de prévisibilité prêtées au droit, peut être appréhendée de différentes manières et, en particulier, un débat peut s'engager sur la nature structurelle ou conjoncturelle de ce désordre juridique. En d'autres termes, le processus d'intégration européenne produit-il un « ordre » juridique structuré sur l'idée de pluralité non hiérarchisée – ni hiérarchisable - pluralité des normes juridiques, pluralités des acteurs juridiques, ou bien, le désordre qu'il produit aujourd'hui est-il transitoire et appelé à se résorber progressivement par à un ré-ordonnancement hiérarchique des normes et des Cours suprêmes au profit du « niveau » européen ? L'hypothèse ici proposée est que le nouvel ordre juridique qui se construit par un « mélange » complexe des droits infra nationaux, nationaux et européens renvoie davantage à la forme d'une spirale ou du réseau qu'à celle de la pyramide ; les différents actes juridiques s'enroulent les uns aux autres de manière horizontale, rétroagissent les uns sur les autres avec, en perspective, ce que j'appellerai un monisme d'horizon.

L'actualité de l'enjeu : l'émergence de l'Europe politique

Ce basculement de la représentation de l'ordre juridique est à la fois récent et différent selon les pays. Il est récent d'abord parce que, au départ, l'Europe se construit comme espace économique « géré » par les moyens classiques du droit international, c'est-à-dire, des moyens

qui respectent la souveraineté des Etats et donc leur ordonnancement juridique. C'est encore sur cette base que se font les premiers élargissements de l'Europe dans les années 1970. Puis, progressivement, l'Europe va s'occuper d'autres sujets – politique des visas, droits fondamentaux,…- et ses instruments vont prendre leur autonomie par rapport au droit international et se rapprocher, sans s'y confondre, des instruments propres au droit « interne ». A ce passage d'une Europe économique à une Europe politique, correspond le moment où se pose, avec une conscience nouvelle, la question de la position des droits nationaux au regard d'un droit européen qui couvre des domaines de plus en plus nombreux et où ils avaient jusqu'alors une position de quasi monopole.

Par voie de conséquence, ce basculement est aussi récent car l'ordre communautaire est rentré dans l'ordre interne sans que les traités qui instituaient cet ordre communautaire aient été soumis à un contrôle de constitutionnalité. Ce n'est donc que dans les années 1990, à l'occasion des traités de Maastricht et Amsterdam, que s'est posée, pour les pays fondateurs de l'Europe, la question des rapports entre leur constitution nationale et les traités européens. Sous l'effet, souvent, des décisions des Cours constitutionnelles – France, Allemagne, Espagne,… - les constitutions des différents Etats européens ont ainsi été modifiées pour permettre l'intégration de ces traités.

Cette question de « l'euro compatibilité » des constitutions nationales est sans doute un peu différente pour les pays qui ont adhéré dans les années 1980 et plus encore pour les pays actuellement candidats à l'adhésion. D'abord parce qu'ils savent l'importance de la production normative européenne, son effet sur les droits nationaux et la dimension politique de la construction européenne. Ensuite, parce que, précisément dans leur volonté de montrer leur capacité à rejoindre l'Europe, ils ont, préventivement, mis leur droit national en conformité avec les exigences européennes. En particulier, leurs constitutions nationales ont pu être rédigées en connaissance des traités ou, comme en Roumanie, être modifiées pour devenir euro compatibles et convaincre ainsi de la détermination européenne de ces Etats.

Quel que soit le moment où elle se pose, la question du conflit possible entre droit national et droit communautaire, entre droits fondamentaux et droit communautaire dérivé, entre champs de compétences transférées et excès de pouvoir communautaire est « vécue » aujourd'hui par toutes les Cours constitutionnelles avec une conscience particulièrement aiguë. Conscience d'avoir à « gérer » une question qui peut faire exploser le processus d'intégration européenne, conscience d'avoir à « gérer » une question qui n'est pas seulement juridique mais qui est aussi pleinement culturelle et politique.

II. L'enjeu politique : la constitution de l'Europe

L'avenir de l'Europe : les stratégies prudentes des Cours constitutionnelles

Du mode de règlement des relations entre constitution nationale et traité européen dépend tout simplement l'avenir de l'Europe en tant qu'entité politique constituée. Le dilemme, éminemment politique, se présente de la manière suivante : ou bien les Cours constitutionnelles contrôlent la constitutionnalité des actes communautaires, et en particulier des actes communautaires de droit dérivé, et alors il n'y a plus d'Europe, chaque cour nationale pouvant donner sa propre interprétation de la conformité à la constitution d'un acte de droit dérivé ; ou bien les Cours constitutionnelles ne contrôlent pas les actes de droit communautaire et alors il n'y a plus d'Etat souverain maître de son droit.

Face à ce dilemme, la Cour de Justice de Communauté Européenne a très tôt fixé le principe par ses arrêts Van Gend En Loos (1963), Costa (1964) et Handelsgesellschaft (1970) en décidant que « l'invocation d'atteintes portées soit aux droits fondamentaux tels qu'ils sont formulés dans la constitution d'un Etat membre soit aux principes d'un système constitutionnel national ne saurait affecter la validité d'un acte communautaire ou son effet sur le territoire d'un Etat membre ».

Face à ce dilemme qui, sous la plume des juges communautaires, se transforme presque en injonction faite aux Cours constitutionnelles de rendre les armes et de soumettre, les juges constitutionnels nationaux ont adopté un comportement « responsable ». La plupart des Cours, en effet, a choisi de « faire comme si », comme si, pour aucune des affaires venues en procès, la question d'un conflit entre une norme nationale et une norme communautaire se posait. A ce « bricolage », à ces petits arrangements avec le droit, d'autres Cours ont préféré le silence constructif qui permet d'intégrer dans le raisonnement juridictionnel le droit européen sans le dire, en partant de la compatibilité a priori des deux espaces normatifs.

Il est certaines Cours constitutionnelles qui, sans doute, ont choisi d'affronter directement la question d'un conflit possible entre droit national et droit communautaire. Ainsi, le Tribunal constitutionnel allemand a considéré qu'il pouvait exercer son contrôle dans deux hypothèses : celle où un acte communautaire dérivé porterait atteinte à un droit fondamental constitutionnellement mieux protégé, et celle où un acte dérivé ne s'inscrirait pas dans le champ des compétences transféré à l'Union par le traité. Mais il a pris la précaution de préciser que « tant que » ces excès de pouvoir ne seraient pas constatés, il n'exercerait pas de contrôle sur le droit communautaire dérivé. En d'autres termes, le contrôle est suspendu ; son cadre théorique est défini, sa menace est posée mais son exercice pratique est différé. Car le Tribunal constitutionnel allemand a eu la sagesse, jusqu'à aujourd'hui, de considérer que les normes communautaires ne portaient pas atteinte aux droits fondamentaux ni ne manifestaient un outre passement des compétences attribuées aux organes de l'Union européenne.

Il n'empêche que ces stratégies juridictionnelles d'évitement du conflit ne sont pas satisfaisantes et ne garantissent nullement contre tout risque de raidissement juridictionnel national. C'est pourquoi, il est certainement préférable que, très rapidement, la construction européenne abandonne l'instrument « traité » pour adopter celui de « constitution », replaçant ainsi la question de l'articulation des normes au sein d'un même ordre constitutionnel européen.

L'avenir de l'Europe : la stratégie de la constitution européenne

De quelque manière que l'on tourne les choses, l'articulation entre constitution et traité est toujours périlleuse, compliquée et conflictuelle. Il n'est pas possible de faire vivre durablement deux types d'entité politique, les Etats d'un côté, l'Union européenne de l'autre, sur la base de deux instruments juridiques aussi différents que la constitution et le traité. La situation actuelle de l'Europe est en effet aujourd'hui celle d'un décalage toujours plus grand entre un droit de plus en plus intégré au niveau européen par le jeu des traités et du droit dérivé, et une légitimité politique « désintégrée », éclatée entre les différentes constitutions nationales.

Ce décalage est dangereux pour l'Europe et il convient en conséquence de le réduire par le seul acte capable de donner au droit européen sa légitimité politique, à savoir une constitution européenne. Une constitution est, en effet, cet acte par lequel les peuples expriment leur souveraineté en décidant des valeurs de leur vivre ensemble et des institutions qui leur donnent forme. Mais, outre cette fonction démocratique, une constitution européenne aurait également

une fonction d'ordre. Qu'il existe des problèmes d'articulation de normes, que ces problèmes puissent même déboucher sur des conflits de normes n'a rien d'anormal ; c'est le travail quotidien des juges. Si ces problèmes et conflits prennent une dimension tragique lorsqu'ils portent sur les relations entre normes nationales et normes européennes, cela tient, pour l'essentiel, à deux raisons. La première est politique en ce que ce conflit-là est représenté sur le mode de la « guerre » entre l'Etat Nation, lieu d'exercice de la démocratie où le droit puiserait sa légitimité, et une « chose » supra nationale, espace innommé où le droit s'inventerait dans les bureaux : donner raison au droit communautaire sur le droit national fait toujours courir le risque d'être soupçonné de vouloir défaire le national alors que l'inverse est accueilli comme le témoignage naturel de l'attachement au droit de « son » pays. Pour faire bref : ou traître à sa patrie, ou héros national ! La seconde raison est juridique en ce qu'un conflit entre normes communautaires et normes nationales n'est pas un simple conflit de normes mais un conflit entre deux ordres juridiques obéissant chacun à un principe d'ordre, le traité pour l'ordre communautaire, la constitution pour l'ordre national. Or, si le traité est évidemment premier dans l'ordre communautaire, il est, théoriquement, second dans l'ordre national où la première place est évidemment occupée par la constitution. En d'autres termes, le principe d'un règlement de ce type de conflit, c'est-à-dire, non pas d'un conflit entre deux catégories de normes mais entre deux ordres juridiques répondant chacun à des exigences hiérarchiques différentes mais qui s'intègrent, est difficile à constituer.

Une constitution européenne peut fournir ce principe de règlement. Non parce qu'elle supprimerait comme par enchantement tous les conflits, mais parce qu'elle les resituerait au sein d'un même ordre, l'ordre constitutionnel européen. Il n'y aurait plus deux ordres qui s'affrontent, celui des traités et celui des constitutions nationales, mais simplement des normes à concilier dans la logique d'harmonisation de l'ordre juridique européen commandée par les principes de la constitution européenne. Sans compter l'apport de légitimité démocratique qu'elle apporterait aux productions juridiques européennes en constituant – dans tous les sens du terme – l'Europe en nouveau lieu d'exercice de la démocratie.

QUESTIONNAIRE ON CONSTITUTIONAL COURTS AND EUROPEAN INTEGRATION

States' domestic legal systems are no longer made up only of legal rules generated by the national public authorities; they now include legal rules from treaties negotiated between states and legal rules from supra-national bodies.

Accordingly, a key current problem is that of co-ordinating national and supranational legal rules within States' legal systems, particularly national legal texts (Constitution, laws, decrees) and European texts (Rome Convention, EU treaties, subordinate EU legislation). National judges, especially constitutional judges, clearly have to "manage" this co-ordination when dealing with cases that relate both to national legal rules and to European and/or EU texts.

The seminar "Constitutional courts and European integration" is specifically aimed at identifying the various means by which constitutional judges reconcile constitutional law and European law. These methods depend on the way in which European legal rules are integrated into the domestic legal system (I), the way in which Constitutional Court decisions take account of European law (II) and the way in which Constitutional Courts integrate the rules of European law into their organisation and operations (III).

I. Integration of European legal rules into the domestic legal system

1. What is the procedure for integrating European and/or EU treaties into the domestic legal system?

a. Is the ratification procedure provided for in the Constitution?
b. What does this procedure involve?
c. Are European and/or EU treaties published?
d. If so, where? (Official Journal, Official Bulletin, the press, etc)

2. What is the status of European and/or EU texts in the domestic legal system?

a. Is this status defined by the Constitution, or does it result from case-law?
b. Where do European and/or EU treaties fit into the hierarchy of legal texts?

3. (For member states of the European Union) What is the status of subordinate EU legislation (regulations and directives) in the national legal system?

a. Is this status defined by the Constitution or does it result from case-law?
b. Where does subordinate EU legislation fit into the hierarchy of legal texts? (is it on the same level as the legislation or the Constitution, does it take precedence over the Constitution, etc).

4. Does the Constitutional Court have jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution?

a. Is this supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise this supervision? By what decision? Have there been changes in case-law in this area?
c. Which bodies are authorised to refer cases to the Court in this area?
d. Must such a referral occur before the European and/or EU treaty in question is ratified, or may it occur after ratification?
e. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

5. Does the Constitutional Court have jurisdiction for supervising compatibility between legislation and European and/or EU treaties?

a. Is such supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise this supervision?
c. Which authorities are entitled to refer cases to the Court in this field?
d. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

6. (For member states of the European Union) Does the Constitutional Court have jurisdiction for supervising the conformity of subordinate EU legislation (regulations, directives) with the Constitution?

a. Is such supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise such supervision?
c. Which bodies are entitled to refer cases to the Constitutional Court in this area?
d. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of subordinate EU legislation with the Constitution?

7. Was admission to the Council of Europe dependent on a series of state undertakings (Parliamentary Assembly Order 488 of 1993, observance of which is subject to supervision by the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee) concerning the Constitutional Court's organisation, functioning, composition or case-law?

a. What were the terms of those undertakings?
b. Have those undertakings been observed?
c. What changes have been made to the status of the constitutional court or to its case-law?

II. European integration and constitutional case-law

1. Does the Constitutional Court have a department that ensures efficient and rapid access to the judgments handed down by the European courts (Court of Justice and/or European Court of Human Rights) and to texts of subordinate EU legislation?

2. In its reasoning, does the Constitutional Court take account of the case-law of the Court of Justice and/or the European Court of Human Rights? If so, in what way:

a. as a primary consideration (the European case-law serves as the basis for the Constitutional Court's interpretation), or as a complementary consideration (the European case-law reinforces the Constitutional Court's interpretation)?
b. Does the European case-law appear in the rapporteurs' conclusions or in the body of judgments?

3. Has the Constitutional Court already reversed or amended its case-law following a judgment by the European Court of Human Rights?

a. Did the relevant judgement condemn the national authorities, or those of another member state of the Council of Europe?
b. What were the terms of the European Court's judgment?
c. Before the European Court's judgment, was there opposing and established Constitutional Court case-law in the relevant area?
d. How was this case-law reversed or amended? Which body effected the referral?

4. Has the Constitutional Court already reversed or amended its case-law following a judgment by the Court of Justice of the European Communities?

a. Did the relevant judgment condemn the national authorities, or those of another member state of the European Union?
b. What were the terms of the Court of Justice's judgment?
c. Before the Court of Justice judgment, was there opposing and established Constitutional Court case-law in the area?
d. How was this case-law reversed or amended? Which body effected the referral?

5. Has the Constitutional Court already reversed or amended its case-law following the adoption of a European instrument by the Council of Europe?

a. What was the status of this instrument (recommendation from the Committee of Ministers or the Parliamentary Assembly, report by the European Commission for Democracy through Law ...)
b. What were the terms of this instrument?
c. How was this case-law reversed or amended? Which body effected the referral?

6. Has the Constitutional Court already reversed or amended its case-law following the enactment of a European Community legal measure?

a. What was the status of this measure? (directive, regulation, recommendation ...)
b. What were the terms of this measure?
c. How was this case-law reversed or amended? Which body effected the referral?

III. European integration and constitutional justice

1. Is the Constitutional Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?
a. Is there a precedent in the case-law of the European Court of Human Rights condemning the national authorities under Article 6 of the Convention, involving a trial before the Constitutional Court?
b. What were the grounds for this judgment?
c. Was this condemnation followed by amendment or changes to the organisation and/or functioning of the Constitutional Court? In what way?

2. Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

a. Has such a judicial review already been implemented?
b. What legal provisions govern this review?
c. Has a review already taken place following a previous constitutional court decision?
d. What were its terms?
e. What was the outcome of the procedure?

3. Has the Constitutional Court already applied Article 177 of the Maastricht treaty, concerning preliminary rulings, as provided for in the context of judicial co-operation between the national courts and the Court of Justice of the European Communities?

a. Of all the disputes submitted to the Constitutional Court, what is the proportion of preliminary rulings (as a percentage)?

b. Of all the disputes that have given rise to a preliminary ruling, what proportion of Constitutional Court judgments followed the opinion of the Court of Justice of the European Communities?

QUESTIONNAIRE SUR LES COURS CONSTITUTIONNELLES ET L'INTEGRATION EUROPEENNE

L'ordre juridique interne des Etats n'est plus fait seulement de normes produites par les pouvoirs publics nationaux ; il comprend désormais des normes issues de traités négociés entre les Etats et de normes issues d'instances supranationales.

Dès lors, un des problèmes aujourd'hui les plus importants est celui de l'articulation au sein de l'ordre juridique des Etats, des normes nationales et des normes supranationales et plus particulièrement des normes nationales (Constitution, lois, décrets) et des normes européennes (Convention de Rome, traités communautaires, droit communautaire dérivé). Les juges nationaux et en particulier les juges constitutionnels, se trouvent évidemment en situation de "gérer" cette articulation lorsqu'ils ont à connaître d'affaires qui relèvent à la fois de normes nationales et de normes européennes et/ou communautaires.

Le thème du séminaire "Cours constitutionnelles et intégration européenne" a précisément pour objet de déterminer les différentes modalités par lesquelles les juges constitutionnels font se rencontrer droit constitutionnel et droit européen. Ces modalités dépendent de la manière dont les normes européennes sont intégrées dans l'ordre juridique interne (I), de la manière dont les décisions des Cours constitutionnelles intègrent le droit européen (II), et de la manière dont les Cours constitutionnelles intègrent dans leur organisation et leur fonctionnement les règles du droit européen (III).

I. Intégration des normes européennes dans l'ordre juridique interne

1. Comment s'opère la réception des traités européens et/ou communautaires au sein de l'ordre juridique interne ?

a. La procédure de ratification est-elle prévue par la Constitution ?
b. En quoi consiste cette procédure ?
c. Les traités européens et/ou communautaires sont-ils rendus publics ?
d. Comment s'opère cette publication ? (Journal officiel, Bulletin officiel, presse, etc.)

2. Quel est le statut des traités européens et/ou communautaires dans l'ordre juridique national ?

a. Ce statut est-il précisé par la Constitution, ou résulte-t-il d'une décision jurisprudentielle ?
b. Quel est le rang des traités européens et/ou communautaires au sein de la hiérarchie des normes ? (Sont-ils situés au même rang que la loi, au même rang que la Constitution, à un rang supérieur à celui de la Constitution, etc.)

3. (Pour les Etats membres de l'Union européenne) Quel est le statut du droit communautaire dérivé (règlements et directives) dans l'ordre juridique national ?

a. Ce statut est-il précisé par la Constitution, ou résulte-t-il d'une décision jurisprudentielle ?
b. Quel est le rang du droit communautaire dérivé au sein de la hiérarchie des normes ? (Est-il situé au même rang que la loi, au même rang que la Constitution, à un rang supérieur à celui de la Constitution, etc.)

4. La Cour Constitutionnelle est-elle compétente pour contrôler la conformité des traités européens et/ou communautaires à la Constitution ?

a. Ce contrôle est-il prévu par la Constitution ?
b. Si non, la Cour s'est-elle autorisée ou refusée le pouvoir de contrôle ? Par quelle décision ? Y a-t-il eu une évolution de la jurisprudence en la matière ?
c. Quelles sont les autorités habilitées à saisir la Cour constitutionnelle dans ce domaine ?
d. Cette saisine s'opère-t-elle obligatoirement antérieurement à la ratification du traité européen et/ou communautaire en cause, ou peut-elle s'exercer postérieurement à cette ratification ?
e. Quel est le nombre de décisions rendues par la Cour constitutionnelle dans le cadre du contrôle de conformité des traités européens et/ou communautaires à la Constitution ?

5. La Cour Constitutionnelle est-elle compétente pour contrôler la conformité de la loi aux traités européens et/ou communautaires ?

a. Ce contrôle est-il prévu par la Constitution ?

b. Si non, la Cour s'est-elle autorisée ou refusée le pouvoir de contrôle ? Par quelle décision ? Y a-t-il eu une évolution de la jurisprudence en la matière ?
c. Quelles sont les autorités habilitées à saisir la Cour constitutionnelle dans ce domaine ?
d. Quel est le nombre de décisions rendues par la Cour constitutionnelle dans le cadre du contrôle de conformité des traités européens et/ou communautaires à la Constitution ?

6. (Pour les Etats membres de l'Union européenne) La Cour constitutionnelle est-elle compétente pour contrôler la conformité du droit communautaire dérivé (règlements, directives) à la Constitution ?

a. Ce contrôle est-il prévu par la Constitution ?
b. Si non, la Cour s'est-elle autorisée ou refusée le pouvoir de contrôle ? Par quelle décision ? Y a-t-il eu une évolution de la jurisprudence en la matière ?
c. Quelles sont les autorités habilitées à saisir la Cour constitutionnelle dans ce domaine ?
d. Quel est le nombre de décisions rendues par la Cour constitutionnelle dans le cadre du contrôle de conformité du droit communautaire dérivé à la Constitution ?

7. L'admission au sein du Conseil de l'Europe a-t-elle été conditionnée par une série d'engagements étatiques (directive 488 de l'Assemblée Parlementaire de 1993, dont le respect est soumis au contrôle du Comité des Ministres et de la Commission de suivi de l'Assemblée Parlementaire) concernant l'organisation, le fonctionnement, la composition ou la jurisprudence de la Cour Constitutionnelle ?

a. Quels étaient les termes de cet engagement ?
b. Ces engagements ont-ils été respectés ?
c. Quelles modifications ont-ils apporté quant au statut de la juridiction constitutionnelle ou à sa jurisprudence ?

II. Intégration européenne et jurisprudence constitutionnelle

1. La Cour constitutionnelle dispose-t-elle d'un service permettant l'accès efficace et rapide aux décisions rendues par les juridictions européennes (Cour de Justice et/ou Cour Européenne des Droits de l'Homme) et aux actes de droit communautaire dérivé ?

2. La Cour constitutionnelle intègre-t-elle dans son raisonnement, la jurisprudence de la Cour de Justice et/ou de la Cour Européenne des Droits de l'Homme ? Si oui, de quelle manière :

a. De manière principale (la jurisprudence européenne sert de fondement au raisonnement de la Cour constitutionnelle) ou de manière complémentaire (la jurisprudence européenne conforte le raisonnement de la Cour constitutionnelle) ?
b. La jurisprudence européenne figure-t-elle dans les conclusions des rapporteurs ou dans le corps même des décisions ?

3. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à une décision de la Cour Européenne des Droits de l'Homme ?

a. Cette décision consistait-elle en la condamnation des autorités nationales, ou celle d'un autre Etat membre du Conseil de l'Europe ?
b. Quels étaient les termes de la décision de la Cour européenne ?
c. Avant la décision de la Cour européenne, existait-il une jurisprudence contraire et constante de la Cour Constitutionnelle en la matière ?
d. Comment s'est opéré ce revirement ou cet aménagement de jurisprudence ? Quelle autorité était à l'origine de la saisine ?

4. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à une décision de la Cour de Justice des Communautés Européennes ?

a. Cette décision consistait-elle en la condamnation des autorités nationales, ou celles d'un autre Etat membre de l'Union européenne ?
b. Quels étaient les termes de la décision de la Cour de Justice ?
c. Avant la décision de la Cour de Justice, existait-il une jurisprudence contraire et constante de la Cour Constitutionnelle en la matière ?
d. Comment s'est opéré ce revirement ou cet aménagement de jurisprudence ? Quelle autorité était à l'origine de la saisine ?

5. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à l'édiction d'un acte européen par le Conseil de l'Europe ?

a. Quel était le statut de cet acte ? (recommandation du Comité des Ministres, de l'Assemblée Parlementaire, rapport de la Commission pour la Démocratie par le Droit…)
b. Quels étaient les termes de cet acte ?
c. En quoi a consisté ce revirement ou cet aménagement ? Quelle autorité était à l'origine de la saisine ?

6. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à l'édiction d'un acte juridique communautaire ?

a. Quel était le statut de cet acte ? (directive, règlement, recommandation…)
b. Quels étaient les termes de cet acte ?
c. En quoi a consisté ce revirement ou cet aménagement ? Quelle autorité était à l'origine de la saisine ?

III. Intégration européenne et justice constitutionnelle

1. La Cour Constitutionnelle est-elle liée par les règles du procès équitable, telles qu'établies à l'article 6 de la Convention Européenne des Droits de l'Homme ?

a Existe-t-il un précédent jurisprudentiel de la Cour européenne de Strasbourg, condamnant les instances nationales au titre de l'article 6 de la Convention, dans le cadre d'un procès devant la juridiction constitutionnelle ?

b. Quels en étaient les motifs ?

c. Cette condamnation a-t-elle eu pour conséquence la modification ou l'aménagement de l'organisation et/ou du fonctionnement de la Cour Constitutionnelle ? De quelle manière ?

2. Existe-t-il des règles ou pratiques procédurales consistant en la révision d'un procès à l'issue d'une condamnation par la Cour Européenne des Droits de l'Homme ?

a. Cette révision a-t-elle déjà été mise en oeuvre?

b. Quelle norme juridique réglemente cette révision ?

c. Une révision a-t-elle déjà été organisée au terme d'une jurisprudence constitutionnelle ?

d. Quelle en a été les termes ?

e. Quelle a été l'issue du procès ?

3. La Cour Constitutionnelle a-t-elle déjà fait application de l'article 177 du Traité de Maastricht relatif au recours préjudiciel, prévu dans le cadre de la coopération juridictionnelle entre les cours nationales et la Cour de Justice des Communautés Européennes?

a. Quelle est, en pourcentage, la part des recours préjudiciels sur l'ensemble des litiges soumis à la Cour Constitutionnelle ?

b. Quelle est, dans l'ensemble des litiges ayant fait l'objet d'un recours préjudiciel, la part des décisions de la Cour Constitutionnelle ayant suivi l'avis de la Cour de Justice des Communautés Européennes ?

BULGARIA

Mr Hristo DANOV,
Chairman, Constitutional Court

I. Integration of European legal rules into the domestic legal system

1. What is the procedure for integrating European and/or EU treaties into the domestic legal system?

a. Is the ratification procedure provided for in the Constitution?

The procedure for integrating European and/or EU treaties into the domestic legal system requires the observance of the procedure provided for by the Bulgarian Constitution.

b. What does this procedure involve?

The procedure involves a ratification of the treaty in question by the National Assembly in the same way as other normative acts are promulgated.

c. Are European and/or EU treaties published?

All European and treaties once ratified by the National assembly are published.

d. If so, where? (Official Journal, Official Bulletin, the press, etc)

They are published in the same way as the other normative acts of the National assembly in the Official gazette.

2) What is the status of European and/or EU texts in the domestic legal system?

a. Is this status defined by the Constitution, or does it result from case-law?

Art 5, subsection 4 of the Constitution of the Republic of Bulgaria provides that international treaties, ratified in accordance with the rules set up by the Constitution, published and have come into force for the Republic of Bulgaria, constitute a part of the internal Law of the Country.

b. Where do European and/or EU treaties fit into the hierarchy of legal texts?

They have a prevalence to the norms of the internal laws which are in contradiction with them.

3) (For member states of the European Union) What is the status of subordinate EU legislation (regulations and directives) in the national legal system?

Not applicable.

4) Does the Constitutional Court have jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution?

a. Is this supervision provided for in the Constitution?

This supervision is provided for by Art.149, subsection 4 of the Constitution of the Republic of Bulgaria.

b. If not, has the Court asserted or disclaimed its power to exercise this supervision? By what decision? Have there been changes in case-law in this area?

Under Art. 150, a reference to the Constitutional Court as to matters set out in Art. 149 subsection 4 may be made by:

- At least one-fifth of the members of Parliament;
- The President of the Republic;
- The Council of Ministers;
- The Supreme Court of Cassation;
- The Supreme Administrative Court;
- The Attorney General.

d. Must such a referral occur before the European and/or EU treaty in question is ratified, or may it occur after ratification?

The reference should be filed with the Constitutional Court prior to its ratification – Art.149, subsection 4 of the Constitution.

5) Does the Constitutional Court have jurisdiction for supervising compatibility between legislation and European and/or EU treaties?

a. Is such supervision provided for in the Constitution?

As already stated in point 2-b above the European and/or EU treaties have predominance over the internal Law in all cases where they contradict them, therefore the question is not applicable.

b. If not, has the Court asserted or disclaimed its power to exercise this supervision?

See point 3-b above.

6. (For member states of the European Union) Does the Constitutional Court have jurisdiction for supervising the conformity of subordinate EU legislation (regulations, directives) with the Constitution?

Not applicable

7) Was admission to the Council of Europe dependent on a series of state undertakings (Parliamentary Assembly Order 488 of 1993, observance of which is subject to supervision by the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee) concerning the Constitutional Court's organisation, functioning, composition or case-law?

a. What were the terms of those undertakings?

In 1992 the Bulgarian Government undertook to sign and ratify the European Convention on Human Rights, including the right of individual application to the European Commission of Human Rights (Article 25 of the Convention), and also the compulsory jurisdiction of the European Court of Human Rights (Article 46).

b. Have those undertakings been observed?

The Bulgarian Government observed all these undertakings and all relevant documents have been duly ratified and constitute the integral part of the domestic legal system.

c. What changes have been made to the status of the Constitutional Court or to its case-law?

The status of the Bulgarian Constitutional Court is determined by the Constitution of the Republic of Bulgaria.

II. European integration and constitutional law

1) Does the Constitutional Court have a department that ensures efficient and rapid access to the judgments handed down by the European courts (Court of Justice and/or European Court of Human Rights) and to texts of subordinate EU legislation?

No reply

2) In its reasoning, does the Constitutional Court take account of the case-law of the Court of Justice and/or the European Court of Human Rights? If so, in what way:

a. as a primary consideration (the European case-law serves as the basis for the Constitutional Court's interpretation), or as a complementary consideration (the European case-law reinforces the Constitutional Court's interpretation)?

According to the problems set up for handing down a decision. In some cases it serves as the basis for the decision, and in other cases it is referred to only as a complementary consideration.

b. Does the European case-law appear in the rapporteurs' conclusions or in the body of judgments?

The reference to the case-law of the said courts may appear in the ruling of the first phase of the case where its admissibility is discussed or later in the decision itself. There are no rigidly set rules on that point. It depends on the case itself.

3) Has the Constitutional Court already reversed or amended its case-law following a judgment by the European Court of Human Rights?

a. Did the relevant judgement condemn the national authorities, or those of another member state of the Council of Europe?

As has already been stated above, there are no provisions for the Constitutional Court of the Republic of Bulgaria to be approached with a constitutional complaint by individual citizens, and therefore there is no precedent in practice of the Constitutional Court changing its decision in accordance with a judgment of the European Court of Human Rights.

The defence and protection of the individual human rights of the Bulgarian citizens is provided by the courts of law with general jurisdiction.

4. Has the Constitutional Court already reversed or amended its case-law following a judgment by the Court of Justice of the European Communities?

The question is answered in the preceding points.

III. European integration and constitutional justice

1) Is the Constitutional Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?

a. Is there a precedent in the case-law of the European Court of Human Rights condemning the national authorities under Article 6 of the Convention, involving a trial before the Constitutional Court?

There is no precedent in which the European Court of Human Rights has condemned the Bulgarian national authorities under Article 6 of the Convention on a matter involving a trial before the Constitutional Court of the Republic of Bulgaria. As it has already been explained, no such trial may be initiated before the Constitutional Court of the Republic of Bulgaria.

2) Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

a. Has such a judicial review already been implemented?

Since the subject matter of the Constitutional Court's activities has no connection with the problems involving violations of the human rights of citizens, there are no rules or practices for a judicial review of the judgments of the Constitutional Court.

3) Has the Constitutional Court already applied Article 177 of the Maastricht treaty, concerning preliminary rulings, as provided for in the context of judicial co-operation between the national courts and the Court of Justice of the European Communities?

a. Of all the disputes submitted to the Constitutional Court, what is the proportion of preliminary rulings (as a percentage)?

The procedure of each case brought before the Constitutional Court for its resolution consists of two phases. The first is concerned with its admissibility: the Court investigates the standing of the party that has filed the petition and whether the problems raised in it fall into the Constitutional Court's jurisdiction. Where the Court is satisfied that the petition meets the requirements, rules that the case should be adjourned and decides which governmental or non-government organisations are interested in the resolution of the problems in the petition for judicial review and adds them as parties in the case. The Court sets a time-limit in which those parties are required to state their opinion in writing on the case. After that time limit expires, the case is set for trial.

In the second phase the problems to be resolved are dealt with in substance and in great depth. After thorough deliberation of all the problems in the petition, the Constitutional Court delivers its decision.

b. Of all the disputes that have given rise to a preliminary ruling, what proportion of Constitutional Court judgments followed the opinion of the Court of Justice of the European Communities?

Very seldom, since the competence of the Constitutional Court of the Republic of Bulgaria is connected mainly with the problems of the conformity of the general laws with the Constitution. As already stated, the Court has no authority to decide on problems connected with conflicts between the general laws and to deal with constitutional complaints brought by citizens, which explains why there are so few cases involving judgments of the Court of Justice the European Communities.

REPUBLIQUE TCHEQUE

M. Jiří MALENOVSKÝ,
juge à la Cour constitutionnelle

I. Intégration des normes européennes dans l'ordre juridique interne

1. Comment s'opère la réception des traités européens et/ou communautaires au sein de l'ordre juridique interne ?

La Constitution de la République tchèque (ci-après la „R.T.“) de 1992 a été récemment modifiée, de façon substantielle dans ses dimensions „internationales“ et „européennes“, par la Loi constitutionnelle n° 395/2001 du Journal officiel (ci-après le „J.O.“) du 18 octobre 2001 qui est entrée en vigueur le 1er juin 2002. Par l'intermédiaire de ces amendements apportés au texte constitutionnel, l´espace juridique tchèque s´est davantage ouvert au droit international ; la conception moniste des relations existant entre le droit international et le droit tchèque a été confirmée et les dispositions nécessaires à l´adhésion de la R.T. à l´Union européenne ont été introduites dans la Constitution.

Conformément à la Constitution en vigueur avant sa révision le 1er juin 2002, seuls les traités internationaux relatifs aux droits de l´homme et aux libertés fondamentales étaient intégrés dans le droit tchèque et, selon la doctrine et la jurisprudence dominante, ils étaient mis sur un pied d´égalité avec les lois constitutionnelles. Par contre, il était nécessaire de reproduire le contenu de tous les autres traités et conventions internationales dans des mesures législatives voire dans d'autres sources formelles du droit tchèque.

Dès le 1er juin 2002, la catégorie constitutionnelle spécifique des traités relatifs aux droits de l´homme et aux libertés fondamentales a été supprimée et ce sont tous les „traités internationaux publiés dont la ratification a été autorisée par le Parlement et qui lient la République tchèque“ qui font désormais partie de l´ordre juridique interne (Art. 10 de la Constitution amendée).

a. La procédure de ratification est-elle prévue par la Constitution ?

Oui, la procédure de ratification est prévue par la Constitution de la R.T. C´est le Président de la République qui négocie et ratifie les traités internationaux ; il peut, néanmoins, déléguer leur négociation au gouvernement [Art. 63, para 1, lettre b)].

b. En quoi consiste cette procédure ?

Le Président de la R.T. a délégué à son gouvernement le pouvoir de négocier les traités internationaux. Les plus importants sont soumis au régime de ratification. La majorité de ceux-ci requière l´autorisation du Parlement comme condition préalable à la ratification. Cette autorisation est demandée dans les traités internationaux suivants:

a. ceux régissant les droits et les obligations des personnes,
b. d´alliance, de paix et autres traités politiques,

c. ceux qui accordent le statut d'Etat membre à la République tchèque dans une organisation internationale,
d. économiques à caractère général,
e. ceux relatifs à d´autres affaires dont le régime est par prévu par la loi.

Par conséquent, en pratique, tous les traités européens et communautaires sont soumis au régime de ratification nécessitant une autorisation préalable du Parlement.

Toutefois, les modalités de vote au Parlement diffèrent en fonction du caractère du traité devant être ratifié. La majorité absolue des membres de la chambre des députés ainsi que la majorité des membres présents au Sénat sont exigées selon le texte constitutionnel. Ainsi, les traités européens édictés par le Conseil de l´Europe sont approuvés de cette manière (Art. 39 para 2 de la Constitution). En revanche, la majorité qualifiée des 3/5 des députés et des sénateurs est requise dans la procédure d´autorisation à l´égard d´un traité international par lequel certains pouvoirs des organes de la R.T. sont délégués à une organisation ou à une institution internationale (Art. 39 para 4 de la Constitution). Ainsi, les traités communautaires sont généralement soumis à cette procédure. D'ailleurs, dans le cas de traités internationaux réglementant la délégation des pouvoirs des organes de la R.T., la loi constitutionnelle peut prévoir que leur ratification requiert une autorisation exprimée par un référendum. Ce type de loi constitutionnelle régissant le référendum n´a pas encore été adoptée. Ce n´est qu´en raison de l'absence d´une telle loi constitutionnelle que ceux-ci pourront être soumis à l´autorisation du Parlement avant sa ratification (procédure subsidiaire).

c. Les traités européens et/ou communautaires sont-ils rendus publics ?

Oui.

d. Comment s'opère cette publication ? (Journal officiel, Bulletin officiel, presse, etc.)

A partir du 1er janvier 2000, conformément à la Loi n° 309/1999 publié au J.O., tous les traités internationaux en vigueur liant la R.T. sont intégralement publiés sous forme de communication du Ministère des Affaires Etrangères dans le Journal officiel des traités internationaux (Sbírka mezinárodních smluv), indépendamment de leur éventuelle ratification (certains traités moins importants peuvent être publiés sans leurs annexes). Ils sont publiés en tchèque et dans une des leurs versions originales (en principe en anglais). D´autres informations pertinentes relatives à la vie et à l´application de ces traités internationaux sont publiés dans le Journal officiel des traités internationaux.

Avant le 1er janvier 2000, les traités internationaux avaient été publiés dans un Journal officiel unique (avec les lois), uniquement en tchèque (notamment la Convention européenne sur les droits de l´homme). Même si certaines catégories de traités internationaux n´étaient pas soumises au régime de la publication obligatoire, tous les traités du Conseil de l´Europe liant la R.T. semblent, à présent, figurer dans le J.O. dans leur version intégrale (ce qui n´est pas le cas de certains traités relevant du système des Nations Unies).

La loi n° 309/1999 du J.O. exige, également, la publication de toutes les décisions contraignantes des organes internationaux et de celles des organisations internationales qui lient la R.T. (ayant une portée normative, bien évidemment).

2. Quel est le statut des traités européens et/ou communautaires dans l'ordre juridique national ?

a. Ce statut est-il précisé par la Constitution ou résulte-t-il d'une décision jurisprudentielle ?

Le statut des traités européens et communautaires dans l´ordre juridique tchèque est précisé par la Constitution. D'après l'Art. 10 de la Constitution, tous les traités internationaux publiés dont la ratification a été autorisée par le Parlement et qui lient la R.T. font partie de l´ordre juridique tchèque. Selon l´Art. 95 para 1 de la Constitution, le juge est lié dans ses décisions par la loi et par le traité international intégré dans l´ordre juridique.

b. Quel est le rang des traités européens et/ou communautaires au sein de la hiérarchie des normes ? (Sont-ils situés au même rang que la loi, au même rang que la Constitution, à un rang supérieur à celui de la Constitution, etc.)

Formellement, les traités européens et communautaires sont placés au même rang que la loi : conformément à l´Art. 95 para 1 de la Constitution, le juge est autorisé à apprécier la conformité d´une ordonnance ou d´un règlement à la loi ou à un traité international faisant partie de l´ordre juridique tchèque. Néanmoins, deux dispositions constitutionnelles privilégient explicitement les traités internationaux et communautaires par rapport aux lois nationales. Selon l´Art.10 de la Constitution, si le traité international intégré à l´ordre juridique national est en contradiction avec une loi, c'est le traité international qui s´applique (donc, dans tous les cas de conflit entre des règles législatives et conventionnelles ce sont ces dernières qui prévalent, la maxime lex posterior derogat priori est inapplicable en l'espèce). Selon l´Art. 1er para 2 de la Constitution, la « R.T. respecte les engagements qui lui incombent du droit international ». L´observation des traités internationaux est ainsi exigée par une règle de rang constitutionnel.

3. (Pour les Etats membres de l'Union européenne) Quel est le statut du droit communautaire dérivé (règlements et directives) dans l'ordre juridique national ?

a. Ce statut est-il précisé par la Constitution, ou résulte-t-il d'une décision jurisprudentielle ?

Le statut du droit communautaire dérivé dans l´ordre juridique tchèque n´est pas précisé explicitement par la Constitution. Par conséquent, le vide constitutionnel est comblé par la jurisprudence de la Cour Constitutionnelle. Deux raisons peuvent expliquer ce phénomène : la première est que le droit communautaire originaire (les traités) fait partie de l´ordre juridique tchèque, et la seconde vient de la Constitution qui reconnaît explicitement que „ par un traité international, certains pouvoirs des organes de la République tchèque peuvent être délégués à une organisation ou à une institution internationale " [Art. 10a) para 1].

b. Quel est le rang du droit communautaire dérivé au sein de la hiérarchie des normes ? (Est-il situé au même rang que la loi, au même rang que la Constitution, à un rang supérieur à celui de la Constitution, etc.)

Néant.

4. La Cour constitutionnelle est-elle compétente pour contrôler la conformité des traités européens et/ou communautaires à la Constitution ?

Oui. La Cour constitutionnelle de la R.T. est compétente pour contrôler la conformité des traités européens et communautaires à la Constitution. Elle n´a été dotée de cette compétence qu´à partir du 1er juin 2002.

a. Ce contrôle est-il prévu par la Constitution ?

Oui, le contrôle est prévu par la Constitution dans son Art. 87 para 2. Cette disposition a été introduite dans la Constitution par la Loi constitutionnelle no 395/2001. Le contrôle de constitutionnalité s'exerce sur 1) un traité international qui délègue certains pouvoirs des organes de la R.T. à une organisation ou à une institution internationale ; 2) tout traité international qui exige une autorisation du Parlement avant sa ratification [Art. 10a) et 49 de la Constitution].

b. Si non, la Cour s'est-elle autorisée ou refusée le pouvoir de contrôle ? Par quelle décision ? Y a-t-il eu une évolution de la jurisprudence en la matière ?

Avant le 1er juin 2002, la Cour constitutionnelle n´a jamais revendiqué ce pouvoir de contrôle.

c. Quelles sont les autorités habilitées à saisir la Cour constitutionnelle dans ce domaine ?

1. le Président de la République (voir § 71 para 1 de la Loi sur la Cour constitutionnelle)

2. une des Chambres du Parlement (l´Assemblée des députés ou le Sénat)

3. un groupe formé d´au moins 41 députés ou d´au moins 17 sénateurs.

d. Cette saisine s'opère-t-elle obligatoirement antérieurement à la ratification du traité européen et/ou communautaire en cause, ou peut-elle s'exercer postérieurement à cette ratification ?

La saisine de la Cour constitutionnelle s´opère obligatoirement avant la ratification du traité international ou européen.

En tenant compte du fait que cette compétence de la Cour constitutionnelle est nouvelle, la question de savoir si la Cour peut se prononcer sur la constitutionnalité des traités internationaux liant déjà la R.T. et donc sur la procédure de ratification achevée avant le 1er juin 2002 reste ouverte. Toutefois, la Constitution ne semble pas favorable à une telle extension des compétences de la Cour.

e. Quel est le nombre de décisions rendues par la Cour constitutionnelle dans le cadre du contrôle de conformité des traités européens et/ou communautaires à la Constitution ?

La Cour n´a pas encore été saisie de ce type de recours.

5. La Cour Constitutionnelle est-elle compétente pour contrôler la conformité de la loi aux traités européens et/ou communautaires ?

a. Ce contrôle est-il prévu par la Constitution ?

Avant le 1er juin 2002, ce contrôle a été explicitement prévu par la Constitution permettant d'apprécier la conformité des Lois aux traités internationaux relatifs aux droits de l´homme et aux libertés fondamentales. La Cour constitutionnelle était compétente pour abroger les lois ou certaines de ses dispositions si elles étaient contraires à un tel traité international.

A l´heure actuelle, ce type de contrôle n´est plus prévu dans la Constitution, car le pouvoir d´abrogation de la Cour constitutionnelle est désormais limité aux cas de non-conformité à l´ "ordre constitutionnel " [Art. 87 para 1 a) de la Constitution].

b. Si non, la Cour s'est-elle autorisée ou refusée le pouvoir de contrôle ? Par quelle décision ? Y a-t-il eu une évolution de la jurisprudence en la matière ?

La Cour constitutionnelle a récemment interprété l´Art. 87 para 1 a) comme lui accordant le pouvoir du contrôle de conventionnalité des lois (par rapport aux traités internationaux sur les droits de l´homme). Dans son arrêt du 25 juin 2002 rendu en assemblée plénière (Pl. ÚS 36/01), la Cour constitutionnelle a déclaré que la notion d´"ordre constitutionnel" devait être interprétée à la lumière de l´Art 1er para 2 de la Constitution (prévoyant le respect des engagements de droit international) et, par conséquent, que ladite notion devait aussi inclure les traités internationaux relatifs aux droits de l´homme et aux libertés fondamentales. En outre, la Cour constitutionnelle a précisé que même l´Art. 95 para 2 de la Constitution devrait être appréhendé conformément à cette interprétation élargie. Par conséquent, si un tribunal arrive à la conclusion que la loi applicable est contraire à un traité international relatif aux droits de l´homme et aux libertés fondamentales, il est obligé de saisir la Cour constitutionnelle de cette affaire.

Par conséquent, hormis le cas des traités sur les droits de l´homme, la Cour constitutionnelle n'est pas compétente en matière de contrôle de la conventionnalité des lois.

c. Quelles sont les autorités habilitées à saisir la Cour constitutionnelle dans ce domaine ?

Une demande d´abrogation d´une loi ou de certaines de ses dispositions peut être introduite par :

1. le Président de la République ;

2. un groupe d´au moins 41 députés ou un groupe d´au moins 17 sénateurs ;

3. la chambre de la Cour constitutionnelle en liaison avec l´examen d´une requête constitutionnelle ;

4. celui qui a introduit une requête constitutionnelle dans les conditions établies par la Loi sur la Cour constitutionnelle.

La Cour constitutionnelle peut alors procéder à l´abrogation de la disposition législative en cause si celle-ci est contraire à l´"ordre constitutionnel". Il reste à savoir si la Cour constitutionnelle va confirmer et consolider son interprétation du terme « ordre constitutionnel » donnée dans l´affaire 36/01 (plénière) (supra) c'est à dire confirmer que les traités internationaux relatifs aux

droits de l´homme et aux libertés fondamentales font partie de l´ordre constitutionnel. Une telle évolution de sa jurisprudence est envisageable.

d. Quel est le nombre de décisions rendues par la Cour constitutionnelle dans le cadre du contrôle de conformité des traités européens et/ou communautaires à la Constitution ?

Il n´existe pas de statistiques suffisamment précises, car, avant le 1er juin 2002, les traités internationaux relatifs aux droits de l´homme et aux libertés fondamentales avaient la même valeur juridique que les lois constitutionnelles. Par conséquent, il n'était pas nécessaire de différencier les traités internationaux sur les droits de l´homme des lois constitutionnelles dans l´exercice du pouvoir d´abrogation des lois.

6. (Pour les Etats membres de l'Union européenne) La Cour constitutionnelle est-elle compétente pour contrôler la conformité du droit communautaire dérivé (règlements, directives) à la Constitution ?

Néant.

