Strasbourg, 15 September 1993 **CDL-STD(1993)005**

Engl only.

Science and Technique of Democratie No. 5

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW

Proceedings of the UniDem Seminar organised in Warsaw on 19-21 May 1993 in co-operation with the University of Wroclaw and the Poznan Human Rights Centre and supported by the PHARE Programme of the European Communities

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The relationship between international and domestic law: traditional problems and new trends -by Antonio La Pergola, President of the European, Commission for Democracy through Law

This seminar has been designed to help us better understand an area of vital interest to the Council of Europe and the Venice Commission. Law is the force through which we can establish and develop both democracy and peace. The dissolution of Communism throughout the ex-Soviet empire has yielded a new season of democratic constitution making. Parallel to this flowering of constitutionalism, there is a growing confidence in international law, supranational institutions and collective security. The need for democracy through law goes hand in hand with the need for peace through law. This is nothing new. On our continent, constitutionalism has often been matched with enlightened internationalism. We may remember the Esprit de Genève *that flourished between the two World Wars. The era of the League of Nations was also marked by the emergence of new and forward looking democratic constitutions. And it was then, significantly, that for the first time in European history constitutional courts were established. In those days a constitutional court was a novelty viewed with mixed feelings by jurists and politicians. Some of them thought it was too audacious a break with the time-honoured doctrine of parliamentary sovereignty.*

The Esprit de Genève *was unfortunately short lived. It was not until after the end of World War II and the fall of Nazi-Fascism that Europe could experience a revival of international legality and democratic constitution making. Democracy, which first spread across Western Europe, is now taking roots throughout the entire continent. The Council of Europe is the institution that best reflects this expansion of the values of freedom and the rule of law. It is the depository of the common values of European nations. It represents the unbroken space of the political civilization in which we live.*

A new spirit is radiating from Strasbourg, our Commission draws its inspiration from this Esprit de Strasbourg *which, I believe, shall prove a stronger and more enduring cohesive force than the weak and transient* Esprit de Genève. *Yet we should not neglect the continuity between novel perspectives and past experience. It was precisely the first generation of*

democratic constitutions between the two World Wars that broke fresh ground in the field we are exploring here. The rigid constitutions of that epoch made explicit provision for the recognition of customary international law as an integral part of domestic law. This was true of the fundamental charters of Weimar, Austria, Czechoslovakia and the second Spanish Republic. The Spanish Constitution even made reference to international bodies like the League of Nations and the International Labour Organization. All of these basic charters included provisions concerning the exercise of the treaty making power. Some of them also addressed the internal effects of international agreements.

The issues we are discussing today had thus been anticipated during the interwar period, and the democratic constitutions of that era still maintain their instructive value. The present day constitution maker must be prepared to face not only the new issues arising in our field, but also the hard core of traditional problems which those constitutions attempted to solve. These traditional problems are in substance two : whether international law should be incorporated into domestic law by constitutional fiat and second, whether or not international law, once incorporated into domestic law, should prevail over inconsistent national legislation. The new and salient issue that we must confront concerns the constitutional implications of the State's membership in a supranational community.

Let me start with a look at the traditional issues relating to incorporation and the internal effect of provisions of international law. A proper understanding of such matters has often been clouded by the ever-raging dispute between monism and dualism. It has been frequently argued that if the constitution maker espouses the monist view, he must establish both the immediate incorporation of international law into domestic law and its unqualified supremacy over national legislation. If, instead, he adopts the dualist interpretation, he must, so the argument runs, conversely exclude automatic incorporation and the prevalence of international laws over internal laws. Yet neither monism nor dualism offer any readymade formula to the constitutional maker, whatever his theoretical standpoint. The fact of the matter is that whether one is a monist or a dualist, international law cannot operate inside the State, much less prevail over inconsistent national legislation, unless it is so provided for by the national constitution or some other basic rule of domestic law. The question is whether to lay down these principles or not. And a dualist, no less than a monist, can reply in the affirmative. From a dualist angle of vision it is internal law, of its own free will, that can allow for the immediate application and supremacy of international law in the domestic sphere. Even when it so provides, however, internal law will remain separate from, independent of, and in no way subordinate to international law.

Let us, then, cast aside the preoccupations of legal philosophy and approach the traditional problems from a technical point of view. The first issue is whether a constitutional norm should be adopted whereby international customary law and treaties will apply in the domestic sphere without the need for internal implementing legislation. The democratic constitutions of the interwar period solved this problem by declaring that customary international law was to be regarded as an integral part of domestic law. This same principle has been laid down in a number, but by no means in all, subsequent democratic constitutions with reference to international treaties. This was a fundamental point to establish. The legal order of the State was no longer conceived as a barrier to incorporation. It was recognized that international law could apply immediately to individuals and could be enforced by national courts.