7. L'admission au sein du Conseil de l'Europe a-t-elle été conditionnée par une série d'engagements étatiques (directive 488 de l'Assemblée Parlementaire de 1993, dont le respect est soumis au contrôle du Comité des Ministres et de la Commission de suivi de l'Assemblée Parlementaire) concernant l'organisation, le fonctionnement, la composition ou la jurisprudence de la Cour Constitutionnelle ?

Au moment de l´adhésion de la R.T. au Conseil de l´Europe (le 30 juin 1993), la Cour constitutionnelle n´avait pas encore été créée. Ce fait a été signalé par les rapporteurs de l´Assemblée parlementaire (doc. de l´AP no 6884 du 29 juin 1993) même si la Cour constitutionnelle a été mise en place 15 jours après l'adhésion de la RT (à la date du 15 juillet 1993).

II Intégration européenne et jurisprudence constitutionnelle :

1. La Cour constitutionnelle dispose-t-elle d'un service permettant l'accès efficace et rapide aux décisions rendues par les juridictions européennes (Cour de Justice et/ou Cour Européenne des Droits de l'Homme) et aux actes de droit communautaire dérivé ?

Chaque juge de la Cour constitutionnelle de la R.T. dispose de plusieurs juristes - assistants personnels qui préparent ses dossiers. Ils ont un accès libre à toute la jurisprudence de la Cour européenne des Droits de l´Homme regroupée dans la base de données des décisions de la CEDH sur internet (tous les assistants ont des ordinateurs individuels équipés d´un accès à internet).

En outre, une sélection des décisions importantes de la CEDH traduites en tchèque est régulièrement publiée dans une revue bimensuelle "Rozsudky a rozhodnutí Evropského soudu pro lidská práva" (Arrêts et Décisions de la CEDH), Prague, ASPI. Tous les numéros de celle-ci sont distribués à chaque juge de la Cour constitutionnelle de la R.T. par les bibliothécaires de la Cour. Les deux moyens d´accès à la jurisprudence de la CEDH sont utilisés, de manière différentes par les juges. De plus, la bibliothèque de la Cour dispose des décisions de la CEDH publiées dans le Recueil des arrêts et des décisions par la Maison d´édition Carl Heymanns ainsi que de celles éditées sous forme de cahiers qui sont mises à la disposition des juges et assistants.

La Cour constitutionnelle de la R.T. n´a pas encore développé un système complet d´accès à la jurisprudence de la CEJ et surtout aux actes de droit communautaire dérivé. Ceci dit, la bibliothèque de la Cour est dotée de toutes les décisions de la CEJ en allemand ("Sammlung der Rechtsprechung des Gerichtshofes") et de quelques unes en anglais ("Reports of Cases before the Court of Justice and the Court of First Instance").

2. La Cour constitutionnelle intègre-t-elle dans son raisonnement, la jurisprudence de la Cour de Justice et/ou de la Cour Européenne des Droits de l'Homme ? Si oui, de quelle manière :

Oui, pour ce qui est de la jurisprudence de la CEDH.

a. De manière principale (la jurisprudence européenne sert de fondement au raisonnement de la Cour constitutionnelle) ou de manière complémentaire (la jurisprudence européenne conforte le raisonnement de la Cour constitutionnelle) ?

Dans la plupart des affaires, la Cour le fait de manière complémentaire. Son raisonnement s'inspire principalement des dispositions constitutionnelles et ne recourt à la jurisprudence de la CEDH qu´afin de démontrer la conformité de celle-ci avec les conclusions de la Cour constitutionnelle.

Toutefois, dans certaines affaires, la jurisprudence de la CEDH sert de fondement au raisonnement de la Cour constitutionnelle. En général, il existe deux cas de figure :

1. soit ce sont des affaires auxquelles aucune disposition constitutionnelle n´est applicable mais qui ont été traitée par la CEDH;

2. soit ce sont des affaires dans lesquelles existe une discordance entre la situation constitutionnelle et la jurisprudence de la CEDH.

La Cour constitutionnelle a recouru à la jurisprudence de la CEJ dans de très rares affaires et de façon complémentaire (p.ex. l´arrêt dans l´affaire C 345/89 relatif à l´interprétation de l´Art. 5 de la Directive du Conseil du 9 février 1976 sur l´égalité des sexes en matière de conditions de travail ; l´affaire Hauer etc.).

b. La jurisprudence européenne figure-t-elle dans les conclusions des rapporteurs ou dans le corps même des décisions ?

La jurisprudence européenne figure, en général, dans les conclusions des rapporteurs et dans le corps des décisions de la Cour constitutionnelle tchèque.

3. La Cour constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à une décision de la Cour Européenne des Droits de l'Homme ?

Oui, dans deux grandes décisions de la Cour constitutionnelle:

1. l´arrêt du 17 janvier 2001 abrogeant le § 83 para 1 de la Loi sur les contraventions (publié sous le n° 52/2001 du J.o.) (ci-dessous la "première affaire")

2. l´arrêt du 27 juin 2001 abrogeant la Partie V de la Loi sur la procédure civile (publié sous le n° 276/2001 du J.o.) (ci-dessous la "deuxième affaire").

a. Cette décision consistait-elle en la condamnation des autorités nationales ou celle d'un autre Etat membre du Conseil de l'Europe ?

Les deux décisions précitées de la Cour constitutionnelle ont été inspirées par des arrêts de la CEDH condamnant une autre Partie contractante à la Convention européenne des Droits de l´Homme : (l´arrêt dans l´affaire Kadubec c. Slovaquie , Lauko c. Slovaquie de 1998, et Albert et le Compte de 1983).

b. Quels étaient les termes de la décision de la Cour européenne ?

Dans la "première affaire" : la qualification de l´infraction aux fins d´applicabilité de l´Art. 6 § 1 - n'exigeait pas d´examiner la gravité de la sanction en jeu car son manque de gravité ne faisait pas perdre à l´infraction son caractère pénal intrinsèque.

Dans la "deuxième affaire" : les organes administratifs sont soumis au contrôle a posteriori d´un organe judiciaire de pleine juridiction qui est compétent dans l'appréciation des faits ainsi que pour les questions de droit.

c. Avant la décision de la Cour européenne, existait-il une jurisprudence contraire et constante de la Cour constitutionnelle en la matière ?

Non.

S´agissant de la première affaire, la Cour constitutionnelle a abrogé les dispositions législatives qui ne permettaient pas l´examen judiciaire des décisions administratives prévoyant des amendes pécuniaires inférieures à deux mille couronnes tchèques. En se référant aux arrêts Lauko et Kadubec, la Cour constitutionnelle a abrogé les dispositions de la Loi relative aux contraventions alors que précédemment, elle se limitait à la critique de cette situation législative.

Concernant la deuxième affaire : conformément à l´ordre juridique tchèque, les décisions des organes administratifs n´avaient pas à être soumises au contrôle judiciaire des tribunaux de pleine juridiction, leur compétence étant limitée aux questions de droit. La Cour constitutionnelle a constaté que, même si ce contrôle judiciaire incomplet était conforme à la Constitution et à la Charte constitutionnelle des droits de l´homme, il était néanmoins contraire à l´Art. 6 § 1 de la Convention et à la jurisprudence de la CEDH.

Avant son arrêt du 27 juin 2001 et depuis 1996, la Cour constitutionnelle se limitait à critiquer cette situation législative en s'interdisant d'abroger les dispositions de la Loi sur la procédure civile en cause. Elle soulignait que cette solution adoptée en 1991 était provisoire en attendant la ratification de la Convention européenne par la Tchécoslovaquie.

d. Comment s'est opéré ce revirement ou cet aménagement de jurisprudence ? Quelle autorité était à l'origine de la saisine ?

L´aménagement de la jurisprudence a eu lieu quand la Cour constitutionnelle est passée de la critique de la situation législative à l´abrogation des dispositions législatives en cause.

Ce sont les requêtes des particuliers qui sont à l´origine des deux demandes d´abrogation des dispositions législatives. Dans la seconde affaire, la chambre de la Cour constitutionnelle elle-même s'est jointe à la demande des requérants.

4. La Cour constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à une décision de la Cour de Justice des Communautés Européennes ?

Néant.

5. La Cour constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à l'édiction d'un acte européen par le Conseil de l'Europe ?

Oui, partiellement.

a. Quel était le statut de cet acte ? (recommandation du Comité des Ministres, de l'Assemblée Parlementaire, rapport de la Commission pour la Démocratie par le Droit…)

Etaient en cause la résolution de l´Assemblée parlementaire n° 1096(1996) sur les mesures de démantèlement de l´héritage des anciens régimes communistes et la recommandation n° (2000)6 du Comité des Ministres relative au statut des agents publics.

b. Quels étaient les termes de cet acte ?

Ils concernaient les principes directeurs à respecter pour que les lois de lustration et les mesures administratives analogues soient conformes aux exigences d´un Etat de droit.

c. En quoi a consisté ce revirement ou cet aménagement ? Quelle autorité était à l'origine de la saisine ?

La Cour constitutionnelle a été appelée, en 2001, à se prononcer sur la question de la constitutionnalité des lois de "lustration" (n° 451/1991 et 279/1992 publié au J.O.).

Cette loi avait déjà été examinée par la Cour constitutionnelle tchécoslovaque en 1991 et certaines de ses dispositions avaient été alors abrogées.

La Cour constitutionnelle tchèque s´est référée au raisonnement de son prédécesseur tchécoslovaque complété par ses conclusions tirées de l´examen des lois de lustration notamment à la lumière des deux actes précités du Conseil de l´Europe. Dans son arrêt du 5 décembre 2001, elle a constaté que les deux lois étaient conformes à la Constitution, à la Charte des droits et libertés fondamentales aux actes et à la jurisprudence européenne en remarquant que la discrimination existant dans les lois de lustration restait discutable. Elle a recommandé d´adopter dans les meilleurs délais une loi sur la fonction publique remplaçant les lois de lustration.

Il est à noter qu'en matière de lois de lustration, la Cour constitutionnelle a été saisie d´un groupe de députés du Parlement de la R.T.

6. La Cour constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à l'édiction d'un acte juridique communautaire ?

Néant.

III Intégration européenne et justice constitutionnelle :

1. La Cour constitutionnelle est-elle liée par les règles du procès équitable, telles qu'établies à l'article 6 de la Convention Européenne des Droits de l'Homme ?

Oui.

a Existe-t-il un précédent jurisprudentiel de la Cour européenne de Strasbourg, condamnant les instances nationales au titre de l'article 6 de la Convention, dans le cadre d'un procès devant la juridiction constitutionnelle ?

Oui. L´affaire Krčmář et autres c. la République tchèque (requête n° 3537/97), arrêt du 3 mars 2000.

b. Quels en étaient les motifs ?

La Cour constitutionnelle a demandé une preuve supplémentaire (elle a demandé et obtenu divers documents de plusieurs institutions) sans les communiquer aux parties au litige. Ces dernières ont donc été privées de la possibilité de faire des observations sur cette preuve. Par conséquent, la Cour constitutionnelle n´a pas respecté le droit à un procès équitable.

c. Cette condamnation a-t-elle eu pour conséquence la modification ou l'aménagement de l'organisation et/ou du fonctionnement de la Cour Constitutionnelle ? De quelle manière ?

Non.

2. Existe-t-il des règles ou pratiques procédurales consistant en la révision d'un procès à l'issue d'une condamnation par la Cour Européenne des Droits de l'Homme ?

Non. Les requérants Krčmář et autres (supra) ont saisi la Cour constitutionnelle d´une demande de réouverture de la procédure après la condamnation de la R.T. par la CEDH. Celle-ci a déclaré leur requête irrecevable en janvier 2001 par une décision prise en chambre. Elle a rejetée la requête en se fondant sur le fait que la Loi réglementant la Cour constitutionnelle ne prévoit pas ce type de procédure (réouverture). En outre, elle a abordé, dans son raisonnement,, l'hypothèse de l'applicabilité de la Recommandation n° R(2000)2 du Comité des Ministres du Conseil de l´Europe à propos du réexamen ou de la réouverture de certaines affaires au niveau interne provoqués par les arrêts de la CEDH. Elle en a conclu que la condition i) de la Recommandation ("la partie lésée continue de souffrir des conséquences très graves... qui ne peuvent être modifiées que par le réexamen ou la réouverture") n´était pas remplie.

Le gouvernement est conscient des carences existantes dans la législation tchèque mise en lumière par la Recommandation n° (2000)2. Une initiative visant à combler ces lacunes est actuellement envisagée.

3. La Cour constitutionnelle a-t-elle déjà fait application de l'article 177 du Traité de Maastricht relatif au recours préjudiciel, prévu dans le cadre de la coopération juridictionnelle entre les cours nationales et la Cour de Justice des Communautés Européennes?

Néant.

ESTONIA

Mr Uno LÖHMUS,
Chief Justice, Supreme Court

I. Integration of European legal rules into the domestic legal system

1) What is the procedure for integrating European and/or EU treaties into the domestic legal system?

a. Is the ratification procedure provided for in the Constitution?
b. What does this procedure involve?
c. Are European and/or EU treaties published?
d. If so, where? (Official Journal, Official Bulletin, the press, etc)

Estonian constitutional system follows the continental European tradition and has developed strict hierarchy of legal norms. Following the monist tradition of international law, enforced international agreements have special status in Estonian legal system.

In the hierarchy of legal norms the Constitution[1] is on the highest level, on the second level are international agreements and on the third laws.[2]

Accession to and conclusion of international treaties is regulated in Chapter IX of the Constitution. On the basis of this a chapter on law specifying the area - *Foreign Relations Act*[3] - was adopted.

Under this act, the procedure for integrating international treaties to Estonian legal system includes three main stages:

- Signing;
- Ratification;
- Enforcement and publication.

The right to **sign** international agreements as specified in the Foreign Relations Act (§ 21) is vested in:

- the President of the Republic;
- the Prime Minister or Minister of Foreign affairs;

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[1] *Eesti Vabariigi Põhiseadus (Constitution of the Republic of Estonia), adopted 28.06.1992, enforced 03.07.1992*

[2] *§ 123 of the Constitution:*

The Republic of Estonia shall not enter into international treaties which are in conflict with the Constitution.

If laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply.

[3] *Välissuhtlemisseadus, adopted 28.10.1993, RT 1992, 72/73, 1020*

- the Head of Diplomatic representation;
- person having a special letter of authorisation.

Signing international treaties is the first step in introducing an international agreement to Estonian legal system. Signing of the treaty is followed by the enforcement stage without which no treaty enters the Estonian legal system.

Ratification of international instruments is possible on two levels.

Less important agreements are ratified by an order of the Government of the Republic (intergovernmental agreements). The above-mentioned order serves as the enforcement act for bilateral and multilateral (closed) treaties. Although rare in practice, some multilateral treaties are enforced by the government by its regulation (general instrument). Both orders and regulations are enacted according to the same procedure as other government instruments.

The ratification acts of the more important treaties are adopted by the *Riigikogu* (Estonian Parliament). § 121 of the Constitution lists five cases when a treaty is ratified by the *Riigikogu*:

- if the treaty alters state borders;
- if implementation of the treaty requires the passage, amendment or repeal of Estonian laws;
- if the treaty provides that the Republic of Estonia joins international organisations or unions;
- if the Republic of Estonia assumes military or financial obligations by the treaty;
- if the treaty itself prescribes ratification.

Although the Constitution and Foreign Relations Act do not specify the instrument by which the *Riigikogu* should enforce treaties, the enforcement is carried out by an act that is processed according to the same procedure as the other acts.[4] All necessary information concerning the implementation of the treaty and reservations to or interpretative declarations of the treaty are contained in the enforcement act. The text of the treaty is attached to the enforcement act. Enforcement acts serve as individual legal instruments from the substantive aspect and from the constitutional aspect, the *Riigikogu* could also enforce treaties by resolutions.

In accordance with general legislative procedure, the enforcement acts are **proclaimed** by the President of the Republic (§ 107 of the Constitution). Within that procedure, the President has the right of suspensive veto. The President may refuse to proclaim a law passed by the Riigikogu and, within fourteen days after its receipt, and return the law, together with his or her reasoned resolution, to the Riigikogu for a new debate and decision. If the Riigikogu again passes the law which is returned to it by the President of the Republic, unamended, the President of the

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[4] *In Estonian constitutional law, a distinction is made between constitutional and simple laws. The former are the laws specified in subsection 104 (2) of the Constitution, for the passing of which a majority of the membership of the Riigikogu, i.e. over 51 votes is required. The list contains, inter alia, "laws pertaining to foreign and domestic borrowing, and to financial obligations of the state". The question of the number of votes needed for the enforcement law of the Riigikogu became particularly burning in relation to the ratification of the WTO Agreement or Marrakesh Agreement in the Riigikogu on 29 September 1999. The Riigikogu adopted the ratification law by 48 votes in favour. The opposition claimed that at least 51 votes should have been given in favour to pass the law as the Agreement clearly provides for the making of a contribution to the Working Capital Fund and the payment of the membership fee. The Legal Chancellor to whom some members of the parliament made an inquiry has not given an adequate answer concerning the constitutionality of such act.*

Republic shall proclaim the law or shall propose to the Supreme Court to declare the law unconstitutional. If the Supreme Court declares the law constitutional, the President of the Republic shall proclaim the law.[5]

On the international arena, instruments of ratification of treaties that require ratification are exchanged or, in the case of multilateral treaties, deposited with the depositary. The country is usually represented by the head of state. In Estonia, the Constitution also provides that the President of the Republic shall sign instruments of ratification (§ 78 (6) of the Constitution). The President of the Republic has, due to his or her limited powers, no right to decide on the purposefulness of the enforcement of the treaty (however, as indicated above, the President may intervene in the enactment of the enforcement law to a certain extent).

All international agreements whether ratified by the Government or the *Riigikogu* are **published** in Riigi Teataja[6] (the official gazette of Estonia) and also at www.riigiteataja.ee. International agreements are published in part II of the Riigi Teataja. Publication language depends on the authentic text (§ 10). When both texts in Estonian and in the foreign language are authentic, then the international agreement is published only in Estonian. When the only authentic language(s) of the treaty is foreign, the treaty is translated into Estonian and the Estonian text together with the authentic text according to which the translation was made are published. When both the Estonian and foreign texts are authentic, but it has been agreed that in the case of disagreement the foreign text is used for the interpretation, both texts are published.

2) What is the status of European and/or EU texts in the domestic legal system?

a. Is this status defined by the Constitution, or does it result from case-law?
b. Where do European and/or EU treaties fit into the hierarchy of legal texts?

The position of international treaties in Estonian legal order has been well specified by the Constitution. Subsection 3 (1) of the Constitution reads : "/.../ Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system". Secondly, § 123 provides :

> "The Republic of Estonia shall not enter into international treaties which are in conflict with the Constitution.
>
> If laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the rules of the international treaty shall apply."

Thus, from the perspective of hierarchy of legal norms, enforced international agreements are on the second level – subordinate to the constitution and superior to ordinary laws.[7] This understanding has been reaffirmed in § 27 of the Foreign Relations Act regulating the changing and amending acts in contradiction with foreign agreement in force for Estonia.

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[5] *See for example case no. 3-4-1-3-98 concerning the review of the petition of the President of the Republic of 10 March 1998 seeking to declare Clemency Procedure Act unconstitutional. Available online http://www.nc.ee/english/. To date, this is the last case initiated by the President.*

[6] *Riigi Teataja seadus (Riigi Teataja Act), adopted 20.01.1999 (RT I 1999, 10, 155), last amendment 15.05.2002 (RT I 2002, 44, 283)*

[7] *For detailed overview see Vallikivi, H. Status of International Law in the Estonian Legal System under the 1992 Constitution, Iuridica International I, 2001, pg. 222-232*

3) (For member states of the European Union) What is the status of subordinate EU legislation (regulations and directives) in the national legal system?

Not applicable

4) Does the Constitutional Court have jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution?

a. Is this supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise this supervision? By what decision? Have there been changes in case-law in this area?
c. Which bodies are authorised to refer cases to the Court in this area?
d. Must such a referral occur before the European and/or EU treaty in question is ratified, or may it occur after ratification?
e. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

In theory, the conflict between the Constitution and international treaty should not appear. According to § 123 (1) of the Constitution, "The Republic of Estonia shall not enter into international treaties which are in conflict with the Constitution."

However, as Estonia uses the monist system of incorporation of international legal norms into Estonian system, the conflict might arise. There are no specific constitutional norms regulating the constitutional review of international agreements.

§ 15 and § 152 of the Estonian Constitution enable the courts not to apply and refer for constitutional review to the Constitutional Review Chamber of the Supreme Court any law or other legislation that is in conflict with the Constitution. All these requests are reviewed by the Constitutional Review Chamber of the Supreme Court. The procedure and scope of constitutional review is specified in the Constitutional Review Court Procedure Act[8].

According to § 2 of the Constitutional Review Act, the Supreme Court has jurisdiction to examine requests to control compliance of the international agreement to Constitution. The right to make these requests has been given to the Legal Chancellor (§ 6 (1) p. 4) and to lower courts (§ 9 (1)). The Supreme Court can declare enforced or signed international agreement or its provision to be unconstitutional.

To date, no such request has been made to the Constitutional Review Chamber of the Supreme Court.

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[8] *Põhiseaduslikkuse järelevalve kohtumenetluse seadus, RT I 2002, 29, 174, adopted 13.03.2002, enters into force 01.07.2002*

5) Does the Constitutional Court have jurisdiction for supervising compatibility between legislation and European and/or EU treaties?

a. Is such supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise this supervision?
c. Which authorities are entitled to refer cases to the Court in this field?
d. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

Under § 123 of the Constitution, all the legislation adopted has to be in conformity with the Constitution and enforced international agreements of Estonia. The primary obligation to control the compliance of legislation with European treaties lies with the drafter of the legislation and with the Parliament. Secondary supervision is carried out by the President, the Legal Chancellor, the courts and Local Government Councils, who have the right to initiate constitutional review proceedings in the Supreme Court.

The central aim of the Constitutional Review Chamber of the Supreme Court is to control the compliance of Estonian legal acts to the Constitution. The competence of the Court as Constitutional Court has been specified in § 149 (3):

/…/The Supreme Court is also the court of constitutional review.

Here, however, the Court is not restricted only to the Constitution but also to other higher legal acts. Thus, it also has the jurisdiction to control the compliance of Estonian legislation with international treaties.

The constitutional review procedure has been specified in the Constitutional Review Court Procedure Act. There are differences in the procedure depending on the contested legal act.

A proposal to review the constitutionality or legality of a law or other legislation or international agreement may be submitted directly to the Supreme Court:

- by the President of the Republic (§ 5) – in cases specified in § 107[9] of the Constitution;
- by the Legal Chancellor (§ 6) – in cases specified in § 142[10] of the Constitution;
- by Council of the Local Government (§ 8) – in cases where the proclaimed but not enforced law is in conflict with constitutional guarantees of the local government.
- by a court – in cases specified in § 152[11] of the Constitution.

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[9] *(2) The President of the Republic may refuse to proclaim a law passed by the Riigikogu and, within fourteen days after its receipt, return the law, together with his or her reasoned resolution, to the Riigikogu for a new debate and decision. If the Riigikogu again passes the law which is returned to it by the President of the Republic, unamended, the President of the Republic shall proclaim the law or shall propose to the Supreme Court to declare the law unconstitutional. If the Supreme Court declares the law constitutional, the President of the Republic shall proclaim the law.*

[10] *If the Legal Chancellor finds that legislation passed by the legislative or executive powers or by a local government is in conflict with the Constitution or a law, he or she shall propose to the body which passed the legislation to bring the legislation into conformity with the Constitution or the law within twenty days.*

If the legislation is not brought into conformity with the Constitution or the law within twenty days, the Legal Chancellor shall propose to the Supreme Court to declare the legislation invalid.

[11] *In a court proceeding, the court shall not apply any law or other legislation that is in conflict with the Constitution.*

There are no decisions of the Supreme Court in reviewing the conformity of European treaties with the Constitution. However, different European treaties are often mentioned in support of the constitutional law principles while reviewing the conformity of the legal acts to the Constitution.[12]

6. (For member states of the European Union) Does the Constitutional Court have jurisdiction for supervising the conformity of subordinate EU legislation (regulations, directives) with the Constitution?

Not applicable

7) Was admission to the Council of Europe dependent on a series of state undertakings (Parliamentary Assembly Order 488 of 1993, observance of which is subject to supervision by the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee) concerning the Constitutional Court's organisation, functioning, composition or case-law?

a. What were the terms of those undertakings?
b. Have those undertakings been observed?
c. What changes have been made to the status of the constitutional court or to its case-law?

In the accession to the Council of Europe, the Parliamentary Assembly conducted monitoring of new members on compliance of the national system with Council of Europe's requirements. On Estonia, it was conducted from 1995 to 1997, Mr Rudolf Binding was appointed as a rapporteur.

In January 1997 the Parliamentary Assembly decided to close the monitoring on Estonia, but made 3 recommendations. On 4th May 2000 the follow-up dialogue was started on these 3 questions. On 22nd January 2001 the Monitoring Committee proposed the closure of the monitoring procedure with Estonia.

None of the problematic areas mentioned concerned the organisation or work of the Constitutional Review Chamber of the Supreme Court.[13] Also, in Recommendation no. 1313

The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution.

[12] Among recent decisions see for example case 3-4-1-7-02 concerning the constitutional review of Local Government Council Election Act. Decision of 15th July 2002. In this decision, central consideration was given to European Charter on Local Government.

[13] In the Resolution 1117 (1997) on the honouring of obligations and commitments by Estonia three problematic areas were brought up:

1. the practice of detaining refugees and asylum-seekers, in contravention of Articles 5 and 6 of the European Convention on Human Rights, for lack of asylum-procedures, a problem that is currently being dealt with by a special government commission preparing Estonia's accession to the 1951 Geneva Convention relating to the Status of Refugees and its 1967 New York Protocol and the necessary internal legislation.

2. the treatment of the "non-historic" Russian-speaking minority, which has given rise to some concern in the last three years, especially as far as the granting of residence permits and citizenship (and the language test that has to be passed in order obtain the latter) are concerned.

(1997) on the honouring of obligations and commitments by Estonia the issues concerning the Supreme Court were not discussed.[14]

II. European integration and constitutional case-law

1) Does the Constitutional Court have a department that ensures efficient and rapid access to the judgments handed down by the European courts (Court of Justice and/or European Court of Human Rights) and to texts of subordinate EU legislation?

The Supreme Court of Estonia has an information service with the obligation to ensure the access to all legal acts and international treaties that are in force for Estonia. There is also access ensured to all relevant European databases. To date, the research on European legislation and case-law is done by the counsellors to the Constitutional Review chamber while presenting their opinions on the cases.

2) In its reasoning, does the Constitutional Court take account of the case-law of the Court of Justice and/or the European Court of Human Rights? If so, in what way:

a. as a primary consideration (the European case-law serves as the basis for the Constitutional Court's interpretation), or as a complementary consideration (the European case-law reinforces the Constitutional Court's interpretation)?

As a primary consideration (the European case-law serves as the *basis* for the Constitutional Court's interpretation), or as a complementary consideration (the European case-Law reinforces the Constitutional Court's interpretation)?

b. Does the European case-law appear in the rapporteurs' conclusions or in the body of judgments?

Estonia is a member of the Council of Europe and has ratified a number of its treaties. Therefore, the case-law of the relevant authorities is a basis for the Constitutional Court decisions.

The use of European case-law certainly depends on the question before the Court. The Court always uses European case-law at least as a complementary consideration, primary

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3. the conditions of custody and detention, which remain deplorable despite Estonia's efforts to improve them and the authorities' good co-operation with the Council of Europe on this matter.

[14] */.../in view of Estonia's remaining obligations and commitments, which Estonia is bound to fulfil within one year, the Assembly recommends that the Committee of Ministers aid Estonia's efforts by:*

i. stepping up its aid to Estonia to carry out its prison reform, in particular in the framework of the Council of Europe-European Commission joint co-operation programme;

ii. offering assistance (including financial means) and advice from the Council of Europe to the Estonian Ministry of Justice to organise a public information and education campaign in favour of the abolition of capital punishment, as has also been suggested in Recommendation 1302 (1996) on the abolition of the death penalty in Europe;

iii. including in its co-operation programme a project to improve the teaching of Estonian as a foreign language, both in public schools and universities, and in adult education, for example through a teacher-training programme.

consideration being the Constitution, but there have also been cases, where European treaty law and case-law have been at the same level with the Constitution in the considerations.

The place of the European case-law depends on who has brought up the arguments involving it. Where the case-law has already been mentioned by the applicant or other party to the proceeding, the mentioning appears both in the conclusion of the rapporteur but as a substantive source, it has also been mentioned in the body of the judgment.[15]

3) Has the Constitutional Court already reversed or amended its case-law following a judgment by the European Court of Human Rights?

a. Did the relevant judgement condemn the national authorities, or those of another member state of the Council of Europe?
b. What were the terms of the European Court's judgment?
c. Before the European Court's judgment, was there opposing and established Constitutional Court case-law in the relevant area?
d. How was this case-law reversed or amended? Which body effected the referral?

To date, there have been only 2 cases against Estonia in the European Court of Human Rights. The first, case of Slavgorodski v. Estonia[16] was struck out of the list due to friendly settlement without discussing the substantive questions. In the second case, Tammer v. Estonia[17] concerning the application of art. 10 of the ECHR, the European Court of Human Rights found no violation of art. 10.
Therefore, there is no practice on revising or amending case-law of the Constitutional Review Chamber. The question has also not been legislatively regulated. Currently, when the Constitutional Review Chamber considers it necessary to review the position taken by the Chamber in previous cases, it has the authority to refer the case to the Supreme Court *en banc*. The similar procedure could be followed also in the case referred to in the question.

4) Has the Constitutional Court already reversed or amended its case-law following a judgment by the Court of Justice of the European Communities?

a. Did the relevant judgment condemn the national authorities, or those of another member state of the European Union?
b. What were the terms of the Court of Justice's judgment?
c. Before the Court of Justice judgment, was there opposing and established Constitutional Court case-law in the area?
d. How was this case-law reversed or amended? Which body effected the referral?

As Estonia is not a member of the European Union, there are no cases concerning Estonia from the European Court of Justice. When the legislation and case-law of European Union have been taken into account, the referring has been similar to the other international treaties in force in Estonia.

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[15] *For example case 3-4-1-2-01 para 20 on review of the petition of Tallinn Administrative Court to declare subsections 12 (5) and 12 (6) of the Aliens Act invalid. Available online http://www.nc.ee/english/*

[16] *Application no. 37043/97, decision 12.09.2000*

[17] *Application no. 41205/98, Final decision 04.04.2001*

5) Has the Constitutional Court already reversed or amended its case-law following the adoption of a European instrument by the Council of Europe?

a. What was the status of this instrument (recommendation from the Committee of Ministers or the Parliamentary Assembly, report by the European Commission for Democracy through Law ...)
b. What were the terms of this instrument?
c. How was this case-law reversed or amended? Which body effected the referral?

No such amendment has taken place in the case-law of the Constitutional Law Chamber of Estonia. New international instruments in force or recommendations made by the supervisory bodies have been taken into account, where appropriate, in the decisions following the adoption of the instrument.

6) Has the Constitutional Court already reversed or amended its case-law following the enactment of a European Community legal measure?

a. What was the status of this measure? (directive, regulation, recommendation ...)
b. What were the terms of this measure?
c. How was this case-law reversed or amended? Which body effected the referral?

No such reversion or amendment has taken place.

III. European integration and constitutional justice

1) Is the Constitutional Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?
a. Is there a precedent in the case-law of the European Court of Human Rights condemning the national authorities under Article 6 of the Convention, involving a trial before the Constitutional Court?
b. What were the grounds for this judgment?
c. Was this condemnation followed by amendment or changes to the organisation and/or functioning of the Constitutional Court? In what way?

As Estonia has been a party to the European Convention on Human Rights since the 16th April 1996, all the provisions of the ECHR are binding. As stated before, there have been only 2 cases against Estonia before the ECHR. In the first case, Slavgorodski v. Estonia[18], the ground of application was violation of art. 6 of the Convention, but the case was struck out of the list as the parties came to a friendly settlement.

[18] *The applicant complained under article 6 of the Convention that he had not had a fair trial and was also a victim of a violation of former Article 25 of the Convention. No further details on the violation of art. 6 have been given.*

2) Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

a. Has such a judicial review already been implemented?
b. What legal provisions govern this review?
c. Has a review already taken place following a previous constitutional court decision?
d. What were its terms?
e. What was the outcome of the procedure?

To date, there is no such procedure provided by law. There is also no court-practice on the issue.

3) Has the Constitutional Court already applied Article 177 of the Maastricht treaty, concerning preliminary rulings, as provided for in the context of judicial co-operation between the national courts and the Court of Justice of the European Communities?

a. Of all the disputes submitted to the Constitutional Court, what is the proportion of preliminary rulings (as a percentage)?

b. Of all the disputes that have given rise to a preliminary ruling, what proportion of Constitutional Court judgments followed the opinion of the Court of Justice of the European Communities?

As Estonia is not a member of the European Union, it has no ground for applying art. 177 of Maastricht treaty.

FINLAND

Justice Pauline KOSKELO,
Supreme Court

Preliminary remarks

1. Finland has no special Constitutional Court. The highest courts in the judicial system are the Supreme Court and the Supreme Administrative Court. An advance review of the constitutionality of legislative bills submitted to Parliament by the Government is carried out by the Constitutional Committee of the Parliament. Such a review takes place before the law in question is passed, in case the proposal is identified as raising constitutional issues. Once legislation has been enacted, the courts are called upon to interpret existing laws in a manner which is compatible with the constitution. They are also empowered to set aside a given legislative provision in an individual case, if its application would clearly conflict with the constitution (Section 106 of the Constitution). The courts do not have the power to declare a piece of legislation unconstitutional *per se*; they only have the power to disapply a provision if its application would be incompatible with the constitution. The general validity of the provision is not affected by such a finding. It may, however, prompt the Government to take action with a view to amending the legislation in question.

2. Finland has a new Constitution, which entered into force on 1 March 2000[1]. The answers below are primarily based on this current Constitution, but the situation under the old constitution is also indicated. Already in 1995, an important part of the constitution underwent a major revision, as the catalogue of fundamental rights was modernized and extended. The reformed provisions on fundamental rights were incorporated as such in the new Constitution (Chapter 2, Sections 6-23).

3. Since the Supreme Court has general jurisdiction in civil and criminal matters, the answers provided below reflect this situation: they are not limited to experience or case-law deriving from cases of a constitutional nature, but are based on the Supreme Court's activities in its general field of jurisdiction.

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[1] *For information on the Constitution in English, including a translation of its text, see www.om.fi/constitution.*

I. Integration of European legal rules into the domestic legal system

1) What is the procedure for integrating European and/or EU treaties into the domestic legal system?

a. Is the ratification procedure provided for in the Constitution?

The procedure for the ratification of international treaties, including EU treaties, is provided for in the Constitution (sections 94-95). Corresponding provisions were also contained in the old constitution.

b. What does this procedure involve?

According to the Constitution, parliamentary approval is required for treaties and other international obligations which contain provisions of a legislative nature, i.e. involve the legislative powers vested in Parliament, or which are otherwise of major importance, or for which such approval is otherwise provided for in the Constitution. Treaty provisions that are of a legislative nature shall not only be approved by Parliament but they shall be enacted by an Act of Parliament. Normally, this takes place through a so-called blanket act, by which the internationally agreed provisions are enacted to apply as such, without any transformation or reproduction in the domestic parliamentary act itself. The procedure for the adoption of an Act of Parliament whereby treaty obligations are integrated into the domestic legal system is the same as for legislative acts of parliament in general. A particular, qualified procedure applies, however, in the case where the treaty in question contains provisions affecting the Constitution, or a change in national territory. In such a case, adoption of the treaty by Parliament requires a majority of two thirds of the votes cast. Furthermore, the domestic adoption of the Act of Accession to the EU was preceded by an ad hoc referendum, which formally was of a consultative nature but politically played a conclusive role. In the referendum the majority of the electorate voted in favour of accession.

c. Are European and/or EU treaties published?
d. If so, where? (Official Journal, Official Bulletin, the press, etc)

Treaties, including EU treaties, must be published upon ratification. Publication takes place in an official journal for statutes (the Statute Book of Finland), which consists of two parts, one for domestic legislation and another for international treaties. Treaties, as well as domestic statutes, are also available in an online database to which access is free of charge.

2) What is the status of European and/or EU texts in the domestic legal system?

a. Is this status defined by the Constitution, or does it result from case-law?
b. Where do European and/or EU treaties fit into the hierarchy of legal texts?

The Constitution does not expressly define the domestic legal status of EU norms, apart from the fact that as treaty provisions of a legislative nature are adopted by an Act of Parliament, they have corresponding legal status. This unequivocally puts such provisions on a hierarchical level superior to that of domestic norms of a lower level, such as presidential, governmental or ministerial decrees, but does not in itself settle the question of their hierarchical status in relation

to constitutional provisions, nor in relation to posterior provisions of domestic law. However, the Act of Accession to the EU was adopted by Parliament through the qualified procedure required for treaties affecting the Constitution. In the Government Bill by which the Accession Act was submitted to Parliament for approval, the supremacy of Community law over national law as laid down by the case-law of the European Court of Justice was acknowledged - and identified as one of the aspects of accession which affected the constitution and therefore necessitated a qualified approval procedure. This position must also be seen in the light the fact that in regard to possible conflicts between domestic law enacted by Parliament and the constitution, the old constitution in force at the time did not, unlike the current Constitution of 2000, contain any provision empowering the courts to set aside provisions of legislation adopted by Parliament on the grounds of their incompatibility with the constitution. The supremacy of Community law entails, among other things, a power and an obligation for the courts to set aside provisions of domestic law in case they are found to conflict with Community law. A power and obligation of this kind for the courts was a novelty. Through the parliamentary adoption of the Accession Act, the principle of supremacy, and the resultant power and obligation for the courts to set aside conflicting domestic law, was recognised as a consequence of existing Community law, even though it is not reflected in the express terms of the Constitution, nor of the Act of Parliament by which the internationally agreed accession act was adopted and incorporated into the domestic legal system.

Ultimately, however, the acknowledgment of the supremacy of Community law remains a matter for case-law. Especially in relation to possible conflicts between EU norms and the national Constitution, the principle of supremacy may give rise to complex and delicate issues, which so far, in the course of the first nearly eight years of EU membership, the courts have not been confronted with: until now, there is no case law addressing the question of supremacy of EU law in relation to the national constitution. In the case of a conflict between primary EU law and ordinary domestic legislation, it is to be expected that the courts would not hesitate to give effect to the principle of supremacy, although until now there is no clear example to such a situation having arisen before either of the Supreme Courts. - In respect of supremacy and secondary EU law, see below under (3)(b).

3) (For member states of the European Union) What is the status of subordinate EU legislation (regulations and directives) in the national legal system?

a. Is this status defined by the Constitution or does it result from case-law?

As stated above under 2(a), the status of EU norms, whether those of primary law or those of secondary law, is not defined in the Constitution.

b. Where does subordinate EU legislation fit into the hierarchy of legal texts? (is it on the same level as the legislation or the Constitution, does it take precedence over the Constitution, etc).

In case-law, the principle of the supremacy of Community law in respect of a directive vs. ordinary domestic law was recognised for the first time by a decision of the Supreme Administrative Court on 31.12.1996, where a provision of domestic VAT legislation was set aside in favour of a provision in the 6th VAT directive. The obligation under Community law for national courts to interpret domestic law in conformity with relevant Community law has been acknowledged on several occasions in the case law of both Supreme Courts, as well as lower courts.

4) Does the Constitutional Court have jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution?

a. Is this supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise this supervision? By what decision? Have there been changes in case-law in this area?
c. Which bodies are authorised to refer cases to the Court in this area?
d. Must such a referral occur before the European and/or EU treaty in question is ratified, or may it occur after ratification?
e. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

As explained in the preliminary remarks above, Finland does not have a constitutional court, or any other court with jurisdiction to declare a domestic law or treaty provision unconstitutional. A review of the constitutionality of proposed legislation, as well as of treaty obligations submitted for parliamentary approval, is carried out by the Constitutional Committee of the Parliament. Such a review takes place before the enactment or approval of the provisions in question, and its primary purpose is to determine which procedure is required for the adoption of the provisions for the purpose of their integration in the internal legal order.

Once a given set of provisions have become law in the domestic system, the courts, when called upon to apply them in individual cases, have the power under section 106 of the Constitution to examine whether their application would manifestly violate the Constitution. In such a case the court shall give precedence to the Constitution. As already mentioned above, this power, or indeed duty, for the courts is a novelty in the Constitution of 2000. In the old constitution, express provision for the power/duty of courts to set aside rules conflicting with the constitution was made only in respect of norms of lower rank than Acts of Parliament.

Even under the current Constitution, however, a particular situation arises in relation to EU treaties, because of the Community law principle of supremacy. As stated above under point (2), in the absence of an express constitutional or other statutory provision dealing with the issue of supremacy, the recognition or confirmation of this principle at the domestic level ultimately remains a matter for the courts. Until now, the question of a conflict between a provision of the EU treaties and the national Constitution has not arisen before the courts. In other words, at present there is no case law either acknowledging or confirming, or qualifying, or otherwise addressing, the supremacy of such treaty provisions over the Constitution.

5) Does the Constitutional Court have jurisdiction for supervising compatibility between legislation and European and/or EU treaties?

a. Is such supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise this supervision?
c. Which authorities are entitled to refer cases to the Court in this field?
d. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

As explained above under point (2), the supremacy of Community law, while not enshrined in any express domestic provision, was in substance recognised in connection with the parliamentary approval of the Accession Act. As regards legislation to be adopted, a review of

its compatibility with treaty obligations falls upon the government and, once a bill has been submitted, to Parliament. No constitutional court or other judicial body exists for the purpose of such an advance review. As regards legislation already in force, the task of examining the compatibility of domestic law provisions with EU treaty obligations falls upon the ordinary courts, at the highest level the Supreme Court and the Supreme Administrative Court. In other words, accession to the EU was understood to entail a power, and a duty, for the courts to review, in connection with individual cases brought before them, the compatibility of domestic legislation with treaty provisions, and to set aside any domestic provision found to conflict with relevant treaty obligations. In practice, the courts do not appear to have faced the problem in any clear-cut manner: there isn't any example so far of a situation where a court would have had to set aside a provision of domestic law because it was found to conflict with a treaty provision. As conforming interpretation is the primary way out of apparent situations of conflict, the need for outright disapplication of domestic provisions does not seem to have arisen until now.

6. (For member states of the European Union) Does the Constitutional Court have jurisdiction for supervising the conformity of subordinate EU legislation (regulations, directives) with the Constitution?

In general terms, the situation in respect of secondary EU law is similar to what was described above under point (4) regarding primary EU law, with the exception that as EU regulations neither require nor permit any legislative action at the national level, an advance review of EU regulations in relation to the national Constitution only takes place in the course of the preparatory phases at EU level. Once provisions of secondary EU law are applicable at the national level, any conflict with them and the national Constitution will be up to the courts to identify. In the case of a conflict, the domestic recognition of the supremacy of EU law will be ultimately tested. Until now, this situation does not appear to have arisen before the courts.

7) Was admission to the Council of Europe dependent on a series of state undertakings (Parliamentary Assembly Order 488 of 1993, observance of which is subject to supervision by the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee) concerning the Constitutional Court's organisation, functioning, composition or case-law?

No particular undertakings were required on the occasion of Finland's entry into the Council of Europe.

II. European integration and constitutional case-law

1) Does the Constitutional Court have a department that ensures efficient and rapid access to the judgments handed down by the European courts (Court of Justice and/or European Court of Human Rights) and to texts of subordinate EU legislation?

There is no official mechanism at the national level for the dissemination of information concerning judgments rendered by the European Courts. In respect of the European Court of Justice, the online database of the Court itself provides efficient and rapid access to the Court's judgments in all the official languages of the EU. Therefore, there is little need for a duplication of this system at the national level, especially as the domestic courts as well as legal professionals are well equipped with technical facilities for accessing the ECJ database. Furthermore, the Court reports are available in the domestic courts' own libraries, or through the domestic library system. In respect of the European Court of Human Rights, the situation is the

same, the main difference being that the judgments of the ECHR are only available in English and French.

2) In its reasoning, does the Constitutional Court take account of the case-law of the Court of Justice and/or the European Court of Human Rights? If so, in what way:

a. as a primary consideration (the European case-law serves as the basis for the Constitutional Court's interpretation), or as a complementary consideration (the European case-law reinforces the Constitutional Court's interpretation)?
b. Does the European case-law appear in the rapporteurs' conclusions or in the body of judgments?

From the perspective of an EU member state, the question posed is somewhat obscure. With a view to taking account of the jurisprudence of the European Court of Justice, it is clear as a matter of Community law that national courts have an obligation to ensure, in cases brought before them, that national law is applied in conformity with relevant Community law, and that when applying Community law national courts have an obligation to give full effect to its requirements. Consequently, since the European Court of Justice has exclusive jurisdiction to interpret Community law, national courts cannot meet their obligations without taking account of the relevant case-law of the European Court of Justice. Therefore, references to relevant case-law are normally also included in the court's reasoning, which forms part of the judgment.

Where an issue touching upon Community law arises, it follows from the supremacy of Community law that its requirements and interpretation become, as a matter of principle, a primary consideration. It is another matter that in many situations the legal situation may be sufficiently clear or well-established, so that express references to ECJ case-law can be dispensed with altogether, or play a more complementary role in the court's reasoning when setting out applicable points of law.

This being said, a consideration of relevant ECJ case-law presupposes that an issue of Community law has been properly identified. Even if a national court is well aware of its general obligations under Community law, there may in practice be instances where a national court fails in its duty to take into account the requirements of Community law as set out in the relevant ECJ case-law, normally because neither the parties nor the court itself have realized that the case gives rise to an issue of Community law.

As regards the case-law of the European Court of Human Rights, it is, likewise, normal practice to take account of relevant ECHR case-law where an issue of Convention rights arises before a domestic court. The European Convention on Human Rights has the status of law at the national level. Even though the national Constitution contains a catalogue of fundamental rights, which in some respects goes further than the Convention, and even though Convention rights are largely secured by more specific domestic legislation, it is not unusual that the Supreme Court is faced with issues where it is necessary to examine and to take into account the specific content of Convention rights as interpreted by the ECHR. Where given case-law is found to be pertinent for the resolution of the case at hand, it will normally be reflected in the court's reasoning. However, where applicable national legislation is considered to meet Convention requirements without any particular doubts, relevant case-law may not be expressly referred to in the court's reasoning.

3) Has the Constitutional Court already reversed or amended its case-law following a judgment by the European Court of Human Rights?

a. Did the relevant judgement condemn the national authorities, or those of another member state of the Council of Europe?
b. What were the terms of the European Court's judgment?
c. Before the European Court's judgment, was there opposing and established Constitutional Court case-law in the relevant area?
d. How was this case-law reversed or amended? Which body effected the referral?

The case-law of the ECHR has had an impact on numerous judgments of the Supreme Court. In most instances, its has resulted in a refinement of domestic case-law - for instance regarding some issues of equality of arms in a procedural context - rather than a reversal or amendment of previous domestic case-law.

The branch of ECHR jurisprudence that has most frequently been of direct significance for the Supreme Court jurisprudence has been the case-law concerning the requirements of impartiality of judges under Article 6(1) of the Convention. The reasons for this are twofold. Firstly, the domestic provisions dealing with the grounds on which a judge is disqualified from hearing a particular case were very old and inadequate until 2001, when a modernisation of the relevant domestic law was enacted. In the absence of sufficiently comprehensive and detailed domestic rules, Article 6(1) of the Convention played a significant role in the Supreme Court's case-law, remedying the deficiencies existing in the domestic provisions. Another reason why requirements of impartiality and independence as laid down in Article 6(1) have arisen more frequently than other Convention issues is the presence of lay judges in courts and tribunals of first instance. Such lay judges participate in certain types of cases, but usually they do not serve on a full-time basis. Through their main occupation, they often have professional or other links to entities or institutions outside the court. Obviously, situations where such a double role exists may give rise to issues of impartiality more often than the position of professional full-time judges.