Incorporation must be correctly understood, however. First of all, it concerns such international rules, whether customary or conventional, as can be applied immediately within the State.

Where incorporation refers to customary international law, it may be further qualified. The point is that customary rules, unlike treaties, can be received into the internal legal system regardless of whether the State has participated in their making. Customary international law forms in this sense an "objective" body of rules, unless we espouse the debatable and commonly disregarded theory that it rests on the "tacit" agreement of States. Yet, a number of constitutions qualify incorporation of customary international law by stating that it applies exclusively to "generally recognised norms".

Now what does this reference to "generally recognised norms" actually mean? Opinions on this issue surely differ. One point of view worth recalling is that customary rules become generally recognised when two requirements are met: they must find their place in treaties endorsed by a majority of States or by an otherwise significant number of participants; and the State whose constitution incorporates these customary rules must be a party to the treaty which has recognised them as being of general application. If this interpretation is accepted, the incorporation of customary international law is based upon a contractual relationship which involves the consent of the State concerned.

Let us now shift our attention to the other traditional problem. How does international law rank within the legal system of the State? A short answer is that quite a few modern constitutions enshrine the supremacy either of international law or of treaties over domestic law and sometimes of both. One caveat is in order, though. Constitutional provisions will vary according to whether customary international law or treaties are under consideration. Even where the supremacy of international law is established in principle, as often as not it is a qualified supremacy. In some legal systems, where international customary law or treaties prevail over national laws, they cannot contradict any constitutional rule. In other systems, the supremacy principle is qualified by the requirement that international law must conform only to the basic principles of the constitution. Whatever the system, the final word would seem to belong to the judicial body responsible for interpreting the constitution and settling conflicts between the fundamental charter and norms of lower standing. That is why it is important that judges interpret national law on the presumption that it conforms to international law. They generally do, and thus conflicts arise only when the provisions of domestic and international law cannot be reasonably reconciled by way of interpretation.

Our distinguished rapporteurs will no doubt set all these matters in their proper perspective. Allow me, if you will, one brief comment on the Italian case. Under the Italian Constitution, generally recognised rules of international law are incorporated automatically into the internal legal system and prevail over inconsistent national legislation. The Constitutional Court has, however, established that no norm of customary international law can violate the basic principles of the Constitution, and has reserved itself sole authority to determine what these basic principles are. Treaties, for their part, are not incorporated automatically and rank as a rule on an equal footing with ordinary laws. Yet there are exceptions to this latter principle. There are certain treaties which the Constitution has expressly endowed with a special force so that they cannot be contradicted by ordinary law: the Lateran Pacts and their subsequent amendments which govern the relationship between the State and the Catholic Church (Article 7); treaties that regulate the legal status of foreigners (Article 10, Clause II); and treaties by which Italy agrees, on conditions of equality with other states, to such limitations on sovereignty as may arise from its participation in international organisations that ensure peace and justice between nations (Article 11). Aside from these cases, there may be treaties to which Italy is a party which amend customary international law that is not jus cogens *but* jus dispositivum*. Here the issue arises whether treaties that can derogate from customary international law must,*

according to the constitution, be treated as customary international law itself. If such a view is accepted this is another class of treaties which must be held to prevail over ordinary legislation.

So much for the traditional issues. The new outstanding phenomenon, as I have said, is that raised by the emergence and growth of supranational communities of various types. Such communities have been and will always be established by multilateral treaties. And there is no denying that any treaty establishing a supranational organisation can be described as a "contract" that gives rise to relations which acquire the character of "status". Contract and status merge in the membership which the State acquires in the organisation, and national sovereignty is limited as a result. This inroad on sovereignty can be more or less extensive according to the powers and fields of action assigned to the community of which the State becomes a member. We need not scan the entire field of international organisations. Suffice it to say that the broad areas in which communities have been formed concern collective security - whether worldwide in scope, like the United Nations, or regional, like NATO, and economic or, on a more limited scale, cultural and even political integration.

How can this whole range of phenomena be taken into account by the constitution maker? Certain charters answer the question by bringing supranational organisations within the purview of the discipline laid down for the conclusion, ratification and internal operation of all treaties to which the state is a party. In that case, there is no specific rule in the constitution which covers treaties that establish supranational communities. This lack of specificity may not be unjustified when the constitution enshrines as a general principle the immediate incorporation and supremacy of all treaties over national laws. However, such a provision is not always found in present day constitutions. At any rate, there are a variety of issues that derive from membership in a supranational organisation and to address them properly, the constitution should properly provide for such membership. They must be addressed by an appropriate constitutional discipline.

At the very least, the constitution must authorise any delegation of sovereign rights to the community which the State joins as a member. Conditions may have to be foreseen in the constitutional text to define the scope of such delegation:

- *a qualified rather than a simple majority is arguably better suited to the parliamentary approval of treaties that establish supranational communities;*

- *the question of ensuring that such a treaty will display all of its possible effects in the internal legal system must also be addressed ;*

- *the national government must be endowed with all the powers needed to fulfil the obligations deriving from membership in the supranational community;*

- *lastly, the principles of immediate incorporation and supremacy must be clearly understood to cover not only the treaty as such, but all binding decisions adopted by the bodies established in pursuance of the treaty.*

As we can see, there is more than one constitutional knot to untie. And it is not only a question of writing appropriate norms into the basic text. Constitutional practice and the interpretation of the fundamental charter by national courts may play a decisive role in settling at least some of the issues I have raised. Let me draw your attention to the important test case of European integration. The European Community envisaged by the Maastricht Treaty will differ from the

sectorial communities we have known thus far, as it promises to develop into monetary, economic and political union. This new form of European Community will, in turn, be only one piece in the institutional jigsaw puzzle taking shape on the continent. The community itself may sooner or later expand to include Central and Eastern European countries, in addition to the nations of the European Free Trade Area that have already applied for membership. The European Economic Space agreed to by the European Community and EFTA has already contributed to expanding economic freedom.

The Conference on Security and Cooperation in Europe is another important part of the overall institutional picture in Europe, while the Council of Europe serves as a connecting framework for all our governments and peoples.

In varying forms and degrees, we are witnessing an overarching process of integration which an open-minded constitution maker must take into account. Without losing sight of the broad picture, let us focus on the European Community as the most advanced example of a supranational type of system. How was its establishment legitimised by the constitutions of the member countries? A grant of authority was needed to bring the community into existence and was put in place in each of the national basic charters.

The relationship between community law and national law has been shaped by the judicial craftsmanship of the Court of Justice in unison with national judges. The rulings of the Court and of the national judicial bodies have established the twin doctrines of direct effect and supremacy of Community law over incompatible national legislation. In fact, the Treaty of Rome has been read as if it contained a supremacy clause of the kind we find in a federal constitution like that of the United States. Nevertheless, the European Community we have known thus far is not a federal one. Not even the union envisaged by the Maastricht Treaty could be termed as federal in the strict and proper sense of the word. But the perspective may well change when the union finally materialises.

The spadework of judicial interpretation has paved the way for a further stage of integration. Our union can arise as a new type of confederation based both on a league of states and a common citizenship. The supremacy principle of community law worked out by the courts will be one of its cornerstones. Let us not forget that this principle was developed through the interpretative powers of the Community Court. We owe its existence to the far reaching idea written into the Treaty of Rome that the Court, sitting in Luxembourg, may be petitioned by any national judge who seeks a binding pronouncement on the interpretation of the Treaty or Community law.[1] *But its power of interpretation, coupled with the other remedies that member states and their citizens can seek to redress alleged violations of the basic Treaty and all Community law are such, on balance, that integration works as if it had been conceived along federal lines by the founding fathers of the Community. My point is buttressed by the case-law of the constitutional courts which have sooner or later come round to the point of view advanced by the European Court of Justice. According to this judicial body, the Treaty of Rome implies that all national judges must apply Community law in the face of incompatible national legislation. Community law is thus viewed as if it were the supreme law of the land. In the words of the U.S. Constitution we may say that "... the judges in every state shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding".*

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[1] *The Community Court is not vested with the power to strike down national rules that run counter to community law.*

The constitutional courts have thus divested themselves of the power to determine whether national laws are inconsistent with Community obligations. Diffuse rather than centralised judicial review is now the generally accepted rule that guarantees the observance of the Treaty of Rome and the law derived from it. National constitutional courts such as those of Germany and Italy have reserved themselves alone the power to solve fundamental conflicts which can arise if Community law violates basic individual rights. A converse yet equally strong claim continues to be made by the Italian Constitutional Court. This court has reserved itself the power to rule upon the validity of national laws which are challenged on the grounds that, if they were left in force, they would frustrate the observance of the basic principles of the Treaty of Rome. What is at stake here is nothing less than the continued membership of the State in the Community. These reservations are far from being insignificant. They highlight the fact that national sovereignty has not been entirely eroded by the European Community, and the constitutional court acts as its ultimate guardian.

It is equally true, however, that these reservations will apply only in highly improbable cases. Integration will normally be governed in the manner defined by the European Court of Justice. The system hinges on the central role of this court as interpreter of the Treaty of Rome. Once the Court has spoken, its interpretation is binding on national judges. And this explains how, after the Court enunciated the principle of direct application and supremacy of community law, that principle was received by all member countries: Community law is now applied automatically, as the Court in Luxembourg intended it should be, without the national constitutional courts or legislatures having to remove incompatible domestic laws.