In one case, the Supreme Court (1995:95) quashed one of its own judgments on the grounds of an error of procedure that was subsequently found by the Supreme Court to have violated the contradictory principle as set out in ECHR case-law on Article 6(1). Due to the error the appellant, who was respondent in a child maintenance dispute, had neither received nor been able to comment on the other party's written submission, although that submission had been taken into account in the judgment. Therefore, the Supreme Court set aside the judgment and re-examined the case.

In most instances where ECHR case-law has played a role in the Supreme Court's jurisprudence - such as in the case just mentioned - guidance has been drawn from general ECHR case-law, i.e. from judgments not originating in or addressed to Finland specifically.

On one occasion, however, the Supreme Court revised a judgment of a court of appeal which had been the subject of a complaint to, and a condemning judgment by the European Court of Human Rights (Z v Finland 25.2.1997). The ECHR had found a violation of the applicant's Convention requirements regarding the protection of privacy (Article 8). The applicant had been involved in criminal proceedings as a witness, and the case file contained sensitive medical and other information regarding her. The ECHR had held that the secrecy of this information had not

been adequately assured, as its disclosure had been barred for ten years only. Consequently, the period of non-disclosure of the relevant information contained in the case file was extended by the Supreme Court from ten to 40 years.

On another occasion, a decision of the Supreme Court itself, upholding a judgment by a Court of Appeal, has been the subject of an ECHR judgment finding a violation of Article 10 the Convention (Nikula v Finland 21.3.2002). The applicant had acted as defence lawyer in criminal proceedings, and subsequently been found guilty of defamation by negligence because of the manner in which she had commented on the prosecutor's action in the case. The applicant had criticised the prosecutor's decision to press charges against a certain person, whereby the applicant's client had been prevented from examining that person as a witness. The applicant had also criticised the prosecutor's decision not to charge another person, who had therefore been able to testify against her client. The applicant had considered these two decisions to form part of a prosecution strategy described as "role manipulation", and a breach of duty. According to the majority of the Supreme Court (3-2), the applicant's submissions amounted to an allegation that the prosecutor had breached his official duties as public prosecutor, thereby committing an offence in office. In her complaint to the ECHR, the applicant had argued that by finding her guilty of defamation, the Supreme Court had violated her right to express herself freely in the capacity as defence counsel. The ECHR found in favour of the applicant.

4) Has the Constitutional Court already reversed or amended its case-law following a judgment by the Court of Justice of the European Communities?

a. Did the relevant judgment condemn the national authorities, or those of another member state of the European Union?
b. What were the terms of the Court of Justice's judgment?
c. Before the Court of Justice judgment, was there opposing and established Constitutional Court case-law in the area?
d. How was this case-law reversed or amended? Which body effected the referral?

It is difficult to answer the questions specifically as posed, for the following reasons.

Most frequently, ECJ case-law having an impact on domestic jurisprudence is contained in ECJ preliminary rulings. Nevertheless, ECJ judgments given in infringement proceedings against a Member State may also contain reasoning on the correct interpretation of Community law which is of importance for a national court when confronted with the same or similar issue. In other words, the relevance of ECJ case-law depends on the issue at hand, rather than on the type or origin of the proceedings that have given rise to a judgment byt the ECJ. When a given national court has itself referred a case to the ECJ for a preliminary ruling, it is formally bound to base its judgment on the ruling given. Apart from this situation, where the preliminary ruling directly concerns the case at hand, ECJ case-law may be relevant before a national court regardless of whether the case before the ECJ concerned, or originated from, one's own or some other member state. The origin or context of a given case before the ECJ may of course make a difference in terms of how closely the circumstances that have given rise to a certain ruling resemble a subsequent situation before the national court and, consequently, how directly the application of law at the national level is affected by a particular interpretation of Community law. But when a national court is faced with an issue of Community law, it is necessary to examine and take into account all relevant ECJ case-law, irrespective of the origin of the cases that have given rise to it.

In Finland, the need to make references to the ECJ for preliminary rulings has arisen more frequently in the administrative courts than in the other courts. Since Finland joined the EU, the Supreme Court has made three references to the ECJ, two of which are currently pending. In the case in which a preliminary ruling was already received, the Supreme Court's judgment was in accordance with the ECJ ruling.

5) Has the Constitutional Court already reversed or amended its case-law following the adoption of a European instrument by the Council of Europe?

Apart from Council of Europe conventions ratified by Finland, other instruments of the Council do not appear to have had an impact on the application of law by the courts, including the Supreme Court.

6) Has the Constitutional Court already reversed or amended its case-law following the enactment of a European Community legal measure?

a. What was the status of this measure? (directive, regulation, recommendation ...)
b. What were the terms of this measure?
c. How was this case-law reversed or amended? Which body effected the referral?

Since Finland is a member of the EU, it is obvious that numerous pieces of Community legislation are either directly applicable in the courts, or affect the interpretation of implementing national legislation by the courts. As most of the Community legislation dealing with matters within the jurisdiction of the Supreme Court is in the form of directives, and there haven't generally been any majour delays or deficiencies in their transformation into domestic legislation, the issues that arise before the Supreme Court in relation to Community law most often have to do with the obligation to interprete national implementing legislation in the light of the relevant directive and its interpretation by the ECJ. Less frequently, questions arise relating to primary Community law, i.e. its effect on the application or interpretation of national law.

III. European integration and constitutional justice

1) Is the Constitutional Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?

a. Is there a precedent in the case-law of the European Court of Human Rights condemning the national authorities under Article 6 of the Convention, involving a trial before the Constitutional Court?
b. What were the grounds for this judgment?
c. Was this condemnation followed by amendment or changes to the organisation and/or functioning of the Constitutional Court? In what way?

The Convention is applied as an integral part of domestic legislation. Thus, article 6 is binding on all the courts, including the Supreme Court.

There is one ECHR case (Kerojärvi vs. Finland 19.7.1995) in which an error of procedure at the Supreme Court was found to violate article 6(1) of the Convention. The case concerned the applicant's claim for Accident Compensation. Some documents relating to the applicant's medical history had been transmitted to the Supreme Court by the competent lower court as part of the case file, without being communicated to the applicant. Thus, the applicant had not

received opportunity to address these documents in his submissions before the Supreme Court. It is a well established procedural requirement that the parties be given opportunity to comment on any materials relevant to the case, and accordingly it is normal practice to communicate any such documents. Thus, the judgment in this particular case has not called for any changes in the general functioning of the Court.

2) Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

The domestic Code of Procedure contains general provisions regarding the grounds on which a final judgment, i.e. a judgment that is no longer subject to ordinary means of appeal, can be set aside or quashed, and the case re-examined. An error of procedure, including a violation of Article 6(1) of the European Convention on Human Rights, is in principle an eligible reason for setting aside the relevant domestic judgment. What is under consideration at present is a legislative amendment in order to ensure that where such a measure is necessary on account of an ECHR jugdment finding a violation of Article 6(1), the applicable time frames will allow it. Under generally applicable time frames, such a measure will otherwise be time-barred.

3) Has the Constitutional Court already applied Article 177 of the Maastricht treaty, concerning preliminary rulings, as provided for in the context of judicial co-operation between the national courts and the Court of Justice of the European Communities?

a. Of all the disputes submitted to the Constitutional Court, what is the proportion of preliminary rulings (as a percentage)?

b. Of all the disputes that have given rise to a preliminary ruling, what proportion of Constitutional Court judgments followed the opinion of the Court of Justice of the European Communities?

As mentioned above under II(4), the Supreme Court has until now made three references for a preliminary ruling. The first one concerned Directive 77/187/EC on the Transfer of Undertakings. The preliminary ruling received was followed in the Supreme Court's judgment. The two others references, which are currently pending at the ECJ, concern intellectual property law (trade marks) and Article 18 of the EC Treaty (free movement of economically non-active persons). In a number of cases, existing ECJ case-law has been considered to make the legal situation sufficiently clear so that no reference for a preliminary ruling was found necessary.

FINLAND

Justice Heikki KANNINEN,
Supreme Administrative Court

Application of Community law and the European Convention on Human Rights in the Finnish Supreme Administrative Court

Introduction

This paper presents some observations based on the experience acquired in the Finnish Supreme Administrative Court. The paper complements the report drafted by Justice Pauliine Koskelo from the Finnish Supreme Court. The author of the present paper fully adheres to the report of Ms Koskelo.

It should first be mentioned that Finland has no special Constitutional Court. The highest courts in the judicial system are the Supreme Court and the Supreme Administrative Court. This paper describes the Finnish system mainly from the point of view of the Supreme Administrative Court.

I. Integration of European legal rules into the domestic legal system

1. Procedure for integrating European and/or EU treaties into the domestic legal system

Approval of the international obligations that contain provisions of a legislative nature, are significant, or otherwise require approval by the Parliament under the Constitution that requires the acceptance of the Parliament (section 94 of the Constitution). A decision concerning the acceptance of an international obligation or the denouncement of it is made by a majority of the votes cast. However, if the proposal concerns the Constitution or an alteration of the national borders, the decision shall be made by at least two thirds of the votes cast. The Constitution specifies that an international obligation shall not endanger the democratic foundations of the Constitution.

However, this acceptance is not sufficient for international law rules to enter into force in the national legal system. For that to happen, it requires, according to section 95 of the Constitution, that the provisions of treaties and other international obligations, in so far as they are of a legislative nature, are brought into force by an Act of Parliament. Otherwise, international obligations are brought into force by a decree issued by the President of the Republic.

A Government bill for the bringing into force of an international obligation is considered in accordance with the ordinary legislative procedure pertaining to an Act. However, if the proposal concerns the Constitution or a change to the national territory, the Parliament shall adopt it, without leaving it in abeyance, by a decision supported by at least two thirds of the votes cast.

Formally, the relation between national law and international law therefore seems to be dualistic. In reality, this relation could be defined as quasi-monistic. This can be explained by the fact that an act bringing into force international obligations is normally confined to stating that the norms

of the treaty in question shall enter into force in the national legal system without changes. Consequently, international statutes are not necessarily rewritten into national law, and therefore national courts of law can directly apply the provisions of an international treaty through the implementing act.

In order to avoid a conflict between national and international legal rules, the national rules in question are actually often modified when the act implementing the international obligations is adopted. This is particularly true for international obligations closely concerning individuals, so that they may rely upon the national law rule in the first place.

Both the European Convention on Human Rights and the Treaty of Accession to the EU were brought into force in Finland by an Act of Parliament. Since these treaties concerned the Constitution, the Parliament adopted the acts by a decision supported by at least two thirds of the votes cast. In addition, a consultative referendum on the membership to the EU was organised in Finland.

All subsequent modifications of the EU treaties have been integrated into the domestic legal system by an Act of Parliament.

2. The status of European and EU texts in the domestic legal system

Ordinary international treaties (including the European Convention on Human Rights)

The Finnish Constitution does not give a special hierarchical status to ordinary international agreements.

The legal norms of ordinary international treaties transposed into national law by an implementing act, have the same hierarchical status as ordinary national acts. Consequently, in case of a conflict between an international norm and a national law rule contained in an ordinary act, the international norm shall not have primacy as a matter of principle. The conflict should be settled by applying the normative rules (such as *lex posterior*).

In this connection, there is reason to emphasise the importance of the method of interpreting a national law rule (even at the level of the Constitution) ensuring as far as possible the consistency of its application with Finland's international obligations. This method of interpretation has become established legal practice in the national courts of law and it is also supported by the Constitutional Committee of the Parliament. Further, section 22 of the Constitution henceforth heightens the importance of this method of interpretation. This section provides that "the public authorities shall guarantee the observance of basic rights and liberties and human rights".

Since the ordinary international norms as such are not superior in hierarchy to national law rules, the question of primacy of the international norm has not explicitly arisen in case law.

As regards the direct application of international norms in the field of human rights, it was not until the 1990s that these norms were more frequently invoked. This is above all due to the fact that Finland acceded to the European Convention on Human Rights in 1990. Although there are no obstacles of principle to the direct application of an international norm, it is true that such applications are still comparatively isolated in number. In fact, application of the provisions of the Constitution governing fundamental rights is normally sufficient in order to comply with the

international obligations as well. Accordingly, the inclusion of these obligations into the national legal system by way of modifying the national provisions in question has rendered superfluous the direct application of the international norms. It seems that the role of the international norms is more important as an influence on the interpretation of national law rules.

Community Law

Community law has now been applied, in Finland, for almost nine years: in the first year (1994) indirectly in the context of the Agreement on European Economic Area and since 1995 in the capacity of a full member of the European Union.

Contrary to the situation when the six first Member states created the European Communities, the main characteristics of the legal order of the European Community, as they have been precised by the case-law of the EC Court of Justice, were already well known at the time of the Finnish accession to the European Union. The principle of primacy over national law, the principle of direct applicability and the principle of direct effect had already been established when the negotiations in view of the Finnish membership started. Even the Francovich-judgement had already been rendered in 1991 meaning that the question of the responsibility of Member states in case of breach of Community law was not a new matter.

Those important principles defining the relationship between Community legal order and national legal order were thus part of the *acquis communautaire* when Finland joined the European Union in 1995. As mentioned already, an international obligation does not produce legal effects in the national legal order simply because of its approval. It has to be incorporated into the national legal order by transformation. Therefore, the Treaty of Accession to the EU was transformed into the national legal order by an Act of Parliament.

There is no express provision in the Finnish Constitution on the partial transfer of sovereignty nor on primacy or direct applicability of Community law. The Government Bill for the Ratification of the constituent Treaties of the EU, submitted to the Finnish Parliament, explained that such a provision is not necessary, as these principles form part of the *acquis communautaire*.

The principles of supremacy and direct effect were, however, considered as being in conflict with the Finnish Constitution. Therefore, these issues, amongst others, made it necessary to adopt the Ratification Act through the procedure applicable to amendments to the Constitution. The wording of the Constitution remained, however, the same as before.

Through the Ratification Act the effects of Community law in Finland are defined by Community law itself. It may be argued that so far the Community Institutions act within the powers conferred to them by the Treaties, no claims founded on the Constitution can be raised against the application of their decisions in Finland. So far, any Finnish court has not been faced with the question of a possible conflict between secondary Community legislation and the Finnish Constitution.

The work to adapt the Finnish law to Community law started in Finland in 1989 in view of the membership in the EEA. Finally, this adaptation involved more than 500 Acts of Parliament. However, the major part of the modifications concerned hierarchically lower norms.

3. Status of secondary EU legislation in the national legal system

See the answer to the previous question.

4. Does the national court have jurisdiction for supervising the conformity of European and EU treaties with the Constitution?

Since Finland has no Constitutional Court the question is reformulated as concerning the Finnish courts in general.

To understand the Finnish system it is useful to describe first *the supervision of the conformity of a national rule with a higher national norm*:

As far as supervision of the constitutionality of ordinary Acts of Parliament is concerned, the Constitutional Committee of the Parliament shall issue statements on the constitutionality of legislative proposals. In this connection, it should be emphasised that the manner of working of the Constitutional Committee, which accordingly exercises a preliminary control, resembles in certain respects that of a court of law, although its members are representatives of Parliament. The control of constitutionality has the main stress on this advance review.

As regards supervision of the constitutionality of ordinary acts after their adoption, no general or special court is assigned to repeal Acts of Parliament in violation of the Constitution. All courts, however, exercise a certain degree of supervision. As a matter of fact, the Constitution stipulates that if the application of an ordinary Act of Parliament clearly conflicts with the Constitution in a matter being tried by a court of law, the court of law shall give primacy to the provision in the Constitution. This function is exercised in the context of an ordinary case, not as a direct action against the Act of Parliament.

As for the subordination of lower level statutes, the Constitution stipulates that if a provision in a decree or another statute of a lower level than an Act of Parliament is in conflict with the Constitution or another act, it shall not be applied by a court of law or by any other public authority.

Formerly, courts of law very rarely applied a provision of the Constitution directly, but the situation has changed particularly during the past twenty years. It is likely that the new provisions of the Constitution governing fundamental rights, adopted in 1995, have further increased direct recourse to these provisions, since they are formulated more precisely, thereby making them easier to apply.

The constitutional provisions (mainly regarding fundamental rights) also have an indirect effect, as the courts of law usually interpret ordinary Acts of Parliament and lower level statutes in the light of the provisions of the Constitution to avoid conflicts of laws to the fullest possible extent.

Even after the introduction, by the enactment of the new Constitution of 2000, of the right and obligation to give primacy to the Constitution in the event of a conflict between the Constitution and an ordinary Act of Parliament, it can be supposed that the method of conforming interpretation will suffice for avoiding most conflicts. This situation is influenced by the fact that to be set aside, an act's inconsistency with the Constitution must be obvious. This new prerogative has apparently not yet been used by the courts of law.

As regards *the supervision of the conformity of ordinary international agreements (including the European Convention on Human Rights) and EU Treaties* with the Constitution, the conformity is examined during the preparation of the decision on the approval of the agreement. This supervision is mainly carried out by the Constitutional Committee of the Parliament. It shall issue statements on the constitutionality of legislative proposals. The control of constitutionality has the main stress on this advance review. There is no advance control exercised by a national court.

The question of the conformity of international agreements with the Constitution can come up before any court of law in the context of a case where a stipulation of the international agreement and a provision of the Constitution should be applied directly and there is a conflict between these norms. In that situation the national court has to decide which norm it will apply and which norm it will set aside. (See also answer to the question 6.)

5. Does the national court have jurisdiction for supervising compatibility between (national) legislation and European and EU Treaties

There is no abstract norm control exercised by the national courts.

If a Finnish court has to apply directly, in a case pending before it, a national legislative rule and a norm of an international treaty, it has jurisdiction to examine the compatibility between them if this is necessary in order to decide which of the two conflicting norms should be applied in the present case.

6. Does the national court have jurisdiction for supervising the conformity of subordinate EU legislations (regulations, directives) with the Constitution?

There is no abstract norm control exercised by the national courts.

If a Finnish court has to take account, in a case pending before it, of a provision of the Constitution rule and a provision of a EU regulation or a directive and there seems to be a conflict between them, the application of the principle of primacy of Community law would give precedence to the regulation or directive. However, the answer is not necessarily that simple from the point of view of the Finnish Constitution. This question has not yet come up before a Finnish court and, therefore, no precise answer can be given. In any case, the national court would try to solve the conflict, as much as possible, by the interpretation of the relevant norms.

II. European integration and constitutional case-law

The answers under this chapter concern the Finnish Supreme Administrative Court.

1. Access to the judgements of the European Courts

In the Supreme Administrative Court, there is no special department for cases involving Community law or the Convention on Human Rights.

The importance of the information services provided by the library of the Supreme Administrative Court has increased in Community law matters. The library offers good facilities

for research using internal and external data bases. It has also consulted the Department of Research and Documentation of the Court of Justice. The staff of the Supreme Administrative Court have each their own computer and Internet connection. The Internet sites of the European Court of Justice and of the Human Rights Court serve well as a source of information on recent case-law.

2. Taking account of the case-law of the European Courts

The Supreme Administrative Courts is bound by the case-law of the Court of Justice of the European Communities as defined by this case-law itself. Therefore, it is a normal practice to take account of the decisions of the judgements of the Court of Justice and to refer to them in the decision. These references are a necessary part of the grounds for the decisions.

As regards to the case-law of the European Court of Human Rights, it should be noted that although there are no obstacles in principle to the direct application of the European Convention on Human Rights, it is true that such applications are still comparatively isolated in number before the Supreme Administrative Court. In fact, application of the provisions of the Constitution governing fundamental rights is normally sufficient in order to comply with the international obligations as well. It seems that the role of the Human Rights Convention is more important as an influence on the interpretation of national law rules. Most cited articles of the Convention in the Supreme Administrative Court are Articles 6 and 8. It happens very seldom that the Court makes an explicit reference to a judgement of the European Court of Human Rights. It is much more frequent to make such reference in the internal preparatory documents of the Supreme Administrative Court.

3. Reversal or amendment of case-law following judgement by the European Court of Human Rights

It may be mentioned that the case-law of the European Court of Human Rights has had particular significance in the field of aliens cases. It has also influenced the question when an oral hearing should be organised. However, it cannot be said that the Supreme Administrative Court has had to reverse or amend its earlier case-law directly because of a particular judgement of the European Court of Human Rights.

4. Reversal or amendment of case-law following a judgement of the European Court of Justice

All Finnish courts and tribunals may have cases involving Community law. This is illustrated by the fact that all kinds of courts and tribunals have made preliminary references to the EC Court of justice. Thus, a question of Community law may arise in civil, criminal and administrative matters and before special judicial bodies as well.

The practice has shown that the application of Community law seems to take place, in Finland, predominantly in administrative courts. Before the Supreme Administrative Court, Community law plays some role in almost 30 % of the cases. Before that court, the significance of Community law in different types of cases may be described as follows:

- In some groups of cases, it has to be taken as a point of departure that the case must be examined in the light of Community law: competition cases, public procurement cases,

agriculture cases, indirect tax cases and cases concerning medicaments are examples of such cases.

- There is a second group of cases where one should always check whether the matter is also governed by Community law. Environmental cases constitute perhaps the best example of this.

- Finally, there is a great number of cases which normally fall outside the scope of Community law, for example most direct tax cases. But even in these fields, one should be cautious. A question of Community law may come up even in the most surprising context.

Due to this abundant role of the Community law in the Supreme Administrative Court, the Court has had to adjust its case-law in many cases so that it corresponds to the jurisprudence of the European Court of Justice. This adjustment does not normally mean that the Supreme Administrative Court is obliged to reverse its earlier case-law. It is more a question of following the normal practice of the case-law of the European Court of Justice closely and, if necessary, to make a preliminary reference.

5. Reversal or amendment of case-law following the adoption of a European Instrument by the Council of Europe

It seems that there have been no such cases.

6. Reversal or amendment of case-law following the enactment of a European Community legal measure

Numerous legislative acts of the European Union are either directly applicable in the courts, or affect the interpretation of implementing national legislation by the courts. New acts may also have the consequence that the earlier case-law becomes irrelevant.

III. European integration and constitutional justice

1. Is the Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?

Article 6 of the Convention is directly applicable before all Finnish courts. As regards the Supreme Administrative Court and lower administrative courts, the correct application of national procedural rules should, however, guarantee the observation of the requirements of Article 6. Particular attention is paid to Article 6 notably when deciding on the oral hearing or when assessing whether the national rules guarantee the right to a court.

2. Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

There are no specific rules concerning the effects of a judgement of the_European Court of Human Rights. The Act on the Procedure before the Administrative Courts contains general provisions regarding the grounds on which a final decision may be quashed and the case re-examined. These grounds should make it possible for the re-opening of a final decision if the European Court of Human Rights has observed that there has been a violation of Article 6 of the Convention.

3. Has the Court applied Article 234 (former Article 177) of the EC Treaty concerning preliminary rulings?

So far, the Supreme Administrative Court has asked for a preliminary ruling in ten cases.

In five of these ten cases the European Court of Justice has given its judgement. In four of these five cases the Supreme Administrative Court has made its final decision and followed the preliminary ruling.

FRANCE

M. Olivier DUTHEILLET de LAMOTHE,
Membre du Conseil constitutionnel,
Membre de la Commission de Venise au titre de la France

I. Intégration des normes européennes dans l'ordre juridique interne

1. Comment s'opère la réception des traités européens et/ou communautaires au sein de l'ordre juridique interne ?

En droit français, la procédure de ratification des traités est prévue par la Constitution. Aux termes de l'article 52 de la Constitution : « Le Président de la République négocie et ratifie les traités. Il est informé de toute négociation tendant à la conclusion d'un accord international non soumis à ratification ».

Aux termes de l'article 53 de la Constitution : « Les traités de paix, les traités de commerce, les traités ou accords relatifs à l'organisation internationale, ceux qui engagent les finances de l'Etat, ceux qui modifient des dispositions de nature législative, ceux qui sont relatifs à l'état des personnes, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu'en vertu d'une loi. Ils ne prennent effet qu'après avoir été ratifiés ou approuvés».

Le décret n° 53-192 du 14 mars 1953 relatif à la ratification et à la publication des engagements internationaux souscrits par la France, modifié par le décret n° 86-7O7 du 11 avril 1986, prévoit la publication des conventions, accords, protocoles et règlements internationaux par le Ministre des Affaires Etrangères. Aux termes de l'article 3 de ce décret, « Après transmission au Ministre des Affaires Etrangères et, s'il y a lieu, ratification, les conventions, accords, protocoles ou règlements, prévus aux articles précédents et de nature à affecter, par leur application, les droits ou les obligations des particuliers, doivent être publiés au Journal Officiel de la République française ».

2. Quel est le statut des traités européens et/ou communautaires dans l'ordre juridique national ?

Ce statut est précisé par la Constitution elle-même, dont l'article 55 dispose : « Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie ».

Selon la jurisprudence concordante de la Cour de Cassation et du Conseil d'Etat, les traités internationaux ont une valeur supra législative mais infra constitutionnelle :

- supra-législative, dans la mesure où les traités ont une valeur juridique supérieure à celle des lois, même postérieures, pour la Cour de Cassation (Chambre mixte 24 mai 1975, Société des Cafés Jacques Vabre, Dalloz 1975 conclusions Touffait) comme pour le Conseil d'Etat (Assemblée 2O octobre 1989, Nicolo recueil p. 19O, conclusion P. Frydman)

- infra-constitutionnelle, dans la mesure où le Conseil d'Etat (Assemblée 3O octobre 1998, Sarran et Levacher et autres recueil p. 369) comme la Cour de Cassation (Assemblée plénière 2 juin 2000, Mlle Fraisse n° 99-60.274) ont jugé que la suprématie conférée par l'article 55 aux engagements internationaux ne s'applique pas dans l'ordre interne aux dispositions de valeur constitutionnelle.

3. (Pour les Etats membres de l'Union européenne) Quel est le statut du droit communautaire dérivé (règlements et directives) dans l'ordre juridique national ?

Le droit communautaire dérivé a, en vertu de l'article 55 de la Constitution, une valeur juridique supérieure à celles des lois. Ainsi, selon une jurisprudence là encore concordante, le Conseil d'Etat comme la Cour de Cassation font-ils prévaloir sur la loi même postérieure :

- le règlement communautaire (Conseil d'Etat 24 septembre 1990, Boisdet recueil p. 25O ; Cassation Criminelle 22 octobre 1970, Société des Fils d'Henri Ramel, Dalloz 1971 p. 221 rapport Mazard note Rideau)

- les objectifs d'une directive communautaire (Conseil d'Etat Assemblée 28 février 1992, S.A. Rothmans International France et S.A. Philip Morris France, recueil p. 8O ; Cassation Criminelle 17 octobre 1994, Bulletin n° 332).

4. La Cour Constitutionnelle est-elle compétente pour contrôler la conformité des traités européens et/ou communautaires à la Constitution ?

Aux termes de l'article 54 de la Constitution : « Si le Conseil constitutionnel, saisi par le Président de la République, par le Premier Ministre, par le Président de l'une ou l'autre assemblée ou par 6O députés ou 6O sénateurs, a déclaré qu'un engagement international comporte une clause contraire à la Constitution, l'autorisation de ratifier ou d'approuver l'engagement international en cause ne peut intervenir qu'après la révision de la Constitution ».

Le contrôle ainsi prévu de la conformité des traités internationaux - et notamment des traités communautaires - à la Constitution est donc un contrôle préventif qui ne peut s'exercer qu' avant la ratification du traité en cause.

Le Conseil constitutionnel peut également se prononcer sur la conformité à la Constitution d'un engagement international lorsqu'il est saisi de la loi portant autorisation de ratifier cet engagement sur la base de l'article 61, alinéa 2, de la Constitution qui permet au Président de la République, au Premier Ministre, aux Présidents des deux assemblées, à 6O députés ou 6O sénateurs de lui déférer une loi avant sa promulgation pour contrôler sa conformité à la Constitution. Il exerce à cette occasion le même contrôle de fond que lorsqu'il est saisi sur la base de l'article 54.

Si le Conseil constitutionnel s'est reconnu la possibilité de contrôler la constitutionnalité d'une loi déjà promulguée à l'occasion de l'examen de dispositions législatives qui la modifient, la complètent ou affectent son champ d'application, il s'est en revanche refusé à étendre cette jurisprudence aux traités. La constitutionnalité d'un traité ratifié ne peut plus être remise en cause, même au travers du contrôle de constitutionnalité d'un traité modificatif (Décision n° 92-3O8 DC du 9 avril 1992, recueil p. 55).

Le Conseil constitutionnel a été conduit à se prononcer à 8 reprises, dans le cadre de ces deux procédures, sur la conformité de traités européens ou communautaires à la Constitution :

- Le Conseil constitutionnel a été saisi pour la première fois, au titre de l'article 54 de la Constitution, en 197O de la conformité à la Constitution du traité signé à Luxembourg le 22 avril 197O portant modification de certaines dispositions budgétaires des traités instituant les communautés européennes et de la décision du Conseil des communautés européennes en date du 21 avril 197O relative au remplacement des contributions des Etats-membres par des ressources propres aux communautés. La décision rendue le 19 juin 197O (n° 7O-39 DC, recueil p. 15) reconnut la conformité des deux textes à la Constitution en se référant pour la première fois au 15e alinéa du préambule de la Constitution de 1946 selon lequel : « Sous réserve de réciprocité, la France consent aux limitations de souveraineté nécessaires à l'organisation et à la défense de la paix ». Le Conseil estima notamment que la décision du Conseil des communautés européennes du 21 avril 197O ne portait atteinte ni par sa nature, ni par son importance « aux conditions essentielles d'exercice de la souveraineté nationale ».

- Saisi en 1976 par le Président de la République, au titre de l'article 54, de la décision du Conseil des Ministres des communautés européennes et de l'acte annexé relatif à l'élection du Parlement européen au suffrage universel, le Conseil constitutionnel en admit la conformité à la Constitution (Décision n° 76-71DC du 3O décembre 1976, recueil p.15).

- Par une décision du 22 mai 1985 (n° 85-188 DC, recueil p.15), le Conseil, saisi par le Président de la République au titre de l'article 54, a déclaré conforme à la Constitution la ratification par la France du protocole n° 6 à la Convention européenne des droits de l'homme relatif à l'abolition de la peine de mort.

- Par une décision du 25 juillet 1991 (n° 91-294 DC, recueil p. 91), le Conseil constitutionnel, saisi par 60 députés sur le fondement de l'article 61, alinéa 2, de la Constitution, de la loi autorisant l'approbation de la convention d'application de l'accord de Schengen du 14 juin 1985, a reconnu la conformité de cette convention à la Constitution.

- Le Président de la République a soumis , sur le fondement de l'article 54, le traité sur l'Union européenne signé à Maastricht le 7 février 1992 au Conseil constitutionnel. Dans sa décision du 9 avril 1992 (n° 92-308 DC recueil p. 55), le Conseil constitutionnel a estimé que « le respect de la souveraineté nationale ne fait pas obstacle à ce que, sur le fondement des dispositions précitées du Préambule de la Constitution de 1946, la France puisse conclure, sous réserve de réciprocité, des engagements internationaux en vue de participer à la création et au développement d'une organisation internationale permanente, dotée de la personnalité juridique et investie de pouvoirs de décision par l'effet de transferts de compétences consentis par les Etats membres ». Seule l'existence d'une clause contraire à la Constitution ou portant atteinte aux « conditions essentielles d'exercice de la souveraineté nationale » nécessiterait une révision de la Constitution, ce qui était le cas du droit de vote et d'éligibilité des citoyens de l'Union européenne aux élections municipales, des dispositions relatives à l'Union économique et monétaire et du recours à la majorité qualifiée pour l'adoption de la politique commune des visas. Cette décision conduisit à la révision constitutionnelle du 25 juin 1992 qui a inséré dans

la Constitution française un nouveau titre XV « Des Communautés européennes et de l'Union européenne »

- Le Conseil fut saisi une nouvelle fois sur le fondement de l'article 54 par 7O sénateurs, après la révision constitutionnelle, de la conformité du traité de Maastricht à la Constitution ainsi révisée. Il a rejeté ce recours par une décision n° 92-312 DC du 2 septembre 1992 (au recueil p. 76).

- Le Conseil constitutionnel a été, saisi, pour la première fois de son histoire, conjointement par le Président de la République et le Premier Ministre sur le fondement de l'article 54 de la conformité à la Constitution du traité d'Amsterdam signé le 2 octobre 1997. Il a estimé que certaines dispositions de ce traité affectaient les conditions essentielles d'exercice de la souveraineté (décision n° 97-394 DC du 31 décembre 1997, recueil p. 344). Cette décision a conduit à la révision constitutionnelle du 25 janvier 1999.

- Le Conseil constitutionnel a été, enfin, saisi par le Président de la République sur le fondement de l'article 54 de la Charte européenne des langues régionales ou minoritaires. Il en a jugé certaines clauses générales contraires aux principes d'indivisibilité de la République et d'unicité du peuple français (Décision n° 99-412 DC du 15 juin 1999, recueil p. 71).

5. La Cour Constitutionnelle est-elle compétente pour contrôler la conformité de la loi aux traités européens et/ou communautaires ?

Aux termes de l'article 55 de la Constitution : « Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie ».

Depuis une décision de principe n° 74-54 DC du 15 janvier 1975 sur la loi relative à l'interruption volontaire de grossesse (au recueil p. 19), le Conseil constitutionnel estime que « si ces dispositions confèrent au traité, dans les conditions qu'elles définissent, une autorité supérieure à celle des lois, elles ne prescrivent ni n'impliquent que le respect de ce principe doit être assuré dans le cadre du contrôle de la conformité des lois à la Constitution prévu à l'article 61 de celle-ci ». Le Conseil constitutionnel a en effet estimé, à l'époque, « que les décisions prises en application de l'article 61 de la Constitution revêtent un caractère absolu et définitif, ainsi qu'il résulte de l'article 62 qui fait obstacle à la promulgation et à la mise en application de toute disposition déclarée inconstitutionnelle ; qu'au contraire, la supériorité des traités sur les lois, dont le principe est posé à l'article 55 précité, présente un caractère à la fois relatif et contingent, tenant, d'une part, à ce qu'elle est limitée au champ d'application du traité et, d'autre part, à ce qu'elle est subordonnée à une condition de réciprocité dont la réalisation peut varier selon le comportement du ou des Etats signataires du traité et le moment où doit s'apprécier le respect de cette condition ». Le Conseil en a déduit « qu'une loi contraire à un traité ne serait pas, pour autant, contraire à la Constitution ; qu'ainsi le contrôle du respect du principe énoncé à l'article 55 de la Constitution ne saurait s'exercer dans le cadre de l'examen prévu à l'article 61, en raison de la différence de nature de ces deux contrôles ; que, dans ces conditions, il n'appartient pas au Conseil constitutionnel, lorsqu'il est saisi en application de l'article 61 de la Constitution, d'examiner la conformité d'une loi aux stipulations d'un traité ou d'un accord international ».

Si cette jurisprudence est constante dans son principe depuis 1975, elle a sensiblement évolué dans sa formulation sur trois points :

- Il n'est plus fait état du caractère relatif et contingent de la supériorité des traités sur les lois affirmée par l'article 55. Cet argument était en fait dépourvu de fondement, comme le Conseil a eu l'occasion de le préciser ultérieurement, tant vis-à-vis des engagements internationaux relatifs aux droits fondamentaux, comme la Convention européenne des droits de l'homme ou le Traité portant statut de la Cour pénale internationale (Décision n° 98-4O8 DC du 22 janvier 1999, recueil p. 29), que vis-à-vis des traités communautaires (Décisions n° 92-3O8 DC du 9 avril 1992, recueil p. 55 ; n° 98-4OO DC du 2O mai 1998, recueil p. 251).

- Le Conseil a par ailleurs précisé que le principe de supériorité du droit international s'impose « même dans le silence de la loi » et « qu'il appartient aux divers organes de l'Etat de veiller à l'application des conventions internationales dans le cadre de leurs compétences respectives » (Décision n°86-216 DC du 3 septembre 1986, recueil p. 135 ; n° 89-268 DC du 29 décembre 1989 de finances pour 199O, recueil p. 11O).

- Le Conseil a, enfin estimé que, lorsqu'il est saisi sur le fondement de l'article 61 de la Constitution, s'il ne lui appartient pas d'examiner la conformité de la loi déférée aux stipulations d'un traité ou d'un accord international, il lui revient en revanche « de s'assurer que la loi respecte le champ d'application de l'article 55 » (Décision n° 89-268 DC du 29 décembre 1989, recueil p. 11O). Ainsi a été déclarée contraire à la Constitution une loi ne reconnaissant la supériorité des engagements internationaux sur la loi qu'aux seuls traités ou accords dûment ratifiés et non dénoncés, excluant de ce fait les accords seulement approuvés (n° 86-216 DC du 3 septembre 1986 précité).

En revanche, le Conseil constitutionnel se refuse toujours, lorsqu'il est saisi en application de l'article 61 de la Constitution, à examiner la conformité de la loi déférée aux stipulations d'un traité ou d'un accord international (Décision n° 89-268 DC du 29 décembre 1989 au recueil p. 11O ; Décision n° 96-375 DC du 9 avril 1996, recueil p. 6O ; Décision n° 98-399 DC du 5 mai 1998, recueil p. 245). Il se refuse également, pour les mêmes motifs, à examiner la conformité de la loi déférée aux actes de droit communautaire dérivés, règlements ou directives (Décision n° 91-298 DC du 24 juillet 1991, recueil p. 82).

Cette règle ne connaît qu'une exception qui s'explique par les dispositions mêmes de la Constitution. En effet l'article 88-3, introduit par la révision constitutionnelle du 25 juin 1992, a expressément subordonné la constitutionnalité de la loi organique sur le droit de vote et d'éligibilité des citoyens de l'Union européenne aux élections municipales « au respect des modalités prévues par le traité sur l'Union européenne ». Le Conseil constitutionnel s'est assuré que cette loi respectait tant l'article 19 du traité instituant la Communauté européenne que la directive n° 94/8O CE du 19 décembre 1994 du Conseil de l'Union européenne qui en fixe les modalités d'exercice (Décision n° 98-4OO DC du 2O mai 1998, recueil p. 251).

Ainsi l'article 55 est analysé par le Conseil constitutionnel comme posant une règle à valeur constitutionnelle de conflit de normes qu'il incombe aux juridictions d'appliquer dans les litiges sur lesquels elles se prononcent. C'est sur cette habilitation donnée au juge par la décision du 15 janvier 1975 que la Cour de Cassation s'est fondée dès le 4 mai 1975 (Chambre mixte, Société des Cafés Jacques Vabre précité) et le Conseil d'Etat 15 ans plus tard (Assemblée 2O octobre 1989, Nicolo précité) pour estimer qu'il appartenait au juge judiciaire ou administratif d'assurer

le respect de la hiérarchie des normes prévue par l'article 55. Le Conseil constitutionnel lui-même, lorsqu'il statue en tant que juge électoral - ne pouvant dans ce cadre apprécier la constitutionnalité d'une loi - examine la conformité des dispositions de la loi interne au regard des stipulations d'une convention internationale (21 octobre 1988, Assemblée Nationale Val d'Oise 5e circonscription, recueil p. 183).

6. (Pour les Etats membres de l'Union européenne) La Cour constitutionnelle est-elle compétente pour contrôler la conformité du droit communautaire dérivé (règlements, directives) à la Constitution ?

Comme pour les traités eux-mêmes, deux procédures prévues par la Constitution peuvent être envisagées :

- Un recours direct introduit contre un acte de droit communautaire dérivé sur le fondement de l'article 54 de la Constitution paraît exclu par la lettre même de cet article : celui-ci ne concerne en effet qu' « un engagement international » soumis à approbation ou à ratification, ce qui n'est à l'évidence le cas ni des règlements ni des directives. Si dans deux décisions n° 70-39 DC du 19 juin 1970 et n° 76-71 DC du 30 décembre 1976 le Conseil constitutionnel s'est reconnu compétent pour connaître de recours fondés sur l'article 54 de la Constitution et dirigés contre deux « décisions » du Conseil des Communautés européennes, c'est parce qu'il s'agissait en réalité d'engagements internationaux soumis à approbation ou ratification :

  dans l'affaire du 19 juin 1970, la décision du Conseil des Communautés européennes en date du 21 avril 1970 relative au remplacement des contributions des Etats-membres par des ressources propres aux communautés était en réalité un accord dont l'approbation était subordonnée, conformément à l'article 53 de la Constitution, à l'intervention d'une loi ;

  dans la décision du 30 décembre 1976, le Conseil constitutionnel a expressément requalifié la décision du Conseil des Communautés européennes relative à l'élection de l'assemblée des communautés au suffrage universel direct et l'acte qui y était annexé d' « engagement international ».

- Rien ne s'oppose, en revanche, à ce que le Conseil constitutionnel soit saisi sur le fondement de l'article 61 de la Constitution d'une loi qui constitue soit une mesure d'application d'un règlement ou d'une décision communautaire, soit une transposition d'une directive. A l'occasion de ce recours, le Conseil peut, - en examinant un moyen tiré de la contrariété entre la loi de mise en oeuvre d'un règlement ou de transposition d'une directive et la Constitution française - exercer un contrôle indirect sur le droit communautaire dérivé par rapport à la Constitution.

Les décisions dans lesquelles le Conseil constitutionnel a eu à connaître de règlement ou de directive communautaire sont à ce jour relativement peu nombreuses puisqu'on peut en dénombrer sept.

Par une décision n° 77-90 DC du 30 décembre 1977 (au recueil p. 44), le Conseil constitutionnel a été amené à se prononcer sur la conformité à la Constitution des dispositions de la loi de finances rectificative pour 1977 fixant les modalités de recouvrement d'une cotisation sur la production d'isoglucose créée par un règlement communautaire du 17 mai 1977 qui en avait

déterminé l'assiette et le taux. Le Conseil constitutionnel a jugé, d'une part, que cette cotisation « a le caractère d'une ressource propre communautaire et échappe aux règles applicables en matière d'imposition nationale » et que, d'autre part, les répercussions de la répartition des compétences opérées par le règlement communautaire entre les institutions communautaires et les autorités nationales au regard tant des conditions d'exercice de la souveraineté nationale que du jeu des règles de l'article 34 de la Constitution relatives au domaine de la loi « ne sont que la conséquence d'engagements internationaux souscrits par la France qui sont entrés dans le champ de l'article 55 de la Constitution » et ne sont, dès lors, contraires à aucune règle ni à aucun principe de valeur constitutionnelle.

Par une décision n° 77-89 DC du 30 décembre 1977 relative à la loi de finances pour 1978 (au recueil p. 46), le Conseil constitutionnel a jugé à propos du prélèvement de co-responsabilité sur le lait institué par un règlement du 17 mai 1977 complété par un règlement du 5 août 1977 « qu'en raison tant du caractère de mesure d'ordre économique touchant à l'organisation du marché laitier qui s'attache au prélèvement que du contenu détaillé des prescriptions édictées par les règlements communautaires qui sont obligatoires dans tous leurs éléments et directement applicables dans tout Etat membre... les dispositions qu'avaient à prendre les autorités nationales pour assurer l'exécution des règlements du 17 mai et du 5 août 1977 n'exigeaient pas l'intervention du Parlement ; que, dans ces conditions, la loi de finances pour 1978, en ne prévoyant aucune règle, ni aucune inscription en recette ou en dépense relative au prélèvement de co-responsabilité, ne méconnaît pas la Constitution ».

Dans sa décision n° 8O-126 DC du 30 décembre 1980 relative à la loi de finances pour 1981 (au recueil p. 53), le Conseil constitutionnel a été amené à se prononcer sur la conformité à la Constitution de l'article 13 déterminant un nouvel aménagement des droits sur les alcools, qui avait pour objet d'harmoniser la législation nationale avec les dispositions adoptées en la matière par les instances de la Communauté économique européenne. Le Conseil constitutionnel a jugé à cette occasion que « l'article 55 de la Constitution ne s'oppose pas à ce que la loi édicte des mesures ayant pour objet d'harmoniser la législation nationale avec les dispositions découlant d'un traité, alors même que celles-ci ne seraient pas appliquées par l'ensemble des parties signataires ». Il a également estimé que les dispositions contestées n'étaient pas contraires au principe de non-rétroactivité en matière pénale posé par l'article 8 de la Déclaration des Droits de l'Homme et du Citoyen.

Enfin et surtout, par une décision n° 94-348 DC du 3 août 1994 (au recueil p. 117), le Conseil constitutionnel a été amené à se prononcer sur la conformité à la Constitution de la loi relative à la protection sociale complémentaire des salariés et portant transposition des directives n° 92/49 et n° 92/96 des 18 juin et 10 novembre 1992 du Conseil des Communautés européennes. Dans cette affaire, le Conseil a été conduit à examiner longuement la conformité des dispositions de la loi de transposition au principe d'égalité, à la liberté d'entreprendre ainsi qu'au principe constitutionnel de participation des travailleurs à la détermination collective des conditions de travail. Il a même été conduit à annuler l'une des dispositions de cette loi comme contraire au principe d'égalité. Comme le montre clairement cette affaire, en exerçant un entier contrôle sur la conformité à la Constitution de la loi de transposition d'une directive communautaire, sans rechercher si les dispositions contestées sont la conséquence nécessaire de la directive transposée - dont les dispositions sont bien souvent purement et simplement reprises par la loi nationale - le Conseil constitutionnel est amené à se prononcer indirectement mais nécessairement sur la constitutionnalité de la directive elle-même.

On ne peut tirer, en revanche, aucun enseignement de trois autres décisions rendues dans ce domaine. La décision n° 78-100 DC du 29 décembre 1978 relative à la loi de finances rectificative pour 1978 (au recueil p. 38) : si les articles 24 à 49 de cette loi relatifs à l'adaptation de la législation sur la taxe à la valeur ajoutée à la 6e directive du Conseil des communautés européennes étaient contestés, c'était en effet exclusivement pour un motif de procédure. De même la décision n° 96- 383 DC du 6 novembre 1996 sur la loi relative à l'information et à la consultation des salariés dans les entreprises et groupe d'entreprises de dimension communautaire ainsi qu'au développement de la négociation collective (au recueil p. 128) ne porte pas sur des dispositions de transposition de la directive créant le comité d'entreprise européen mais exclusivement sur une disposition reprenant le contenu d'un accord national interprofessionnel. Enfin, la décision n° 2000-440 DC du 10 janvier 2001 sur la loi portant diverses dispositions d'adaptation au droit communautaire dans le domaine des transports (au recueil p. 39) porte exclusivement sur les modalités d'indemnisation des courtiers-interprètes et conducteurs de navires du fait de la suppression de leur monopole pour mettre notre législation en conformité avec le règlement communautaire du 12 octobre 1992 établissant le code des douanes communautaire.

7. *L'admission au sein du Conseil de l'Europe a-t-elle été conditionnée par une série d'engagements étatiques (directive 488 de l'Assemblée Parlementaire de 1993, dont le respect est soumis au contrôle du Comité des Ministres et de la Commission de suivi de l'Assemblée Parlementaire) concernant l'organisation, le fonctionnement, la composition ou la jurisprudence de la Cour Constitutionnelle ?*

La France est membre du Conseil de l'Europe depuis sa création par la Convention portant statut du Conseil de l'Europe du 5 mai 1949. A cette date, le Conseil constitutionnel n'existait pas, la constitution de la IVe République n'ayant prévu qu'un Comité constitutionnel aux attributions très limitées.

II. Intégration européenne et jurisprudence constitutionnelle :

1. *La Cour constitutionnelle dispose-t-elle d'un service permettant l'accès efficace et rapide aux décisions rendues par les juridictions européennes (Cour de Justice et/ou Cour Européenne des Droits de l'Homme) et aux actes de droit communautaire dérivé ?*

Le Conseil constitutionnel comporte un service de documentation très performant qui dispose en permanence, tant sur support papier que sur support informatique :

- de la jurisprudence de la Cour européenne des Droits de l'Homme ;
- de la jurisprudence de la Cour de Justice des Communautés européennes ;
- des commentaires de doctrine auxquels donnent lieu ces jurisprudences ;
- des actes de droit communautaire dérivé.

2. *La Cour constitutionnelle intègre-t-elle dans son raisonnement, la jurisprudence de la Cour de Justice et/ou de la Cour Européenne des Droits de l'Homme ? Si oui, de quelle manière ?*

Il a toujours existé une grande similitude entre la jurisprudence du Conseil constitutionnel et celle de la Cour Européenne des Droits de l'Homme :

- similitude, d'abord, des droits et des libertés garantis dans la mesure où la Déclaration des Droits de l'Homme et du Citoyen de 1789, intégrée par le Conseil constitutionnel dans le bloc de constitutionnalité, a largement inspiré la rédaction de la Convention européenne des Droits de l'Homme ;

- similitude, également, des modes de raisonnement et des techniques jurisprudentielles utilisées : contrôle de proportionnalité, modalité de conciliation de droits fondamentaux antagoniques, notion de « marge nationale d'appréciation » reconnue aux Etats membres par la CEDH qui a son pendant, dans la jurisprudence du Conseil constitutionnel, dans la reconnaissance au Parlement d'un « large pouvoir d'appréciation » ;

- similitude, enfin, sur le fond dans la définition des garanties apportées : il n'est qu'à comparer les jurisprudences respectives de la Cour et du Conseil constitutionnel dans les domaines du droit répressif, du droit au respect de la vie privée, ou encore des droits de la défense.

Depuis une dizaine d'années, on assiste à un rapprochement plus volontariste des deux jurisprudences, le Conseil constitutionnel s'inspirant directement de la jurisprudence de la CEDH.

Ceci l'a conduit à aligner le champ matériel des droits et libertés constitutionnellement garantis sur le standard européen minimum que constitue la CEDH, opérant ainsi une sorte de nationalisation discrète de la norme européenne. Le Conseil constitutionnel a été ainsi amené à reconnaître un « droit à un recours juridictionnel » dont le fondement constitutionnel a été trouvé dans l'article 16 de la Déclaration des Droits de l'Homme et du Citoyen de 1789, selon lequel « Toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée n'a point de constitution » (Décision n° 96-373 DC du 9 avril 1996, recueil p. 43).

Ceci l'a également conduit à rapprocher la définition formelle - et donc la formulation - des droits et libertés constitutionnellement garantis de celle des droits énoncés par la Convention. Ainsi le Conseil constitutionnel reconnaît-il « le droit à une vie familiale normale » (Décision n° 93-325 DC du 13 août 1993, recueil p. 224) et le « droit au respect de la vie familiale et privée » des étrangers (Décision n° 97-389 DC du 22 avril 1997, recueil p. 45).

S'agissant de la liberté d'expression, le Conseil affirme désormais la nécessité « du pluralisme comme condition de la démocratie » (Décision n° 86-217 DC du 18 septembre 1986, recueil p. 141) en écho aux arrêts Sunday Times (26 avril 1979) et Lingens (8 juillet 1986) de la CEDH. Il affirme également la nécessaire indépendance des médias, le législateur devant mettre à même les usagers de porter un jugement éclairé sur les moyens d'information qui leur sont offerts (Décisions n° 84-181 DC des 10 et 11 octobre 1984, recueil p. 78, et n° 86-210 DC du 29 juillet 1986, recueil p. 110), à rapprocher de la jurisprudence de la Cour de Strasbourg pour laquelle la liberté d'expression comprend non seulement la liberté de communiquer des informations ou des idées mais également celle d'en recevoir (cf. par exemple l'arrêt Jersild du 23 septembre 1994).

Le Conseil a également reconnu la nécessité d'une « procédure juste et équitable garantissant l'équilibre des droits des parties » (décision n° 89-260 DC du 28 juillet 1989, recueil p. 71) qui s'inspire directement du « droit à un procès équitable » garanti par l'article 6 de la Convention et de la nécessaire « égalité des armes » entre les parties qui en découle. Ce faisant, le Conseil constitutionnel oeuvre non seulement à l'harmonisation du droit interne et du droit international

mais également à l'unification du droit interne, les juridictions nationales devant appliquer la loi telle que l'a interprétée le Conseil constitutionnel mais sous réserve de sa conformité à la Convention européenne des Droits de l'Homme.

L'influence de la jurisprudence de la Cour Européenne des Droits de l'Homme se traduit par des références systématiques à sa jurisprudence dans les rapports et, comme on vient de le voir, par la reprise dans les décisions du Conseil d'un certain nombre de formulations de la jurisprudence de la Cour sans référence explicite toutefois à la CEDH et aux arrêts de la Cour, compte tenu de la jurisprudence IVG évoquée ci-dessus (cf. I question 5).

3. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à une décision de la Cour Européenne des Droits de l'Homme ?

Le Conseil constitutionnel a été amené à aménager sa jurisprudence à la suite d'une décision de la Cour européenne des Droits de l'Homme en matière de validation législative.

Par une décision n° 93-322 DC du 13 janvier 1994 (au recueil page 21), le Conseil constitutionnel avait admis la conformité à la Constitution de l'article 85 de la loi n° 94-13 du 18 janvier 1994 relative à la santé et à la protection sociale, qui avait validé le montant d'une indemnité instituée en 1953 au profit des personnels des organismes de sécurité sociale des départements d'Alsace- Moselle. Relevant que le législateur avait entendu mettre fin par cet article à des divergences de jurisprudence et éviter par là-même le développement de contestations dont l'aboutissement aurait pu entraîner des conséquences financières préjudiciables à l'équilibre des régimes sociaux en cause, le Conseil avait estimé qu' « il lui était loisible, sous réserve du respect des principes susvisés, d'user comme lui seul pouvait le faire en l'espèce, de son pouvoir de prendre des dispositions rétroactives afin de régler pour des raisons d'intérêt général les situations nées des divergences d'une jurisprudence ci-dessus évoquées ».

Or, postérieurement à cette décision, la Cour Européenne des Droits de l'Homme a développé une jurisprudence admettant de façon beaucoup plus restrictive les validations (CEDH affaire Raffineries grecques Stran et Stratis Andreadis contre Grèce, arrêt du 9 décembre 1994 ; affaire Papageorgiou contre Grèce, arrêt du 22 octobre 1997 ; affaire National and Provincial Building Society contre Royaume Uni, arrêt du 23 octobre 1997).

Dans le prolongement de cette jurisprudence, la Cour Européenne des Droits de l'Homme a été amenée par un arrêt du 28 octobre 1999 (affaire Zielinski, Pradal, Gonzales et autres contre France) rendu donc cinq ans plus tard, à estimer que l'article 85 de la loi du 18 janvier 1994 était contraire à l'article 6 paragraphe 1 de la Convention européenne des droits de l'Homme relatif au droit à un procès équitable. La Cour a en effet estimé que « si, en principe, le pouvoir législatif n'est pas empêché de réglementer en matière civile, par de nouvelles dispositions à portée rétroactive, des droits découlant de lois en vigueur, le principe de la prééminence du droit et la notion de procès équitable consacrés par l'article 6 s'opposent, sauf pour d'impérieux motifs d'intérêt général, à l'ingérence du pouvoir législatif dans l'administration de la justice dans le but d'influer sur le dénouement judiciaire du litige ». En l'espèce, la Cour a estimé que l'article 85 avait purement et simplement entériné la position adoptée par l'Etat dans le cadre d'une procédure pendante et réglé en réalité le fond du litige. Cette décision, fondée sur le principe de la séparation des pouvoirs, opérait ainsi un contrôle de proportionnalité entre l'intérêt général invoqué et l'atteinte portée aux droits individuels du justiciable.

Par une décision n° 99-422 DC du 21 décembre 1999 (au recueil p. 143), rendue moins d'un mois plus tard, le Conseil constitutionnel a adapté sa jurisprudence dans le sens de celle de la CEDH, en estimant que « si le législateur peut, dans un but d'intérêt général suffisant, valider un acte dont le juge administratif est saisi, afin de prévenir les difficultés qui pourraient naître de son annulation, c'est à la condition de définir strictement la portée de cette validation, eu égard à ses effets sur le contrôle de la juridiction saisie ; qu'une telle validation ne saurait avoir pour effet, sous peine de méconnaître le principe de la séparation des pouvoirs et le droit à un recours juridictionnel effectif, qui découlent de l'article 16 de la Déclaration des Droits de l'Homme et du Citoyen, d'interdire tout contrôle juridictionnel de l'acte validé quelle que soit l'illégalité invoquée par les requérants ». Le Conseil constitutionnel s'est ainsi fondé explicitement sur le principe de la séparation des pouvoirs pour exercer comme la Cour Européenne des Droits de l'Homme un contrôle de proportionnalité entre l'intérêt général invoqué et l'atteinte portée au droit au recours du justiciable.

Quelques jours plus tard, le Conseil constitutionnel devait faire application de ce contrôle de proportionnalité sur deux dispositions de validation en matière fiscale (décision n° 99-425 DC du 29 décembre 1999, recueil p. 168). S'agissant de la validation d'avis fiscaux de mise en recouvrement, en tant qu'ils seraient contestés par un moyen tiré de l'incompétence territoriale de l'agent qui les a émis, le Conseil a estimé « que l'intérêt général qui s'attache à une telle validation l'emporte sur la mise en cause des droits des contribuables qui résulterait de l'irrégularité de pure forme que la validation a pour effet de faire disparaître », soulignant en outre « qu'à défaut de validation, la restitution aux intéressés d'impositions dont ils sont redevables au regard des règles de fond de la loi fiscale pourrait constituer un enrichissement injustifié ». S'agissant par ailleurs de la validation d'avis de mise en recouvrement émis à la suite d'une notification de redressement, en tant qu'ils seraient contestés par le moyen tiré de ce qu'ils se réfèreraient à la seule notification du redressement, le Conseil a relevé que ce vice de forme n'avait pu porter atteinte aux droits de la défense des contribuables concernés, qu'il correspondait à une pratique très courante d'ailleurs conforme à la jurisprudence du Conseil d'Etat jusqu'à un revirement récent et que « dans ces conditions la validation est justifiée tant par le montant très élevé des sommes qui pourraient être réclamées par les contribuables concernés que par le trouble apporté à la continuité des services publics fiscaux et juridictionnels, du fait de la multiplication de réclamations qui, en vertu du livre des procédures fiscales, pourraient être présentées pendant plusieurs années ».

Comme l'a relevé un commentateur, en se fondant sur des éléments tels que l'absence d'atteinte aux droits de la défense des contribuables, le risque d'enrichissement sans cause des contribuables ou l'existence d'une pratique conforme à la jurisprudence, le Conseil constitutionnel a pris en compte des considérations liées au principe de confiance légitime, les contribuables « victimes » de la validation n'ayant pas d'intérêt légitime à défendre, leurs droits n'étant ni fondés, ni attachés à un légitime espoir (Bertrand Mathieu, Les validations législatives devant le juge de Strasbourg : une réaction rapide du Conseil constitutionnel. A propos des décisions de la Cour Européenne des Droits de l'Homme du 28 octobre 1999 et du Conseil constitutionnel 99-422 DC et 99-425 DC, revue française de droit administratif 16 (2 mars-avril 2000 page 289).

4. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à une décision de la Cour de Justice des Communautés Européennes ?

A une occasion au moins, le Conseil constitutionnel a eu à connaître d'une disposition législative tirant les conséquences d'une décision de la Cour de Justice des Communautés Européennes.

A la suite de l'arrêt de la Cour de Justice du 27 février 1980 (affaire n° 168/78) jugeant contraire à l'article 95 du Traité de Rome le régime français de taxation différentielle des eaux de vie, de vins et de fruits, la loi de finances pour 1981 a procédé à une modification du régime fiscal des alcools et des boissons alcoolisées.

Un groupe de députés fit valoir devant le Conseil constitutionnel qu'une telle modification de la législation n'était nullement imposée par l'article 55 de la Constitution au motif que certains Etats membres de la CEE ne respectaient pas eux-mêmes l'obligation communautaire en matière de publicité des boissons alcoolisées.

Par une décision n° 8O-126 DC du 30 décembre 1980 (au recueil p. 53), le Conseil constitutionnel a rejeté cette argumentation. Il a estimé en effet que « l'article 55 de la Constitution ne s'oppose pas à ce que la loi édicte, comme l'article 13 de la loi de finances pour 1981 le fait en l'espèce, des mesures ayant pour objet d'harmoniser la législation nationale avec les dispositions découlant d'un traité, alors même que celles-ci ne seraient pas appliquées par l'ensemble des parties signataires ; que la règle de réciprocité posée à l'article 55 de la Constitution, si elle affecte la supériorité des traités ou accords sur les lois, n'est pas une condition de la conformité des lois à la Constitution ».

5. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à l'édiction d'un acte européen par le Conseil de l'Europe ?

A la suite de la signature à Budapest le 7 mai 1999 de la Charte européenne des langues régionales ou minoritaires, le Conseil constitutionnel a été saisi par le Président de la République, sur le fondement de l'article 54 de la Constitution, de la question de la conformité à la constitution de cette Charte. Il a été amené à cette occasion à préciser la portée de l'article 1er de la Constitution de 1958 aux termes duquel : « La France est une République indivisible, laïque, démocratique et sociale. Elle assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion. Elle respecte toutes les croyances », ainsi que du principe d'unicité du peuple français dont aucune section ne peut, aux termes de l'article 3 de la Constitution, s'attribuer l'exercice de la souveraineté nationale.

Le Conseil constitutionnel a jugé que « ces principes fondamentaux s'opposent à ce que soient reconnus des droits collectifs à quelque groupe que ce soit, définis par une communauté d'origine, de culture, de langue ou de croyance ».

Le Conseil constitutionnel en a déduit que la ratification de la Charte européenne de langues régionales ou minoritaires nécessiterait une révision préalable de la Constitution, dans la mesure où cette Charte confère des droits spécifiques à des « groupes » de locuteurs de langues régionales ou minoritaires, à l'intérieur de « territoires » dans lesquels ces langues sont pratiquées.

6. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à l'édiction d'un acte juridique communautaire ?

Dans une hypothèse très particulière, le Conseil constitutionnel, comme on l'a vu, a été amené, contrairement à une jurisprudence constante, à vérifier la conformité d'une loi à une directive communautaire. Il s'agit de la loi organique déterminant les conditions d'application de l'article 88-3 de la Constitution relatif à l'exercice par les citoyens de l'Union européenne résidant en France, autre que les ressortissants français, du droit de vote et d'éligibilité aux élections municipales, et portant transposition de la directive 94/80/CE du 19 décembre 1994.

Le Conseil constitutionnel a, en effet, estimé qu'en disposant que le droit de vote et d'éligibilité des citoyens de l'union aux élections municipales est accordé « selon les modalités prévues par le traité sur l'Union européenne », l'article 88-3 de la Constitution, issu de la révision constitutionnelle du 25 juin 1992, a expressément subordonné la constitutionnalité de la loi organique prévue pour son application à sa conformité aux normes communautaires. Il a estimé en conséquence qu' « il résulte de la volonté même du constituant qu'il revient au Conseil constitutionnel de s'assurer que la loi organique prévue par l'article 88-3 de la Constitution respecte tant le paragraphe 1er de l'article 8B précité du traité instituant la Communauté Européenne, relatif au droit de vote et d'éligibilité des citoyens de l'union aux élections municipales, que la directive sus-mentionnée du 19 décembre 1994 prise par le Conseil de l'Union Européenne pour la mise en oeuvre de ce droit ».

Si, en dehors de cette hypothèse, le Conseil constitutionnel n'est pas amené, compte tenu de la jurisprudence IVG, à faire application des traités et du droit communautaire dérivé, les notions essentielles du droit communautaire inspirent cependant largement sa jurisprudence, qu'il s'agisse des principes de libre concurrence, de liberté contractuelle, de liberté d'entreprendre ou de la sécurité juridique.

III. Intégration européenne et justice constitutionnelle

1. La Cour Constitutionnelle est-elle liée par les règles du procès équitable, telles qu'établies à l'article 6 de la Convention Européenne des Droits de l'Homme ?

Aux termes de l'article 6, paragraphe 1, de la Convention Européenne des Droits de l'Homme, « toute personne a droit à ce que sa cause soit entendue équitablement, publiquement... par un tribunal indépendant et impartial, établi par la loi, qui décidera, soit des contestations sur ses droits et obligations de caractère civil, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle... ».

L'article 6, paragraphe 1, est par nature inapplicable au contentieux des normes devant le Conseil constitutionnel français puisqu'il n'y a ni parties -le Conseil ne pouvant être saisi que par des autorités politiques : Président de la République, Premier Ministre, Présidents des deux Assemblées, 6O députés ou 6O sénateurs - ni procès, dans la mesure où le Conseil constitutionnel se borne à examiner, avant la promulgation d'une loi, sa conformité à la Constitution. Celui-ci donne néanmoins lieu à une procédure contradictoire entre le Gouvernement, représenté par son Secrétaire Général, et les parlementaires requérants.

Le seul domaine dans lequel le Conseil constitutionnel est amené à trancher un procès entre des parties est le domaine du contentieux électoral, c'est-à-dire des recours formés contre l'élection des députés et des sénateurs.

Saisi à la suite des élections législatives de 1993 d'un recours de M. Pierre-Bloch, le Conseil constitutionnel, par une décision du 24 novembre 1993, déclara M. Pierre-Bloch inéligible pendant un an et démissionnaire d'office de son mandat de député pour dépassement du plafond légal de dépenses.

Saisie d'un recours contre cette décision, la Cour Européenne des Droits de l'Homme a jugé, par un arrêt du 21 octobre 1997, que les dispositions de l'article 6, paragraphe 1, n'étaient pas applicables en l'espèce.

Si le fait qu'une procédure s'est déroulée devant une juridiction constitutionnelle ne suffit pas à la soustraire au champ d'application de l'article 6, paragraphe 1, la Cour a estimé que la procédure litigieuse n'avait trait :

- ni à une « contestation sur des droits et obligations de caractère civil », dans la mesure où la décision du Conseil constitutionnel avait pour effet de priver M. Pierre-Bloch de son droit de se porter candidat à une élection à l'Assemblée Nationale et de conserver son mandat, droit de caractère politique et non civil au sens de l'article 6 paragraphe 1 ;

- ni à une accusation en matière pénale, dans la mesure où aucun des trois critères retenus par la Cour n'était rempli : s'agissant de la qualification juridique de l'infraction en droit français et de la nature même de celle-ci, les dispositions en cause, relatives au financement et au plafonnement des dépenses électorales, ne relèvent à l'évidence pas du droit pénal français mais du droit des élections ; s'agissant de la nature et du degré de sévérité de la sanction, ni la nature, ni le degré de sévérité de l'inéligibilité ne placent cette sanction dans la sphère pénale et l'obligation de verser au Trésor Public une somme égale au montant du dépassement ne peut s'analyser comme une amende.

2. Existe-t-il des règles ou pratiques procédurales consistant en la révision d'un procès à l'issue d'une condamnation par la Cour Européenne des Droits de l'Homme ?

La France a introduit récemment dans son code de procédure pénale une procédure de réexamen d'une décision pénale consécutif au prononcé d'un arrêt de la Cour Européenne des Droits de l'Homme. Aux termes de l'article 626-1 du code de procédure pénale, dans sa rédaction résultant de l'article 89 de la loi
n° 2000 - 516 du 15 juin 2000 renforçant la protection de la présomption d'innocence et les droits des victimes : « le réexamen d'une décision pénale définitive peut-être demandé au bénéfice de toute personne reconnue coupable d'une infraction lorsqu'il résulte d'un arrêt rendu par la Cour Européenne des Droits de l'Homme que la condamnation a été prononcée en violation des dispositions de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ou de ses protocoles additionnels, dès lors que, par sa nature et sa gravité, la violation constatée entraîne pour le condamné des conséquences dommageables auxquelles « la satisfaction équitable » allouée sur le fondement de l'article 41 de la Convention ne pourrait mettre un terme ». Cette procédure de réexamen a été notamment mise en oeuvre à la suite de l'arrêt rendu par la Cour Européenne des Droits de l'Homme dans l'affaire Papon.

Elle n'est évidemment pas applicable devant le Conseil constitutionnel qui ne connaît d'aucune procédure pénale.

3. La Cour Constitutionnelle a-t-elle déjà fait application de l'article 177 du Traité de Maastricht relatif au recours préjudiciel, prévu dans le cadre de la coopération juridictionnelle entre les cours nationales et la Cour de Justice des Communautés Européennes?

Aux termes de l'article 234 (ex-article 177) du traité instituant la Communauté Européenne :

> « La Cour de Justice est compétente pour statuer, à titre préjudiciel :
>
> a. sur l'interprétation du présent traité,
>
> b. sur la validité et l'interprétation des actes pris par les institutions de la Communauté et par la BCE,...
>
> Lorsqu'une telle question est soulevée dans une affaire pendante devant une juridiction nationale dont les décisions ne sont pas susceptibles d'un recours juridictionnel de droit interne, cette juridiction est tenue de saisir la Cour de Justice ».

Dans la mesure où le Conseil constitutionnel n'examine pas, conformément à une jurisprudence constante précitée (cf. I question 5), la conformité des lois qui lui sont déférées au droit communautaire, la question de l'interprétation et de l'appréciation de la validité de ce droit communautaire ne s'est jamais posée.

En tout état de cause, une telle procédure de renvoi se heurterait à des obstacles tant juridiques que pratiques :

- juridiques, dans la mesure où le Conseil constitutionnel, même si ses décisions ont l'autorité de la chose jugée, n'a jamais admis jusqu'ici qu'il constituait une « juridiction nationale » au sens de l'article 177 ;

- pratiques, en raison de l'incompatibilité entre le délai imparti au Conseil constitutionnel lorsque celui-ci doit se prononcer sur la conformité d'une loi à la Constitution (un mois) et celui dans lequel la Cour de Justice statue sur renvoi préjudiciel.

IRELAND

The Hon Mr Justice Ronan KEANE,
Chief Justice, Supreme Court

I. Integration of European legal rules into the domestic legal system

1. What is the procedure for integrating European and/or EU treaties into the domestic legal system?

a. Is the ratification procedure provided for in the Constitution?
b. What does this procedure involve?

Article 29.6 of the Irish Constitution provides that an international agreement shall not be part of Irish domestic law, except as determined by the Oireachtas (parliament). The Government (cabinet) exercising executive power may, on behalf of Ireland, enter into international agreements, but such agreements must be laid before Dáil Éireann and where such an agreement involves a charge on public funds, must be approved by Dáil Éireann.

Article 29 of the Constitution provides, *inter alia*:

> « 4 1° The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.
>
> 2° For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern.
>
> 3° The State may become a member of the European Coal and Steel Community (established by Treaty signed at Paris on the 18th day of April, 1951), the European Economic Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). The State may ratify the Single European Act (signed on behalf of the Member States of the Communities at Luxembourg on the 17th day of February, 1986, and at the Hague on the 28th day of February, 1986).
>
> 4° The State may ratify the Treaty on European Union signed at Maastricht on the 7th day of February, 1992, and may become a member of that Union.

5° The State may ratify the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts signed at Amsterdam on the 2nd day of October, 1997.

6° The State may exercise the options or discretions provided by or under Articles 1.11, 2.5 and 2.15 of the Treaty referred to in subsection 5° of this section and the second and fourth Protocols set out in the said Treaty but any such exercise shall be subject to the prior approval of both Houses of the Oireachtas.

7° No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.

8° The State may ratify the Agreement relating to Community Patents drawn up between the Member States of the Communities and done at Luxembourg on the 15th day of December, 1989.

5 1° Every international agreement to which the State becomes a party shall be laid before Dáil Éireann.

2° The State shall not be bound by any international agreement involving a charge upon public funds unless the terms of the agreement shall have been approved by Dáil Éireann.

3° This section shall not apply to agreements or conventions of a technical and administrative character.

6 No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.

Irish law, therefore, is dualist, and treaties must be expressly incorporated into Irish law by the national parliament. On accession to the European Economic Community in 1972, the people voted in a referendum to insert Article 29.4.3° into the Constitution. When the Single European Act was negotiated in 1986, the Government did not intend to put the matter before the people in a further referendum. The Supreme Court held in *Crotty v. An Taoiseach*[1] that although much of the Single European Act was within the scope of the original terms of Article 29.4.3°, the commitment in Title III to endeavour to agree a common foreign policy restricted the State's independence in foreign policy and was inconsistent with the sovereignty of the State (expressed in Article 5 of the Constitution).

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1 *[1987] I.R. 713.*

The Single European Act was therefore ratified by a further constitutional amendment. Since then, every EU treaty has been put before the people in this fashion, although it is arguable that it was not always necessary. »

c. Are European and/or EU treaties published?
d. If so, where? (Official Journal, Official Bulletin, the press, etc)

The European Commission office in Dublin arranges for European treaties to be published by a domestic publisher, Alan Hanna's, and they are also available on the EUR-LEX website. The Department of Foreign Affairs arranges for treaties which have been ratified and have entered into force, and bilateral treaties, to be published by the Government Publications Office in what is called the "Treaty Series".

2. What is the status of European and/or EU texts in the domestic legal system?

a. Is this status defined by the Constitution, or does it result from case-law?
b. Where do European and/or EU treaties fit into the hierarchy of legal texts?

(Are they on the same level as the legislation or the Constitution, do they take precedence over the Constitution, etc).

European texts, i.e. treaties negotiated outside the EU structures, are not part of domestic law unless ratified by the Oireachtas. EU texts *necessitated by the obligations of membership* are automatically part of domestic law and are immune from constitutional challenges. EU texts not necessitated by membership are part of domestic law, provided that they are valid in EU and Irish law, but are not immune from constitutional challenge. The validity of EU texts in EU law is, of course, exclusively a matter for the European Court of Justice, but a text that is valid in EU law is not necessarily valid in Irish law - see the discussion of the *Crotty* case above. Also, EC law takes precedence over inconsistent national measures, including constitutional laws, where the Community provision imposes clear and unconditional obligations.

This status is defined by Article 29.4.7° but has been expanded on in case-law.

3. (For member states of the European Union) What is the status of subordinate EU legislation (regulations and directives) in the national legal system?

a. Is this status defined by the Constitution or does it result from case-law?
b. Where does subordinate EU legislation fit into the hierarchy of legal texts? (is it on the same level as the legislation or the Constitution, does it take precedence over the Constitution, etc).

As a result of Article 29.4.7°, regulations are directly effective in domestic law. Directives are implemented into domestic law by either primary or secondary legislation (which are authorised by sections 3 and 4 of the European Communities Act, 1972).

This status is defined by the Constitution and the 1972 Act.

EU regulations are equal to primary legislation, and would take precedence over the Constitution if they are necessitated by membership. Although directives will generally require some form of implementing legislation, if they are necessitated by membership they will also take precedence over the Constitution. Directly effective EU legislation overrides domestic law.[2]

4. Does the Constitutional Court have jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution?

This supervision is not explicitly provided for in the Constitution, but Article 34.4.4° states

> No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.

This gives the Supreme Court jurisdiction for supervising the conformity of any law with the Constitution. In the case of *Crotty v. An Taoiseach*,[3] which was the first important case on the topic, the Supreme Court implicitly accepted that it did have such jurisdiction. Cases come before the Supreme Court either on appeal from the High Court or by way of Case Stated (for adjudication on a question of law) from the Circuit Court. Any legal or natural person can bring a case before the courts.

The judgments in *Crotty v. An Taoiseach*[4] express the view that it would not be very useful for such a case to be brought after ratification of the treaty, and the plaintiff in that case was granted injunctions preventing the Government from ratifying the Single European Act pending the hearing of the full case.

Since *Crotty*, the Government has always taken the safe route of having every new EC/EU treaty ratified by constitutional amendment, and there have therefore been no Supreme Court cases on the topic since then.

5. Does the Constitutional Court have jurisdiction for supervising compatibility between legislation and European and/or EU treaties?

The Supreme Court has jurisdiction in this area on the same basis to that given above. As Ireland is a dualist state, the conformity of a treaty with the Constitution is not a matter for domestic courts unless and until the treaty is made part of domestic law by the Oireachtas. Once the relevant legislation is enacted, it is subject to constitutional challenge in the same way as any other, by any affected party bringing an action in the High Court. There does not appear to be any judgments of

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2 *Tate v. The Minister for Social Welfare [1995] I.L.R.M. 507.*

3 *[1987] I.R. 713.*

4 *[1987] I.R. 713.*

the Supreme Court in this context, although it should be noted that in *McGimpsey v. Ireland*,[5] the constitutionality of the Anglo-Irish Agreement was unsuccessfully challenged.

6. (For member states of the European Union) Does the Constitutional Court have jurisdiction for supervising the conformity of subordinate EU legislation (regulations, directives) with the Constitution?

The Supreme Court has jurisdiction in this area on the same basis to that given above, and has asserted this in *S.P.U.C. (Ireland) Ltd. v. Grogan*.[6] Any affected party can begin a case challenging the constitutionality of subordinate EU legislation in the High Court and the decision there may then be appealed to the Supreme Court. There are two Supreme Court decisions in this area: *Meagher v. Minister for Agriculture*[7] (holding that it was constitutional to transpose directives into domestic law by means of national secondary legislation, even where that secondary legislation amended primary legislation) and *Maher v. The Minister for Agriculture*[8] (holding that milk quota regulations were not necessitated by membership of the EU).

It should be noted that only Irish legislation enacted to give effect to European legislation can be challenged in this way. The validity of European legislation *per se* is solely within the jurisdiction of the European Court of Justice.

7. Was admission to the Council of Europe dependent on a series of state undertakings (Parliamentary Assembly Order 488 of 1993, observance of which is subject to supervision by the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee) concerning the Constitutional Court's organisation, functioning, composition or case-law?

No.

II. European integration and constitutional case-law

1. Does the Constitutional Court have a department that ensures efficient and rapid access to the judgments handed down by the European courts (Court of Justice and/or European Court of Human Rights) and to texts of subordinate EU legislation?

The Judges' Library has subscriptions to the European Court Reports, the Official Journal, various journals dealing with community law and textbooks on community law. All judges and many Courts Service staff have Internet access, allowing use of sites such as Eur-lex.

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5 *[1990] 1 I.R. 110.*

6 *[1989] I.R. 753.*

7 *[1994] 1 I.R. 329.*

8 [2001] 2 I.R. 131.

2. In its reasoning, does the Constitutional Court take account of the case-law of the Court of Justice and/or the European Court of Human Rights? If so, in what way:

a. as a primary consideration (the European case-law serves as the basis for the Constitutional Court's interpretation), or as a complementary consideration (the European case-law reinforces the Constitutional Court's interpretation)?
b. Does the European case-law appear in the rapporteurs' conclusions or in the body of judgments?
c. Before the European Court's judgment, was there opposing and established Constitutional Court case-law in the relevant area?
d. How was this case-law reversed or amended? Which body effected the referral?

In the first instance, it is important to note that Ireland is a common law country. Thus, the primary responsibility for raising particular case-law lies with the parties in a case. It would be rare for the court to consider case-law of its own motion. Having said that, in cases involving EC/EU law, the Court of Justice case-law would be a primary consideration. As the Government has not yet made the European Convention on Human Rights part of domestic law, Court of Human Rights case-law is not binding on the Supreme Court, but it would be a complementary consideration. Although there are no rapporteurs in the Irish Supreme Court, where the court relies on European case-law, that reliance would be clearly spelt out in the text of the judgments.

3. Has the Constitutional Court already reversed or amended its case-law following a judgment by the European Court of Human Rights?

No. In fact, in *Norris v. Ireland*,[9] O'Higgins C.J. stated that a ECHR precedent on the same topic (the validity of legislation criminalising homosexual acts) was not relevant to the decision of the Supreme Court, as the Convention was not part of domestic law.

4. Has the Constitutional Court already reversed or amended its case-law following a judgment by the Court of Justice of the European Communities?

No.

5. Has the Constitutional Court already reversed or amended its case-law following the adoption of a European instrument by the Council of Europe?

No.

6. Has the Constitutional Court already reversed or amended its case-law following the enactment of a European Community legal measure?

No.

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[9] *[1984] I.R. 36.*

III. European integration and constitutional justice

1. Is the Constitutional Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?

Article 38.1 of the Constitution provides

"No person shall be tried on any criminal charge save in due course of law."

Although the European Convention on Human Rights has not yet been made part of domestic law, it would seem from the case-law that the due process rights under the Irish Constitution are at least equal to the rights to a fair trial in Article 6.

a. Is there a precedent in the case-law of the European Court of Human Rights condemning the national authorities under Article 6 of the Convention, involving a trial before the Constitutional Court?

No.

2. Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

No.

3. Has the Constitutional Court already applied Article 177 of the Maastricht treaty, concerning preliminary rulings, as provided for in the context of judicial co-operation between the national courts and the Court of Justice of the European Communities?

Yes.

a. Of all the disputes submitted to the Constitutional Court, what is the proportion of preliminary rulings (as a percentage)?

Preliminary rulings are rare. Generally, the Supreme Court refers one case every two years, making the percentage less than 1%.

b. Of all the disputes that have given rise to a preliminary ruling, what proportion of Constitutional Court judgments followed the opinion of the Court of Justice of the European Communities?

100%.

LATVIA

Mr Aivars ENDZINS,
Chairman, Constitutional Court
Member of the Venice Commission in respect of Latvia

CONSTITUTIONAL COURTS AND EUROPEAN INTEGRATION

Honourable ladies and gentlemen!

One of the Latvian sayings is: ”Shared worries are half worries” or ”Two in distress makes trouble less”. I would like to paraphrase it and say: ”Shared problems are half-solved problems”. By coming together and discovering that we have the same problems, we are able to solve them much quicker. The organisers of this seminar have worked hard to help us achieve this. I believe it to be a really positive contribution to this process.

Latvia is not a member-state of the European Union. Although from the political point of view there is no alternative but to join the European Union (all the parties represented at the Saeima - the Parliament have stressed this), from the legal point of view neither the Latvian nation nor the European Union have expressed their concluding remarks in a legally correct form. Several agreements have been signed and the talks on Latvia joining the EU are proceeding. To determine the process of approximation of norms and their implementation, the Government of the Republic of Latvia has declared that Latvia will be ready to join the European Union on January 1, 2003. Talks will continue up to the end of 2002 and Latvia will participate in the 2004 European Parliament Elections. Since February 15, 2000, when Latvia commenced the talks with the EU, 30 out of 31 sectors have been discussed. Talks on 27 sectors have been provisionally completed.

There is one essential point: we have come to the conclusion that the process of Latvia joining the EU and functioning in would be unthinkable without the elaboration of amendments to the Republic of Latvia Satversme (Constitution). The team set up for this purpose under the guidance of the Minister of Justice worked out the draft amendments, which have been discussed in full detail and not only by the lawyers. Minimum but adequate amendments to the Satversme are envisaged to create a qualitative legal basis for joining the Union after referendum and for the efficient functioning of the Latvian legal system. Among other issues the interpretation of the Satversme norms has also been incorporated into it. What does the above draft envisage?

Referendum shall be a mandatory precondition for joining the EU. At the moment the Satversme of the Republic of Latvia envisages instituting a referendum. However, none of the matters which would allow the referendum to be organised can be applied to enable the decision on whether the fully-fledged citizens of Latvia back the idea of joining the EU to be reached. Furthermore, Article 73 of the Satversme determines that ”foreign agreements shall not be submitted to a referendum”.

For the time being Article 68 of the Satversme determines that ”the ratification of the Saeima shall be indispensable to all international agreements dealing with issues to be settled by

legislation". The above draft amendments envisage supplementing the Article by new parts with the following wording:

> "*Membership of Latvia in the EU shall be decided by referendum, initiated by the Saeima. If at least one half of the Saeima deputies demand it, alterations in conditions of participating in the EU shall be settled in a referendum".*

When debating issues such as "Shall the process of Latvia joining the EU be regarded as legitimate if one-half of those voting have declared themselves in favour or is the vote of one-half of those who have the right to vote in its favour necessary?" and " What should the number of voters be, to consider the ballot real?", the team decided that Article 79 of the Satversme should have the following wording:

> "*The draft law, submitted for national referendum, the decision on membership of Latvia in the European Union or alterations on conditions of membership shall be adopted if the number of participants is at least one half of those, who participated in the previous Saeima elections and if the majority has voted for the adoption of the draft law, for the decision on participation of Latvia in the European Union or alterations on conditions of membership".*

In reaching the above-mentioned decision, the team took into consideration that a positive result of a referendum requires the vote of a qualified majority. This means that issue will not in fact be decided by the voters in Latvia who are active, who are concerned about change and who have their own opinions, but by the voters who are inactive, who are indifferent to the process and who by not participating in the referendum, will vote "against" it. Such a situation is intolerable.

The team is of the opinion that the above norms will suffice not only to join the EU but also to function in it, accordingly interpreting the Satversme norms. In turn, when discussing the amendments, the point of view has been expressed that the above amendments shall be supplemented to precisely settle the issues on the hierarchy of normative acts and the place of international agreements in it.

At the moment Latvia is on the eve of Parliamentary elections. Issues on the EU are and will remain an integral part of the party programmes. The new Parliament, in whose mandate this issue is inscribed, will evidently take the decision on the above or other amendments to the Republic of Latvia Satversme.

For the time being Latvian courts are not the courts of the European Union and jurisdiction of the European Court of Luxembourg does not apply to Latvia.

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Quite different is the issue of the agreements of the Council of Europe, including the European Convention for the Protection of Human Rights and Fundamental Freedoms.

On February 10, 1995 Latvia was admitted to the Council of Europe and on the very same day it signed the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention and its Protocols No. 1, 2, 4, 7 and 11 were ratified on June 4, 1997, Protocol 6 was ratified on April 29, 1999.

As with any other interstate agreement, the European Convention for the Protection of Human Rights and Fundamental Freedoms has been translated into Latvian and published in the official state newspaper "Latvijas Vēstnesis" as well as in the official bulletin ("the Bulletin of the Saeima and the Cabinet of Ministers). The documents are also accessible on-line in the information system of the Latvian Normative acts (NAIS) and of course they can be found in many other publications.

May I remind you that Latvia, when renewing its independence, also renewed the validity of the 1922 Constitution – the Republic of Latvia Satversme. The fact that this Constitution, adopted at the beginning of the XX century, is still valid is nothing special either in Europe or in the rest of the world. What is special is that the validity of the Satversme has been renewed after a period of more than half a century. Furthermore, in this half a century world legal science has developed extremely rapidly, especially in the sector of international law.

Several amendments have been made to the Satversme to make it compatible with the standards of modern European democracy. The addition of Chapter VIII "The Fundamental Human Rights[1]" has been the most important step in this direction. Thus, it is vital that fundamental rights in Latvia were fixed in the Satversme following entry into force of the European Convention for the Protection of Human Rights and Fundamental Freedoms in the State. In fact the legislator - as far as the laconic style of our Constitution allows it – always tried to bear in mind the letter and the spirit of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Republic of Latvia Satversme does not determine the hierarchy of normative acts.

The legal science and the "ordinary" legislator holds that the Satversme has the highest legal force, then follow the agreements, ratified by the Saeima and the laws. However, the above viewpoint has caused much dispute, because the international agreements are ratified or confirmed by "simple" law and there is no ground to hold that the agreements are of higher legal force. Priority of international agreements as compared to national legal norms follow from the law "On International Agreements" and Article 16 of the Constitutional Court Law, which determines that " the Constitutional Court shall review cases on… 2) compliance with the Constitution of international agreements signed or entered into by Latvia (even before the Saeima ratified the agreement)".

I would like to remind you that the Republic of Latvia Constitutional Court began its activities in 1996. The range of subjects, for which one had the right to submit a claim, was initially rather narrow. Since 2001 the Law provides the right to submit an application to: "1. the President; 2. the Saeima; 3. no less than twenty members of the Saeima; 4. the Cabinet of Ministers; 5. the Procurator General; 6. the Council of the State Control; 7. the Dome (Council) of a municipality; 8. the State Human Rights Bureau; 9. a court, when reviewing an administrative, civil or criminal case; 10. a judge of the Land Registry when entering real estate – or thus confirming property rights on it – in the Land Book; 11. a person, whose fundamental rights, established by the Constitution, have been violated.

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[1] *The Law "Amendments to the Republic of Latvia Satversme", adopted in 15.10.1998, published in the newspaper "Latvijas Vēstnesis" on October 10, 1998.*

One should note that under the Latvian model, a person has the right to submit an application to the Constitutional Court only if he/she holds that his/her fundamental rights, established by the Constitution, have been violated by a normative act which is not in compliance with the legal norm of a higher legal force. Thus, an application can only be submitted on conformity of the law or other normative act with the Satversme and not on the conformity of a court decision or an administrative act.

Up to now no cases on the conformity of international agreements signed or entered into by Latvia with the Satversme either before ratification of the agreements in the Saeima or after it have been initiated.

In turn, a number of cases have been reviewed on the conformity of the national legal norms of Latvia with the international agreements entered into by Latvia. The Constitutional Court has declared judgments in 4 cases, in which the conformity of acts with the European Convention for the Protection of Human Rights and Fundamental Freedoms has been challenged.

While reviewing the first of the above cases[2] the Constitutional Court already made use of the practice of the European Court of Human Rights. The value of the case in the theory of Latvian laws lies not only in the decision on its merit, but also in the way it is interpreted. In a comment on this judgment the Journal of Human Rights stresses:" This judgment by the Constitutional Court is the very first example when the Latvian institution has acquainted itself with the practice of an international juridical institution and has applied it, at the same time ascertaining, whether the national norms are in compliance with the principles, elaborated by the above international forum. Besides, the Constitutional Court not only mentions the international agreement – but also in this case the European Convention for the Protection of Human Rights and Fundamental Freedoms – and some of its Articles (courts of general jurisdiction often do this), however, on the basis of analysis of the practice of the European Court of Human Rights as well as publications by well-known authors, the contents of the relevant Article have been substantiated. These are the methods used by the courts of any developed democratic state. And the Constitutional Court of Latvia has made use of them".[3]

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At the same time another vital moment in the practice of the Constitutional Court has to be stressed. Namely, the Constitutional Court also makes use of the practice of the European Court of Human Rights when interpreting the norms of the Republic of Latvia Constitution. Thus the judgment of August 30, 2000 concludes: "Article 89 of the Satversme determines that the State recognises and protects the fundamental rights of a person in accordance with the Constitution, the laws and international agreements binding on Latvia." From this Article it can be seen that the aim of the legislator has not been to oppose norms of human rights, incorporated into the Satversme, against the international ones. On the contrary, the objective has been to achieve a harmony of the norms.

In cases, when there is any doubt about the contents of the human rights norms, included in the Satversme, they should be interpreted in conformity with the practice of application of

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[2] *Case No. 09-02(98) "On Conformity of Paragraph 2 of the Supreme Council September 15, 1992 Resolution "On the Procedure by which the Republic of Latvia Law "On Eminent Domain" Takes Effect" (wording of the Amendments of December 19, 1996) with Article 1 of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms"".*

[3] *Ziemele I. A Comment on a Judgment. The Journal of Human Rights 9-12/1999, pages 249 -250.*

international norms of human rights. The practice of the European Court of Human Rights, which in accordance with the obligations that Latvia has undertaken (Article 4 of the Law "On November 4, 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols 1, 2, 4, 7 and 11) is mandatory when interpreting the norms of the Convention.

This practice shall be also used when interpreting the respective norms of the Satversme".[4]

This conclusion has had far-reaching consequences in the performance of the Constitutional Court. Both participants in the case and the Constitutional Court itself have made references to it. It is interesting to note that the applicant of the case, (judgment announced on January 17, 2002) in her written explanations expressed the point of view that the Saeima in its written reply has groundlessly referred to the way of interpreting the international human rights norms and paid no attention to the national legal system. The Constitutional Court analysed the arguments of the applicant in the context of the particular case and concluded: "Well-grounded is the reference of the Saeima that in cases, when doubt on contents of the norm of the human rights, incorporated into the Satversme, arises, it should be interpreted as close as possible to the international practice of applying the human rights norms. In turn, both the context in which it is used and the applicant's view that the national legal system had not been taken into consideration, shall be discussed from two aspects. To establish whether on the one hand Article 92 of the Satversme includes the right to appeal against the court decision on a civil case at a higher instance court, the Convention and its interpretation in the practice of the Court of Human rights and norms of other international human rights have to be analysed. On the other hand, it should be ascertained whether the legislator has included more extensive rights in Article 92 of the Satversme than those determined by international documents.

On the one hand the possibility and even the necessity of applying international norms for interpretation of the fundamental rights, incorporated into the Satversme, follow from Article 89 of the Satversme, determining that the State recognizes and protects the fundamental rights of a person in accordance with this Constitution, the laws and international agreements binding on Latvia. It can be seen that the objective of the legislator has not been to contradict the norms of human rights, included in the Satversme with the international human rights norms. On the contrary the objective was to create mutual harmony of these norms… Furthermore Chapter VIII of the Satversme "Fundamental Human Rights" was adopted after Latvia had undertaken the above international liabilities".[5] In addition the Constitutional Court pointed out that constitutional courts of other states, for example the German Federal Constitutional Court interpret human rights, incorporated into the Fundamental Law in the same way.

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The jurisdiction of the European Court of Human rights is only applicable in Latvia since 2000. Currently :

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[4] *Case No. 2000-03-01 "On Compliance of Items 5 and 6 of the Saeima Election Law and Items 5 and 6 of the City Dome, Region Dome and Rural Council Election Law with Articles 89 and 101 of the Satversme (Constitution), Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 25 of the International Covenant on Civil and Political Rights"".*

[5] *Judgment in case No.2001-08-01 "On the Conformity of Article 348 (the seventh part) of the Civil Proceedings Law with Article 92 of the Republic of Latvia Satversme (Constitution).*

- one case (Kulakova v. Latvia) ended in a friendly settlement;
- and in one more case (Podkolzina V.Latvia) the judgment has been announced. In this case the European Court of Human Rights unanimously held that there had been a violation of Article 3 of Protocol No.1 (the right to free elections) of the European Convention on Human Rights. Under Article 42 (just satisfaction) of the Convention, the Court awarded the applicant 7,500 euros for non-pecuniary damage and 1,500 euros for legal costs and expenses;
- in its turn hearing on the merits of the case Sisojeva v. Latvia took place on September 19;
- one more case is partly admissible (Slivenko and others v. Latvia).

None of the above cases touched upon the issues reviewed in the Constitutional Court judgments. Therefore, no conflicts have arisen. In the same way, the Constitutional Court has neither reversed nor amended its judgments in connection with any instrument of the European Council.

However, in future such conflicts could occur. There is a noticeable increase in the activity of Latvian citizens. Thus, according to the European Court of Human Rights Survey, the activity of Latvians during 2001 was as follows :

- in 1999, only 73 provisional files were opened; in 2000 there were 99, however in 2001, 216 applications have already been made;
- in 1999, 29 applications were registered, in 2000, 79, in 2001, 126.

However it seems that other Eastern European states have experienced the same situation and it should be assessed as a positive fact, as the process of realisation of self-confidence and rights by the individual.

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Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is also connected with the review of cases at the Constitutional Court. To date no-one has stated that the Constitutional Court has violated the above Article. At the same time it is clear that the Constitutional Court Law will have to be perfected to ensure the possibility of both addressing the Court of the European Community in Luxembourg and revising the decisions if there are differences of opinion between our Court and the European Court of Human Rights or the Court in Luxembourg.

This is a short survey of the situation in Latvia. Much has been achieved but we still have a long way to go. It seems that many states find themselves in a similar situation.

Thank you for your attention!

LITHUANIA

Dr. Stasys STAČIOKAS,
Justice of the Constitutional Court of the Republic of Lithuania

The Constitutional Court of the Republic of Lithuania and European integration

Preface

International integration became an feature 20th century life and it is still continuing at the beginning of the 21st century. For more than 50 years the United Nations has performed its most important role - maintaining stabilisation and peace. The most important global function of international co-operation is and will remain ensuring the security of nations and states. However, this monumental task has been transformed into an even broader one - the international protection *of individual security and freedom* - in modern international politics. This aim cannot be attained by the traditional methods of international politics and international law (by way of international agreements and international customs). The actual resolution of this problem requires at least minimal guarantees of well-being and legal protection – including that which is performed by courts of international jurisdiction – of individual rights of people, irrespective of their place of living. It is not possible to achieve this goal on a global scale in the near future. Therefore after World War II a new qualitative phenomenon of international co-operation first occurred in Europe - *international regional integration* [1; P. 52-55].