The observance of Community Law has thus been entrusted to an efficient system of guarantees. Let me take this latter point further. Can we regard such a system as a possible model for the relationship between national law and international law in general? Once more, we should bear in mind that integration in the European Community has led to the establishment of a central court whose power of interpretation is the basis for the whole mise en oeuvre *of the judicial guarantees that ensure the observance of the Treaty of Rome. It is only the European Community that has such a central court. No court outside or above the nation-state has been empowered to interpret international law in the same fashion as the Community Court interprets Community law.*

It is significant, nevertheless, that in at least one case the interpretation of international law should have been entrusted to a constitutional court. I am alluding to the German Bundesverfassungsgericht*. Article 100, Clause 2 of the Basic Law of Germany reads as follows: "If, in the course of litigation, doubts arise as to whether a rule of public international law is an integral part of federal law and whether such a rule directly creates rights and duties for the individual (Article 25), the court shall obtain a decision from the Federal Constitutional Court". The competence of the Constitutional Court is thus confined to issuing a declaratory judgement. Should doubts arise in the course of litigation, national judges must obtain a decision from the Constitutional Court concerning the interpretation of the international rule to be applied. This is a rational solution and is based on the same principles which operate in the European Community.*

The question I would like to raise is whether this monopoly of interpretation, which in the case of Germany is left with the Constitutional Court, could be assigned to an international judicial body - one which national judges would be able or even obliged to petition for a declaratory judgement. I do not know when political conditions will be ripe to establish such a judicial

mechanism by treaty. To take this bold step forward, nation-states would have to be convinced that it is in their common interest to lay down a uniform procedure to ensure the observance of international law. The price to pay would again be an inroad upon national sovereignty, in this case a limitation on judicial power. The principle is that domestic judges must bow to the interpretative rulings of an international court. This type of international jurisdiction, should it be established, would crown a long line of efforts made to secure the observance of international law. It would be the linchpin of a new judicial community among states.

A new judicial community does not mean a political community, to be sure: you need not have a highly developed supranational structure like that of the European Community to sustain the kind of international jurisdiction of which I am speaking. You do need , however, an integrated circle of states that share the same attitude vis-a-vis the importance of the judiciary, the rule of law and the strength that these principles can lend to the enforcement of the law of nations.

This may be a lofty goal and a difficult one to achieve, but it is not a castle in the air. What I am countenancing is an evolution in what is already an established pattern in the relationship between international and domestic law. We can see in retrospect that there have been two stages in the refinement of legal technique. First, provision was made for incorporation and for the supremacy of international law. Emphasis was laid on guaranteeing the observance of international law by removing all conflicting internal legislation. Immediacy of effect was equally essential as international law should operate directly whenever possible. The most effective guarantee was afforded by empowering constitutional courts to declare null and void national laws passed in violation of international obligations.

The second stage was brought about by the emergence of supranational communities. This phenomenon spurred the creation of a novel type of guarantee based on the random review of national enactments contrary to international law with, however, a central court acting as the authoritative interpreter of the international norms that the other judicial bodies must apply. This shift in emphasis is due, I think, to the paramount importance now attached to the idea that international law generates fully justiciable individual rights. What matters is that the meaning of the international rule be clearly fixed by an authoritative judge.

We are moving from guarantees underpinning the observance of international norms to guarantees securing the respect of individual rights generated by these norms. The time has come for the internationalisation and universalisation of human rights. The principles of constitutionalism are spreading. We are witnessing the creation of new and widening circles of citizenship. As lawyers we must consider ourselves fortunate. All of us, imbued with the Esprit de Strasbourg*, have a creative role to play in developing the legal safeguards to ensure that the rights of man are fully protected both by the state and within the international community.*

Intervention of Prof. Wolfke, University of Wroclaw

Professor Wolfke from the University of Wroclaw welcomed the participants and guests in the name of the University of Wroclaw and the Poznan Human Rights Centre. He thanked the European Commission for Democracy through Law for its initiative to organise a series of seminars in the countries of Central and Eastern Europe and, more particularly, for the decision to organise this seminar here in Poland.

The subject of the seminar was proposed by the University of Wroclaw. It was one of the key issues if one wanted to ensure that European law and international law in general could occupy their proper place and be effective. At the global level this problem had not been satisfactorily solved. The differences between countries were simply too big. The possibilities of success were much better in Europe, a continent on the way towards integration. This not only responded to an urgent need but was also facilitated by a common European heritage.

Interesting reports by outstanding experts would be presented to the seminar and he was sure that lively discussions would follow. The seminar would also be an occasion to establish personal contacts. He was convinced that the seminar would contribute towards clarifying many important questions in this field and it would thereby become an important achievement within the framework of the European Commission for Democracy through Law's UniDem programme.