Although the main aim of international regional integration is the international protection of individual security and freedom, however, it should be mentioned that the international legal system is still mainly dependent on the acts of an international association of states which are represented by their governments [2; P. 25-26]. Individual persons do not play a very important role in creating the international legal system: it is obvious that we are speaking about the international universal legal system. Of course, the Law of the European Communities has its specifics. The Court of Justice of the European Communities emphasised in the case *Van Gend en Loos* (Judgement # 26/62 of the 5th February 1963): „The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals. Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community" [3]. Regardless of that, the secondary Law of the European Communities is created by the institutions of the community where the representatives of the sovereign states participate, and the primary Law of EC is created by the sovereign member states [4; P. 796-798]. So *the Law of EC can be and*, in our opinion, *must be considered as a part of international law*. Of course, there is another opinion that the Law of the EC is an independent system of Law *sui generis*. However, it declares the significance of the secondary Law of the EC and „forgets“ about the primary Law of the EC [4; P. 798-801]. Anyway, there occurs a problem of the relation between international and national legal systems.

In the opinion of dualist classics (*H. Triepel, L. Oppenheim, K. Strupp* and others) international law and national law are different and separate systems of Law which regulate different spheres of social relations. In the opinion of monists (*H. Kelsen*) international and national law must constitute an indivisible harmonious system [5; P. 173-194].

According to *V. Vadapalas*, today discussions between monists and dualists do not have any important significance if these discussions are connected to practical questions. States have already found effective methods for their international obligations to be carried out in their national systems. In a monistic national legal system international legal norms are directly applicable and have primacy over national laws (e.g. in France). In a dualistic national system international legal norms are not directly applicable, and so for this to be the case it is necessary to promulgate a national legal act [5; P. 173-194].

How does Lithuania propose to solve this problem? The answer to this question is presented below.

I. Integration of European legal rules into the domestic legal system

Processes of the integration into Europe are the most interesting for us, because Lithuania became a member of the Council of Europe on 14th May 1993. Lithuania is also hoping to become a member of the European Union. It is clear that the EU will become a non-traditional organisation of states with one of the main features being a commomn legal system. The common legal system is one of the most problematic phenomena.
It is clear that, while creating the EU, a universal law for all members of the Union has to be created. All members are sovereign states whose national legal systems are based on their legal traditions. There are some explanations that members give up a part of their sovereignty for the Union. The transfer of sovereignty for a new subject or the limitation of sovereignty would mean that it only autonomy (or self-government) for members is recognised. Institutions of the Union would establish the extent of this autonomy, at the same time the sovereignty of the nation or people, which is the origin of the state's powers and the main feature of the state's sovereignty, would be denied. But the sovereignty of the nation is the basis of democracy. If we recognise the right of the majority of residents of the Union to decide major problems not only of the Union, but also of its members, we deny the sovereignty of every nation which is established in the constitutions of the majority of European states (including the Lithuanian Constitution). Therefore, "the powers of the (EU) organisation are constituted by the treaty - ratified by legislative act or referendum *according to the national constitutions*" [6; P.172-174].

It is necessary to emphasise the importance of the formation of legal doctrine to enable Lithuania to join the EU. This doctrine must not only explain the usefulness of joining, but it must also be the purification of legal terms and concepts; the prognosis of possible constitutional conflicts between the Lithuanian Constitution and *aquis communitaire* must be done; furthermore, they must provide methods of avoiding conflicts. One such method is the development of the Lithuanian Constitution. This is the most radical method which is applied when the constitutional conflicts cannot be solved in any other way. And it is very important to stress that national sovereignty, while accepting the decision to join the EU, would achieve this. Thus, the development of the Constitution must be carried out not because the EU institutions insist on it, but because these amendments to the Constitution are necessary because of Lithuania's aim to become part of a democratic legal civilisation. Our legal system, which is based on the Constitution, must be harmonised with the legal values of the contemporary world.

Otherwise, it will be isolated from the world not only as an element of the political system, but also as a system which limits human rights.

I.I. The procedure for integrating European treaties and the status of European texts in the legal system of Lithuania

Part 3 of Article 138 of the Constitution of the Republic of Lithuania provides: "International treaties which are ratified by the Seimas of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania." The Constitutional Court of the Republic of Lithuania held on 24 January 1995 the conclusion [7] that: "this constitutional provision implies that upon its ratification and enforcement the Convention[1] will become a constituent part of the legal system of the Republic of Lithuania and shall be applied in the same way as laws of the Republic of Lithuania. The provisions of the Convention in the system of legal sources of the Republic of Lithuania are equal to the laws, because in Article 12 of the Law of 21 May 1991 "On International Agreements of the Republic of Lithuania" (Official Gazette "Valstybės Žinios" No 16-415, 1991) it is established that: "International agreements shall have the power of law on the territory of the Republic of Lithuania."

However, the above-mentioned constitutional norm does not mean that *only* those international treaties which are ratified by the Seimas (Parliament of Lithuania) are the constituent part of the legal system of the Republic of Lithuania. There may be and there are other international treaties which constitute a part of the legal system of Lithuania. It is universally recognised that international treaties may fix obligations for states not only by their ratification: international treaties may come into force and be binding on a state even without ratification (e.g. states can confirm that they would observe treaties by signing, confirming, accepting or joining them) [8; P. 135-139].

Parts 1 and 2 of Article 138 of the Constitution provide that:

"The Seimas shall either ratify or renounce international treaties of the Republic of Lithuania which concern:

1) the realignment of the State borders of the Republic of Lithuania;
2) political co-operation with foreign countries, mutual assistance, or treaties related to national defence;
3) the renunciation of the utilisation of, or threatening by, force, as well as peace treaties;
4) the stationing and status of the armed forces of the Republic of Lithuania on the territory of a foreign state;
5) the participation of Lithuania in universal or regional international organisations; and
6) multilateral or long-term economic agreements.

Laws and international treaties may provide for other cases in which the Seimas shall ratify international treaties of the Republic of Lithuania."

Almost the same provisions are established by the Republic of Lithuania Law "On International Treaties of the Republic of Lithuania" [9]. Article 7 of this Law provides in addition that: 1) international treaties concerning the stationing and status of the armed forces of foreign states on

[1] *This Conclusion of the Constitutional Court concerns the European Convention for the Protection of Human Rights and Fundamental Freedoms.*

the territory of the Republic of Lithuania and 2) international treaties setting other legal norms than the valid laws of the Republic of Lithuania, must be ratified".

We may conclude that all major international treaties must be ratified by the Seimas (Parliament of Lithuania). These international agreements and treaties ratified by the Republic of Lithuania are applied directly in Lithuania's legal system. All State bodies, the legislature, the judiciary, administrative and other bodies as well as their officers must apply them and comply with them.

Although the Constitution does not provide the answer to what the place of international treaties is in the hierarchy of legal acts in Lithuania's legal system, the official constitutional doctrine of Lithuania does give an answer to this question. The Constitutional Court of the Republic of Lithuania emphasised:

"The legislature enjoys discretion to particularise and detail the provisions of the Constitution and to regulate relations in a legal manner, which are not regulated *expressis verbis* in the Constitution. It is important that in doing so, the legislature does not violate the principles and norms of the Constitution."

[10]. Article 12 of the 21 May 1991 Republic of Lithuania Law "On International treaties of the Republic of Lithuania"[2] [11] provided: "International treaties of the Republic of Lithuania shall have the force of law on the territory of the Republic of Lithuania." In its 17 October 1995 ruling "On the compliance of Part 4, Article 7 and Article 12 of the Law of the Republic of Lithuania "On International Treaties of the Republic of Lithuania" with the Constitution of the Republic of Lithuania" [12] the Constitutional Court held that:

"Any provision of the 1969 Vienna Convention does not establish that any treaties in the State internal law must have the force of law or any other force. The Vienna Convention establishes only two main principles in the sphere of implementing international treaties, namely: in Article 26 – the principle *pacta sunt servanta* and in Article 27 – the principle which does not allow to justify non-fulfilment of a treaty by the norms of the national law.

The principle *pacta sunt servanta* does not mean that different states may choose different ways and forms of implementing the norms of international law in their internal legal system. This is the sovereign right of every state. In the legal systems of states there are various ways and forms of implementing the norms of international law into national law. It is, moreover, recognised that the validity of international law in general and concretely of international treaties in the legal system of the state shall always depend on the national law.

<...> The provision of Article 12 of the Law in question "shall have the force of law", when it is applied to the international treaties ratified by the Seimas and does not contradict the Constitution."

Thus *only those international treaties ratified by the Seimas have the force of law in Lithuania*. Moreover, under Part 2 of Article 11 of the 22 June 1999 Law "On International treaties" these treaties, while applying them, have priority over national laws: "If a valid *ratified* international agreement stipulates other provisions than the laws or other legal acts of the Republic of Lithuania, irrespective of whether they are in force at the moment of the conclusion of the

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[2] *This Law is invalid since the 8 July 1999, when 22 June 1999 Law "On international treaties" came into force.*

agreement or enter into force following the conclusion of the agreement, the provisions of the international agreement of the Republic of Lithuania shall apply". According to *V. Vadapalas*, the Constitution does not exclude a special law, applicable to international treaties, from providing the rules establishing what norms must be applied in the cases of their conflict [13; P. 13-25] and competition.

The Constitution does not regulate the procedure of ratification of international treaties. However, under the provisions of Article 138 of the Constitution only the Seimas ratifies international treaties and agreements. The President of the Republic signs international treaties of the Republic of Lithuania and submits them to the Seimas for ratification (Item 2 of Article 84 of the Constitution). Part 1 of Article 8 of the 22 June 1999 Law "On International Treaties of the Republic of Lithuania" provides that "The Seimas of the Republic of Lithuania ratifies international treaties and agreements by promulgating the law".

It must be stressed that "laws shall be deemed adopted if the majority of the Seimas members participating in the sitting vote in favour thereof" (Part 2 of Article 69 of the Constitution). However, Part 1 of Article 181 of the Statute of the Seimas, which has the power of law (Article 76 of the Constitution), provides that "a law, which must be adopted for the ratification of an international treaty, is deemed adopted if the majority of the Seimas members participating in the sitting vote in favour thereof, but not less than by at least a two-fifths majority vote of all the Seimas members" [14]. Moreover, Part 2 of Article 10 of the Constitution provides that "The State borders may only be realigned by an international treaty of the Republic of Lithuania which has been ratified by four-fifths of all the Seimas members". So laws, which must be adopted for the ratification of the international treaties, differ from ordinary laws by the procedure of their adoption.

Under Article 16 of 22 June 1999 Law "On International Treaties of the Republic of Lithuania" "international treaties of the Republic of Lithuania upon recommendation of the Ministry of Foreign Affairs shall be published in the Official Gazette *Valstybės Žinios*".

As previously mentioned, only those international treaties ratified by the Seimas have the force of law in Lithuania. In its 17 October 1995 Ruling "On the conformity of Part 4, Article 7 and Article 12 of the Law of the Republic of Lithuania "On International Treaties of the Republic of Lithuania" with the Constitution of the Republic of Lithuania" the Constitutional Court emphasised that:

"The classification of international treaties into different kinds is an objective phenomenon which has its legal, logical and constitutional substantiation. *Pursuant to the Constitution only the legislator by way of ratification may decide which statute of international law shall be the constituent part of the legal system of the Republic of Lithuania having the force of law.* The Seimas shall have the right of legislation and the legislation shall not be delegated to any other institution of the State power. Upon recognising that non-ratified international treaties have the force of law, the prerogative of the Seimas to pass laws would be negated. It is also important that the treaties which must be ratified have an essential significance to the further creation of the legal system. Therefore, the provision of Article 12 of the Law in question that "international treaties of the Republic of Lithuania", i.e. also the international treaties which are not ratified by the Seimas, have the force of law, unfoundedly extends their juridical force in the system of sources of law of the Republic of Lithuania. From this standpoint the provision of Article 12 of the disputable Law that international treaties of the Republic of Lithuania "shall have the force of law" contradicts Part 3 of Article 138 of the Constitution.

The Constitutional Court also points out that after the Constitution has entered into force, the legal force of the concluded and enforced but non-ratified international treaties of the Republic of Lithuania is obvious. They have force which is obligatory for entities of legal relations and which is typical of every legal act. However, their juridical force differs from ratified treaties in a way that they must be in compliance not only with the Constitution but also with the laws."

As previously underlined, the Seimas also ratifies international treaties which set the legal norms other than valid laws of the Republic of Lithuania. Therefore all international treaties which set the legal norms other than valid laws of the Republic of Lithuania have the force of law and even primacy over national laws.

I.II. Jurisdiction of the Constitutional Court for supervising the conformity of European treaties with the Constitution

Part 1 of Article 7 of the Constitution of the Republic of Lithuania provides that "any law or other statute which contradicts the Constitution shall be invalid." The Constitution is a legal act having the supreme legal power and serving as a basis for the legal system of this country. All other legal acts must be in conformity with the Constitution. The main provisions of legal regulation are entrenched in the Constitution, the Constitution forms the basis for legislation. "The principle of the supremacy of the Constitution in the system of legal acts is a fundamental requirement for a democratic state" [15].

This rule concerns international treaties, regardless of whether they are ratified or not. They must also conform to the Constitution. Part 3 of Article 105 of the Constitution provides that:

"The Constitutional Court shall present conclusions concerning:

1) the violation of election laws during presidential elections or elections to the Seimas;
2) whether the President of the Republic of Lithuania's health is limiting his or her capacity to continue in office;
3) the conformity of international agreements of the Republic of Lithuania with the Constitution; and
4) the compliance with the Constitution of concrete actions of Seimas members or other State officers against whom impeachment proceedings have been instituted."

Under Part 5 of Article 106 of the Constitution "the Seimas may request a conclusion from the Constitutional Court, and in cases concerning Seimas elections and international agreements, the President of the Republic of Lithuania may also request a conclusion."

It must be stressed that conclusions of the Constitutional Court are not binding, they are only recommendations [16; P. 47-62]. Part 3 of Article 107 of the Constitution provides that "on the basis of the conclusions of the Constitutional Court, the Seimas shall have a final decision on the issues set forth in part 3 of Article 105 of the Constitution." However, in my opinion, the Constitutional Court has wide support within society, and the powers of the Seimas are bound by all acts of the Constitutional Court.

To date the Constitutional Court has only adopted one ly conclusion concerning the supervision of international treaties within the Constitution, i.e. the Conclusion of 24 January 1995 "On the compliance of Articles 4, 5, 9, 14 as well as Article 2 of Protocol No 4 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania". The request to investigate whether certain norms of the European Convention are in conformity with the Constitution was presented by the President of the Republic of Lithuania. Following the investigation the Constitutional Court concluded that Articles 4, 5, 9, 14 and Article 2 of Protocol No 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms are in conformity with the Constitution of the Republic of Lithuania. It is interesting and important to note that this conclusion was adopted prior to ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As previously stated, only those international treaties ratified by the Seimas have the force of law in Lithuania and primacy over the national laws. This rule can only however be perceived in practice. The Decision of the Constitutional Court of 25 April 2002 emphasised that "Under Paragraph 1 of Article 105 of the Constitution, the Constitutional Court shall consider and adopt decisions concerning the conformity of laws of the Republic of Lithuania and legal acts adopted by the Seimas with the Constitution of the Republic of Lithuania. Thus, under the Constitution, the Constitutional Court shall not consider the conformity of a law with a legal act having the force of the law" [17]. In other words, the Constitutional Court of the Republic does not consider the conformity of a law with a ratified international treaty or agreement.

II. European integration and constitutional case-law

II.I. The case-law of the European Court of Human Rights and acts of the Council of Europe and constitutional case-law

Lithuania became a member of the Council of Europe on 14th May 1993. Although the European Convention for the Protection of Human Rights and Fundamental Freedoms was ratified only on 5th May 1995, it must be emphasised that the draft of the Constitution of the Republic of Lithuania, which was adopted by the Lithuanian nation on 25th October 1992, was discussed by the European Commission for Democracy through Law (or Venice Commission). The Commission's experts paid particular attention to the problems of human rights and freedoms, as well as the general principles of the composition of the Lithuanian State. This gives an opportunity to speak about some preliminary integration of the Lithuanian legal system into the European legal system [18; P. 59-65]. The Constitutional Court used the norms of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as the case-law of the European Court of Human Rights, while arguing its decisions, before the ratification of the European Convention (e.g. see 27 May 1994, 18 November 1994, 20 April 1995 Rulings of the Constitutional Court of the Republic of Lithuania).

In my opinion, there are two groups of decisions of the Constitutional Court of the Republic of Lithuania where some international aspects are covered [19; P. 34-42]:

1) Decisions where the constitutionality of international acts are discussed. Such a decision is the one of 24 January 1995 already mentioned, Conclusion "On the compliance of Articles 4, 5, 9, 14 as well as Article 2 of Protocol No 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms with the Constitution of the Republic of Lithuania";

2) Decisions (rulings) where the Constitutional Court takes account of the case-law of the European Court of Human Rights or acts of the Council of Europe in its reasoning. The table below shows a list of these decisions, which are more numerous than the first group :

Year (starting from the ratification date of the European Convention)	Number of rulings in which the argumentation deals with the case-law of the European Court of Human Rights or acts of the Council of Europe	Number of rulings adopted in that year
from 1995 05 05	1	7
1996	3	13
1997	6	12
1998	4	14
1999	3	14
2000	4	16
2001	4	17
till 2002 08 31	1	14

The Constitutional Court uses the case-law of the European Court of Human Rights or acts of the Council of Europe as a complementary consideration in its arguments in most or even all cases (the European case-law and acts of the Council of Europe reinforces the Constitutional Court's interpretation). Of course, these arguments appear in the body of the rulings of the Constitutional Court, but not in their concluding part. However, although these "European arguments" have only a supplementary role, there are some rulings of the Constitutional Court of the Republic of Lithuania where they contain a considerable part of the argumentation (e.g. 9 December 1998 Ruling "On the compliance of the death penalty provided for by the sanction of Article 105 of the Republic of Lithuania Criminal Code with the Constitution of the Republic of Lithuania" [20] or 8 May 2000 Ruling "On the compliance of Part 12 of Article 2, Item 3 of Part 2 of Article 7, Part 1 of Article 11 of the Republic of Lithuania Law on Operational Activities and Parts 1 and 2 of Article 198^1 of the Republic of Lithuania Code of Criminal Procedure with the Constitution of the Republic of Lithuania" [21]). The case-law of the European Court of Human Rights or acts of the Council of Europe cannot therefore be considered as the basis for the Constitutional Court's interpretation owing to the principle of the supremacy of the Constitution in the system of legal acts in Lithuania.

The Constitutional Court began its work in the second half of 1993. During a nine-year period the Court's case-law was not very "rich". Although the integration of Lithuania into the EU accelerated and Lithuania became a member of the Council of Europe in 1995, the acts of the Council of Europe and the case-law of the European Court of Human Rights did not change very much during that year. Lithuania also adopted a Constitution embodying European standards, so the laws and the other legal acts must also comply with such standards. Because the Constitutional Court argues its rulings cautiously and uses the Constitution of the Republic of Lithuania as a main base for this interpretation and argumentation, there is no need to amend or even reverse the constitutional case-law according to the judgements of the European Court of Human Rights or the acts of the Council of Europe. It should be noted that the legislature and executive bodies take into account not only this law, but also the EU law when creating national law.

On 30 June 2002 the Constitutional Court of the Republic of Lithuania reorganised its section of Legal information and analysis into the Law Department. The main function of this department is to obtain legal information and to review it for cases. However, the work in this sphere is mainly done by assistants of justices. They ensure an efficient and rapid access to the judgments

handed down by the European Court of Human Rights and acts of the Council of Europe. A further reorganisation of the Law Department could however change the situation: specialists of this department would ensure a fast and efficient access to the necessary information, and the assistants would need to assist the justices in their work.

II.II. The case-law of the Court of Justice and law of the EU and constitutional case-law

Lithuania is not a member of the European Union. However, it is an associated member of the EU. On the one hand, Lithuania accepted the Europe Agreement instituting association between the European Communities and their Member States and on the other hand, the Republic of Lithuania, signed the Europe (Association) Agreement on 12 June 1995 and ratified it on 20 June 1996. This agreement came into force on 1 February 1998. The Europe (Association) Agreement is therefore a constituent part of Lithuanian national law. Article 124 of this agreement provides that:

"1. The Parties shall take any general or speciflc measures required to fulfil their obligations under this Agreement. They shall see to it that the objectives set out in this Agreement are attained.
2. If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.“

In the selection of measures, priority must be given to those which would least disturb the functioning of this Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests."

Moreover, it has been recognised in the practice of application of European (Association) agreements that these agreements should be directly applied in the domestic law of Associated Member States. This means that the provisions of these agreements, as a rule, create rights and obligations for the subjects of national law - natural and legal persons [13; P. 13-25]. Moreover, as mentioned above, international treaties have primacy over national laws.

However, I would like to point out that as Lithuania is not a member of the EU European law is not used in the rulings of the Constitutional Court of the Republic of Lithuania (with some exceptions, e.g. 20 April 1995, 13 February 1997, 6 October 1999 and 14 March 2002 Rulings).

Although the legal norms of the European Union, as well as the norms laid down in the Europe (Association) Agreements as a rule have supremacy over the legal norms of domestic law of Member States, this is because the Constitution is considered an extremely abstract act which embodies only the main legal values, which are almost identical to European values. Therefore, EU law cannot be subordinate to the Constitution. In other words, *the principle of the supremacy of the Constitution in the system of legal acts would have to be maintained*. This is very important for an independent and sovereign state. But the case-law of the Constitutional Court of the Republic of Lithuania (or the "living Constitution") may and must change according the requirements of EU law.

III. European integration and constitutional justice

The European Convention for the Protection of Human Rights and Fundamental Freedoms is the "living convention" because its norms and provisions are constantly interpreted by the European Court of Human Rights. Judgments of this Court have a direct influence on the legal system of Lithuania; moreover, their doctrinal propositions are also part of it because the European Convention is a part of the legal system of Lithuania. The Constitutional Court analyses judgments of the European Court of Human Rights while adopting its rulings. However, as has already been mentioned, the basis for constitutional argumentation is the norms and provisions of the Constitution.

Lithuania has lost some cases before the European Court of Human Rights, where violations of Article 6 of the European Convention have been found, (see cases of *Daktaras v. Lithuania*, *Grauslys v. Lithuania*, *Šleževičius v. Lithuania*, *Birutis and others v. Lithuania*). It should be stressed that the case-law of the Constitutional Court of the Republic of Lithuania, which is connected to the rules of a fair trial, do not differ much from the similar case-law of the European Court of Human Rights. This is because the regulation of the European Convention and the regulation of the national law of Lithuania are almost the same. Although the Constitution does not set *expressis verbis* all the rules which are related to a fair trial provided by Article 6 of the European Convention, other legal acts (e.g. the Code of Criminal Procedure and others) fill in any missing rules. All cases before the Strasbourg Court were lost by Lithuania owing to the improper application of legal acts, not due to imperfections of the regulation. In addition, the Constitutional Court of Lithuania does not apply laws: it decides whether the laws and other acts provided in the Constitution comply with the constitutional provisions and norms.

The European Court of Human Rights referred to the Constitutional Court's ruling 19 September 2000 in its case *Birutis and others v. Lithuania*:

The facts
<...>
"1. Article 31 of the Constitution (*Konstitucija*) guarantees the right to a fair trial and lists specific defence rights.

On 19 September 2000 the Constitutional Court held that Articles 267 § 5 and 317-1 of the Code of Criminal Procedure, to the extent that they did not guarantee the right of the defendant to question anonymous witnesses while preserving the secrecy of their identity, unjustifiably limited the defendant's defence rights in breach of Article 31 of the Constitution."

In its judgment the European Court held that there had been a violation of Article 6 §§ 1 and 3 (d) of the Convention. However, the Constitutional Court of the Republic of Lithuania previously quoted the propositions of the European Court of Human Rights in its 19 September 2000 Ruling [22]:

In the jurisprudence of the European Court of Human Rights the possibility to grant anonymity to a witness or the victim is in essence not questioned, however, the exceptional character of the evidence of anonymous witnesses or victims is emphasised. Attention is also paid to the other conditions which must be followed while making use of the testimony of anonymous witnesses and victims as evidence in criminal cases in the course of substantiating judgements of

conviction. This is linked to the requirements set down in the Convention for the Protection of Human Rights and Fundamental Freedoms.

Paragraph 1 of Article 6 of the Convention contains the right of individuals to a fair trial, while Paragraph 3 of Article 6 provides for the guarantees of right to a defence of the person charged with a criminal offence. One of these rights is contained in Paragraph 3 (d) of Article 6 of the Convention, which is a requirement that the indicted person has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

The European Court of Human Rights in the case of *Lüdi v. Switzerland* (*European Court of Human Rights, judgment of 15 June 1992, series A No. 238*) paid attention to the circumstance that neither the accused nor his counsel had at anytime during the proceedings an opportunity to question the undercover agent. The Court qualified it as a violation of Paragraph 3 (d) of Article 6 of the Convention. In the opinion of the Court, it would have been possible to carry out questioning of the undercover agent so that the suspect and his counsel might have questioned the undercover police agent and that the anonymity of the agent would have been preserved.

In the case of *Doorson v. the Netherlands*, the European Court of Human Rights held that there was no violation of the right to a fair trial expressed in Article 6 of the Convention in the criminal proceedings where anonymous witnesses were questioned by an investigating judge who was aware of their identity, while the counsel was present and was put in a position to question the witnesses, and when the culpability of the person accused of having committed the crime was reiterated by evidence from other sources (*European Court of Human Rights, Case of Doorson v. the Netherlands, Reports 1996-II*).

The principles which ought to be observed in the course of assessment of the lawfulness of the testimony given by anonymous witnesses were laid down by the European Court of Human Rights in the case of *Van Mechelen and others v. the Netherlands* (*European Court of Human Rights, Case of Van Mechelen and others v. the Netherlands, Reports 1997-III*). It may be justifiable to resort to anonymous witnesses provided that their interests are preserved and if this, in the case of testimony of anonymous witnesses, does not deprive the accused of the right to a fair trial and generally to a just investigation of the case. The defendant must be given an opportunity to question the witnesses against him, as the anonymity of witnesses restricts the opportunities of the defence to question the credibility of the witness, or to present arguments concerning his animosity or prejudice towards the accused. These restrictions must be "sufficiently counterbalanced by the procedures followed by the judicial authorities". In addition, the testimony given by anonymous witnesses may not be the only and decisive evidence substantiating the judgement of conviction."

Article 371[18] of the Code of Civil Procedure provides that civil proceedings may be renewed if the European Court of Human Rights finds that the decision of the Court of Lithuania contradicts the European Convention for the Protection of Human Rights and Fundamental Freedoms and its supplementary protocols. The same norms are established in the Code of Criminal Procedure (Articles 482–487). However, because the first final judgment of the European Court of Human Rights against Lithuania was adopted in the case of *Raišelis v. Lithuania* on the 29 February 2000, so far there is no practice of such cases.

Conclusions

1. Only those international treaties ratified by the Seimas (Parliament of Lithuania) have the force of law in Lithuania. However, this does not mean that only these international treaties are a constituent part of the legal system of the Republic of Lithuania. There may be and there are other international treaties which constitute a part of the legal system of Lithuania. It is universally recognised that international treaties may give rise to obligations for states not only by their ratification: the international treaties may come into force and bind a state even without their ratification (e.g. states can confirm that they would observe treaties by signing, confirming, accepting or joining them).

2. The Seimas ratifies international treaties which set the legal norms other than valid laws of the Republic of Lithuania. Therefore all international treaties which set the legal norms other than valid laws of the Republic of Lithuania have the force of law.

3. According to the national regulation: "If a valid *ratified* international agreement stipulates other provisions than the laws or other legal acts of the Republic of Lithuania, irrespective of whether they are in force at the moment of conclusion of the agreement or enter into force following the conclusion of the agreement, the provisions of the international agreement of the Republic of Lithuania shall apply". International treaties have primacy over national laws. However, this primacy can only be perceived in practice.

4. The Constitution is a legal act which has supreme legal power and serves as a basis for the legal system of Lithuania. All other legal acts must be in conformity with the Constitution. The main provisions of a legal regulation are entrenched in the Constitution, the Constitution forms the basis for legislation. The case-law of the European Court of Human Rights or acts of the Council of Europe cannot be considered as the basis for the Constitutional Court's interpretation because of the principle of the supremacy of the Constitution in the system of legal acts in Lithuania.

LUXEMBOURG

M. Georges KILL,
Vice président de la Cour Constitutionnelle

Par la loi du 12 juillet 1996 révisant de l'article 95 de la Constitution, le Grand-Duché s'est doté d'une Cour Constitutionnelle et de juridictions administratives indépendantes reprenant la partie juridictionnelle du rôle du Conseil d'Etat (décision de la Chambre des Députés du 9 juillet 1996 et décision du Conseil d'Etat du 12 juillet 1996 portant qu'il n'y a pas lieu à second vote ; documents parlementaires 4153; session ordinaire 1995-1996).

La concordance dans le temps des deux innovations ne doit pas surprendre. Ces deux institutions, organe de contrôle de la conformité à la Constitution d'une part et juridiction administrative autonome d'autre part, avaient depuis longtemps fait l'objet d'âpres débats et discussions sans que la finalisation de ces projets n'ait revêtu un quelconque caractère d'urgence.

L'arrêt PROCOLA contre Grand-Duché de Luxembourg, prononcé le 28 septembre 1995 par la Cour Européenne des Droits de l'Homme de Strasbourg, a mis en cause l'impartialité structurelle du Comité du contentieux du Conseil d'Etat comme juge administratif. Cet arrêt a, ainsi, précipité l'évolution du système juridictionnel luxembourgeois en provoquant une situation d'urgence qui a aboutit à la mise en place de nouvelles juridictions administratives. L'article de la loi fondamentale instituant les différentes juridictions devant dès lors être révisé dans les plus brefs délais, il paraissait logique et opportun de réunir dans une même procédure de révision constitutionnelle l'une et l'autre des innovations en question.

L'urgence ainsi imposée à l'élaboration de la loi de révision a forcément accélérée, sinon précipitée les réflexions sur les options à prendre, les modèles à adopter, voire pour certains sur la nécessité même de la création d'un contrôle de constitutionnalité dans un petit pays n'ayant pas d'organes décentralisés autonomes dont les compétences sont susceptibles de devoir être départagés par une juridiction spéciale en cas de litige.

Dans ce dernier cas, il faut rappeler que c'est en se référant par référence aux principes de la séparation des pouvoirs, donc à ce qui est considéré dans ce pays comme le fondement de la démocratie, que les Cours et tribunaux du Grand-Duché se sont interdit d'apprécier une loi sous l'angle de sa conformité à la Constitution.

C'est dès 1874, donc moins d'une décennie après la promulgation de la Constitution du Grand-Duché de Luxembourg, que cette règle a été énoncée dans les termes forts, précis et concis suivants: "In Erwaegung, dass die Gerichte in Gemässheit der Gesetze, aber nicht über die Gesetze selbst zu erkennen haben (Cour de cassation 24 avril 1874)".

Monsieur Pierre Pescatore avait résumé l'attitude des Cours et des Tribunaux en constatant que ces juridictions considéraient que l'appréciation de la constitutionnalité des lois devait appartenir aux

pouvoirs politiques et que c'était en vertu de cette auto-limitation de leurs pouvoirs qu'elles refusaient d'examiner la conformité des lois à la constitution. Le même auteur faisait encore remarquer à bon droit que le principe du non-contrôle était contrebalancé par le fait qu'en l'absence d'un contrôle formel de la constitutionnalité le juge pouvait interpréter la loi, ce qu'il ferait en appliquant la présomption de conformité de la loi à la Constitution en résolvant dans la mesure du possible dans un sens favorable à la loi fondamentale les discordances entre la loi et la Constitution.

Ce ne sont cependant pas ces considérations de démocratie formelle qui ont fait naître quelques réticences à l'égard du projet d'une juridiction constitutionnelle, mais le souci que cette instance supplémentaire puisse être utilisée par des plaideurs malveillants pour retarder l'issue de procès qu'ils savaient perdus d'avance.

Ce souci a été pris en compte par les rédacteurs de la loi organique qui ont su, par un système rigoureux de délais imposés aux transmissions et à l'instruction, réduire au minimum la durée de la procédure devant la Cour Constitutionnelle. La question est importante car le recours prévu à l'article 95ter de la Constitution est un recours préjudiciel qui suspend le cours du procès devant le juge de droit commun pendant la durée de l'instance devant la juridiction constitutionnelle.

La Cour Constitutionnelle du Grand-Duché a été institué depuis le 1er octobre 1997 et a rendu 14 arrêts depuis lors.

Ci-joint en annexe, la loi de révision constitutionnelle du 12 juillet 1996 et la loi organique du 27 juillet 1997.

Quant aux questions posées :

I. Intégration des normes européennes dans l'ordre juridique interne

1. Comment s'opère la réception des traités européens et/ou communautaires au sein de l'ordre juridique interne ?

Pour être opposable dans l'ordre juridique interne, les traités internationaux doivent :

- avoir été régulièrement approuvés par le pouvoir législatif qui se prononce dans la forme d'une loi approbative,

- avoir été publiés dans le Mémorial, journal officiel du Grand-Duché de Luxembourg, et

- être toujours en vigueur dans le droit international au moment de leur application éventuelle,

Ces conditions remplies, les traités internationaux sont appliqués tels quels, sans autre transformation, dans la mesure où ils rentrent dans la catégorie des traités dits « self-executing ». Dans le cas contraire, une transposition dans le droit interne s'impose.

Les juridictions appliquent les traités et, si nécessaire, les interprètent.

2. Quel est le statut des traités européens et/ou communautaires dans l'ordre juridique national ?

Ni la Constitution ni les lois luxembourgeoises ne règlent la question de la prééminence des règles nationales ou internationales. Une réponse a été donnée par la jurisprudence qui place le droit international, ensemble avec la Constitution, au rang le plus élevé de la hiérarchie des normes et fait une application étendue des conceptions doctrinales monistes voyant dans le Droit interne et le Droit international deux manifestations d'un même ordre juridique.

Par conséquent, le droit international conventionnel prime sur le droit national. Ainsi les traités internationaux priment sur la loi nationale, même postérieure ; le traité ayant un rang hiérarchiquement supérieur à la volonté d'un organe interne (arrêt de la Cour de cassation du 14 juillet 1954).

3. (Pour les Etats membres de l'Union européenne) Quel est le statut du droit communautaire dérivé (règlements et directives) dans l'ordre juridique national ?

La jurisprudence luxembourgeoise a répondu à cette question en adoptant une conception moniste de l'ordre juridique qui implique la primauté du droit internationale.

4. La Cour Constitutionnelle est-elle compétente pour contrôler la conformité des traités européens et/ou communautaires à la Constitution ?

Aux termes de l'article 95ter. (1) de la loi fondamentale la Cour Constitutionnelle statue, par voie d'arrêt, sur la conformité des lois à la Constitution. Cette formulation exclut toute compétence pour contrôler la conformité des traités à la Constitution.

5. La Cour Constitutionnelle est-elle compétente pour contrôler la conformité de la loi aux traités européens et/ou communautaires ?

Pour les mêmes motifs invoqués à la question 4), l'article 95 ter. (1) exclut toute compétence pour contrôler la conformité des lois au droit communautaire dérivé.

6. (Pour les Etats membres de l'Union européenne) La Cour constitutionnelle est-elle compétente pour contrôler la conformité du droit communautaire dérivé (règlements, directives) à la Constitution ?

Pour les mêmes motifs invoqués à la question 4), l'article 95 ter. (1) exclut toute compétence pour contrôler la conformité du droit communautaire dérivé à la constitution.

7. L'admission au sein du Conseil de l'Europe a-t-elle été conditionnée par une série d'engagements étatiques (directive 488 de l'Assemblée Parlementaire de 1993, dont le respect est soumis au contrôle du Comité des Ministres et de la Commission de suivi de l'Assemblée Parlementaire) concernant l'organisation, le fonctionnement, la composition ou la jurisprudence de la Cour Constitutionnelle ?

Cette question est sans objet pour le cas du Grand-Duché : son admission au Conseil de l'Europe date de la fondation de celui-ci.

II. Intégration européenne et jurisprudence constitutionnelle :

1. La Cour constitutionnelle dispose-t-elle d'un service permettant l'accès efficace et rapide aux décisions rendues par les juridictions européennes (Cour de Justice et/ou Cour Européenne des Droits de l'Homme) et aux actes de droit communautaire dérivé ?

Comme il est précisé implicitement dans le texte constitutionnel qui introduit le recours préjudiciel en matière constitutionnel et comme la loi organique le dispose expressément, la Cour Constitutionnelle luxembourgeoise est un organe non permanent. Conformément aux dispositions de l'article 27 de la loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle, le greffe de la Cour Supérieure de Justice fait fonction de greffe de la Cour Constitutionnelle. Cette dernière peut ainsi disposer des accès aux banques de données juridiques auxquelles la Cour Supérieure de Justice est abonnée. Un accès aux recueils internationaux et aux décisions de la Cour de Justice des Communautés européennes et de la Cour européenne des Droits de l'homme est donc disponible de façon permanente.

2. La Cour constitutionnelle intègre-t-elle dans son raisonnement, la jurisprudence de la Cour de Justice et/ou de la Cour Européenne des Droits de l'Homme ? Si oui, de quelle manière ?

Il est évident que, dans un pays membre-fondateur de l'Union, le raisonnement du praticien du droit est directement influencé par les décisions rendues par la Cour de Justice des Communautés européennes destinée à jouer le rôle d'unificateur de la jurisprudence en matière d'interprétation des Traités. Cette imprégnation n'implique pas nécessairement des citations jurisprudentielles dans les différents arrêts.

3. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à une décision de la Cour Européenne des Droits de l'Homme ?

La question ne s'est pas posée à la Cour jusqu'à cette date.

4. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à une décision de la Cour de Justice des Communautés Européennes ?

La question ne s'est pas posée à la Cour jusqu'à maintenant mais il est évident que les décisions de la Cour de Justice des Communautés européennes s'imposent à la Cour Constitutionnelle qui, dans

le cas visé par la question, ne saurait manquer de s'aligner sur la position de la Cour de Justice des Communautés européennes.

5. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à l'édiction d'un acte européen par le Conseil de l'Europe ?

La question ne s'est pas posée à la Cour jusqu'à cette date.

6. La Cour Constitutionnelle a-t-elle déjà effectué un revirement ou un aménagement de sa jurisprudence suite à l'édiction d'un acte juridique communautaire ?

La question ne s'est pas posée à la Cour jusqu'à cette date, mais en vertu de la conception moniste du droit luxembourgeois impliquant la primauté du droit international, la Cour Constitutionnelle ne saurait refuser de prendre en considération *l'édiction d'un acte juridique communautaire*.

III. Intégration européenne et justice constitutionnelle :

1. La Cour Constitutionnelle est-elle liée par les règles du procès équitable, telles qu'établies à l'article 6 de la Convention Européenne des Droits de l'Homme ?

Aux termes de l'alinéa 3 de l'article 95ter de la Constitution et de l'article 3 de la loi du 27 juillet 1997 portant sur l'organisation de la Cour Constitutionnelle cette dernière est composée de magistrats professionnels. Cette constatation garantit le déroulement équitable du procès pour chaque partie et assure une égalité aussi parfaite que possible des moyens car la sauvegarde de ces principes est assurément le premier souci de tout magistrat. Il est évident que les principes inscrits à l'article mentionné dans la question font partie intégrante du droit régissant la procédure et sont appliqués systématiquement. Le fait que la question ne mentionne pas la jurisprudence relative à l'article 6 permet de passer sous silence les aspects qui s'y rattachent.

2. Existe-t-il des règles ou pratiques procédurales consistant en la révision d'un procès à l'issue d'une condamnation par la Cour Européenne des Droits de l'Homme ?

Non.

3. La Cour Constitutionnelle a-t-elle déjà fait application de l'article 177 du Traité de Maastricht relatif au recours préjudiciel, prévu dans le cadre de la coopération juridictionnelle entre les cours nationales et la Cour de Justice des Communautés Européennes?

La Cour Constitutionnelle n'a pas eu l'occasion de se prononcer sur la recevabilité d'une question préjudicielle prévue par la désignation désinvolte de l'article régissant ce recours. (ci-avant article 177 du Traité de Rome, devenu article 234 CE après le Traité de Maastricht). Cependant, un recours devant la Cour de Justice des Communautés européennes ne paraît nullement conforme à la logique interne de l'institution en raison de la limitation de sa compétence à la seule question de la conformité de la loi au texte de la Constitution. Un problème de conformité de la loi au Droit

européen doit être soulevé devant la juridiction du fond qui est tenue, le cas échéant, d'appliquer l'article 234 précité.

Annexe 1

Loi du 12 juillet 1996 portant révision de l'article 95 de la Constitution.

Art. I. - Les articles suivants sont ajoutés à l'article 95 de la Constitution:

…

«Art. 95ter.

(1) La Cour Constitutionnelle statue, par voie d'arrêt, sur la conformité des lois à la Constitution.

(2) La Cour Constitutionnelle est saisie, à titre préjudiciel, suivant les modalités à déterminer par la loi, par toute juridiction pour statuer sur la conformité des lois, à l'exception des lois portant approbation de traités, à la Constitution.

(3) La Cour Constitutionnelle est composée du Président de la Cour Supérieure de Justice, du Président de la Cour administrative, de deux conseillers à la Cour de Cassation et de cinq magistrats nommés par le Grand-Duc, sur l'avis conjoint de la Cour Supérieure de Justice et de la Cour administrative. Les dispositions des articles 91, 92 et 93 leur sont applicables. La Cour Constitutionnelle comprend une chambre siégeant au nombre de cinq magistrats.

(4) L'organisation de la Cour Constitutionnelle et la manière d'exercer ses attributions sont réglées par la loi."

Art. II. - La présente loi entrera en vigueur le 1er janvier 1997.

Annexe 2

Loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle

Chapitre 1er
De l'institution et du siège

Article 1er

La présente loi porte organisation de la Cour Constitutionnelle.

Le siège de la Cour est à Luxembourg.

Chapitre 2
Des attributions

Article 2

La Cour Constitutionnelle statue, suivant les modalités déterminées par la présente loi, sur la conformité des lois à la Constitution, à l'exception de celles qui portent approbation de traités.

Chapitre 3
De la composition

Article 3

(1) La Cour Constitutionnelle est composée de neuf membres, à savoir d'un président, d'un vice-président et de sept conseillers.

(2) Le Grand-Duc nomme le président, le vice-président et les sept conseillers.

(3) Le président de la Cour supérieure de justice, le président de la Cour administrative et les deux conseillers à la Cour de cassation sont de droit membres de la Cour Constitutionnelle.

(4) Les cinq autres membres de la Cour Constitutionnelle, qui doivent avoir la qualité de magistrat, sont nommés par le Grand-Duc sur l'avis conjoint de la Cour supérieure de justice et de la Cour administrative.

Aux fins de rendre cet avis la Cour supérieure de justice et la Cour administrative se réunissent en assemblée générale conjointe, convoquée par le président de la Cour supérieure de justice.

Pour chaque place vacante, l'assemblée générale conjointe présente trois candidats; la présentation de chaque candidat a lieu séparément.

(5) Le président de la Cour supérieure de justice est président de la Cour Constitutionnelle. Il est chargé de surveiller la bonne marche des affaires et d'assurer le fonctionnement de la juridiction.

Le président de la Cour administrative est vice-président de la Cour Constitutionnelle.

(6) Les membres de la Cour continuent à exercer leurs fonctions à leur juridiction d'origine. La cessation des fonctions des membres de droit de la Cour Constitutionnelle et la cessation temporaire ou définitive de la fonction de magistrat entraînent celle des fonctions à la Cour Constitutionnelle.

Article 4

La Cour siège, délibère et rend ses arrêts en formation de cinq membres.

Article 5

Les membres de la Cour ne peuvent délibérer, siéger ou décider dans aucune affaire dans laquelle soit eux-mêmes, soit leurs parents ou alliés jusqu'au quatrième degré inclusivement ont un intérêt personnel.

Les membres de la Cour ne peuvent siéger, décider ou prendre part aux délibérations sur les affaires dont ils ont déjà connu dans une qualité autre que celle de membre de la Cour Constitutionnelle.

Les membres de la Cour peuvent en outre être récusés pour les causes et selon
les modalités indiquées aux dispositions afférentes du Code de procédure civile.

Chapitre 4
De la saisine et du fonctionnement

Article 6

Lorsqu'une partie soulève une question relative à la conformité d'une loi à la Constitution devant une juridiction de l'ordre judiciaire ou de l'ordre administratif, celle-ci est tenue de saisir la Cour Constitutionnelle.

Une juridiction est dispensée de saisir la Cour Constitutionnelle lorsqu'elle estime que:

a. une décision sur la question soulevée n'est pas nécessaire pour rendre son jugement;

b. la question de constitutionnalité est dénuée de tout fondement;

c. la Cour Constitutionnelle a déjà statué sur une question ayant le même objet.

Si une juridiction estime qu'une question de conformité d'une loi à la Constitution se pose et qu'une décision sur ce point est nécessaire pour rendre son jugement, elle doit la soulever d'office après avoir invité au préalable les parties à présenter leurs observations.

Article 7

La décision de poser une question préjudicielle à la Cour Constitutionnelle suspend la procédure et tous délais de procédure et de prescription depuis la date de cette décision jusqu'à celle à laquelle l'arrêt de la Cour est notifié à la juridiction qui a posé la question préjudicielle.

Cette décision, contre laquelle aucun recours n'est possible, est notifiée par courrier recommandé par les soins du greffe de la Cour aux parties en cause.

Article 8

La question préjudicielle qui figure au dispositif du jugement ne doit répondre à aucune condition particulière de forme. Elle indique avec précision les dispositions législatives et constitutionnelles sur lesquelles elle porte.

Le greffe de la juridiction qui pose la question préjudicielle transmet la décision de saisine au greffe de la Cour Constitutionnelle.

Article 9

Le président de la Cour Constitutionnelle arrête la composition de la Cour pour chaque affaire et désigne un conseiller-rapporteur.

Toutefois, le président et le vice-président peuvent à leur demande siéger dans chaque affaire.

Lors de la désignation des conseillers et du conseiller-rapporteur pour les affaires successives, le président procède suivant la liste de rang arrêtée à l'article 19 de manière à garantir une rotation régulière entre les différents membres de la Cour.

Article 10

Dans un délai de trente jours qui court à compter de la notification aux parties de la question préjudicielle, celles-ci ont le droit de déposer au greffe de la Cour des conclusions écrites; de ce fait elles sont parties à la procédure devant la Cour Constitutionnelle.

Le greffe transmet de suite aux parties copie des conclusions qui ont été déposées. Ces parties disposent alors de trente jours à dater du jour de la notification, pour adresser au greffe des conclusions additionnelles.

Dans les trente jours qui suivent l'expiration des délais indiqués aux alinéas précédents, la Cour entend, en audience publique, le rapport du conseiller-rapporteur et les parties en leurs plaidoiries. Le délai prévu ci-avant est suspendu entre le 15 juillet et le 16 septembre de chaque année. La date de cette audience est fixée par la Cour, hors présence des parties; elle est communiquée par courrier recommandé aux avocats, au moins quinze jours à l'avance, par le greffe de la Cour.

Les délais prévus au présent article ne donnent pas lieu à une augmentation à raison des distances.