FIRST WORKING SESSION

Chaired by Prof. Antonio LA PERGOLA, President of the European Commission for Democracy through Law

THE IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS AGREEMENTS

a. *The implementation of international human rights agreements within a domestic legal system*
Report by Prof Carl Aage NØRGAARD

b. *The implementation of international human rights agreements in Poland*
Report by Prof. Zdzislaw KEDZIA

c. *Summary of the discussion*

a.The Implementation of International Human Rights' Agreements within a Domestic Legal System - Report by Prof. Carl Aage NØRGAARD, Aarhus University, President of the European Commission of Human Rights

The implementation of international law within the national legal systems is one of the classical problems of international law, normally discussed under the heading of monism and dualism.

In the present paper the general theories will not be discussed and the question of the implementation of international human rights agreements will be limited to the implementation of the European Convention of Human Rights within domestic legal systems in Europe.

The point of departure for the discussion of this problem will be the often expressed fundamental idea that human rights must be and are best secured on the national level. International control, as carried out for example by the European Commission and Court of Human Rights, is and should only be subsidiary.

Against this background the aim of implementation of the European Convention into national law, therefore, is to ensure that national law is in conformity with the Convention so that national organs and courts can apply its rules correctly at the national level.

The Convention itself refers to domestic law in several places. For example, Article 1 of the Convention provides that the High Contracting Parties "shall secure to everyone within their jurisdiction the rights and freedom" defined in the Convention. In the Ireland v. United Kingdom judgment of 18 January 1978[2] the Court observed the following:

> *"By substituting the words `shall secure' for the words `undertake to secure' in the text of Article 1, the drafters of the Convention intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States (document H (61) 4, pp. 664, 703, 733 and 927). That intention finds a particularly faithful reflection in those instances where the Convention has been incorporated into the domestic law ..."*

Although the Court here refers to incorporation as an especially faithful way of giving effect to the Convention on the national level, no rule addresses directly the question as to the way in which the Convention shall be implemented in national law. The question is whether the implementation system required by the Convention demands incorporation of its substantive provisions into the domestic law, or whether a system in which the Convention as such does not become part of the domestic law is also permitted. This problem has primarily been examined in the light of Article 13 of the Convention which provides:

> *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."*

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[2] *Series A No. 25. p. 91 para 239.*

Interpreting this article the court has clearly established that the text of the Convention does not impose any obligation on the States to incorporate the Convention into their domestic law. In the Swedish Engine Drivers' Union case[3] the Court stated

> *".... neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention."*

This principle has been confirmed by the Court in a number of subsequent cases. For example, in the James and Others judgment[4] and in the Lithgow and Others judgment[5] it was stated:

> *"Although there is thus no obligation to incorporate the Convention into domestic law, by virtue of Article 1 of the Convention, the substance of the rights and freedoms set forth must be secured under the domestic legal order, in some form or another to everyone within the jurisdiction of the Contracting States ... Article 13 guarantees the availability within the national legal order of an effective remedy to enforce the Convention rights and freedoms in whatever form they may happen to be secured."*

The same principle has also been stated with regard to the implementation of other provisions of the Convention. Thus in the case of the National Union of Belgian Police[6] the Court held in its judgment that freedom of association under Article 11 para. 1 must be interpreted as requiring "that under national law trade unions should be enabled, in conditions not at variance with Article 11, to strive for the protection of their members' interests". The specific right claimed in this case, the right of trade unions to be consulted by the State, was found to be outside the scope of Article 11 because not all Contracting States "incorporate it in their national law and practice" and because Article 11 para. 1 "leaves each State a free choice of means to be used to this end".

The states which have ratified the Convention have implemented it in national law in different ways. The large majority - 18 states - have incorporated the Convention into national law, whereas 5, namely Norway, Sweden, Iceland, the United kingdom, and Ireland have not incorporated it, and I understand that Poland has not yet formally incorporated the Convention.

Incorporation normally is effected by a national statute or similar legislative measure. The hierarchical level on which the Convention is placed differs. In two countries, namely Austria and the Netherlands, the Convention is at the same level as the constitution. In the remaining states the Convention ranks either higher than normal legislation, but lower than the Constitution, or at the same level as other legislation.

As has been mentioned, incorporation is the most faithful way of implementing the Convention within domestic law. However, the mere act of incorporation does not in itself in practice solve the problem of full implementation. It will nevertheless be necessary for a State, before ratifying

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3 *Decision of 6 February 1976. Series A No. 20. p. 18 para 50.*

4 *Decision of 21 February 1986. Series A No. 98, p. 47, para 84.*

5 *Decision of 8 July 1986. Series A No. 102. p. 74 para 205.*

6 *Decision of 27 October 1975. Series A No. 19. p. 18. para 38.*

the Convention, to carefully scrutinise its national laws which are or may be in conflict with the Convention and similarly, after ratification, to ensure that national legislation is kept in conformity with the developing case law from the Convention organs.