La computation des délais se fait à partir de minuit du jour de la notification qui fait courir le délai. Le délai expire le dernier jour à minuit. Les jours fériés sont comptés dans les délais. Tout délai qui expirerait normalement un samedi, un dimanche, un jour férié légal ou un jour férié de rechange, est prorogé jusqu'au premier jour ouvrable suivant.

Article 11

Les parties sont admises à conclure et à plaider devant la Cour Constitutionnelle par le ministère d'un avocat inscrit à la liste I des tableaux dressés annuellement par les conseils des ordres des avocats.

En cas de saisine de la Cour Constitutionnelle par une juridiction de l'ordre administratif dans une affaire où l'Etat est partie, celui-ci peut se faire représenter par un délégué ou un avocat inscrit à la liste I des tableaux dressés annuellement par les conseils des ordres des avocats.

En cas de saisine de la Cour par une juridiction de l'ordre judiciaire d'une décision à laquelle est partie le ministère public, celui-ci est représenté par le procureur général d'Etat ou un membre de son parquet par lui désigné, lequel peut intervenir en tant que partie devant la Cour Constitutionnelle.

Article 12

La Cour Constitutionnelle prend l'affaire en délibéré. Les délibérations de la Cour sont secrètes. Les décisions sont prises à la majorité des voix.

Article 13

La Cour statue par voie d'arrêt sur la conformité de la loi à la Constitution.

Les arrêts sont rendus dans les deux mois à compter de la clôture des débats. Les arrêts de la Cour sont motivés.

Article 14

L'arrêt est lu en audience publique par le président ou par un autre membre de la Cour, délégué à cette fin, sans que la présence des autres membres de la Cour soit requise. L'arrêt est publié au Mémorial, Recueil de législation, dans les trente jours de son prononcé.

La Cour Constitutionnelle peut décider de faire abstraction, lors de la publication, des données à caractère personnel des parties en cause.

Article 15

L'expédition de l'arrêt est envoyée par le greffe de la Cour à la juridiction dont émanait la saisine et une copie certifiée conforme est envoyée aux parties en cause devant cette juridiction.

La juridiction qui a posé la question préjudicielle, ainsi que toutes les autres juridictions appelées à statuer dans la même affaire, sont tenues, pour la solution du litige dont elles sont saisies, de se conformer à l'arrêt rendu par la Cour.

Article 16

La procédure devant la Cour est gratuite. Les arrêts de la Cour ne donnent pas lieu à la liquidation de frais et dépens.

Chapitre 5
De l'organisation

Section 1re
De la réception et de la prestation du serment

Article 17

La réception des membres de la Cour se fait à l'audience publique de la Cour Constitutionnelle.

Les membres de la Cour prêtent serment entre les mains du Grand-Duc ou de la personne désignée par Lui.

Article 18

Avant d'entrer en fonctions, les membres de la Cour prêtent le serment suivant:

“ Je jure fidélité au Grand-Duc, obéissance à la Constitution et aux lois de l'Etat. Je promets de remplir mes fonctions avec intégrité, exactitude et impartialité. ”

Section 2
Du rang et de la préséance

Article 19

Il est tenu une liste de rang sur laquelle les membres de la Cour sont inscrits dans l'ordre qui suit:

Le président, le vice-président, les conseillers à la Cour de cassation dans l'ordre de leur nomination.

Les conseillers sont portés sur cette liste dans l'ordre que suivent les arrêtés de nomination, ou dans celui de leur inscription dans l'arrêté de nomination simultanée.

La liste détermine le rang des membres dans les cérémonies et aux audiences de la Cour.

Section 3
Des empêchements et des remplacements

Article 20

Le président de la Cour Constitutionnelle est, en cas d'absence, d'empêchement ou de vacance de poste, remplacé par le vice-président ou, à défaut de celui-ci, par le membre le plus élevé en rang, dans l'ordre de la liste prévue par l'article 19.

Section 4
De la discipline

Article 21

(1) Les membres de la Cour ne peuvent, directement ou indirectement, avoir des entretiens particuliers avec les parties ou leurs avocats sur les contestations qui leur sont soumises.

(2) Aucun membre de la Cour ne peut s'absenter si le service doit souffrir de son absence.

(3) Les membres de la Cour qui ont manqué à la dignité de leurs fonctions ou aux devoirs de leur état peuvent faire l'objet d'une peine disciplinaire.

(4) Toute affaire disciplinaire est initiée, instruite et poursuivie par le président de la Cour Constitutionnelle.

Article 22

Les peines disciplinaires sont :

1. l'avertissement;
2. la réprimande;
3. la suspension des fonctions pour une durée qui ne peut dépasser six mois;
4. la révocation.

Article 23

Les peines disciplinaires sont infligées par la Cour Constitutionnelle siégeant en assemblée générale et statuant en chambre du conseil.

Le président de la Cour, ou le membre de la Cour qui a instruit l'affaire disciplinaire en cas d'empêchement du président, ne participe pas aux délibérations et décisions en la matière.

Article 24

Aucune peine ne peut être infligée sans que le membre mis en cause ait été entendu ou dûment appelé. S'il ne comparaît pas en la chambre du conseil, il peut se pourvoir, en cas de condamnation, par voie d'opposition, dans les cinq jours de la notification par la voie du greffe.

Article 25

La Cour Constitutionnelle peut prononcer la suspension provisoire de tout membre poursuivi judiciairement ou administrativement pendant tout le cours de la procédure jusqu'à la décision définitive.

Article 26

L'action disciplinaire est indépendante de toutes poursuites judiciaires et peut être cumulée avec elles.

Section 5
Dispositions diverses

Article 27

Le greffe de la Cour supérieure de justice fait fonction de greffe de la Cour Constitutionnelle. Le greffier assiste aux audiences publiques de la Cour et aux assemblées générales ainsi qu'à l'instruction des affaires disciplinaires à charge des membres de la Cour.

Article 28

La Cour arrête son règlement d'ordre intérieur. Celui-ci est publié au Mémorial.

Article 29

Les membres de la Cour Constitutionnelle reçoivent une indemnité mensuelle équivalente à quarante points indiciaires. Le greffier de la Cour Constitutionnelle reçoit une indemnité mensuelle équivalente à vingt points indiciaires. La valeur numérique des points indiciaires est déterminée conformément aux règles fixées par la législation en matière de traitements des fonctionnaires de l'Etat. Les indemnités des membres de la Cour et du greffier peuvent être cumulées avec toute autre rémunération.

Article 30

Les crédits nécessaires au fonctionnement de la Cour sont inscrits au budget de l'Etat.

Article 31

La présente loi entre en vigueur le 1er octobre 1997.

Doc. parl. N 4218; sess. ord. 1996-1997.

Annexe 3

Règlement d'ordre intérieur de la Cour Constitutionnelle du 31 octobre 1997

Vu l'article 28 de la loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle;

Article 1

La Cour Constitutionnelle siège à Luxembourg, 12, Côte d'Eich. La Cour tient audience le vendredi à 15 heures; elle peut fixer des audiences extraordinaires.

Article 2

Le greffier en chef de la Cour supérieure de justice est le greffier de la Cour Constitutionnelle. En cas d'empêchement, le greffier est suppléé par le greffier de la Cour supérieure de justice qu'il désigne. S'il se trouve dans l'impossibilité de faire lui-même cette désignation, il y est pourvu par le président de la Cour Constitutionnelle.

Article 3

Il est tenu au greffe de la Cour Constitutionnelle un rôle général, coté et paraphé par le président de la Cour, sur lequel sont inscrites toutes les causes dans l'ordre de leur présentation.

L'inscription au rôle général détermine le rang d'après lequel les causes sont plaidées.

La Cour peut, au vu de circonstances particulières, décider de faire juger une affaire par priorité.

Le greffier inscrit au rôle général la date des arrêts rendus et la date de leur publication au Mémorial.

Article 4

Le présent règlement sera publié au Mémorial.

MALTA

Mr Anthony ELLUL,
Venice Commission Liaison Officer, Constitutional Court

I. Integration of European legal rules into the domestic legal system

1. What is the procedure for integrating European and/or EU treaties into the domestic legal system?

Treaties merely ratified by the Executive do not have the force of law under the Maltese legal system. Although valid according to international law, such a treaty does not directly modify the domestic law. Section 3 of the Ratification of Treaties Act (Chapter 304 of the Laws of Malta) provides for the ratification procedure with respect to certain treaties. Article 2 of the Act reads: *"Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation; and any reference to the ratification of a treaty shall include a reference to accession to such treaty and to any other act or manner in which such treaty may be brought into force"*. The law stipulates that the House of Representatives is to consent to treaties which concern or affect:

- The status of Malta under International Law or the maintenance or support of such status;

- The security of Malta, its sovereignty, independence, unity or territorial integrity;

- The relationship of Malta with any multinational organisation, agency, association or similar body.

A treaty concerning matters referred to in the above-mentioned paragraphs shall not enter into force with respect to Malta unless it has been ratified or its ratification has been authorised or approved in accordance with the provisions of the Ratification of Treaties Act. With respect to paragraphs (a) and (b) ratification shall be authorized by Act of Parliament. Thus, for example, the Law of the Sea (Ratification) Act enacted by Act XII of 1993 authorised the ratification by the Government of the United Nations Convention on the Law of the Sea signed at Montego Bay, Jamaica. Similarly, by virtue of the Ratification of Chemical Weapons Convention Act enacted by Act V of 1997 (Chapter 392 of the Laws of Malta), the Government of Malta was authorised to ratify the Convention in terms of the Ratification of Treaties Act. On the other hand, a treaty referred to in paragraph (c) requires merely a Resolution of the House of Representatives for purposes of ratification. The law further provides in Article 3(3) that no provision of a treaty shall become or be enforceable as Maltese law except "by" or "under" an Act of Parliament. In a judgment delivered on 13 August 2001 by the Court of Criminal Appeal (The Police v. Mohammed Abdel Monem Abbas Aly), the Court stated that a treaty could be either directly incorporated:

- in a principal law. For example, Article 3[2] of the Child Abduction and Custody Act (Chapter 410 of the Laws of Malta) reads: *"subject to the provisions of this Part of the Act, the provisions of the Convention set out in the First Schedule to this Act shall have the force of law in Malta"*. The "Convention" means the Convention on the Civil Aspects of International Child Abduction which was signed at The Hague on 25 October 1980; or

- by reference made in subsidiary legislation published under the authority of the principal law (as was the case, for example, with the European Convention on Extradition).

The European Convention for the Protection of Human Rights together with its first Protocol were incorporated into Maltese law by the enactment of the European Convention Act (Chapter 319 of the Laws of Malta). Malta became a signatory to the Convention on 12 December 1966, and subsequently ratified the Convention and its First Protocol on 23 January 1967. With effect from 1 May 1987 Malta recognised (for a period of five years) the competence of the European Commission of Human Rights to receive individual petitions, as well as the compulsory jurisdiction of the ECHR. Subsequently, the European Convention Act (Act XIV enacted on 19 August 1987 - Chapter 319 of the Laws of Malta) incorporated the European Convention on Human Rights into Maltese law. This legislation was, *"An Act to make provision for the substantive articles of the European Convention on Human Rights for the Protection of Human Rights and Fundamental Freedoms, to become and be enforceable as, part of the law of Malta"*. Since the enactment of the European Convention Act, further protection may be sought before the ECHR. The judgments delivered are enforceable by the Maltese Constitutional Court *'in the same manner as judgments delivered by that Court and enforceable by it'* (Article 6 of the European Convention Act, 1987).

Treaties ratified by Malta are published in the Government Gazette.

2. What is the status of European and/or EU texts in the domestic legal system?

Treaties that are enforceable as part of the law of Malta have the same status as other domestic legislation.

On the other hand, the Constitution is the supreme law. Article 6 reads: *".....,if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void"*. Amendment to this provision is only possible if a bill for an Act of Parliament is passed in the House of Representatives where at the final voting thereon it is supported by the votes of *"not less than two-thirds of all the members of the House"* [Article 66 of the Maltese Constitution]. Similarly, The European Convention Act (Act XIV of 1987) stipulates that where an ordinary law is inconsistent with the Convention's protective provisions, the Convention shall prevail, and such law shall, to the extent of the inconsistency, be void. Section 2 defines *"ordinary law"* as *"any instrument having the force of law and any unwritten rule of law, other than the Constitution of Malta"*. Thus it is apparent that the legislator kept intact the concept of the supremacy of our Constitution. In a judgment delivered by the Constitutional Court on 12 April 989, in the case Dr. Lawrence Pullicino v. Commanding Officer Armed Forces of Malta nomine et, the Court dealt with the issue whether a domestic law, which is in conformity with the Constitution but which is in conflict with the European Convention, is to be applied or disregarded. The point in issue was a provision in the Maltese Criminal Code which prohibited the granting of

bail to persons accused of homicide. The applicant argued that that provision was in breach of the European Convention. The Constitutional Court held that a domestic law, although not contrary to the Constitution, is inapplicable if it conflicts with the provisions of the European Convention. It is interesting to note that during the parliamentary debates preceding the enactment of Act XIV of 1987, it was argued that if a human right as expressed in the Constitution had a more limited extension than that expressed in the Convention, the latter should prevail once it became part of Maltese law. It was emphasised that the principle should always be that the human rights provisions with the more extensive definition should prevail.

3. What is the status of subordinate EU legislation (regulations and directives) in the national legal system?

This question is not applicable since Malta is not a member state of the European Union. In July 1990 Malta applied for membership of the European Union. The application was re-activated on 10 September 1998. Next year a consultative referendum will be held.

The legislator is empowered to adopt a law which is applicable under EU law by introducing it in local legislation. As confirmed by the Minister of Foreign Affairs in a speech delivered on 23 January 2001 in Berlin, *"Parliament is working hard to legislate changes to existing laws that we feel may be enhanced through adherence with the norms and standards of the EU"*.

4. Does the Constitutional Court have jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution?

The Constitutional Court, as an appellate court, has jurisdiction to hear and determine appeals from decisions:

- of the Civil Court, First Hall dealing with an application whereby any person alleges that any of the fundamental rights and freedoms as protected under Article 33 – 45 of the Constitution has been, is being or is likely to be contravened in relation to him or her (a similar provision is found in the European Convention Act);

- of any court of original jurisdiction in Malta as to the interpretation of the Constitution [Article 95(2)(d) of the Constitution];

- of any court of original jurisdiction on questions as to the validity of laws [Article 95(2)(e) of the Constitution] other than those referring to an alleged breach of an individual's fundamental rights and freedoms.

It is pertinent to note that in terms of Article 116 of the Constitution, a right of action (*actio popolaris*) is granted for a declaration that any law is invalid on any grounds other than inconsistency with Articles 33 to 45 of the Constitution. In the latter case, the applicant does not have to prove any personal interest in support of his claim. Thus, it would seem that European treaties that are not enforceable as part of Maltese law are not subject to review by the Constitutional Court.

If proceedings are pending in any court, and an issue concerning the breach of an individual's fundamental human rights and freedoms arises, the court is to refer the matter to the First Hall of the Civil Court in its constitutional jurisdiction (Article 46[3] of the Constitution). Any decision will be binding on the Court that has referred the matter. Referral would take place only in those cases where the European treaty is enforceable as part of the law of Malta.

I am not aware of any judgments delivered by the Constitutional Court in the context of supervising the conformity of European and/or EU treaties with the Constitution.

5. Does the Constitutional Court have jurisdiction for supervising compatibility between legislation and European and/or EU treaties?

The Constitutional Court does not have jurisdiction to supervise the compatibility between legislation and European and/or EU treaties that are not enforceable as part of Maltese law.

6. Does the Constitutional Court have jurisdiction for supervising the conformity of subordinate EU legislation (regulations, directives) with the Constitution?

This question is not applicable since Malta is not a member of the European Union.

7. Was the admission to the Council of Europe dependent on a series of state undertakings (Parliamentary Assembly Order 488 of 1993, observance of which is subject to supervision by the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee) concerning the Constitutional Court's organisation, functioning, composition or case-law?

Malta became a member of the Council of Europe on 29 April 1965. Admission was not dependent on undertakings concerning the Constitutional Court's organisation, functioning, composition or case-law.

II. European integration and constitutional case-law

1. Does the Constitutional Court have a department that ensures efficient and rapid access to the judgments handed down by the European courts (Court of Justice and/or European Court of Human Rights) and to texts of subordinate EU legislation?

No such department exists within the Constitutional Court.

2. In its reasoning, does the Constitutional Court take account of the case-law of the Court of Justice and/or the European Court of Human Rights?

The Constitutional Court does take account of case-law of the ECHR.

Since the enactment of the European Convention Act, the case-law of the ECHR is a primary consideration when a provision of the European Convention is interpreted. Reference to case-law of the ECHR is made in the body of the judgments.

However, it must be emphasised that notwithstanding the consideration which local courts attribute to Strasbourg case-law in delivering judgments dealing with human rights issues, there have been cases where the local courts have departed from such interpretation. Thus, in the case of *Colin J. Trundell v. Minister of Foreign Affairs et al.* (Constitutional Court, 22 April 1991), it was held that the right to a fair trial was applicable in extradition proceedings. This conclusion was confirmed in recent judgments dealing with extradition proceedings.

3. Has the Constitutional Court already reversed or amended its case-law following a judgment by the European Court of Human Rights?

Judgments delivered by the ECHR have undoubtedly had an effect on case-law of the Constitutional Court. Thus, for example in the case *Nicholas Ellul v. Commissioner of Police* (5 April 1989), the Constitutional Court held that the appointment of ballistic experts who were at the same time members of the police force, did not respect the notion of fair hearing. Such experts were not only closely connected with the prosecution but were also its dependants. A similar conclusion was reached by the Constitutional Court in the case *Police v. Longinu Aquilina* decided on the 23 January 1993.

The legal acknowledgement of transexuality has been dealt with and examined in the light of the principles established in the case-law of the ECHR. In *Lawrence k/a Roxanne Cassar v. Prime Minister* (Constitutional Court, 14 July 1995), the Court emphasised that a fair balance had to be struck between the general interest of the community and the interests of the individual. Controls by the state that seek to establish the identity of the individual inevitably restrict the area of privacy of an individual. Although the original entry in the birth certificate did not in itself amount to a breach of Article 8, since merely historical facts are recorded, the Court ordered an annotation in the birth certificate to the effect that the applicant had by means of surgery acquired the female sex.

Judgments of the ECHR have had an effect on local case-law to the extent that in the case of *Paul Stoner v Prime Minister* (Constitutional Court, 22 February 1996) a provision of the Maltese Constitution protecting the right to freedom of movement solely to women married to Maltese citizens, was held to be discriminatory on the basis of sex as it treated a foreign husband of a Maltese citizen differently from a foreign wife of a Maltese citizen. The Court confirmed the principle expressed by the ECHR that the advancement of the equality of sexes is today a major goal in the Member States of the Council of Europe, and very cogent reasons have to be put forward before a difference in treatment on the sole ground of sex could be regarded as compatible with the Convention. From the above it appears to be clear that the Maltese Constitutional Court was prepared to go a long way to protect the right to non-discrimination on the basis of sex, notwithstanding the supremacy of the Constitution as entrenched in Article 6. For the reasons explained above (see Part I Question number 2), judgment in favour of applicant was based on the provision found in our Constitution and which provides for protection against discrimination on the basis of sex. Protection from discrimination on the basis of sex has come to be enforceable as a fundamental right under Maltese law by virtue of Act No. XIX enacted in 1991. Prior to this enactment, non-discrimination on the basis of sex was only referred to in the Maltese Constitution under the declaration of principles, which are unenforceable in a court of law.

The judgments *T.W. v. Malta* (1999), *Aquilina v. Malta* (1999), and *Sabeur Ben Ali v. Malta* (2000) delivered by the ECHR, dealt with the fundamental human right to personal liberty. The Court held that review as to the merits of the detention should be automatic and prompt. Furthermore, judicial control under Article 5(3) of the Convention should not be made to depend on a previous application by the detained person. Maltese law did not grant the court the power to review automatically the merits of the detention. Such automatic review required under Article 5(3) of the Convention had to be sufficiently wide to encompass the various circumstances militating in favour and against detention. Following these judgments, amendments were introduced in the Criminal Code (Chapter 9 of the Laws of Malta). Act No. III of 2002 promulgated on 9 April 2002 introduced Article 574A, which reads:

> *"(1) When the person charged or accused who is in custody is first brought before the Court of Magistrates, whether as a court of criminal judicature or as a court of criminal inquiry, the Court shall have the charges read out to the person charged or accused and, after examining the person charged as provided in article 392 as the proceedings may require, shall summarily hear the prosecuting or arraigning officer and any evidence produced by that officer on the reasons supporting the charges and on the reasons and circumstances, if any, militating against the release of the person charged or accused.*
>
> *(2) After hearing the prosecuting or arraigning police officer and any evidence produced as provided in sub-article (10), the court shall inform the person charged or accused that he may be temporarily released from custody on bail by the court under conditions to be determined by it and shall ask him what he has to say with respect to his arrest and his continued detention and with respect to the reasons and the circumstances militating in favour of his release.*
>
> *(3) Where any of the offences charged consist of any of the offences mentioned in sub-article (2) of article 575, the court shall, after hearing the person charged or accused as provided in sub-article (2) of this article, ask the prosecuting officer or arraigning officer whether he has any submissions to make on the question of temporary release from custody on bail of the person charged or accused and the latter shall be allowed to respond.*
>
> *(4) Where none of the offences charged consist of any of the offences mentioned in sub-article (2) of article 575 the court shall, after hearing the person charged or accused as provided in sub-article (2) of this article, ask the prosecuting or arraigning officer whether he and the Attorney General have any submissions, in writing or otherwise, to make on the question of the temporary release from custody of the person charged or accused and the latter shall be allowed to respond.*
>
> *(5) At the end of submissions as provided in the preceding sub-articles of this article, the court shall review the circumstances militating for or against detention.*
>
> *(6) If the court finds that the continued detention of the person charged or accused is not founded on any provision of this Code or of any other law which authorises the arrest and detention of the person in custody, it shall unconditionally release that person from custody*

(7) If the court does not find cause to release unconditionally the person charged or accused under the provisions of sub-article (6) of this article, it may nevertheless, saving the provisions of sub-article (1) of article 575 of this Code and unless release is prohibited by any provision of law, release that person from custody on bail subject to such conditions as it may deem appropriate.

(8) If the court does not find cause to release unconditionally the person charged or accused and refuses to grant that person bail, the court shall remand that person into custody and the provisions of sub-article (11) of article 575 shall apply.

(9) Where the court orders the release from custody of the person charged or accused, whether unconditionally or on bail subject to conditions, under any of the provisions of this article, the decision of the court to that effect shall be served on the Attorney General by not later than the next working day and the Attorney General may apply to the Criminal Court to obtain the re-arrest and continued detention of the person so released or to amend the conditions, including the amount of bail, that may have been determined by the Court of Magistrates".

Other judgments delivered by the ECHR have had an effect on local legislation. A case in point is the amendment of Article 575 of the Criminal Code (Chapter 9 of the Laws of Malta). Prior to the enactment of Act XXIX of 1989, persons accused of crimes against the safety of Government or of crimes liable to the punishment of imprisonment for life could not be granted bail. Article 575(1) of the Criminal Code (Chapter 9 of the Laws of Malta) read:

"(1) Saving the provisions of subsection (2) of the last preceding Section, bail shall not be granted in the case of :

- *persons accused of any crime against the safety of the government;*
- *persons accused of any crime liable to the punishment of imprisonment for life".*

In a judgment delivered on 12 April 1989 [Lawrence Pullicino v. Chief Commanding Officer of the Armed Forces et al.], the Constitutional Court held that Article 575(1) of the Criminal Code was in breach of Article 5(1)(c) of the European Convention as it removed any possibility for a Court, which had to the decide on the issue of bail, to exercise any discretion. As a result of the judgment, applicant was granted bail and the law was amended to remove the then prevailing inconsistency between Article 575(1) of the Criminal Code and the European Convention. The approach adopted was to make provision for the possibility of bail in the two instances mentioned in Article 575(1). In granting bail, the Court must exercise its discretion and ensure that certain mandatory principles are observed. Section 575(1) as amended reads:

"(1) Saving the provisions of sub-section 2 of the last preceding Section in the case of -

(i) a person accused of any crime against the safety of the government, or
(ii) a person accused of any crime liable to the punishment of imprisonment for life

the Court may grant bail, only if, after taking into consideration all the circumstances of the case, the nature and seriousness of the offence, the character, antecedents, associations and community ties of the accused, as well as any other matter which appears to be relevant, it is satisfied that there is no danger that the accused if released on bail

- *will not appear when ordered by the authority specified in the bail bond; or*
- *will abscond or leave Malta; or*
- *will not observe any of the conditions which the Court would consider proper to impose in the bail bond; or*
- *will interfere or attempt to interfere with witnesses or otherwise obstruct or attempt to obstruct the course of justice in relation to himself or to any other person; or*
- *will commit any offence".*

Following the judgment delivered by the ECHR in the *Charles Demicoli case*, an amendment was introduced in 1995 to the House of Representatives (Privileges and Powers) Ordinance, whereby a breach of privilege by an individual is to be tried by the Court of Magistrates (Malta) following an order to that effect made by the Speaker of the House to the Executive Police.

4. Has the Constitutional Court already reversed or amended its case-law following a judgment by the Court of Justice of the European Communities?

This question does not apply to Malta.

5. Has the Constitutional Court already reversed or amended its case-law following the adoption of a European instrument by the Council of Europe?

Where a European instrument is enforceable as part of Maltese law, the Constitutional Court would be bound to reverse or amend its case-law. However, even though not enforceable as Maltese Law, a European instrument adopted by the Council of Europe may be referred to in the court's judgment, by way of reference. For instance, in the case *Victoria Cassar v. Maritime Authority et al*. (Constitutional Court, 2 November 2001), a legal notice restricting port work to men was held to give rise to discrimination between the sexes. In its judgment, the Constitutional Court mentioned Article 11 of the Convention for the Elimination of All Forms of Discrimination Against Women, when it stated that States should take all appropriate measures to eliminate discrimination against women in the field of employment. Malta became a signatory to this Convention in March 1991.

6. Has the Constitutional Court already reversed or amended its case-law following the enactment of a European Community legal measure?

This question does not apply to Malta.

III. European integration and constitutional justice

1. Is the Constitutional Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?

The Constitutional Court is bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights. There is no precedent in the case-law of the ECHR that declared the Maltese Constitutional Court to have breached the right of fair trial as guaranteed in Article 6 of the Convention.

In a judgment delivered by the Constitutional Court in the case of *Lawrence Cuschieri v. Hon. Prime Minister et al.* (6 April 1995), the Constitutional Court confirmed that it was bound by the rules of a fair trial.

2. Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

A judgment delivered by the ECHR in cases in which Malta is a party are enforceable by the Constitutional Court in the same manner as are other judgments delivered by that court. A demand for enforcement is filed in the Constitutional Court and served on the Attorney General (Article 6 of the European Convention Act – Chapter 319 of the Laws of Malta). Such a provision seeks to give the fullest possible implementation to the provisions of the European Convention which has ensured undoubtedly the international protection of human rights. Once such an application has been filed, the Constitutional Court examines whether the judgment delivered by the ECHR and which is sought to be enforced, is one to which a declaration made by the Government of Malta in accordance with Article 46 of the Convention is applicable. However, as such there are no procedural rules for judicial review of proceedings following a condemnation by the ECHR. Thus for example, it is a moot point whether a re-trial is to take place if the ECHR finds that a judgment of the Maltese Constitutional Court has itself violated the Convention and enforcement is taken to imply that the Court must strike its own judgment.

3. Has the Constitutional Court already applied Article 177 of the Maastricht Treaty, concerning preliminary rulings, as provided for in the context of judicial co-operation between the national courts and the Courts of Justice of the European Communities?

The Maastricht Treaty is not enforceable in Malta.

THE NETHERLANDS

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I. Integration of European legal rules into the domestic legal system

1. What is the procedure for integrating European and/or EU treaties into the domestic legal system?

a. Is the ratification procedure provided for in the Constitution?
b. What does this procedure involve?
c. Are European and/or EU treaties published?
d. If so, where? (Official Journal, Official Bulletin, the press, etc)

In accordance with Art. 91 of the Constitution, the Kingdom is not bound by treaties, and treaties cannot be denounced, without prior approval of the States General (parliament). Section 8 of the Kingdom Act on the Approval and Publication of Treaties defines the cases in which this approval is not required (e.g. if the sole purpose of the treaty in question is to implement a treaty that has already been approved or to extend one that is due to expire).

When the government deems it desirable for the Kingdom to be bound by a particular treaty, it puts the treaty before the States General for approval as soon as possible (section 2, subsection 1 of the Kingdom Act on the Approval and Publication of Treaties). Approval may be either explicit or tacit (section 3 of the Kingdom Act on the Approval and Publication of Treaties). Explicit approval is granted by act of parliament (section 4 of the Kingdom Act on the Approval and Publication of Treaties). Tacit approval is deemed to have been granted if, within thirty days of a treaty being submitted to the States General, the wish has not been expressed by or on behalf of one of the houses, or by at least one-fifth of the constitutional number of members of one of the houses, that the treaty be subject to the process of explicit approval.

Treaties that have entered into force for the Kingdom of the Netherlands are published (section 17 of the Kingdom Act on the Approval and Publication of Treaties).

Treaties are published in the Treaty Series ("Tractatenblad") of the Kingdom of the Netherlands (section 16, subsection 1 of the Kingdom Act on the Approval and Publication of Treaties).

2) What is the status of European and/or EU texts in the domestic legal system?

a. Is this status defined by the Constitution, or does it result from case-law?
b. Where do European and/or EU treaties fit into the hierarchy of legal texts? (Are they on the same level as the legislation or the Constitution, do they take precedence over the Constitution, etc).

The status of treaties and of resolutions adopted by organisations established under international law is regulated by the Constitution. The provisions concerned apply to all treaties and resolutions adopted by organisations established under international law. There are no specific provisions governing European and/or EU treaties and resolutions.

Art. 94 of the Constitution provides that statutory regulations in force within the Kingdom are inapplicable if such application is in conflict with provisions of treaties that are binding on all persons and resolutions by international institutions. Thus precedence is accorded to any binding provision of a treaty or of a resolution adopted by an international organisation over national legislation. Furthermore, it is important to note that art. 120 of the Constitution prohibits courts from reviewing the constitutionality of acts of parliament and treaties. This implies that treaties and resolutions adopted by organisations established under international law likewise occupy a higher place in the hierarchy of legal texts than the national Constitution. Treaties and resolutions adopted by organisations established under international law cannot be reviewed for compatibility with the national Constitution.

It should be noted that the principle of the priority of Community law is a principle of Community law itself. According to the prevalent view it is unnecessary as far as Community law in the Netherlands is concerned, to rely upon the provision of art. 94 of the Constitution. According to the prevalent view a Dutch court, in the event of a conflict with rules of Community law, would refuse to apply the relevant national provisions not on account of incompatibility with art. 94 of the Constitution but on account of their incompatibility with Community law.

3. (For member states of the European Union) What is the status of subordinate EU legislation (regulations and directives) in the national legal system?

a. Is this status defined by the Constitution or does it result from case-law?
b. Where does subordinate EU legislation fit into the hierarchy of legal texts? (Is it on the same level as the legislation or the Constitution, does it take precedence over the Constitution, etc).

For the application of the Constitution, subordinate EC/EU legislation is subject to the same regime as that applicable to resolutions adopted by organisations established under international law. However, it should be noted again that the principle of the priority of Community law is a principle of Community law itself. According to the prevalent view it is unnecessary as far as Community law in the Netherlands is concerned, to rely upon the provision of art. 94 of the Constitution. That also holds as far as regulations or directly effective provisions of directives are concerned.

Subordinate EC/EU legislation occupies the same place in the hierarchy of legal texts as that outlined above for treaties and resolutions adopted by organisations established under international law.

4. Does the Constitutional Court have jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution?

a. Is this supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise this supervision? By what decision? Have there been changes in the case-law in this area?
c. Which bodies are authorised to refer cases to the Court in this area?
d. Must such a referral occur before the European and/or EU treaty in question is ratified, or may it occur after ratification?

e. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

The Netherlands does not have a constitutional court. However, there are constitutional elements in the case law of "regular" Dutch courts, certainly in cases involving the relationship between national and international law. Dutch courts are free to decide not to apply statutory provisions if these are incompatible with binding provisions of higher law. However, they may not review the constitutionality of treaties (art. 120 of the Constitution).
Dutch Courts have never asserted any power to review the constitutionality of treaties. Such an assertion would be contrary to the Constitution.

5. Does the Constitutional Court have jurisdiction for supervising compatibility between legislation and European and/or EU treaties?

a. Is such supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise this supervision?
c. Which authorities are entitled to refer cases to the Court in this field?
d. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

It is possible that the compatibility of Dutch statutory provisions with EC or EU conventions be examined before a Dutch court. In cases of this kind, the Dutch court will not apply national provisions if this would be incompatible with binding provisions of European and/or EU treaties.

Any Dutch court may on occasion have to review the compatibility of legislation with higher-ranking legal norms. For instance, a criminal court will check that the norm that has been violated is compatible with a higher-ranking one. If any such incompatibility is discovered, the lower-ranking norm will be declared non-binding and there will be no conviction (*nulla poena sine lege*). Examples of this abound in Dutch case law. For instance, courts have often ruled some municipal regulation inapplicable because it was incompatible with the Constitution - with the provisions governing freedom of expression, for instance.

Administrative courts, too, are often called upon to rule on whether a lower-ranking rule or regulation is binding. If a government decision is predicated on a non-binding rule, the administrative court will reverse that decision on the grounds that it is incompatible with the law. In the Netherlands, only appeals against individual decisions, not those against rules or regulations, can be submitted to an administrative court. However, the idea of allowing administrative courts to hear appeals challenging lower-ranking rules or regulations is currently under consideration.

Civil courts also play an important role in offering individuals legal protection against the government. Civil courts are competent to hear proceedings instituted by members of the public who base their claims against the government on civil law. The most notable examples here are actions against the government for tort (under art. 6:162 of the Civil Code). Civil courts have long since acknowledged that legislators - at whatever level in the hierarchy - may be guilty of tort in respect of members of the public. This applies, for instance, if a lower-ranking regulation (an order in council, for instance) is promulgated and applied in defiance of the Constitution. If this happens, any member of the public who is affected can claim compensation from the government.

As far as the subject of civil courts is concerned, one should also mention interim injunction proceedings. If a member of the public is adversely affected by a rule or regulation that is incompatible with a higher legal norm, he or she can institute interim injunction proceedings against the state. The court concerned can issue an injunction forbidding any further application of the rule concerned. In practice, there is little difference between such an injunction and the annulment or withdrawal of the rule concerned.

Dutch courts are empowered to examine the compatibility of rules and regulations with higher legislation such as the Constitution. What is more, according to established case-law, they are also empowered to examine compatibility with unwritten principles of law. This is important, for instance, if a specific group of members of the public feel that they have been disproportionately disadvantaged by a particular rule or regulation. If the court finds for the plaintiffs in such a case, this too constitutes grounds for declaring the regulation inapplicable; in the French system one would speak of incompatibility with the principle of "égalité devant les charges publiques". Only secondary or lower legislation can be examined for compatibility with unwritten law. Acts of parliament cannot be subjected to any such scrutiny. This makes sense, because of the ban on reviewing the constitutionality of acts of parliament. If courts had the power to examine the compatibility of acts of parliament with unwritten principles of law such as the principles of legal certainty and equality - that is, the prohibition of discrimination - they could easily use this as a loophole to get around the ban.

When it comes to the power of Dutch courts to examine legislation, international law is of paramount importance. The Dutch Constitution states that statutory regulations (including acts of parliament) are not applicable if this would be in conflict with provisions of universally binding treaties. The same applies if they are incompatible with resolutions of international organisations (for example, EC institutions).

Over the past few decades, the significance of international law has grown enormously in the Netherlands, as elsewhere. With the growing significance of international law has come a substantial widening in the scope for judicial review, in particular the judicial review of acts of parliament. By now, many examples could be given of cases in which acts of parliament have been declared inapplicable on account of their incompatibility with international law. Such cases often concern the prohibition of unequal treatment, or discrimination, that is enshrined in Community law and in a number of conventions. This prohibition has had dramatic consequences for the application of Dutch fiscal and social legislation.

It was in fact the development of international law that triggered the current debate in the Netherlands about whether or not to widen the scope for judicial review. The ban on reviewing the constitutionality of acts of parliament is considered less justifiable today, given that these same acts of parliament must give way, in some circumstances, to the provisions of international law. Although the most recent version of the Dutch Constitution - dating from 1983 - upheld the ban on reviewing the constitutionality of acts of parliament, the mood is swinging against the ban.

Another point being debated is whether the review of legislation should be the special competence of a constitutional court. Advocates of this system point out that in view of the political implications, it would be best to entrust the judicial review of legislation to a constitutional court, rather than allowing ordinary courts to rule in such proceedings. Opponents point out the advantages of the present Dutch system. Although the scope for judicial review is

somewhat limited, any court, from the lowest to the highest court in the land, has the power of review. Furthermore, the fact that cases do not need to be referred to a constitutional court saves time, particularly in cases where it is also necessary to ask the Court of Justice of the EC for a preliminary ruling. As things stand, any Dutch court that suspects that a particular Dutch regulation may be incompatible with Community law can simply ask the Court of Justice to make a preliminary ruling on the matter.

Constitutional jurisdiction does not yet exist in the Netherlands. However, legislation is in fact reviewed in Dutch judicial practice, and the laws of the European Community (as well as those of the Council of Europe) occupy an important place in this practice.

6. (For member states of the European Union) Does the Constitutional Court have jurisdiction for supervising the conformity of subordinate EU legislation (regulations, directives) with the Constitution?

a. Is such supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise such supervision?
c. Which bodies are entitled to refer cases to the Constitutional Court in this area?
d. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of subordinate EU legislation with the Constitution?

Dutch courts may not review the constitutionality of treaties or resolutions adopted by international organisations (art. 120 of the Constitution).

Dutch Courts have never asserted any power to review the constitutionality of treaties. Such an assertion would be contrary to the Constitution.

7. Was admission to the Council of Europe dependent on a series of state undertakings (Parliamentary Assembly Order 488 of 1993, observance of which is subject to supervision by the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee) concerning the Constitutional Court's organisation, functioning, composition or case-law?

a. What were the terms of those undertakings?
b. Have those undertakings been observed?
c. What changes have been made to the status of the constitutional court or to its case-law?

The accession of the Kingdom of the Netherlands to the Council of Europe was not dependent on any such undertaking.

II. European integration and constitutional case-law

1. Does the Constitutional Court have a department that ensures efficient and rapid access to the judgments handed down by the European courts (Court of Justice and/or European Court of Human Rights) and to texts of subordinate EU legislation?

Efforts are currently under way in the Netherlands to improve the judiciary's knowledge infrastructure with respect to Community law. One measure designed to improve the accessibility of the sources of European law (both case law and legislation) is to make them available online to all courts as part of the Porta Iuris project. In addition, a two-weekly e-

bulletin ("Vaknieuws") detailing new developments will be published online. The effort to form a network of European law coordinators at all Dutch courts also merits attention in this respect.

2. In its reasoning, does the Constitutional Court take account of the case-law of the Court of Justice and/or the European Court of Human Rights? If so, in what way:

a. As a primary consideration (the European case-law serves as the basis for the Constitutional Court's interpretation), or as a complementary consideration (the European case-law reinforces the Constitutional Court's interpretation)?
b. Does the European case-law appear in the rapporteurs' conclusion or in the body of judgments?

In general, Dutch courts will be guided by the case-law of the European Court of Human Rights, the Court of Justice of the European Communities, and (to a lesser extent) of the Court of First Instance of the European Communities.

In explaining how they have arrived at their rulings, Dutch courts will generally expressly invoke the European legislation and case-law they have taken into account.

3. Has the Constitutional Court already reversed or amended its case-law following a judgment by the European Court of Human Rights?

a. Did the relevant judgement condemn the national authorities, or those of another member state of the Council of Europe?
b. What were the terms of the European Court's judgment?
c. Before the European Court's judgment, was there opposing and established Constitutional Court case-law in the relevant area?
d. How was this case-law reversed or amended? Which body effected the referral?

The case-law of the European Court of Human Rights has led on more than one occasion to radical changes in Dutch case-law. For instance, the Court ruled that the Dutch Crown and the Dutch Trade and Industry Appeals Tribunal did not meet the requirements of an independent tribunal within the meaning of art. 6 of the European Convention on Human Rights (European Court of Human Rights, 23 October 1985, *Benthem v. the Netherlands*, and European Court of Human Rights 19 April 1994, *Van de Hurk v. the Netherlands*). In consequence, it was decided to allow a fresh hearing before a civil court, in certain circumstances, in cases where these bodies had already given judgment.

In the judgments concerned, the European Court of Human Rights ruled that there had been a breach of art. 6 of the Convention.

In earlier judgments handed down by the Dutch courts, the independence of the Crown and the Trade and Industry Appeals Tribunal had been accepted. In consequence, cases in which judgments had been handed down by one of these two bodies could not be heard again before a civil court.

In the cases concerned, it was the parties themselves who applied for a fresh hearing before the civil court.

4. Has the Constitutional Court already reversed or amended its case-law following a judgment by the Court of Justice of the European Communities?

a. Did the relevant judgment condemn the national authorities, or those of another member state of the European Union?
b. What were the terms of the Court of Justice's judgment?
c. Before the Court of Justice judgment, was there opposing and established Constitutional Court case-law in the area?
d. How was this case-law reversed or amended? Which body effected the referral?

Under Community law, domestic courts are competent (and domestic courts that hand down judgments without any possibility of appeal are obliged) to ask the Court of Justice to hand down a preliminary ruling if Community law could affect their decision and the interpretation of this law is not clear-cut. Dutch courts regularly use their competence to ask for preliminary rulings (even in interim injunction proceedings), and where obliged to do so, they generally fulfil this obligation. The Dutch court will then cite the Court of Justice's preliminary ruling when giving judgment. Only rarely has a Dutch court, wrongly holding the interpretation of Community law on a particular point to be clear-cut, omitted to ask for a preliminary ruling, going on to develop case-law that proved incompatible with a later preliminary ruling by the Court of Justice. A case in point related to the issues at stake in the Court of Justice's *Securitel judgment (ECJ 30 April 1996, case C-194/94, Case law 1996, p. I-2201*). The Dutch court in question (the Trade and Industry Appeals Tribunal) initially held that the failure to observe the notification obligation, enshrined in the then directive 83/189 did not mean that it should not apply the national regulation concerned. The Court of Justice ruled otherwise in the Securitel judgment, however, in response to requests for preliminary rulings by a Belgian court. Since the Securitel judgment, Dutch case-law has changed to reflect the views it contained.

In the cases concerned, the Court of Justice of the European Communities gave an interpretation of Community law that proved to deviate from the interpretation previously arrived at by the domestic court. Infringement proceedings have never played a role in this context.

In the cases concerned, previous domestic case-law existed which proved incompatible with a judgment handed down at a later stage by the Court of Justice of the European Communities.

The domestic courts tended to follow the views of the Court of Justice in later, similar cases. There is an ongoing debate in the Netherlands as to whether, when a final and conclusive judgment on a case has already been handed down by a domestic court, later case-law of the European Court of Justice should entail a review or compensation payable by the state.

5. Has the Constitutional Court already reversed or amended its case-law following the adoption of a European instrument by the Council of Europe?

a. What was the status of this instrument (recommendation from the Committee of Ministers or the Parliamentary Assembly, report by the European Commission for Democracy through Law ...)?
b. What were the terms of this instrument?
c. How was this case-law reversed or amended? Which body effected the referral?

No precedents are known in which instruments of the Council of Europe have led to a definite change in the established case-law of Dutch courts.

6. Has the Constitutional Court already reversed or amended its case-law following the enactment of a European Community legal measure?

a. What was the status of this measure (directive, regulation, recommendation ...)?
b. What were the terms of this measure?
c. How was this case-law reversed or amended? Which body effected the referral?

Measures (especially directives) geared towards the harmonisation of national legislation have often necessitated the revision of rules previously developed in Dutch case-law. One example relates to case-law on the exhaustion of trademark rights. Dutch courts tended to adopt the position that trademark holders exhausted their rights by marketing products bearing their trademark anywhere in the world (doctrine of universal exhaustion). According to the Court of Justice, however, the European trademark directive means that the doctrine of Community exhaustion should apply: the trademark holder does not exhaust his rights by marketing products for the first time outside the Community. Dutch courts have since adopted the doctrine of Community exhaustion.

Although the directive seems to suggest that the doctrine of Community exhaustion should apply, it leaves so much room for doubt that the Court of Justice has had to make preliminary rulings on this point.

Since the Court of Justice ruling in favour of this doctrine, Dutch courts have applied the principle of Community exhaustion.

III. European integration and constitutional justice

1. Is the Constitutional Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?

a. Is there a precedent in the case-law of the European Court of Human Rights condemning the national authorities under Article 6 of the Convention, involving a trial before the Constitutional Court?
b. What were the grounds for this judgment?
c. Was this condemnation followed by amendment or changes to the organisation and/or functioning of the Constitutional Court? In what way?

The Kingdom of the Netherlands does not have a constitutional court. Any Dutch court may decide not to apply statutory norms that are incompatible with binding provisions of higher law, whether in criminal, administrative or regular civil proceedings. Without any constitutional proceedings being at issue, the European Court of Human Rights has twice decided that a Dutch judicial body did not fulfil the independence requirement enshrined in art. 6 of the European Convention on Human Rights. As related above, the bodies concerned were the Crown as an administrative court and the Trade and Industry Appeals Tribunal, an administrative court ruling on cases involving socio-economic matters.

The Crown was found not to be independent to the extent that it was free to depart from the advice it received from the Council of State, which is independent of government. The Trade and Industry Appeals Tribunal was found not to be independent because of the possibility of the Crown intervening in the execution of its judgments.

When the judgment on the Trade and Industry Appeals Tribunal was given, it had already been decided to abolish the possibility of the Crown intervening in the execution of the Tribunal's judgments. The judgment on the Crown prompted a review of the organisation of the relevant branch of administrative justice, in consequence of which the Council of State was given final responsibility for the jurisdiction concerned, whereas it had previously only advised the Crown.

2. Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

a. Has such a judicial review already been implemented?
b. What legal provisions govern this review?
c. Has a review already taken place following a previous constitutional court decision?
d. What were its terms?
e. What was the outcome of the procedure?

The case-law (rulings) of the European Court of Human Rights do not give occasion to review the final and conclusive judgments. However, according to this case-law the execution of a judgment in a criminal case may give rise to an action against the government for tort (under art. 6:162 of the Civil Code) if the European Court of Human Rights rules that the Convention has been breached. As from 1 January 2003 a new bill (bill of 12 September 2002, Official Journal No. 479) will come into force, making a special provision for the procedure to be followed if the European Court of Human Rights rules that the Convention has been breached in a criminal case in which a Dutch court has already handed down a final and conclusive judgment. In this event the convict may ask for a review of the conviction. Consideration is also being given to providing for a similar review of judgments in administrative and civil proceedings.

3. Has the Constitutional Court already applied Article 177 of the Maastricht treaty, concerning preliminary rulings, as provided for in the context of judicial co-operation between the national courts and the Court of Justice of the European Communities?

a. Of all the disputes submitted to the Constitutional Court, what is the proportion of preliminary rulings (as a percentage)?
b. Of all disputes that have given rise to a preliminary ruling, what proportion of Constitutional Court judgments followed the opinion of the Court of Justice of the European Communities?

The total number of preliminary rulings requested by Dutch courts is estimated at about 20 a year on average. This number corresponds to an extremely small percentage (well below 1%) of the total number of judgments handed down in the Netherlands annually.

When a preliminary ruling has been given, Dutch courts generally adhere to it.

POLAND

Mr Marian GRZYBOWSKI,
Judge, Constitutional Court

I. Integration of European legal rules into the domestic legal system

1. What is the procedure for integrating European and/or EU treaties into the domestic legal system?

a. Is the ratification procedure provided for in the Constitution?