It could theoretically be argued that such formal changes of national law would not be necessary, because from the moment the Convention is incorporated, it will take precedence, at least over older national law. Therefore each administrative organ and each court, in any case when applying national law, would have to take the Convention into consideration. In practice, however, it is not conceivable that this would be possible and even states which have incorporated the Convention have therefore made the required changes in national legislation. In principle, however, the fact remains that if national legislation is not in conformity with the Convention, the Convention must be applied - a task which in practice especially will be for the higher courts to secure.

The states which have not incorporated the Convention into national law are in fact all states which follow the dualist approach to the question of the relation between international law and municipal law.

The pattern followed in these states regarding the implementation of the Convention into national law may be illustrated by the situation in Denmark. Denmark signed the Convention in 1950 and ratified it in 1953. The Convention was, however, not incorporated into Danish law until 1992. Before such incorporation, the existing situation was analysed by an expert committee appointed by the Government. In its report the committee described how Denmark had tried to comply with the rules of the Convention. Prior to ratification, the Government reviewed the compatibility of Danish law with the provisions of the Convention. This revision showed that in the Government's view Danish law was consistent with the provisions of the Convention, although a few rules of the Statute on Social Assistance were amended. This amendment abolished the possibility of detaining a person who failed either to support his family or to pay alimony or maintenance, a provision which was considered to be in conflict with Article 5 of the Convention.

After 1953 the practical problem has mainly been to ensure that new Danish legislation is in conformity with the rules of the Convention. This control is normally undertaken by a special department in the Ministry of Justice which checks that proposed legislation is in conformity with the Danish Constitution and with international treaty obligations.

If bigger or more important changes in legislation are contemplated, the Government often sets up a special committee of experts to investigate the whole problem and to make proposals for new legislation. In such committees, it is standard procedure that the proposed legislation is compared with the Convention, and an attempt is made to bring the new legislation into conformity with the rules of the Convention. The reports of such committees are normally published, and numerous examples can be found of discussion and careful consideration of questions in order to avoid any conflict between new legislation and the Convention.

Apart from general attempts to keep Danish law in conformity with the Convention, a special problem arises if Danish law is found to be inconsistent with the interpretation of the Convention by the Court of Human Rights. This will arise, firstly, in respect of judgments by which Denmark itself has been found to be in violation of the Convention, and, secondly, in respect of judgments by which other countries have been so found to be in violation. In both

cases there are examples of changes of legislation in order to bring it into conformity with the interpretation given by the Court to the rules of the Convention.

Although the Convention for nearly 40 years was not part of Danish law and therefore could not be directly applied by the courts, the courts could and should attempt to avoid possible conflicts in concrete cases by applying the rules of interpretation and rules of presumption. The courts would normally attempt to interpret the national rules in such a way as to bring them in conformity with the treaty obligations. Under the rule of presumption, the courts may go further than would normally be possible by applying usual rules of interpretation in order to avoid a conflict between national law and treaty obligations. This rule, of course, is based on the idea that Danish law is generally presumed to be in conformity with already existing international obligations. It is, however, evident that the rather vague rules of interpretation and presumption cannot secure conformity between national law and international obligations in the same way as would be the situation if the international treaty obligation was formally incorporated into national law.

This was especially so because for many years Danish courts had been very reluctant to apply the Convention. An examination of the role of the Convention in Danish law in fact shows that it was for many years difficult to substantiate the value of the Convention in court proceedings as a source of law. This difficulty is attributable to sparse case material and very brief ratio decidendi in the decisions. It even gave rise to doubts in the case law as to whether the Convention could be invoked at all before courts of law.

In 1989, however, a remarkable change took place and the legal position on this point has now been clarified by three Supreme court decisions dating from the end of 1989, which establish that Danish courts of law and other authorities are under an obligation to base their interpretation of Danish law, to the widest possible extent, upon the European Convention of Human Rights and such practice as is incidental thereto.

In spite of this change in the situation the expert committee nevertheless proposed that the Convention should be incorporated into Danish law, and Parliament adopted a statute to this effect with the result that the Convention was made part of municipal law from 1 July 1992.

Against this background it seems relevant to ask the general question: What are the advantages and disadvantages of incorporation?

One main argument in favour of incorporation is that the incorporation of the Convention will clarify the legal position, and that even a statute solely designed to codify a practice already established by the courts will offer a decisive advantage by providing an explicit basis for the application of the Convention. The status enjoyed by the Convention in the legal system will be evident, and against a background of a more thorough knowledge of the Convention it will also be possible to generate a higher degree of awareness of the Convention principles. Therefore, incorporation of the Convention might lead to an improved legal protection of the individual citizen.

There are, however, also problems associated with incorporation of the Convention, and I would like to mention three of the most important ones:

1. *The question of finding a proper balance between the legislature and the judiciary.*

2. *The division of competence between national and international supervisory bodies, and*

3. *Technical disadvantages.*

Re 1. Irrespective of whether incorporation has taken place or not, the legislature will have to follow the developing case law from the Convention organs. It is very important that the legislature continuously adapts national rules of law to the Convention on a case by case basis regardless of any possible incorporation. Incorporation should not be a pretext for passivity in the legislative branch with the result that the main responsibility for the practical observance of the Convention will be conferred on the judiciary. Incorporation would, however provide a safe legal foundation for the supervisory functions of the courts which should be the kind of safety-net to ensure the correct execution of the Convention.

The European Convention on Human Rights contains a number of vague standards which leave it to the individual Member State to exercise a considerable amount of discretion and the choices involved in such a political discretion should be made by the legislature and not by the courts, even in the case where the Convention is incorporated.

Let me, as an example of the interplay and balance between the legislature and the judiciary, mention a case decide by the Danish Supreme Court in December 1989. In this case, the Supreme Court considered whether it was contrary to Article 6 of the Convention (impartiality of courts) that a judge who had tried and convicted a person charged with drug trafficking had in fact prior to this tried and convicted several other persons charged with purchasing drugs from that person.

The Supreme Court found that in the light of the judgment of the European Court of Human rights in the Hauschildt-Case[7] it was doubtful whether the normal Danish practice whereby the same judge for practical reasons sentences all the persons charged in the same case was in accordance with Article 6.

Considering the far-reaching consequences for the organisation of the courts in Denmark that such an interpretation of Article 6 would entail, in particular courts with only one judge, the Supreme Court found, however, that the question should be dealt with by the legislature and not by the Supreme Court. The Supreme Court consequently held that the principle of impartiality had not been violated in the concrete case.

It seems correct that, in countries where the Convention has been incorporated, courts should also take this cautious attitude towards an independent interpretation of the Convention, notably in cases when such an interpretation might have more far-reaching consequences for existing law. The adoption of a similarly cautious attitude by the courts would mean that the balance between the legislature and the judiciary is not disturbed by incorporation.

Re 2. It has been argued that some of the decisions necessitated by the application of the Convention can be made only by the control organs under the Convention. This is, for instance, relevant in connection with Articles 8-11 of the Convention which provide that national

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7 *Decision of 26 September 1988. Series A No. 154.*

provisions which place restrictions on the exercise of such rights are only compatible with the Convention if necessary in a democratic society.

It has been argued that in circumstances where the Convention is incorporated and national courts are called upon to decide whether a concrete restriction is necessary in a democratic society or not and where no practice from Strasbourg has yet been established, uncertainty would inevitably result . Such uncertainty could be detrimental to the individual applicant in cases where the national courts have found no violation of the Convention and where the complainant therefore decides not to bring the matter to Strasbourg on the possibly wrong assumption that the matter has now been finally settled by the national courts or at least settled in a manner which will not strengthen the complainant's position in Strasbourg.

On the other hand, it has been argued that the government or State body is open to the risk that a national court of law will find a conflict with the Convention even if its finding is not based on the practice of the control organs under the Convention. The state will not be entitled to challenge such a decision before the control organs under the Convention but will have to abide by the decision of the national court.

I do not find that any major importance should be attached to these objections.

As far as the latter objection is concerned the situation would be most unlikely to occur on any major scale. And where a governmental organisation is incapable of convincing the domestic court of the correctness of an interpretation, there will normally be no reason to assume that the State will be more successful in a case before the control organs of the Convention.

As far as the first objection is concerned, where a citizen accepts a theoretically wrong interpretation of the Convention, it will in any event be up to the individual citizen to decide whether he or she wishes to bring a matter of human rights before the Convention organs. It is not the duty of the state in question to make sure that all cases where there might be a human rights' issue are brought before the organs under the Convention irrespective of the interests of the person in question. Furthermore, it will basically be an advantage for citizens, who are under a duty to exhaust local remedies, to be offered the possibility of hearing the national court's interpretation of the human rights' aspect of the case.

Re 3. It has been argued that a statute of incorporation will take the form of a supplementary act in relation to other legislation and therefore be systematically alien. Under normal circumstances, provisions on imprisonment will be looked for in the Administration of Justice Act and provisions on the minimum age for marriages will be looked for in the Contracting and Dissolution of Marriage Act, but both issues are governed by the Convention and the Protocols to the Convention and a statute of incorporation will apply as a supplement to the existing statutes, which will not thereby be formally amended.

There may be some force in the argument that this constitutes a departure from the generally accepted principles governing the drafting of legislation. However, no major importance should be attached to such departure, in part because it is an inevitable consequence of the first years following incorporation. Later, however, the relevant legislation should be adapted to the obligations imposed by the Convention, as interpreted by the control organs. A statute of incorporation is designed to clarify that the relevant national provisions are based upon international law, and to establish the binding nature of the provisions so incorporated.