The ratification procedure is provided for in the Constitution.

b. What does this procedure involve?

This procedure involves the treaties dealing with issues which should be regulated by statutes (statutory regulations). According to Art. 90 para.1 of the Constitution, the Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of state authority with regard to certain matters.

A statute granting consent for the ratification of an international agreement referred to in para.1 of art. 90 of the Constitution shall be passed by the Seym by a two-third majority vote in the presence of at least half of the statutory number of Deputies and by the Senate by a two-third majority vote in the presence of at least half of the statutory number of Senators.

There is no provision in the Constitution of Poland referring directly to the European "case-law" (and the jurisdiction of the European Court of Justice).

c. Are European and/or EU treaties published?

The European and /EU treaties are published after their ratification.

They should be published in the "Journal of Laws" ("Dziennik Ustaw") , where – in addition – the ordinary statutes used to be published too. The President of Poland is responsible for deciding on sending the above-mentioned acts for publishing. The Prime Minister is responsible for the editing of the "Journal of Laws" ("Dziennik Ustaw"). There are also other ways of unofficial publication (including the Internet).

d. If so, where? (Official Journal, Official Bulletin, the press, etc)

They use to be published in "Journal of Laws" ("Dziennik Ustaw").

2. What is the status of European and/or EU texts in the domestic legal system?

a. Is this status defined by the Constitution, or does it result from case-law?

The status of European and EU texts is defined by the Constitution of Republic of Poland. They belong to the group of "ratified international treaties", which are "ranked" in the second position within the hierarchy of "sources of law" (according the Chapter 3 of the 1997 Constitution of Poland). This observation applies to European treaties (conventions) .

The definition is found in Art. 90 (1) of the 1997 Constitution, according to which they are defined as "agreements that delegate to an international organisation (or international institution) the competence of organs of State authority in relation to certain matters".

b. Where do European and/or EU treaties fit into the hierarchy of legal texts?

The European and EU treaties are on the "intermediate" level, i.e. between the Constitution and the ordinary statutes.

They should be drawn up and executed in accordance with the provisions of the Constitution of Poland. On the other hand, the ordinary statutes should be drawn up and interpreted in accordance with the European treaties. The European treaties have a priority *vis-à-vis* the ordinary statutory provisions and *vis-à-vis* sub-statutory (administrative) legislation.

According to Art. 88 para. 3 international agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes.

The principles of promulgation shall be specified. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by the agreement shall be applied directly and have precedence in the event of a conflict of laws.

In a process of law-making the relevant bodies should observe the bulk of the European regulations. Such an obligation has been established by "internal" (procedural) rules of their functioning.

3. (For member states of the European Union) What is the status of subordinate EU legislation (regulations and directives) in the national legal system?

Not applicable.

4. Does the Constitutional Court have jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution?

The Constitutional Tribunal in Poland has jurisdiction for supervising the conformity of European and/or the EU treaties with the Constitution. In case of conflict, the Constitutional Tribunal should give priority to European regulations. The "domestic" laws (statutes and sub-statutory legislation) have to be changed or should be declared "not-binding where they are not compatible with the ratified European treaties as well as the other ratified treaties, in the event that ratification is decided on the basis of statutory "delegation" (legitimisation).

This means that in practice the Seym and the Senate decide which international (European) treaties should be regarded as having priority over internal treaties.

a. Is this supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise this supervision? By what decision? Have there been changes in case-law in this area?

This supervision is provided for in the Constitution.

c. Which bodies are authorised to refer cases to the Court in this area?

The bodies authorised:

the President, the Prosecutor General, the Chief Justice of the Supreme Court, the President of the Highest Administrative Court, the group of (50) Seym deputies, the group of (30) senators, Prime Minister, Marshal of the Seym, Marshal of the Senate, the President of Supreme Chamber of Control, the Ombudsman and - only within the framework of their competence - the National Council of Judiciary, trade unions statutory heading bodies, the professional and employers` organisations (their headquarters), churches and local self-government representative bodies in the sphere of matters related to their competences.

The relevant regulation is provided by Art. 191 of the Constitution of 2 April 1997.

This regulation seems to be developed and concrete.

d. Must such a referral occur before the European and/or EU treaty in question is ratified, or may it occur after ratification?

Yes, but after ratification.

e. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

Less than one hundred. The exact number is not available.

5. Does the Constitutional Court have jurisdiction for supervising compatibility between legislation and European and/or EU treaties?

The Constitutional Tribunal has jurisdiction for supervising the compatibility of domestic legislation and European/EU treaties. The regulation, which is adequate, is provided by Art. 188 (2, 3) of the Constitution of the Republic of Poland (of 2 April 1997) and additionally, in a more specific way, by Art. 25 (2 “b”) of the Law on Constitutional Tribunal of 1 August 1997.

a. Is such supervision provided for in the Constitution?

This supervision is provided for in the Constitution in a broader framework of supervision dealing with compatibility of legislation and the ratified international treaties, and especially the treaties which were ratified on a basis of statutory legitimisation by the Seym and the Senate.

b. If not, has the Court asserted or disclaimed its power to exercise this supervision?

Not applicable.

c. Which authorities are entitled to refer cases to the Court in this field?

See point 4 c) above. The list of bodies (subjects) legitimised to submit a petition is listed in Art. 191 (1) of the Constitution.

d. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

Less then one hundred during the last 2 years (2001-2002). Some of them are quoted in the judgements, some of them only in the justification parts. Therefore it is quite problematic to count them in detail and to offer exact numbers.

6. (For member states of the European Union) Does the Constitutional Court have jurisdiction for supervising the conformity of subordinate EU legislation (regulations, directives) with the Constitution?

Not applicable.

7. Was admission to the Council of Europe dependent on a series of state undertakings (Parliamentary Assembly Order 488 of 1993, observance of which is subject to supervision by the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee) concerning the Constitutional Court's organisation, functioning, composition or case-law?

a. What were the terms of those undertakings?

All had been mentioned some months before the systemic changes in Poland in 1989.

b. Have those undertakings been observed?

They were observed.

c. What changes have been made to the status of the constitutional court or to its case-law?

The Tribunal judgments have become final and binding "*erga omnes*" since 1977.

II. European integration and constitutional case-law

1. Does the Constitutional Court have a department that ensures efficient and rapid access to the judgments handed down by the European courts (Court of Justice and/or European Court of Human Rights) and to texts of subordinate EU legislation?

The Constitutional Tribunal has a small specialised unit dealing with such issues (as part of a study department). It is, however, composed of a group of very experienced and well-qualified lawyers.

In addition, many judges show deep interest in and knowledge of both the European Court of Justice (in Luxemburg) and the European Court of Human Rights.

2. In its reasoning, does the Constitutional Court take account of the case-law of the Court of Justice and/or the European Court of Human Rights? If so, in what way:

a. as a primary consideration (the European case-law serves as the basis for the Constitutional Court's interpretation), or as a complementary consideration (the European case-law reinforces the Constitutional Court's interpretation)?

As a complementary or parallel consideration.

b. Does the European case-law appear in the rapporteurs' conclusions or in the body of judgments?

Frequently in the reporter's conclusions and from time to time in the body of judgements

3. Has the Constitutional Court already reversed or amended its case-law following a judgment by the European Court of Human Rights?

a. Did the relevant judgement condemn the national authorities, or those of another member state of the Council of Europe?
b. What were the terms of the European Court's judgment?

No open reversal

c. Before the European Court's judgment, was there opposing and established Constitutional Court case-law in the relevant area?

Slightly incompatible in some cases.

d. How was this case-law reversed or amended? Which body effected the referral?

The newest judgement has observed the judgements of the European Court and the Court of Justice (EU).

4. Has the Constitutional Court already reversed or amended its case-law following a judgment by the Court of Justice of the European Communities?

a. Did the relevant judgment condemn the national authorities, or those of another member state of the European Union?

No "open" reversal

b. What were the terms of the Court of Justice's judgment?

Not applicable.

c. Before the Court of Justice judgment, was there opposing and established Constitutional Court case-law in the area?

There can be some opposing or incompatible elements in individual judgments.

d. How was this case-law reversed or amended? Which body effected the referral?

The Constitutional Tribunal tends to follow the EU case-law and the Court of Justice judgments (at least since 1991 – the year of signature of an association treaty). These trends have been intensified during the last three years, and in particular in 2002, due to Poland's involvement in accession treaty negotiations (and the on-going harmonisation of the legal system).

5. Has the Constitutional Court already reversed or amended its case-law following the adoption of a European instrument by the Council of Europe?

a. What was the status of this instrument (recommendation from the Committee of Ministers or the Parliamentary Assembly, report by the European Commission for Democracy through Law ...)
b. What were the terms of this instrument?
c. How was this case-law reversed or amended? Which body effected the referral?

The Constitutional Tribunal tends to follow all requirements set out by Council of Europe for legal systems. In particular, the Tribunal is obliged to observe the provisions of the European Convention on Human Rights.

Recommendations by the Committee of Ministers and the Parliamentary Assembly are, additionally, taken into account in constitutional case-law.

6. Has the Constitutional Court already reversed or amended its case-law following the enactment of a European Community legal measure?

a. What was the status of this measure? (directive, regulation, recommendation ...)
b. What were the terms of this measure?
c. How was this case-law reversed or amended? Which body effected the referral?

The Constitutional Tribunal of Poland quite frequently tends to refer in the "reasoning" of its judgments to regulations and directives issued by the European Council or, in case of directives, by the European Commission as well.

III. European integration and constitutional justice

1. Is the Constitutional Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?

This rule is incorporated into Article 45 of the Constitution of Poland and not the relevant provisions of the Code of Criminal Procedure.

a. Is there a precedent in the case-law of the European Court of Human Rights condemning the national authorities under Article 6 of the Convention, involving a trial before the Constitutional Court?

Not so far (December 2002).

b. What were the grounds for this judgment?

c. Was this condemnation followed by amendment or changes to the organisation and/or functioning of the Constitutional Court? In what way?

Not so far (December 2002).

2. Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

They should possibly be introduced during the on-going reform of criminal procedure legislation. The preparatory work is over and the relevant Bills have been sent to the Seym (the first chamber of the Parliament of the Republic of Poland).

a. Has such a judicial review already been implemented?

Not applicable.

b. What legal provisions govern this review?

Not applicable.

c. Has a review already taken place following a previous constitutional court decision?

No

d. What were its terms?

Not applicable.

e. What was the outcome of the procedure?

Not applicable.

3. Has the Constitutional Court already applied Article 177 of the Maastricht treaty, concerning preliminary rulings, as provided for in the context of judicial co-operation between the national courts and the Court of Justice of the European Communities?

a. Of all the disputes submitted to the Constitutional Court, what is the proportion of preliminary rulings (as a percentage)?

b. Of all the disputes that have given rise to a preliminary ruling, what proportion of Constitutional Court judgments followed the opinion of the Court of Justice of the European Communities?

No.

Poland is not a member state of the EU (therefore the Maastricht Treaty has not yet been ratified).

Due to the last decision of the Copenhagen Summit of 13 December 2002 Poland is ready to ratify the Treaties of Maastricht and of Amsterdam as well as the Nice Treaty. The issue of accession should be decided by nationwide referendum. The referendum will be held on 8 June 2003.

The approval of accession will result in the ratification of European treaties as well as acceptance of the whole *acquis communitaire.*

In practice, the Constitutional Tribunal of Poland, due to on-going "harmonisation" of the legal system of Poland with the EU legal system and jurisdiction tends to study and to follow some elements of procedure as established in the Treaty of Maastricht. Such a practice should be continued intensively, especially after the Copenhagen Summit of 13 December 2002.

ROUMANIE

M. Nicolae COCHINESCU,
Juge à la cour constitutionnelle

Monsieur le Président de la Cour Constitutionnelle de la République Slovaque, Monsieur le Président de la Commission de Venise, Mesdames et Messieurs,

J'ai l'honneur de participer à cette réunion en ma qualité de juge à la Cour Constitutionnelle de la Roumanie et je profite de cette occasion pour vous saluer au nom de mes collègues juges à la Cour.

Je désirerais, ensuite, observer que le thème de ce Séminaire présente un intérêt particulier pour la Cour Constitutionnelle de la Roumanie, dans la perspective de la révision de la Constitution, mentionnée par M. Gianni Buquicchio, Secrétaire de la Commission de Venise.

Au sujet de cette révision, il est intéressant de noter que la Constitution de la Roumanie est une Constitution nouvelle – âgée d'à peine 10 ans – conçue et élaborée, avec l'aide d'experts européens reconnus dans le domaine des principes démocratiques et de la protection des droits de l'homme.

La plupart des systèmes juridiques actuels et notamment celui de la Roumanie s'intègre parfaitement dans l'étude engagée dans le cadre de cette conférence sur les mutations des systèmes juridiques et leurs conséquences, dont la problématique a été développée avec une grande clarté par Monsieur le Professeur Dominique Rousseau.

C'est dans cet esprit que je vais présenter mon rapport.

I. Intégration des normes européennes dans l'ordre juridique interne

1. Dans le système juridique roumain, on peut distinguer deux moyens d'intégration des normes internationales dans l'ordre juridique interne.

Le premier concerne les normes européennes, et, plus précisément, celles sur les droits de l'homme et les libertés fondamentales, qui ont été intégrées dans la Constitution de la Roumanie de 1991, lors de son élaboration.

Ainsi, le droit à la vie, l'interdiction de la torture, l'interdiction du travail forcé, le droit à la liberté et à la sûreté, le libre accès à la justice, le droit au respect de la vie privée et familiale, la liberté de pensée, de conscience et de religion, la liberté d'expression, la liberté de réunion et d'association, ainsi que d'autres droits et libertés consacrées par la Convention des Droits de l'Homme et par ses Protocoles, ont été introduits dans la Constitution de la Roumanie en reprenant le contenu voire les termes même des textes originaux.

Il est à remarquer que les normes prévues dans la Convention des Droits de l'Homme et des Libertés Fondamentales et dans ses Protocoles ont été insérées dans la Constitution de la Roumanie avant son adhésion au Conseil de l'Europe en 1993 et avant la ratification de ladite Convention, par la Loi no. 30 de 18 mai 1994.

De plus, les normes européennes sur la protection des droits et des libertés fondamentales ont été introduites – après la chute du régime totalitaire – notamment dans le Code pénal, le Code civil, le Code de procédure pénale, le Code de procédure civile, ainsi que dans les lois relatives au régime de la propriété, dans celles concernant le régime des étrangers, et le droit du travail, etc.

La deuxième voie d'intégration des normes européennes dans l'ordre juridique national est prévue à l'art. 11(2) de la Constitution, qui dispose que : "Les traités ratifiés par le Parlement, conformément à la loi, font partie du droit interne".

D'ailleurs, selon l'article 20 alinéa 2 de la Constitution, « en cas de non concordance entre les pactes et les traités portant sur les droits fondamentaux de l'homme, auxquels la Roumanie est partie, et les lois internes, les réglementations internationales ont la primauté".

Ces dispositions constitutionnelles portent, entre autre, sur les traités européens et les autres traités internationaux auxquels la Roumanie est partie.

On peut ainsi parler d'une véritable constitutionnalisation des normes internationales de sauvegarde des droits de l'homme et des libertés fondamentales, notamment de celles contenues dans la Convention européenne des Droit de l'Homme.

Intégrés dans le droit positif interne par le pouvoir constituant, les pactes et les traités internationaux sur les droits de l'homme doivent être respectés par le Parlement, lors de l'élaboration, la modification ou l'abrogation des normes sur les droits subjectifs des personnes ; et, pour les autres autorités publiques, le Gouvernement, l'administration publique, le Ministère Public, les organes de juridiction et, bien sûr, pour la Cour Constitutionnelle, elles constituent une des normes de référence dans l'application des lois ou dans la solution des litiges concernant l'existence, l'étendue et l'exercice de ces droits.

2. À la suite de son admission au sein du Conseil de l`Europe, la Roumanie a adhéré à tous les traités européens essentiels qui ont été ratifiés par le Parlement et ont ainsi été intégrés dans l`ordre juridique interne.

La procédure de ratification des traités énoncée dans la constitution roumaine, est assimilable à celle prévue pour l'adoption d'une loi. La ratification des traités est, à la fois, réglementée, par les principes constitutionnels et par la Loi no. 4/1991, relative à la conclusion et la ratification des traités.

Conformément à ces dispositions, les traités signés au nom de la Roumanie sont donc soumis au Parlement en vue de leur ratification par l'adoption d'une loi.

Le Parlement se prononce ainsi sur les lois de ratification des traités à la majorité des voix des membres présents dans chacune des deux Chambres.

Après leur adoption par le Parlement, elles sont envoyées au Président de la Roumanie afin qu'il les promulgue.

Une loi (y compris une loi de ratification d'un traité) est promulguée dans un délai de 20 jours à partir de sa réception. Avant de réaliser cette étape, le Président peut demander au Parlement le réexamen de la loi. Ce pouvoir ne peut être exercé qu'une seule fois. Si le Président décide de le

mettre en oeuvre ou si la vérification de la constitutionalité du texte est demandée, la loi sera promulguée dans un délai maximum de 10 jours à compter de la date de réception de la décision de la Cour Constitutionnelle confirmant la constitutionnalité du texte.

3. Les traités européens, comme les autres traités internationaux ratifiés par la loi, sont publiés dans le Journal Officiel (Monitorat Oficial) de la Roumanie.

Ils sont également publiés dans des recueils édités par les institutions de l'Etat ou par des organisations non gouvernementales. Ainsi, l'Institut National pour les Droits de l'Homme a publié, à partir de 1996, trois éditions du volume intitulé "Les principaux instruments internationaux relatifs aux droits de l'homme, auxquels la Roumanie est partie", contenant: Le Statut du Conseil de l'Europe, la Convention européenne des Droits de l'Homme, la Charte sociale européenne, la Convention cadre pour la protection des minorités nationales, les principales conventions en matière d'éducation, sport et culture, de droit civil, de droit pénal, de droit public ainsi que d'autres protocoles additionnels à ces conventions. De même, il a été récemment publié à Bucarest, sous l'égide du Conseil de l'Europe un volume intitulé "Des traités du Conseil de l'Europe" réunissant les principaux traités portant sur les domaines suivants: les droits de l'homme, les minorités, la démocratie locale et la coopération transfrontalière, culture/éducation/sport, les médias, la coopération juridique, l'environnement, les affaires sociales et la santé.

En outre, les traités auxquels la Roumanie est partie – y compris les traités européens – sont placés au même niveau de la hiérarchie normative que la loi. Cependant, comme il a été vu précédemment pour le cas des traités ayant pour objet les droits et les libertés des citoyens, les réglementations internationales, dont celles étant européennes, ont la primauté.

4. La compétence de la Cour Constitutionnelle en la matière. La Constitution de la Roumanie ne prévoit pas expressément la compétence de la Cour Constitutionnelle pour contrôler la constitutionalité des traités internationaux. Toutefois, comme ceux-ci sont intégrés dans l'ordre juridique interne après leur ratification par des lois adoptées par le Parlement et que le contrôle de constitutionnalité de ces Lois est obligatoire cela conduit à examiner indirectement la conformité d'un traité à la constitution.

La Cour Constitutionnelle est ainsi saisie du contrôle de constitutionnalité des lois de ratification des traités internationaux auxquels la Roumanie est partie, dans les mêmes conditions que celles prévues pour le contrôle de constitutionnalité des lois ordinaires, c'est à dire :

a. Conformément à l'article 144 lettre a) de la Constitution, par voie principale : avant la promulgation des lois de ratification des traités.

Dans ce cas, le débat a lieu en Assemblée plénière à la Cour Constitutionnelle avec la participation de tous les juges de celle-ci. La saisine a été effectuée sur la base des documents et des points de vue communiqués par les présidents des deux Chambres parlementaires et par le premier ministre . Les discussions portent aussi bien sur les dispositions mentionnées dans la saisine que sur celles ne pouvant être dissociées de celle-ci.

Après les délibérations, la décision est prononcée à la majorité des voix par les juges et communiquée au Président de la Roumanie. La décision constatant l'inconstitutionnalité de la loi sera également transmise aux présidents des deux Chambres du Parlement, en vue de la mise en œuvre de la procédure prévue à l'article 145(1) de la Constitution.

Selon cet articles, dans les cas d'inconstitutionnalité constatés conformément à l'article 144 lettre a), la loi est renvoyée au Parlement pour y être réexaminée. Après cet examen, si la loi est adoptée dans les mêmes termes avec une majorité de deux tiers au moins des membres de chaque Chambre, l'objection d'inconstitutionnalité est rejetée et la promulgation devient obligatoire.

b. Conformément à l'article 144 lettre c) de la Constitution, par la voie de l'exception d'inconstitutionnalité, soulevée devant les instances judiciaires, par les parties au procès ou, d'office après la ratification des traités.

Dans ce cas, le jugement de l'exception d'inconstitutionnalité a lieu dans le cadre d'une procédure publique et contradictoire. Il se fonde sur le rapport présenté par le juge rapporteur sur le jugement avant dire droit ayant entraîné la saisine de la Cour Constitutionnelle, sur les points de vue présentés par les présidents des deux Chambres du Parlement, le Gouvernement et l'Avocat du Peuple et sur les arguments des parties et du Ministère Public développés lors de leur audition.

Les parties peuvent être représentées par des avocats.

Les décisions constatant de l'inconstitutionnalité d'une loi sont opposables à partir de leur publication au Journal Official et seront communiquées aux présidents des deux Chambres du Parlement et au Gouvernement.

Jusqu'à présent, la Cour Constitutionnelle de la Roumanie n'a pas été saisie d'une requête nécessitant qu'elle se prononce sur la constitutionnalité d'un traité international.

De plus, la Constitution de la Roumanie ne prévoit pas expressément la compétence de la Cour Constitutionnelle pour exercer ce type de pouvoir.

Mais, l'article 20 de la Constitution dispose que « Les dispositions constitutionnelles relatives aux droits et aux libertés des citoyens seront interprétées et appliquées en concordance avec la Déclaration Universelle des Droits de l'Homme, avec les pactes et les autres traités auxquels la Roumanie est partie ». La Cour Constitutionnelle vérifie donc, lors de l'exercice de ses attributions juridictionnelles, la conformité des lois internes avec les traités européens, notamment avec la Convention européenne des Droits de l'Homme.

De plus, cet article prévoit dans son alinéa (2) la primauté des pactes et des traités portant sur les droits fondamentaux de l'homme ratifiés par la Roumanie et sur les lois internes. Par conséquent, on peut affirmer que la Cour Constitutionnelle de la Roumanie est la véritable Cour nationale défendant les droits de l'homme. Cette affirmation peut être illustrée par les nombreuses affaires où la Cour Constitutionnelle a constaté l'inconstitutionnalité de textes de lois en raison de leur non conformité à la Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales.

Ainsi, dans la Décision no. 349 du 19 décembre 2001 , la Cour Constitutionnelle – saisie par la voie de l'exception d'inconstitutionnalité de l'article 54 du Code de la famille, selon lequel l'action en contestation de paternité peut être intentée seulement par le conjoint - a décidé que cette disposition est inconstitutionnelle et contraire à la Convention européenne des Droits de

l'Homme dans la mesure où elle ne reconnaissait pas à la mère et à l'enfant né pendant le mariage le droit d'introduire cette action.

En outre, la Cour Constitutionnelle a été saisie par la voie de l'exception d'inconstitutionnalité de l'art. 175 du Code du travail qui mettait en place un recours hiérarchique contre les mesures prises par des organes administratifs prévoyant la dissolution du contrat de travail des personnes accomplissant des fonctions de direction et nommés par ces organes administratifs compétents pour connaître de l'action gracieuse.

Par la Décision No. 59/1994, la Cour a admis l'exception d'inconstitutionnalité, en déclarant que « La juridiction instituée à l'art. 175 du Code du travail est discriminatoire, non seulement par rapport à l'art. 16 de la Constitution qui se réfère à l'égalité des citoyens devant la loi, mais aussi par rapport aux dispositions de l'art. 6 paragraphe 1 de la Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales, selon lesquelles, toute personne a droit à ce que sa cause soit entendue équitablement, publiquement et dans un délai raisonnable, par un tribunal indépendant et impartial, établi par la loi.

Or, dans cette Décision, il est important de noter que les autorités administratives nommées à l'art. 175 du Code du travail ne peuvent pas avoir des attributions juridictionnelles parce que cela impliquerait que la même autorité puisse être juge et partie dans la même affaire violant ainsi la Constitution et la Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales ».

D'ailleurs, l'idée de fonder le contrôle de la Cour Constitutionnelle non seulement sur les dispositions de la Constitution, mais aussi sur celles des traités internationaux, notamment la Convention Européenne des Droit de l'Homme, a été formulée très clairement dans plusieurs décisions de la Cour, dont par exemple :

La Décision no. 148 du 8 mai 2001 qui a constaté l'inconstitutionnalité des dispositions de l'art. 8 alinéa 3 du Décret Loi no. 118/1990 prévoyant l'octroi de certains droits aux personnes persécutées pour des raisons politiques, ainsi qu'à celles déportées ou faites prisonnières. Ces dispositions indiquaient des délais différents pour le dépôt des demandes dont l'objet était la détermination des droits variant en fonction de la qualité des requérants. Ainsi, les personnes domiciliées à l'étranger n'étaient pas soumises à un certain délai alors que celles habitant dans le pays avait l'obligation de déposer leurs demandes au plus tard le 31décembre 2000. Dans la motivation de cette décision, la Cour a retenu que la détermination d'un régime différent pour les personnes dépendant du lieu de leur résidence principale transgresse les dispositions prévues à l'art. 16 de la Constitution roumaine et à l'art. 14 de la Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales.

La Décision no. 193 du 19 juin 2001 a constaté l'inconstitutionnalité des dispositions de l'art. 136 alinéa 2 du Code du Travail selon lesquelles la personne illégalement licenciée a le droit de percevoir une indemnité égale à la différence entre son salaire moyen réalisé avant la conclusion du contrat de travail et le profit réalisé après cette date lors de l'exercice d'autres activités. La Cour a considéré que ces dispositions légales sont en contradiction avec celles de l'art. 38 de la Constitution prévoyant que le droit au travail ne peut pas être restreint et celles de l'art. 1 par. 2 de la Charte sociale européenne révisée et adoptée à Strasbourg le 3 mai 1996, selon laquelle, en vue de permettre l'exercice effectif du droit au travail, les parties s'obligent à protéger de manière efficace le droit du travailleur de gagner sa vie par une activité exercée librement.

La Décision no. 255 du 20 septembre 2001 a constaté que les dispositions de l'art. 504 alinéa 2 du Code de Procédure Pénale, relatif à la réparation par l'Etat du dommage subi par une personne à la suite d'une condamnation injuste, sont inconstitutionnelles dans la mesure où elles limitent le droit au dédommagement aux hypothèses prévues par l'article mentionné c'est à dire quand il a été décidé, après la révision de l'affaire, que la personne en cause n'a pas commis le fait imputé ou que ce fait n'existe pas. Dans les motivations de cette décision, la Cour a établi que les dispositions légales mentionnées excluent du droit au dédommagement les personnes qui ont commis un fait prévu par le droit pénal, mais qui, en application de la loi, ne peuvent pas être déclarées responsables pénalement. Cette mesure a été jugée contraire aux prescriptions de l'art. 48 alinéa 3 de la Constitution en vertu desquelles l'Etat est matériellement responsable des préjudices causés par les erreurs judiciaires commises lors des procès pénaux et à celles de l'art. 5 par. 5 de la Convention de Sauvegarde des Droits de l'Homme prévoyant que toute personne victime d'une arrestation ou d'une détention dans des conditions contraires à ces dispositions a le droit d'être dédommagée.

II. Intégration européenne et jurisprudence constitutionnelle

1. La Cour Constitutionnelle de la Roumanie dispose d'un service de documentation permettant l'accès rapide et efficace aux décisions rendues par la Cour Européenne des Droits de l'Homme ainsi qu'aux documents émis par le Conseil de l'Europe.

L'accès à ces documents se fait aussi bien par Internet que par des publications périodiques transmises par la Cour Européenne des Droits de l'Homme et par la Commission de Venise.

Le système informatique de la Cour comprend, également, une partie sur la jurisprudence de la Cour Européenne des Droits de l'Homme.

De même, dans la bibliothèque de la Cour, comme dans celle de chaque juge, se trouvent des ouvrages sur la jurisprudence – tel le recueil de Monsieur Vincent Berger, intitulé "La jurisprudence de la Cour Européenne des Droits de l'Homme – ainsi que de nombreux ouvrages de doctrine en roumain, anglais et français.

2. La Cour Constitutionnelle de Roumanie n'a pas de lien organique et hiérarchique avec la Cour Européenne des Droits de l'Homme et avec la Cour de Justice des Communautés Européennes. Par conséquent, la jurisprudence de ces instances n'est pas opposable à la Cour Constitutionnelle ou aux instances judiciaires roumaines.

Pourtant, en vertu de l'adhésion de la Roumanie au Conseil de l'Europe, la Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales a la même valeur qu'une norme de droit interne, et est, en principe, obligatoire tant pour la Cour Constitutionnelle que pour les instances judiciaires. En effet, la jurisprudence de la Cour de Strasbourg constitue une importante source d'inspiration pour la jurisprudence de la Cour Constitutionnelle de la Roumanie.

Elle invoque, en outre, fréquemment dans ses arrêts, la Convention de Sauvegarde des Droits de l'Homme et des Libertés Fondamentales – comme norme de référence – et la jurisprudence de la Cour Européenne des Droits de l'Homme, comme point de repère dans l'argumentation des arrêts.

Quant à la jurisprudence de la Cour de Justice des Communautés Européennes, rien ne s'oppose à ce que celle-ci constitue une importante source d'inspiration pour le juge constitutionnel de la Roumanie, même si cet Etat n'est pas encore membre de l'Union Européenne.

Les arrêts de la Cour de Luxembourg peuvent aussi inspirer la jurisprudence de la Cour Constitutionnelle roumaine notamment lorsque l'application des normes de l'acquis communautaire intégrées dans la législation roumaine par le processus de pré adhésion de notre pays à cette organisation est en cause.

La jurisprudence de la Cour de Strasbourg est invoquée par les parties, dans les débats contradictoires, lors des audiences devant la Cour Constitutionnelle, ainsi que par les juges de la Cour pendant les délibérés.

La jurisprudence de la Cour Européenne des Droits de l'Homme est, également, invoquée dans les conclusions du juge rapporteur et dans le corps des décisions.

Ainsi, dans un des cas précités (Décision no. 148/8.05.2001), la Cour Constitutionnelle a invoqué, dans les motifs de sa décision, la jurisprudence de la Cour Européenne des Droits de l'Homme à travers la Décision prononcée en 1979 dans l'affaire *Marckx contre Belgique*. Dans une autre espèce (résolu par la Décision no. 70 du 27 février 2001), les décisions prononcées par la Cour Européenne des Droits de l'Homme dans les affaires *ex-Roi et autres contre Grèce* (l'an 2000), *Beyeler contre Italie* (l'an 2000) et *Van Marle et autres contre Pays-Bas* (l'an 1986) ont été invoquées.

L'importance accordée par la Cour Constitutionnelle à la jurisprudence de la Cour Européenne des Droits de l'Homme est, à mon avis, illustrée d'une manière significative par le revirement de jurisprudence opéré par la Cour à la suite d'un arrêt de l'instance européenne.

Ainsi, la Cour Constitutionnelle a révisé sa jurisprudence antérieure dans l'affaire préalablement mentionnée qui concernait l'exception d'inconstitutionnalité de l'article 54 du Code de la famille légiférant l'action en contestation de paternité de l'enfant né pendant le mariage.

En effet, dans un première temps - Décision no. 78 du 13 septembre 1995, publiée au Journal Officiel de la Roumanie no.294 du 20 septembre 1995 -, la Cour avait décidé que l'art. 54 du Code de la famille n'était pas contraire aux dispositions constitutionnelles.

La révision de cette jurisprudence a eu lieu par la Décision no.349 du 19 décembre 2001. La Cour Constitutionnelle a admis l'exception d'inconstitutionnalité soulevée dans une affaire jugée par le tribunal de première instance d'Alba Iulia jugeant d'un recours en contestation de paternité intentée par Jutelcan Letiția au sujet de son enfant né pendant son mariage. En se rapportant aux dispositions de l'article 8 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales, ainsi qu'à l'interprétation donnée de ces dispositions par l'Arrêt du 27 octobre 1994 de la Cour Européenne des Droits de l'Homme (l'affaire *Kroon c. les Pays–Bas*), la Cour Constitutionnelle a constaté que les dispositions de l'article 54 du Code de la famille étaient inconstitutionnelles dans la mesure où elles ne reconnaissaient qu'au père, et non à la mère et à l'enfant né pendant le mariage, le droit d'intenter une action en contestation de paternité.

III. Intégration européenne et justice constitutionnelle

1. La compétence juridictionnelle de la Cour Constitutionnelle de Roumanie est exclusivement exercée afin de contrôler la constitutionnalité des lois. La Cour Constitutionnelle ne juge donc pas des litiges entre les sujets de droit liés à l'existence, l'étendue ou l'exercice de leurs droits subjectifs ; mais elle examine la conformité des lois ou de ses dispositions à celles de la Constitution.

Le contrôle exercé par la Cour revêt ainsi la forme d'un procès judiciaire uniquement lorsqu'il est saisi des cas d'exception d'inconstitutionnalité c'est-à-dire dans le cadre d'un contrôle a posteriori, et non pas dans le cadre d'un contrôle a priori, exercé sur les lois avant leur entrée en vigueur.

Dans le cadre du contrôle exercé lors de l'examen de l'exception d'inconstitutionnalité, la Cour Constitutionnelle se prononce sur les arguments soulevés devant les instances judiciaires invoquant l'inconstitutionnalité d'une loi ou d'une de ses disposition dont dépend la solution de l'affaire. L'exception peut être invoquée soit à la demande de l'une des parties soit d'office par l'instance judiciaire. C'est l'instance devant laquelle a été soulevée l'exception d'inconstitutionnalité qui dispose de la saisine de la Cour Constitutionnelle. Elle le fait par un jugement contenant les points de vue des parties et l'opinion de l'instance sur l'exception.

Le jugement devant la Cour Constitutionnelle se déroule sur la base du rapport présenté par le juge rapporteur, des considérants de l'instance judiciaire énoncés dans le jugement par lequel elle a saisie la Cour Constitutionnelle, des points de vue des présidents des deux Chambres du Parlement, du Gouvernement et de l'Avocat du Peuple (l'Ombudsman) et des conclusions des parties et du Ministère Public.

Dans le cadre de ce type d'affaire, la Cour Constitutionnelle est tenue de respecter les règles du procès équitable, établies par l'article 6 de la Convention Européenne des Droits de l'Homme. Ainsi, la Cour Constitutionnelle a l'obligation d'examiner la requête de manière équitable, publiquement, dans un délai raisonnable, et dans le cadre d'une procédure contradictoire où les parties peuvent être représentées par des avocats de leur choix.

2. Jusqu'à présent, la Cour Européenne de Strasbourg n'a pas été saisie de cas ayant pour objet des décisions de la Cour Constitutionnelle de la Roumanie. Mais, la Cour Européenne des Droits de l'Homme a déjà jugé plusieurs affaires relatives à des décisions prononcées par les instances judiciaires de Roumanie. Dans une de celles-ci (*Rotaru c. la Roumanie*), par la Décision du 4 mai 2000, la Cour Européenne des Droits de l'Homme a condamné l'Etat roumain à payer au requérant des indemnités pour la violation de l'article 6 paragraphe 1 de la Convention Européenne des Droits de l'Homme.

La Cour Européenne de Strasbourg a retenu que, dans un procès intenté par Aurel Rotaru contre le Service Roumain de Renseignements, la Cour d'Appel de Bucarest avait omis de se prononcer sur la demande du requérant visant au paiement de dommages et intérêts et des dépens. La Cour Européenne a motivé sa décision en ces termes: "À n'en pas douter, la demande du requérant d'octroi d'une indemnité pour réparer le dommage moral et le remboursement des dépens revêtait un caractère civil au sens de l'article 6 paragraphe 1, et la cour d'appel de Bucarest était compétente pour en connaître. La Cour estime ainsi que

l'omission de la cour d'appel d'examiner cette demande a porté atteinte au droit du requérant à un procès équitable au sens de l'article 6 paragraphe 1 ".

Comme il s'agissait d'une erreur dans l'application de la loi, et non pas d'un cas d'inconstitutionnalité, la Décision de la Cour de Strasbourg n'a pas influencé l'organisation, le fonctionnement ou la jurisprudence de la Cour Constitutionnelle.

3. Jusqu'à présent il n'existe pas de cas où l'organisation ou le fonctionnement de la Cour Constitutionnelle de la Roumanie auraient été influencés par des arrêts validant les requêtes intentées contre la Roumanie. En revanche, je pourrais évoquer une affaire dans laquelle, à la suite de la condamnation de la Roumanie par la Cour Européenne des Droits de l'Homme, le législateur roumain a institué des règles procédurales permettant la révision d'un procès civil après que l'instance européenne ait constaté la violation de droits de l'Homme.

Ainsi, la condamnation de la Roumanie par la Cour Européenne des Droits de l'Homme – dans l'affaire *Brumărescu c. la Roumanie* – a entraîné la modification l'article 330 du Code de procédure civile. En effet, un nouveau cas de recours en annulation contre des arrêts judiciaires irrévocables a été créé prévoyant que : "Quand la Cour Européenne des Droits de l'Homme a constaté une violation des droits ou des libertés fondamentales et le fait que la partie, selon la loi roumaine, peut obtenir une réparation, au minimum partielle, lors de l'annulation de l'arrêt prononcé par une instance roumaine".

Afin de conclure cet exposé, les remarques suivantes peuvent être formulées :

- Le processus d'intégration européenne qui a des conséquences sur l'ordre juridique interne et dans la jurisprudence constitutionnelle a les meilleures chances de se développer et de se consolider.

- Les traités européens et la jurisprudence européenne, notamment celle de la Cour Européenne des Droits de l'Homme, s'imposent de plus en plus et d'une manière naturelle et logique, dans la pratique des juges roumains lorsqu'il s'agit des droits et des libertés des citoyens.

- Suite à l'intégration des normes européennes dans la l'ordre juridique interne et de la jurisprudence de la Cour Européenne des Droits de l'Homme dans la jurisprudence de la Cour Constitutionnelle de Roumanie, l'instance constitutionnelle roumaine devient une véritable instance nationale de sauvegarde des droits de l'homme.

SLOVAK REPUBLIC

Mr Jan KLUCKA,
Judge, Constitutional Court
Member of the Venice Commission in respect of the Slovak Republic

I. Integration of European legal rules into the domestic legal system

1) What is the procedure for integrating European and/or EU treaties into the domestic legal system?

a. Is the ratification procedure provided for in the Constitution?
b. What does this procedure involve?
c. Are European and/or EU treaties published?
d. If so, where? (Official Journal, Official Bulletin, the press, etc)

The latest amendment to the Slovak Constitution (No.90/2001 Col1.of Laws and since 1st July 2001) entirely regulates the relationship between international and domestic law of Slovakia and also reacts on the constitutional requirements of accession into the European Union (integration clause). New Article 7, para 2, of the Constitution expressly confirms that Slovakia may by international treaty or in virtue of such a treaty transfer part of its sovereign rights to the European Union and European Communities. This treaty of accession is subjected to the internal process of ratification consisting of the consent of the National Assembly of Slovakia (Parliament) and consecutive act of its ratification by the President of Republic. According to Article 84. para. 4 of the Constitution a qualified majority of three-fifths of all deputies of the National Assembly (90 out of 150) is however required to express the consent of the legislator with the accession treaty. Such a high parliamentary majority is usually required only for the adoption or amendment of the constitution or the constitutional law and emphasise the crucial importance of the Accession Treaty for Slovakia. A nationwide referendum is not required by the Constitution of Slovakia (as a part of the ratification process with respect to the treaty of accession). However, the General Position of the Slovak Republic on Accession Negotiations (full text can be seen in http://integracia.government.gov.sk) confirms that „a ratification referendum through which the citizens of Slovakia shall declare their will to enter into the European Union is to be held". All European Union treaties of primary law shall in Slovakia also be subjected to the ratification process. The consent of more than half the deputies of the National Council is required in this respect (Article 84, para 3 of the Constitution). European and EU treaties shall be published in the Official Journal of the Slovak Republic. According to Article 8, para. 2 of the Act of the National Council on the Official Journal (Act No. 1/1993 in the wording of later amendments) the treaties are to be published (similarly to other treaties) in their original language version together with an official Slovak translation (if necessary). The European treaties will be promulgated as a special supplement in the relevant issue of the Official Journal.

2) What is the status of European and/or EU texts in the domestic legal system?

a. Is this status defined by the Constitution, or does it result from case-law?
b. Where do European and/or EU treaties fit into the hierarchy of legal texts?

The Constitution of Slovakia specifically identifies neither the internal position of European and/or EU treaties in the hierarchy of legal norms of the domestic legal order nor their relationship to the Constitution. Similarly as other international treaties (and According to Article 7. para.5 of the Constitution) European treaties shall be superior to the laws (Acts of the National Council) but not take precedence over the Constitution. Where provisions of a European treaty do not seem to be in conformity with the Constitution or Constitutional law this problem should be settled within the framework of special proceedings before the Constitutional Court. According to Article 125a para. 1 of the Constitution (and since 1st January 2002) the Constitutional Court is authorised to review the conformity of each international treaty (before its ratification) with the Constitution or Constitutional Law of Slovakia. If the Constitutional Court finds that the treaty does not conform with the Constitution or Constitutional Law such a treaty may not be ratified until the relevant constitutional amendments have been made (in order to harmonise the text of the constitution or constitutional law with the provisions of the treaty). This constitutional regulation, however, should not be detrimental to the recognition of supremacy and the direct effect of community law due to the ratification of the Treaty of Accession by the Slovak Republic.

3) (For member states of the European Union) What is the status of subordinate EU legislation (regulations and directives) in the national legal system?

Slovakia is not a member state of the European Union but Article 7. para.2 of the Constitution regulates the position of the secondary law of the European Union within the domestic legal order whereas: „Legally binding acts of the European Communities and the European Union shall have supremacy over laws of the Slovak Republic".

4) Does the Constitutional Court have jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution?

a. Is this supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise this supervision? By what decision? Have there been changes in case-law in this area?
c. Which bodies are authorised to refer cases to the Court in this area?
d. Must such a referral occur before the European and/or EU treaty in question is ratified, or may it occur after ratification?
e. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

The Constitutional Court of Slovakia has no special jurisdiction concerning the supervision of the constitutionality of „European" treaties but since 1st January 2002 (and according to Article 125a of the latest constitutional amendment) it is vested with general competence to review the constitutionality of all international treaties requiring the consent of the National Council of Slovakia before their ratification (Article 125a para. 1 of the Constitution). This competence of the Constitutional Court may also be extended to all European and/or EU treaties. According to Article 125a para. 2 of the Constitution the subjects entitled to bring a case before the

Constitutional Court are the President of the Republic and the Government. The Constitutional Court reviews the constitutionality of international treaties prior to its ratification and its findings (unconstitutionality of international treaty) prevents the President of the Republic from ratifying it until the necessary constitutional amendments have been made (Article 125a para. 3 of the Constitution).

5) Does the Constitutional Court have jurisdiction for supervising compatibility between legislation and European and/or EU treaties?

a. Is such supervision provided for in the Constitution?
b. If not, has the Court asserted or disclaimed its power to exercise this supervision?
c. Which authorities are entitled to refer cases to the Court in this field?
d. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

The Constitutional Court has no special jurisdiction for supervising the compatibility of domestic legislation with European and/or EU treaties. However, according to Article 125 para. 1 a) b) c) d) of the Constitution it is authorised to review the general conformity of various kinds of domestic legal regulations (acts of parliaments, governmental decrees, generally binding regulations of Ministries etc.) with ratified and valid international treaties promulgated in the Official Journa1. Any kind of valid international treaty is excluded from this supervision. The case may be brought before the Constitutional Court by the one-fifth of the deputies of the National Counci1.The President of the Republic, Government, General Prosecutor and the Court of General Jurisdiction (Article 130 para. 1 of the Constitution).

6. (For member states of the European Union) Does the Constitutional Court have jurisdiction for supervising the conformity of subordinate EU legislation (regulations, directives) with the Constitution?

The Slovak Republic is not a member state of the European Union.

7. Was admission to the Council of Europe dependent on a series of state undertakings (Parliamentary Assembly Order 488 of 1993, observance of which is subject to supervision by the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee) concerning the Constitutional Court's organisation, functioning, composition or case-law?

a. What were the terms of those undertakings?
b. Have those undertakings been observed?
c. What changes have been made to the status of the constitutional court or to its case-law?

The accession of the Slovak Republic to the Council of Europe was not dependant on any undertakings concerning its Constitutional Court.

II. European integration and constitutional case-law

1) Does the Constitutional Court have a department that ensures efficient and rapid access to the judgments handed down by the European courts (Court of Justice and/or European Court of Human Rights) and to texts of subordinate EU legislation?

No such department exists within the Constitutional Court of Slovakia. However, all judges of the Constitutional Court have direct on-line access to the generally available case-law databases of both courts through the Internet. The library of the Constitutional Court continuously collects all available current collections of decisions of these courts.

2) In its reasoning, does the Constitutional Court take account of the case-law of the Court of Justice and/or the European Court of Human Rights? If so, in what way:

a. as a primary consideration (the European case-law serves as the basis for the Constitutional Court's interpretation), or as a complementary consideration (the European case-law reinforces the Constitutional Court's interpretation)?
b. Does the European case-law appear in the rapporteurs' conclusions

The Constitutional Court of the Slovak Republic has two kinds of proceedings dealing exclusively with international treaties (including human rights treaties). The purpose of the first is to review the conformity of various kinds of domestic legal regulations with valid international treaties (including human rights treaties and the Convention for the protection of Human Rights and Fundamental Freedoms - hereinafter the Convention; see also above I-6). In the second one the constitutional complainant may allege a violation of one's fundamental rights and freedoms directly guaranteed by international human rights treaties (including the Convention). Provided that Convention is „at stake" the Constitutional Court shall apply its concrete provision(s) as interpreted by the relevant case-law of the European Court of Human Rights (hereinafter ECHR). It should be pointed out that in this context the Constitutional Court uses the case-law of ECHR as a main basis for reasoning its particular finding and/or judgment. The Constitutional Court applies the case law of the ECHR as a complementary tool of its reasoning as well as in „ordinary" proceedings reviewing either the constitutionality of domestic legislation or alleged violation of fundamental rights and freedoms of an individual complainant contained in the constitution. Provided that constitutional provisions are identical with the provisions of the Convention the case-law of ECHR is used in order to reinforce the Constitutional Court's „domestic" reasoning of its finding and/or judgment. The similar position of the case-law of the ECHR (in proceedings mentioned above) is in a situation when the subject entitled to bring the case before the Constitutional Court asked at the same time for a review of the constitutionality of the challenged norms of domestic legislation as well as its conformity with an international treaty and/or if an individual complainant alleged violation of his/her fundamental rights regulated both by the Constitution and an international human rights treaty.

3) Has the Constitutional Court already reversed or amended its case-law following a judgment by the European Court of Human Rights?

a. Did the relevant judgement condemn the national authorities, or those of another member state of the Council of Europe?
b. What were the terms of the European Court's judgment?
c. Before the European Court's judgment, was there opposing and established Constitutional Court case-law in the relevant area?
d. How was this case-law reversed or amended? Which body effected the referral?

No such case has been identified.

4) Has the Constitutional Court already reversed or amended its case-law following a judgment by the Court of Justice of the European Communities?

Since the Slovak Republic is not a member state of the European Union this question is not applicable.

5) Has the Constitutional Court already reversed or amended its case-law following the adoption of a European instrument by the Council of Europe?

a. What was the status of this instrument (recommendation from the Committee of Ministers or the Parliamentary Assembly, report by the European Commission for Democracy through Law ...)
b. What were the terms of this instrument?
c. How was this case-law reversed or amended? Which body effected the referral?

No reversal or amendment of Constitutional Court case-law due to the adoption of a European instrument of the Council of Europe has been identified.

6) Has the Constitutional Court already reversed or amended its case-law following the enactment of a European Community legal measure?

a. What was the status of this measure? (directive, regulation, recommendation ...)
b. What were the terms of this measure?
c. How was this case-law reversed or amended? Which body effected the referral?

No reversal or amendment of Constitutional Court case law following the enactment of a European Community legal measure has been identified.

III. European integration and constitutional justice

1) Is the Constitutional Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?

a. Is there a precedent in the case-law of the European Court of Human Rights condemning the national authorities under Article 6 of the Convention, involving a trial before the Constitutional Court?
b. What were the grounds for this judgment?
c. Was this condemnation followed by amendment or changes to the organisation and/or functioning of the Constitutional Court? In what way?

The Constitutional Court of the Slovak Republic is obviously bound by the fair trial rules as set out in Article 6 of the Convention. According to Article 1 para. 2 of the Constitution, the Slovak Republic respects and observes its international obligations including obligations arising from international human rights treaties. There are a limited number of judgments of the ECHR finding the violations of the Convention by the Slovak Republic (at this moment 10). A prevailing number of cases (8) concern a breach of Article 6, para. 1 of the Convention by the Courts of General Jurisdiction (unreasonable delay of proceedings in civil and criminal matters primarily). The Slovak Constitutional Court so far has not been „condemned“ by the European Court of Human Rights for violations of the guarantees of Article 6 para. 1 of the Convention in its proceedings.

2) Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

a. Has such a judicial review already been implemented?
b. What legal provisions govern this review?
c. Has a review already taken place following a previous constitutional court decision?
d. What were its terms?
e. What was the outcome of the procedure?

The Slovak legal order has no special provision for the procedure to be followed should the ECHR find that the Convention has been breached by Slovakia (in cases in which the Slovak Court has already rendered a final decision). In Slovakia (as in a number other member states of the Council of Europe) judgment by the ECHR does not represent a direct legal basis for judicial review (re-opening, re-examination) of the civil or criminal (administrative) proceedings in which a violation of the Convention has been identified. Within the on-going process of re-codification of the Civil Procedure Act and Criminal Procedure Act the possibility and concrete conditions for the domestic implementation of the basic principles set out in Recommendation No. R (2000) of the Committee of Ministers to Member States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights“ are however constantly discussed by the legislator and legal doctrine.

3) Has the Constitutional Court already applied Article 177 of the Maastricht treaty, concerning preliminary rulings, as provided for in the context of judicial co-operation between the national courts and the Court of Justice of the European Communities?

Since Slovakia is not a member state of the European Union this question is not applicable.

SWEDEN

Mr Torkel GREGOW,
President, Supreme Court

Introduction

Like the other Nordic countries, Sweden does not have a Constitutional Court. In Sweden two different kinds of courts exist: one for the civil cases and criminal cases; and the other for the administrative cases, such as cases concerning taxes, communications, social matters etc. Both courts are composed of three instances, of which the last instance is the Supreme Court and respectively the Supreme Administrative Court. In Sweden there also exist two courts for special cases: the Labour Court and the Market Court.

Whether a law or a provision in a law is in conformity with the Constitution or with other superior statutes is examined in a case in which the issue has been raised. All the courts have the authority to refuse to apply a law or a provision that is considered to be incompatible with a superior law (Ch. 11 Art. 14 in the Constitution). A reason for the decision not to apply a law or a provision could be that the incompatibility is manifest, which is seldom the case.

A court, on account of incompatibility with a superior law, cannot declare a law or a provision invalid; the court can only refuse to apply the law or provision in a particular case. When a law or a provision has been struck down, the decision has probably been made by the Supreme Court or the Supreme Administrative Court.

Many people have criticised the insufficiency of these regulations, hoping that the condition "manifest" in Ch. 11 Art.14 in the Constitution will be removed soon.

Before bills are presented to the parliament they must be scrutinized for judicial aspects by a special body, composed by the justices of the Supreme Court and the Supreme Administrative Court (three justices in all). This scrutiny is regulated in the Constitution and the main purpose of the scrutiny is to examine if the proposed law or provision is in conformity with the Constitution and other laws. In this respect, the issue of conformity with the European Convention on Human Rights and with the EU treaties and EU legislation is an important task and the government usually changes the bill on recommendation from the justices. That scrutiny can be considered as a substitute for a Constitutional Court.

I. Integration of European legal rules into the domestic legal system

1) What is the procedure for integrating European and/or EU treaties into the domestic legal system?

In the Swedish Constitution there are provisions that set out the procedure of the ratification of treaties, including the European and EU treaties, that must be followed in order for the treaties to be part of our domestic legal system Ch. 10 Art. 1-4). The regulations allow the government to enter into the treaty, however in principle it is the parliament that decides on its ratification. The parliament examines the treaty on the basis of a government bill, and when a treaty has been approved by the parliament, it will apply as a law. EU treaties are published in a special edition

for EU legislation, and the European treaties are published in another edition for international conventions.

2) What is the status of European and/or EU texts in the domestic legal system?

In 1994 Sweden adopted the European Convention on Human Rights as a law. At the same time a new constitutional provision, which states that a law or provision may not be in conflict with the commitment of Sweden in relation to the European Convention (Ch. 2 Art. 23), came into force in the Constitution. In Sweden EU treaties are valid as laws, which take precedence over other laws. Other treaties are usually transformed into laws, which are applied as other laws. These laws are also based on the Constitution and are not based on case-law. The Constitution follows the European Convention on Human Rights, and the EU treaties have priority over other laws, however, other European and EU texts are applied as ordinary laws. When the European Convention on Human Rights or the EU treaty is incompatible with our Constitution, the question arises which text will get priority over the other? The answer is that the European Convention and the EU treaty will most probably be given priority.

3) (For member states of the European Union) What is the status of subordinate EU legislation (regulations and directives) in the national legal system?

Subordinate EU legislation such as regulations and directives have the same status in the Swedish national legal system as laws in general, and the directives are transformed into laws. This status derives from the Constitution. Subordinate EU legislation is on the same level as Swedish domestic laws and the problem is that such legislation takes precedence over the Constitution, which probably is a theoretical issue.

4) Does the Constitutional Court have jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution?

As was mentioned in the introduction, Sweden does not have a Constitutional Court. According to the Constitution or other laws, neither the Supreme Court nor the Supreme Administrative Court has the jurisdiction to undertake general supervision of the application of the conformity of European treaties and EU treaties with our Constitution. Both Supreme Courts do not have any authority to undertake such supervision, and an examination of the application can only take place in cases that are appealed to the Supreme Court or to the Administrative Court. Issues on the conformity of European treaties and EU treaties with the Constitution cannot separately be referred to the Supreme Court or to the Supreme Administrative Court. For example, if a party has lost a case in the second instance, it can appeal to the Supreme Court or, in administrative cases, to the Supreme Administrative Court. Consequently, such a case cannot be examined before the treaty has been ratified.

5) Does the Constitutional Court have jurisdiction for supervising compatibility between legislation and European and/or EU treaties?

Neither the Supreme Court nor the Supreme Administrative Court has the authority to supervise the application of the compatibility between our legislation and European treaties and EU treaties. A supervision of this kind would not be consistent with the Constitution and the state of the Courts. Only the cases which have been brought to the Supreme Court or to the Supreme Administrative Court on appeal, can be examined. The issue of compatibility between the Swedish legislation on the one hand and the European treaties and EU treaties on the other

cannot be separately referred to the Supreme Court or the Supreme Administrative Court. However, a party who has lost its case in the second instance can appeal to the Supreme Court or, in administrative cases, to the Supreme Administrative Court.

6. (For member states of the European Union) Does the Constitutional Court have jurisdiction for supervising the conformity of subordinate EU legislation (regulations, directives) with the Constitution?

The Supreme Court or the Supreme Administrative Court has no authority to undertake a general supervision of the application of the conformity of the subordinate EU legislation, such as regulations and directives, with the Constitution. This kind of supervision does not correspond with the Constitution or the state of Courts. Such examination can only take place in cases that are appealed to the Supreme Court or the Supreme Administrative Court. Issues on the conformity of the subordinate legislation with the Constitution cannot be separately referred to the Supreme Court or the Administrative Court. Only a party who has lost a case can do so.

7) Was admission to the Council of Europe dependent on a series of state undertakings (Parliamentary Assembly Order 488 of 1993, observance of which is subject to supervision by the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee) concerning the Constitutional Court's organisation, functioning, composition or case-law?

As was mentioned in the introduction, Sweden does not have a Constitutional Court.

II. European integration and constitutional case-law

1) Does the Constitutional Court have a department that ensures efficient and rapid access to the judgments handed down by the European courts (Court of Justice and/or European Court of Human Rights) and to texts of subordinate EU legislation?

The Supreme Court has a library with a special department for literature concerning EU legislation and where the judges have efficient and rapid access to the judgements of the Court of Justice and texts concerning EU legislation. There is also a great amount of legal literature on EU law, and in that department, the Court also has the judgments of the European Court of Human Rights.

2) In its reasoning, does the Constitutional Court take account of the case-law of the Court of Justice and/or the European Court of Human Rights? If so, in what way:

In the reasoning of the cases, great consideration is given by the Supreme Court to the judgments given by the European Court of Human Rights and the Court of Justice. It depends on the circumstances of the case in which way and at which stage the judgments of the European Court of Human Rights and the Court of Justice are taken into consideration. In principle, a judgement by the European Court of Human Rights or the Court of Justice acts as a precedent in a similar case in the Supreme Court. Judgments by the European Court of Human Rights and the Court of Justice are of great importance for a case in the Supreme Court and are always referred to and discussed in detail for explaining the reasoning of the courts. The reasons are a part of the Court's judgments.

3) Has the Constitutional Court already reversed or amended its case-law following a judgment by the European Court of Human Rights?

The Supreme Court has reversed its case-law on a few occasions by taking in account the judgment of the European Court of Human Rights. The judgments in question concerned the Swedish authorities. The cases have often referred to the issue of under which conditions a court of appeal has a right to refuse a party an oral hearing in certain types of cases. The conditions are considered stricter in the European Court's judgments than in previous case-law, in which less strict conditions applied. The issue of an oral hearing was not referred to the court. Such a referral is not possible.

4) Has the Constitutional Court already reversed or amended its case-law following a judgment by the Court of Justice of the European Communities?

Until now, the Supreme Court has not reversed its case-law on account of a judgment by the Court of Justice. However, the Supreme Court has in one case changed the case-law on account of a preliminary ruling by the Court of Justice. This case referred to the conditions regarding payment by the States guaranteeing wages in bankruptcy. Before the preliminary ruling, other conditions for such payment were established in the case-law. The reversal took place in a case of appeal of a decision by the Court of Appeal, and then the Supreme Court asked for a preliminary ruling.

5) Has the Constitutional Court already reversed or amended its case-law following the adoption of a European instrument by the Council of Europe?

As far as I know, the Supreme Court has not reversed its case-law on account of a European instrument adopted by the Council of Europe.

6) Has the Constitutional Court already reversed or amended its case-law following the enactment of a European Community legal measure?

As far as I am aware, the Supreme Court has not changed its case-law on account of the enactment of a EU legislative measure. However, the directives by the European Communities have resulted in new laws in Sweden. These new laws have implied reversal of some old laws, which had been applied by the court and the Supreme Court as well.

III. European integration and constitutional justice

1) Is the Constitutional Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?

The Supreme Court, like other courts in Sweden, is bound to apply the rules of a fair trial, as set out in Article 6 of the European Convention on Human Rights. The Supreme Court has been following the Convention since 1994 when Sweden adopted it as a law. There have been some precedents in which the European Court of Human Rights has criticised Swedish authorities under Article 6 of the Convention.

2) Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

If the European Court of Human Rights were to condemn the Swedish Supreme Court, there would be no special procedural rules or practices, providing for judicial review of the proceedings for the Swedish Supreme Court. In such a case, the provisions of a new trial could possibly be applied. In the future the Supreme Court would follow the opinion of the European Court of Human Rights in which that Court condemned the Swedish Supreme Court.

3) Has the Constitutional Court already applied Article 177 of the Maastricht treaty, concerning preliminary rulings, as provided for in the context of judicial co-operation between the national courts and the Court of Justice of the European Communities?

The Supreme Court has applied Article 177 of the Maastricht Treaty concerning preliminary rulings. In some cases, the Supreme Court asks for preliminary rulings, but only in a few cases. This is due to two factors: the Supreme Court only deals with civil and criminal cases, and there are not many cases concerning EU law. The Supreme Administrative Court asks more frequently for preliminary rulings.

The Supreme Court has followed the opinion of the Court of Justice regarding the cases where a preliminary ruling has been requested.

TURKEY

Mr Samia AKBULUT,
Constitutional Court

I would like to thank the Venice Commission and the Constitutional Court of the Slovak Republic for their kind hospitality in this beautiful city.

In the first part of my speech I would like to touch upon the subject of the integration of European legal rules into the domestic legal system.

In the 1982 Constitution there is no specific reference for the incorporation of European treaties. They are classified within the ambit of international agreements per se.

For the agreements to be binding, they shall be ratified by a decree of the Council of Ministers, according to law no 244 which came into effect in 1963.

Moreover it is stipulated in article 104 of the Constitution that it is the duty of the President of the Republic to ratify and put the international agreements into effect.

Regarding the publication of treaties, all treaties, including European ones, which are approved for ratification by the Turkish Grand National Assembly, are published in the Official Gazette, the original and Turkish languages.

The Constitutional Court has no jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution. There is no provision in the Constitution for the court to deal with this type of issue.

Once an EU Treaty has been ratified, according to article 90/5 of the Constitution, no appeal can be made against that EU treaty on the ground that it is unconstitutional. Therefore under no circumstances could a case concerning the constitutionality of such a treaty be heard before the Constitutional Court after ratification.

The Constitutional Court supervises the constitutionality of laws, decrees having the force of law, of Rules of Procedure of the Turkish Grand National Assembly or of specific articles or provisions thereof.

Thus, the Court cannot supervise a treaty before its ratification in that it does not fall within any of the categories listed above.

There is only one solution, which is that the provisions of an EU treaty which are claimed to be unconstitutional should be taken to the Constitutional Court by way of a law approving the ratification. This is due to the fact that "The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey shall be subject to adoption by the Turkish Grand National Assembly by a law". Only the law approving the ratification of the given treaty could be brought to the Court for constitutionality review.

In the second part of my speech I would like touch upon European Integration and constitutional court case law issues.

Concerning the question of efficient and rapid access to the judgments handed down by the European courts : In the Constitutional Court there are three academics working as rapporteur-judges who are in charge of keeping abreast of recent developments. In addition, the Ministry of Foreign Affairs distributes the Turkish version of the case-law of the European Court of Human Rights and these documents are copied and handed out to every rapporteur.

The Constitutional Court has never interpreted European case-law as a primary norm. There are many cases where the Court made references to the case law of the European Court of Human Rights.

Such references are not of a primary nature, rather European Conventions are used as supportive norms.

The Constitutional Court did not reverse or amend its case-law following a judgment by the European Court of Human Rights. However, academics discuss the place and impact of the case law of the European Court of Human Rights. The Constitutional Court organises a symposium every April in commemoration of its establishment.

On the other hand, with the new articles of the law of the civil and criminal procedure which were inserted into the corpus of Turkish law on 3 August 2002, judicial review of proceedings is possible following a condemnation by the European Court of Human Rights.

Amendments to these articles introduce provisions that make retrial possible for civil and criminal law cases, in the light of the decisions of the European Court of Human Rights. Thus, the European Court of Human Rights' jurisprudence may be directly applicable to our legal system and the means of redress of human rights of human violations will be reinforced.

In the third part of my speech, I would like to give you brief information regarding the harmonisation packages of EU rules and regulations within the context of accession to the European Union.

In October 2001, the Turkish Grand National Assembly agreed with an absolute majority to amend 34 articles, almost one-fifth of the Constitution. This package was a most comprehensive set of constitutional amendments to date.

The constitutional amendments included provisions on the enhancement of freedom of expression, prevention of torture, strengthening of democracy and civilian authority, freedom and security of the individual, privacy of individual life, inviolability of the domicile, freedom of communication, residence and unfettered movement, freedom of association, and on gender equality.

With the amendments, individual rights and freedom have been extended. The scope of freedom of thought and expression is particularly extended. The package reduced the pre-trial detention period as well as the scope of the death penalty.

In addition, a Ministerial Commission for Human Rights had been established.

Immediately after these constitutional amendments, the Turkish Parliament adopted a new Civil Code, which introduced further improvements notably as regards the freedom of association and the right to assembly, as well as gender equality and child protection.

The first legislative package, adopted in February 2002, amended various existing acts, such as the Turkish Penal Code, the Law on combating with terrorism, the Law on State Security Court, the Code on Penal Procedure etc. which were often referred to and criticised for being the legal basis for the detention and sentencing of many intellectuals for expressing their views.

The second legislative package, which entered into force in April 2002, further extended the scope of the freedom of thought and expression, freedom of the press, freedom of association and peaceful assembly. It reinforced measures for the prevention of torture and ill treatment. It also introduced an effective deterrent against human rights violations by employees of the public sector.

Finally, on 3 August 2002, the Turkish Grand National Assembly adopted, with an overwhelming majority, a comprehensive reform package, which is of historic importance in its scope and content. The package includes virtually all the controversial issues which have been hotly debated by the Turkish public since the beginning of this year.

I would like to give you an overview of the main aspects of this latest package.

Turkey abolished the death penalty except for crimes committed in times of war or the imminent threat of war, in line with Additional Protocol No.6 to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

Legal restriction on broadcasting in the different languages and dialects used by Turkish citizens in their daily lives has been lifted.

Retransmission of broadcasts has been ensured in line with the European Convention on Trans-frontier Television.

The legal obstacle preventing Turkish citizens from learning the different languages and dialects used in their daily lives has been lifted, allowing private courses also to be available for this purpose.

Freedom of expression has been consolidated by a new provision added to the Turkish Penal Code, which underlines that expressions of thought, made with the intention of criticising, without deliberate intent to insult or deride the fundamental institutions of the Republic, will not be penalised.

The scope of the freedom of the press has been extended by the amendments made to the Press Act, which abrogate prison sentences and introduce fines instead.

By alleviating those provisions which had hitherto regulated the organisation and functioning of civil society, the scope of freedom of association and the right to assembly have been further extended.

Religious Associations as defined in the Lausanne Treaty are allowed to acquire and dispose of property.

Furthermore, the legal basis has been provided for the activities of associations which have already been established or would like to establish branches in Turkey, thus ending a void in that area.

The final decisions of Turkish courts, which are found by the European Court of Human Rights to have violated the Convention on the Protection of Human Rights and Fundamental Freedoms or its additional protocols and which create irreparable damage according to the Convention are now a reason for retrial.

New provisions have been added to the Turkish Penal Code to define the crime of migrant trafficking and to provide penalties for perpetrators of this crime.

Abolishing the death penalty, lifting legal restrictions on individual cultural rights, making retrial possible in the light of the decisions of the European Court of Human Rights, reinforcing legal guarantees on freedoms of expression and press, easing restrictions on the right to association and peaceful assembly, ensuring the right to property of community foundations belonging to the minorities in Turkey, providing the legal basis needed for the activities of foreign foundations in Turkey, introducing new definitions and measures to deal with illegal immigration, altogether mark a more effective process of democratisation and development in Turkey.

TURKEY

Mr Samia AKBULUT,
Constitutional Court

I. Integration of European legal rules into the domestic legal system

1) What is the procedure for integrating European and/or EU treaties into the domestic legal system?

a. Is the ratification procedure provided for in the Constitution?

There is no specific reference for the incorporation of European treaties in the 1982 Turkish Constitution. They are classified within the ambit of international agreements *per se*. The incorporation of international treaties into the domestic legal order is not automatic: in order to regard an international agreement as part of the law of the land, formal process of ratification is needed. Article 90 of the 1982 Turkish Constitution, composed of five paragraphs and laying down the ratification and effect of treaties, reads as follows:

1. The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey shall be subject to adoption by the Turkish Grand National Assembly by a law approving the ratification.

2. Treaties regulating economic, commercial, and technical relations, and covering a period of no more than one year, may be put into effect through promulgation, provided they do not entail any financial commitment by the state, and provided they do not infringe upon the status of individuals or upon the property rights of Turkish citizens abroad. In such cases, these treaties must be brought to the knowledge of the Turkish Grand National Assembly within two months of their promulgation.

3. Treaties in connection with the implementation of an international treaty, and economic, commercial, technical, or administrative agreements which are concluded depending on an authorization given by law shall not require approval by the Turkish Grand National Assembly. However, treaties concluded under the provision of this paragraph and affecting the economic or commercial relations and private rights of individuals shall not be put into effect unless promulgated.

4. All kinds of treaties resulting in amendments to Turkish laws shall be subject to the provisions of the first paragraph.

5. International treaties duly put into effect have the force of law. No appeal to the Constitutional Court can be made with regard to these treaties, on the ground that they are unconstitutional.

b. What does this procedure involve?

Article 90/2-3 spells out cases of exemptions where the procedure of ratification is of a one-layered nature in which Parliament has no role to play. The first exemption is laid down in paragraph 2 where treaties may only be put into effect through promulgation. These treaties must be brought to the knowledge of Parliament within two months of their promulgation. This so-called internal ratification process, which is an administrative act, can be reviewed by the Council of State. The Constitutional Court has no role to play in this regard.

The aim of this notification is not to deprive Parliament of the chance to review the case politically, to avoid a situation where the Council of Ministers inserts disguised provisions for 'approval of ratification'. Since this review is only for political considerations, Parliament has no right to veto the treaty, once entered into force. Provided the Council of Ministers acted in *ultra vires*, this political review initiates legal responsibility of the Council.

The second exemption is set out paragraph 3 of Article 90 where there are two powers given in favour of the Executive. Firstly, treaties concerning the implementation of an international treaty are not be forwarded to the Turkish Grand National Assembly. Secondly, in these cases entry into force is possible without promulgation. This should not be construed as by-passing the review of Parliament inasmuch as the legislative organ is initially involved in the issue and this follow-up treaty is a part of the treaty that is in force. If a follow-up treaty implementing further provisions emanating from international relations results in amendments to Turkish laws, then the "approval of ratification" clause embedded in the first paragraph becomes a prerequisite.

There are, however, other exemptions one can come across in special agreements which do not require the involvement of Parliament for the entry into force of their provisions. In this context, one exception is the resolutions of the Joint Exchange Commission, established in accordance with the Lausanne Treaty whose decisions are of binding nature according to Article 19 of the 1930 Ankara Agreement.

Another exception that does not require the approval of Parliament is the decisions delivered by the Council of Association set up by the Agreement Establishing an Association between the European Economic Community and Turkey (signed in Ankara, on 12 September 1963). Article 22 of the Agreement empowers the Council of Association to take decisions in the cases provided for therein in order to attain the objectives of this Agreement. Each of the Parties shall take the measures necessary to implement the decisions taken. Within this framework, the Council took a very significant decision called the Decision No 1/95 (on Customs Union) of the EC-Turkey Association Council of 6 March 1995 on implementing the final phase of the Customs Union (Decision, 1/95).

According to Article 90/3 of the Constitution:

Treaties in connection with the implementation of an international treaty and economic, commercial, technical or administrative agreements which are concluded depending on an authorisation given by law shall not require approval by the Turkish Grand National Assembly.

However, the decision might not be looked upon as a treaty in literal terms but its "genetic code" may contain so many of the peculiarities of a treaty that the European Parliament must vote on it. Such a significant *quasi*-treaty decision should be subject to the provisions of Article 90/4 and

Act no. 244 in order to enter duly into effect. However, this has not been the case despite the Decision establishing transfer of decision making-power to Community institutions.

c. Are European and/or EU treaties published?
d. If so, where? (Official Journal, Official Bulletin, the press, etc)

All treaties, including European treaties, that are approved for ratification by the Turkish Grand National Assembly are published in the Official Gazette.

All treaties ratified by Turkey are published twice in the Official Gazette. After the Council of Ministers issues a decree during the internal ratification process, treaties are sent to the Official Gazette for the second time. At that time, the Turkish translation of the treaty is coupled with the original one. Once this is done, treaties are formally incorporated in the domestic law.

However, there is a special governmental body that has been set up for EU-Turkish relations. The name of this unit is "The Republic of Turkey, Prime Ministry Secretariat General for EU Affairs". The website is http://www.abgs.gov.tr . Many primary and secondary sources can be assessed by this body.

Moreover, the problem of translation should not be left untouched. The translation of the a*cquis communautaire* is a huge task. Several ministries have launched projects to prepare a Turkish version of EU legislation.

As for the EU treaties (e.g. from Rome to Maastricht and to Nice), as Turkey has not so far acceded to them, they are not published in the Official Gazette. However, their unofficial translations are available from various written sources and e-media.

2) What is the status of European and/or EU texts in the domestic legal system?

a. Is this status defined by the Constitution, or does it result from case-law?

The European legal texts are governed by Article 90 of the Constitution. Although there is no specific reference to ECHR and EU law documents, they are generally regarded as 'international agreements'.

b. Where do European and/or EU treaties fit into the hierarchy of legal texts? (Are they on the same level as the legislation or the Constitution, do they take precedence over the Constitution, etc).

Since the Constitution does not distinguish European legislation from other international treaties, there are various opinions as to how Article 90 might be interpreted. To this end, the case law is of pivotal importance as to where European treaties are in the hierarchy of legal texts.

The fifth and last paragraph of Article 90 conveys two important principles under the banner of monist approach to international law:

1. International treaties duly put into effect have the force of law.

2. No appeal to the Constitutional Court can be made with regard to these treaties, on the ground that they are unconstitutional.

3) (For member states of the European Union) What is the status of subordinate EU legislation (regulations and directives) in the national legal system?

N/A (Since Turkey is not a member state of the European Union).

4) Does the Constitutional Court have jurisdiction for supervising the conformity of European and/or EU treaties with the Constitution?

a. Is this supervision provided for in the Constitution?

There exists no leeway for such supervision, as the Constitution does not empower the Court to supervise such revision. The Constitutional Court examines and reviews the constitutionality of laws, decrees having the force of law and the Rules of Procedure of the Turkish Grand National Assembly according to the Constitution.

b. If not, has the Court asserted or disclaimed its power to exercise this supervision? By what decision? Have there been changes in case-law in this area?

The Constitutional Court has not had recourse to 'judicial activism' hitherto. It acts within the scope of the Constitution. As the Constitution equates all international treaties with national laws, sometimes the Court makes references to the European Convention on Human Rights to entrench its judgements rather than base its judgements on them. It has not so far encountered conflicts with EU norms and national legislation. In the course of reviewing the constitutionality of laws, it refers to the European Convention on Human Rights.

c. Which bodies are authorised to refer cases to the Court in this area?

No body has been specifically vested with the authority to refer such cases to the Court. However, as a general rule, parliamentary groups of the party in power, the main opposition party, one-fifth of the Parliament and the President shall have the right to apply for annulment of the act which is issued as 'approval of ratification' by the National Assembly (Article 150 of the Constitution).

d. Must such a referral occur before the European and/or EU treaty in question is ratified, or may it occur after ratification?

Where an EU treaty has been ratified, Article 90/5 of the Constitution provides that no appeal may be made against that EU Treaty on the ground that it is unconstitutional.

Therefore under no circumstances could a case concerning the constitutionality of such a treaty be heard before the Constitutional Court after ratification.

The Constitutional Court supervises the constitutionality of laws, decrees having the force of law, Rules of Procedure of the Turkish Grand National Assembly and specific articles or provisions thereof.

Thus, the Court cannot supervise a treaty before its ratification in that it does not fall within any of the categories listed above.

There is only one solution, which is that the provisions of an EU treaty whose constitutionality is challenged should be brought before the Constitutional Court by way of a law approving the ratification. This is due to the fact that "The ratification of treaties concluded with foreign states and international organisations on behalf of the Republic of Turkey, shall be subject to adoption by the Turkish Grand National Assembly by a law".

Only a law approving the ratification of given treaty could be brought to the Court for a review of constitutionality.

A case which came before the Constitutional Court in 1996 is very instructive as to the approach of Parliament as well as the Court to treaties. The background of the case is as follows (E.1996/55, K. 1997/33, 27.2.1997, AMKD, vol. 37/1): the Standing Committee for Economic and Commercial Cooperation of the Organisation of the Islamic Conference (ISEDAK) prepared an agreement on the Institution for Export and Investment Credit Insurance Among Islamic Countries in 1992. Turkey signed the agreement soon after and it passed to Parliament in 1995 for approval of ratification. Although a reservation was made that the application of interest-free insurance system based on *Sharia* Law should not impair constitutional principles, there were many objections by the ministers with regard to such an interpretation, recourse to arbitration and application of Islamic principles. They claimed that reservations would not be inapplicable in practice; if reservations were strictly followed, there would be no point in becoming a party to the Agreement.

After heated debates, the Chairman of the National Assembly stated:

"It is improbable that international treaties supersede the Constitution; if an agreement is concluded contrary to this, it is void in the sense of Turkish law... we herewith settle the matter as it is."

Finally, the Bill passed by a majority. The Opposition Parties appealed to the Constitutional Court for its annulment. The Court settled the matter concluding that the Agreement was not contrary to the Constitution.

The importance of the case is twofold. First, it shows how national law prevails in the event that sensitive issues (*e.g.* secularity) come to the fore. And secondly, the Court accepted the claim that Grand National Assembly's act of ratification approving of a treaty could be heard.

The Court can hear the unconstitutionality of international agreements indirectly despite the wording of Article 90/5 which reads *"... No appeal to the Constitutional Court can be made with regard to these treaties, on the ground that they are unconstitutional*". In other words, all treaties requiring an act of approval of ratification are subject to the scrutiny of the Court. However, treaties in connection with the implementation of an international treaty, and economic, commercial, technical or administrative agreements and treaties, and regulating economic, commercial and technical relations and put into effect through only promulgation (Article 90/2-3) cannot be brought before the Court on the basis of unconstitutionality. In these cases, only the Court of State can question the legality of acts of the Council of Ministers.

e. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

None

5) Does the Constitutional Court have jurisdiction for supervising compatibility between legislation and European and/or EU treaties?

a. Is such supervision provided for in the Constitution?

In technical terms, all treaties are regarded as laws of the land. Therefore, *lex specialis* and *lex posterior* rules are applied in the case of conflict. Hence, the compatibility issue does not arise as both are in the same status.

b. If not, has the Court asserted or disclaimed its power to exercise this supervision?

No. Article 11 of the Constitution states:

> "The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals".

It is the Court which first of all should abide by this provision. Hence, the Court cannot assert such a power contrary to the Constitution.

c. Which authorities are entitled to refer cases to the Court in this field?

There is no explicit provision for such a reference.

d. How many judgments has the Constitutional Court handed down in the context of supervising the conformity of European and/or EU treaties with the Constitution?

None.

6. (For member states of the European Union) Does the Constitutional Court have jurisdiction for supervising the conformity of subordinate EU legislation (regulations, directives) with the Constitution?

Since Turkey is not a member of the EU, this question is not applicable.

7) Was admission to the Council of Europe dependent on a series of state undertakings (Parliamentary Assembly Order 488 of 1993, observance of which is subject to supervision by the Committee of Ministers and the Parliamentary Assembly's Monitoring Committee) concerning the Constitutional Court's organisation, functioning, composition or case-law?

a. What were the terms of those undertakings?

Turkey became a member of the Council of Europe in 1954. The Constitutional Court was set up in 1961. Therefore, no such undertakings were mentioned at that time.

II. European integration and constitutional case-law

1) Does the Constitutional Court have a department that ensures efficient and rapid access to the judgments handed down by the European courts (Court of Justice and/or European Court of Human Rights) and to texts of subordinate EU legislation?

Even though the Court has not officially set up a department to this end, there are three academics working as rapporteur-judges who are in charge of keeping abreast of recent developments. In addition, the Ministry of Foreign Affairs distributes the Turkish version of the case-law of the ECourtHR and these documents are copied and handed out to every rapporteur. Some universities publish the translations of the case-law of the ECourtHR judgements (e.g. http://www.pa.edu.tr/gbf/aihmk/).

2) In its reasoning, does the Constitutional Court take account of the case-law of the Court of Justice and/or the European Court of Human Rights? If so, in what way:

a. as a primary consideration (the European case-law serves as the basis for the Constitutional Court's interpretation), or as a complementary consideration (the European case-law reinforces the Constitutional Court's interpretation)?

The Constitutional Court has never interpreted European case-law as a primary norm. There are many cases where the Court made references to the case-law of the ECourtHR. (No reference can be found for the ECJ).

For example, the Court annulled the provision of the Civil Code which provided for refusal to recognise the legitimacy of a child who is a fruit of a relationship whose male partner is a married man. In its judgment the Court made reference to UNDHR, the European Convention on Human Rights, the European Social Charter, the Declaration on the Rights of the Child and the Convention on the Rights of the Child.

In *the working wife case,* the Court declared void an article of the Civil Code which required the husband's permission in cases where his wife wished to enter into business. The Court ruled that this permission was against the principle of equality and non-discrimination laid down both in the Constitution and various international documents such as the UNDHR and the European Convention on Human Rights (Protocol 7).

In 1996, the Court broadened its jurisdiction to sexual discrimination by abolishing Article 441 of the Penal Court which states that a married male could only commit the crime of adultery should he reside with his partner as if they are married. That is to say single sexual intercourse does not amount to adultery. The Court found that the provision is against not only the preambles of the UNDHR and the European Convention on Human Rights as well as Article 14 but also of Article 2(f) the Convention on the Elimination of All Forms of Discrimination against Women. The Court emphasised in its judgment that "developments witnessed in the conception of contemporary law forces states to review their legal system and remove controversies spotted". In some cases, the Court pointed out the parallel nature of the European Convention on Human Rights and the Constitution.

In these and similar cases, such references are not of a primary nature, rather European Conventions are used as supportive norms.

In some cases there are references to the European Convention on Human Rights. However, some of these references can be found in either dissenting opinions or in the applicant's arguments.

b. Does the European case-law appear in the rapporteurs' conclusions or in the body of judgments?

ECJ's case law is rather alien for Turkish Courts. No rapporteur has so far referred to its jurisprudence. This is mainly because Turkish law has not been a part of the EU legal system hitherto.

As to ECourtHR's cases, Turkey pays special attention to the case-law of the Strasbourg Court. In this respect, there are many references to the case-law of the Strasbourg Court in the rapporteurs' conclusions, especially in relation to the following subjects: fundamental rights and freedoms, the right to fair trial, the right to life etc.

But this should not be construed as the case-law being used as a yardstick for the review of constitutionality. It is used as a complementary source.

3) Has the Constitutional Court already reversed or amended its case-law following a judgment by the European Court of Human Rights?

No. The two courts operate in different spheres.

4) Has the Constitutional Court already reversed or amended its case-law following a judgment by the Court of Justice of the European Communities?

No answer can be given for this section, as Turkey is not a member of the EU. However, Turkey, with the Customs Union Agreement of 31 December 1995 (Decision 1/95 of the EC-Turkey Association Council), became part of the European legal order. To put it clearly, according to Article 39 of the Decision, Association Council is entitled to take issues on government subsidies to the ECJ. And according to Article 66 of the Decision, the interpretation of the ECJ will be taken into account in relation to the interpretation of the provisions of the Decision. Years before this Decision, Decisions Nos. 1/80 and 3/80 of the Turkey-EU Council laid down the procedures related to the entry of Turkish workers and their families to the EU employment market and their wages and working conditions, according to which the interpretations of the European Court of Justice would be taken into consideration.

Even though Turkey makes strenuous efforts to harmonise and approximate its legal system to the *acquis communautaire*, in the Turkish National Programme for the Adoption of the *Acquis*, there is no section on how the Turkish legal system will be restructured so as to take into account the case-law of the European Court of Justice. The fact that the case-law or jurisprudence of the ECJ is part of the *Acquis* is somewhat underscored in the National Programme.

In the years to come, when national courts face problems with the custom union agreements, they may then apply to the Court. Until then, the Court has no competence to hear cases involving ECJ judgements.

5) Has the Constitutional Court already reversed or amended its case-law following the adoption of a European instrument by the Council of Europe?

a. What was the status of this instrument (recommendation from the Committee of Ministers or the Parliamentary Assembly, report by the European Commission for Democracy through Law ...)

As stated above, the Constitutional Court uses Council of Europe instruments as supplementary norms to support its decisions. But this does not mean that CoE instruments have the force of supra constitutional status, which the Constitutional Court uses as a basis to reverse or amend its case-law.

b. What were the terms of this instrument?

N/A

c. How was this case-law reversed or amended? Which body effected the referral?

N/A

6) Has the Constitutional Court already reversed or amended its case-law following the enactment of a European Community legal measure?

No.

III. European integration and constitutional justice

1) Is the Constitutional Court bound by the rules of a fair trial as set out in Article 6 of the European Convention on Human Rights?

On 3 October 2001, Turkey changed 37 articles of the Constitution in order to harmonise its legal system with the European norms. To this end, Article 36 of the Constitution was amended so as to include the right to fair trial. (*Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures*). Today, the Constitutional Court is bound by the rules of the Constitution, in addition to those of the EConvHR.

a. Is there a precedent in the case-law of the European Court of Human Rights condemning the national authorities under Article 6 of the Convention, involving a trial before the Constitutional Court?

No. Even though Turkey has been accused of breaching Art. 6 of the Convention, all decisions rendered relate to lower courts.

b. What were the grounds for this judgment?

N/A

c. Was this condemnation followed by amendment or changes to the organisation and/or functioning of the Constitutional Court? In what way?

N/A

2) Are there procedural rules or practices providing for judicial review of proceedings following a condemnation by the European Court of Human Rights?

a. Has such a judicial review already been implemented?
b. What legal provisions govern this review?

On 3 August 2002, Parliament passed *the Law Amending Various Laws*. Two new articles on the Laws of Civil and Criminal Procedure were promulgated. These are as follows:

Article 445/A of Law on Legal Procedures, dated 18.6.1927.

"Article 445/A. — If a final or finalised decision is found by the European Court of Human Rights to be in violation of the Convention on the Protection of Human Rights and Fundamental Freedoms or its annexed protocols and if the results of this violation cannot be compensated for as provided for in Article 41 of the Convention due to the character or significance of the particular violation; the Minister of Justice, the Chief Public Prosecutor at the Court of Appeals, the individual who has applied to the European Court of Human Rights or his/her legal representative can apply for a retrial to First Presidency of the Court of Appeals within a year of the finalisation of the decision of the European Court of Human Rights.

This request is to be reviewed in the General Legal Council of the Court of Appeals. If the results of the violation confirmed by the European Court of Human Rights are compensated or if the request has not been filed within the specified period, it is rejected. Otherwise, the file will be forwarded without a hearing to the court that has made the decision."

Article 327/a of the Code of Criminal Procedure No. 1412 dated 4.4.1929.

"Article 327/a. — If a finalised judgement is found by the European Court of Human Rights to be in violation of the Convention on the Protection of Human Rights and Fundamental Freedoms or its annexed protocols and if the results of this violation cannot be compensated for as provided for in Article 41 of the Convention due to the character or significance of the particular violation; the Minister of Justice, the Chief Public Prosecutor of the Court of Appeals, the applicant to the European Court of Human Rights or his/her legal representative can apply for a retrial to First Presidency of the Court of Appeals within a year of the finalisation of the decision of the European Court of Human Rights.

This request is to be reviewed in the General Legal Council of the Court of Appeals. If the results of the violation confirmed by the European Court of Human Rights have been compensated for or if the request has not been filed within the specified period, the application is rejected. Otherwise, the file will be sent without a hearing to the court that has made the decision for re-examination."

As can be seen, amendments to these articles introduce provisions that make retrial possible for civil and criminal law cases, in light of the decisions of the European Court of Human Rights.

Thus, the case-law of the European Court of Human Rights may be directly applicable to our legal system and the means of redressing human violations will be reinforced.

To put it clearly, if a decision of the ECourtHR declaring that the Convention and its protocols have been infringed is not rectified by way of compensation (See Article 41 of the ECHR), then the trial process will be renewed. The procedure shall be initiated by the Minister of Justice, Chief Public Prosecutor of the Court of Cassation, or the applicant or his or her legal advocate. High Criminal/Civil Board of the Court of Cassation will decide if such an application is justified. Should the request be approved, the court of first instance will settle the case.

If the case is related to the administrative courts, the Ministry in question or the Chief Public Prosecutor of the Court of Cassation or the individual who has taken the case to the Strasbourg Court may request such retrial. The General Board of Administrative or Tax Chambers would decide whether or not such retrial is well-founded. In this framework, the criteria in the Accession (to the EU) partnership to "strengthen opportunities to redress the consequences of human rights violations" has been fulfilled.

c. Has a review already taken place following a previous constitutional court decision?

Not yet.

3) Has the Constitutional Court already applied Article 177 of the Maastricht treaty, concerning preliminary rulings, as provided for in the context of judicial co-operation between the national courts and the Court of Justice of the European Communities?

As EC Law is not currently part of the law of the country, the answer cannot be given.

CONCLUSIONS

Mr Antonio LA PERGOLA,
Judge, Court of Justice of the European Communities,
President of the Venice Commission

Ladies and Gentlemen of this distinguished audience,

The Court of Justice in Luxembourg on which I sit is grateful for having been invited to the present seminar. It is an important occasion to debate a topic of growing interest to all lawyers who work for Europe. May I add, on behalf of the Venice Commission, that this is also a highly welcome contribution to the long and successful series of UniDem seminars designed to bring its work as an expert body up-to-date with the salient trends of the law by which we shape democracy within our countries and run the communities where our democracies have gathered to make our continent, once divided by hideous walls, a homeland of shared ideals and common achievements.

The UniDem seminar in Warsaw of 1992 was devoted to the relationship between international law and domestic law. This line of enquiry has lost none of its value. Yet it is high time we focused on the issues that arise as we step from traditional international law into the area where nation States are involved in what is known as integration, with the world of meaning one can pack into this one word. The problems with which we are concerned are not far to seek. What provisions should a national constitution adopt to allow the state to join the Communities and Union and measure up to the responsibilities of membership? Constitutional Courts have sprung up in several countries in the wake of the healthy legalism that has pervaded Europe, and another inevitable question is what role each of these Courts is to play with regard to the internal observance of treaty and the binding enactments of Community institutions. Answers here may of course vary from one member state to another, and they do. But the compelling logic of integration is such that, differ as they may for our purposes, national constitutions are bound to define certain key rules without which the state could hardly fit as a member in the structure created by the treaty or adapt its legal system to that of the Community. This is the lesson member States have learned from the hard trial of making the whole process advance over nearly half a century.

Let us remember that at the beginning there was no common ground in the national constitutions on which to base the new and peculiar phenomenon of integration. Some of these charters did not even address the general problem of the rank of treaties in the hierarchy of internal sources of law. Other constitutions provided for immediate application of self-executing treaties and their prevalence over incompatible national legislation. Now this latter type of clause could conceivably amount to a strong, if not automatic guarantee of compliance with Community obligations, but in view of the many far-reaching implications with which the founding treaties were charged it is commonly held that they deserve an appropriate treatment under national constitutional law, a place apart from all the other international agreements. Member States have grown aware of the need for specific rules in their basic text concerning the case of European integration and have in fact produced them to authorise the transfer or delegation of their sovereign rights to the Community. New norms have also been written into constitutional texts to spell out the conditions, which appeared after Maastricht, under which the participation of the State in the European Union is permitted. In some countries, for instance, a popular referendum

or a special majority for parliamentary approval are prescribed before international engagements relating to the Union are ratified. And another set of such conditions regards the principles upon which the Union must be founded in order for the State concerned to be legitimised constitutionally as a member: subsidiarity of the Union *vis-à-vis* its members in their respective powers, conformity with the rule of law or the basic requirements of a democratic order, as well as a protection of human rights equivalent in substance to that afforded by the national constitution. The best known example of this kind of provision is offered by the so-called *Europa-Artikel*, art. 23 of the German constitutional text. Let me also recall in this connection art. 7.2 of the Slovak Constitution. It paves judiciously the way for the delegation of the rights of sovereignty to the European Community and the European Union when the hour of admission strikes. Allow me in addition a few words of comment on the delegation or cession of national powers.

Integration means above all else common legislation and common binding principles of law. It is this end result that matters. A wise constitution maker knows he must ensure it. Now, the conditions that may be laid down by the state in its constitution to effect the transfer of sovereign rights as a member of the European Community must be consistent with the principles stemming from the treaty and established as an *acquis communautaire*. Here are two twin principles that come to mind: supremacy and direct effect of community law. National judges are obliged to apply community law even in the presence of conflicting national legislation provisions of whatever rank. They must do so immediately, without having to wait until such incompatible norms are removed from the national legal system. Only thus can the rights conferred by community law on litigants before national judges be duly recognised and enforced. The national legislature, for its part, is, under the treaty, bound to abrogate internal rules that violate community law. This obligation is imposed on the legislative body of the State by virtue of another principle deriving from the treaty, that of legal certainty, and does not impinge on the duty for national judges to secure the immediate effect and prevalence of community law.

All of this leads me to a final point. The observance of community law is guaranteed by all judges whenever this law governs the solution of a case: if there are internal laws that contradict applicable community law, this does not give rise to any question that may be referred for decision to the constitutional court as is the case with the so-called prejudicial question of constitutionality, such as is envisaged in the systems where the Court reviews legislation on reference from other judges, who will in turn settle the cases pending before them in accordance with the Court's ruling on the constitutional issue they have raised. Such a procedural mechanism is ruled out in the field we are exploring because of the immediacy of judicial protection which rights deriving from community law require.

However, no principle of the treaty prohibits a constitutional court from being empowered to review and strike down legislation that violates community law when that question is raised in the sphere of the so called abstract control of norms, in which proceedings are instituted that are not connected with litigation before other judges. Likewise, it would seem to be a natural prerogative of constitutional courts to rule on whether the treaty concerning the community is compatible with the constitution as a preventive question before ratification of the treaty by the competent political organs can intervene. Should incompatibility be ascertained by the Court's judgement, the constitutional text would have to be amended and reconciled with the provisions of the treaty - a necessary clearance to make ratification possible.

These options are available to the constitution-makers. And there may be more in their tool-kits to make room for the control of the observance of community law in one or the other system of constitutional justice, depending on their preference. The one point I would like to stress is the crucial importance of choosing a kind of constitutional justice that will find its proper place in the European scheme of things. The observance of the treaty is entrusted at the community level to the court of justice, which is too, in more ways than one, a constitutional court, though one devoid of a power of judicial review that can lead to the annulment of the legislation of member states, unlike a supreme or constitutional court in a true and proper federal context. That is why it is so important that, where a constitutional court exists, it should lend to the jurisdiction of the Luxembourg Court the strong helping hand of its power to purge internal law by sanctioning the violation of community law and annulling the state acts that perpetrate it. This can happen only if internal law is regarded as being subordinate to community law as it is subordinate to the constitution. In such a case, the overall system of guarantees put in place for the observance of the treaty will extend, within the member state, in an efficient form. This is by itself quite a remarkable achievement. Our Union in the making is not likely to develop into a super-state. But we can and do aspire to a confederation of a modern kind, as the Venice Commission found out in the Santorini Seminar of 1994 on this subject: *a Staatenverbund*, to use a formula of the German Constitutional Court, where the national constitutional courts and the judicial body set up in Luxembourg as the custodian and interpreter of the treaty can engage through their judgements in a mutual effort to reason, as it were, on the same wavelength. It is a fact that the thorniest knots of the relationship between community law and national law have been untied when their case-laws avoid discordance. The two legal systems work together thanks to the links forged between them by the craft of constitutional interpretation. Solutions were called for which could not possibly have been found ready-made in the naked text of the treaty or of the constitution in each member state. What we need then is a unison, a unison of judicial minds along with a unison of legislation, for the very soul of integration is law and the protection of rights.