Finally, it has been argued that incorporation will give rise to a very high demand for information and education pertaining to the Convention. This, of course, is true and it may at least for a certain period create some extra work for lawyers in private practice or in public service. In order to meet the demand for information, specific arrangements must be made. I do not, however, see that as a disadvantage because in any case - whether the Convention is incorporated or not - there is and must be extensive information about it on the national level in order to make the Convention a reality in the daily life of citizens.

To sum up: it is left to contracting States to decide in which way they will implement the rules of the Convention within their national legal system. Incorporation is certainly desirable as it represents a "particularly faithful reflection" of the aim of securing Convention rights to everyone within the jurisdiction of the Contracting States.

It is, however, important to underline that whether a state chooses to incorporate or to implement the rules in other ways, a state joining the Convention system will have to carefully scrutinise its national law and if necessary change legislation in order to bring it into conformity with the rules of the Convention.

Likewise any Contracting state must constantly follow the decisions from the Convention organs and, if necessary, change its legislation again in order to stay in conformity with the developing case law.

b.The implementation of international human rights agreements in Poland - Report by Prof. Zdzislaw KEDZIA, Poznan Human Rights Centre, alternate member of the European Commission for Democracy through Law on behalf of Poland

1. The role of international human rights law in the democratic change in Poland

Under the ancien regime in the Central and Eastern European countries, international human rights standards constituted a basic point of reference not only for the advocates of fundamental rights and freedoms but also for the whole political opposition. They delivered axiological criteria for the evaluation of existing and proposed political and legal solutions. They provided the focus for arguments in the political struggle for a democratic order. Numerous instances confirming this observation are widely known and do not need to be referred to here. In the light of these remarks, one would expect also that international human rights standards would be used as guidelines and as a point of reference by legislators, politicians, social movements and last but not least *by the administration of justice in the so-called new democracies. This has indeed been the case in Poland.*

2. International treaty obligations of Poland in the field of human rights

a. Substantial human rights

Poland has ratified 19 of the 25 existing universal treaties related to human rights (putting the ILO Conventions here aside). Among them are both international Covenants and, ratified most recently in 1992, the UN Convention relating to the Status of Refugees. Poland has not yet ratified :

- *Optional Protocol II to the International Covenant on Civil and Political Rights;*
- *1953 Protocol amending the 1926 Slavery Convention and the Convention itself, as amended;*
- *Conventions related to Statelessness, and*
- *Convention on the right of migrant workers and the members of their families.*

In 1993 Poland ratified the European Convention on Human Rights, including the majority of its Protocols. The ratification of both the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and of the Social Charter are under consideration.

b. Procedures

Until the political turn around of 1989, Poland refused to accept two types of implementation procedure, namely procedures providing for individual petitions and state complaints. This was related to the evident mistrust and reluctance which characterised the attitude of Poland, like other communist countries, towards international control over the fulfilment of international obligations in the field of human rights.

The political changes of 1989-90 in Poland have removed any ideological obstacles to the ratification of treaties providing for these procedures and to co-operation in the adoption of new ones. The declaration under Article 41 of the International Covenant on Civil and Political Rights was made in September 1990. The First Optional Protocol to the International Covenant on Civil and Political Rights was ratified in late 1991. The declarations under Articles 25 and 46 of the European Convention on Human Rights concerning individual petitions and the obligatory jurisdiction of the European Court of Human Rights respectively, as well as the declaration under Articles 21 and 22 acknowledging state complaints and individual petitions, of the International Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment were made in the Spring of 1993. Poland has still refrained from making a declaration under Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination (concerning individual petitions). Having regard to the general policy outlined above, however, one can expect also that this declaration will be made soon.

In the light of this information, one specific comment is required. One can say that the international protection of human rights has already entered the third stage of its development since 1945. "Standard setting" dominated the first stage; "standard implementation" has dominated since the middle of the seventies, and now it is the "prevention of violations". It seems that the problem of how to prevent human rights violations, how to react promptly and efficiently to grave violations and how to enforce human rights will draw our attention with increasing intensity in the coming years. First signs of its growing relevance are visible in the form of procedural solutions aimed at establishing emergency mechanisms within the United Nations and the CSCE. The most transparent legal treaty focusing entirely on the prevention of human rights violations is the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The proposal under discussion for an Optional Protocol to the UN Convention against Torture remains in line with this European instrument. Poland, being convinced of the value of preventive measures against human rights violations, strongly supports this proposal.

3. The place of human rights treaties in the Polish Legal Order

a. Historical development

The distance maintained by socialist states, including the Polish Government, after 1945 from international law and its enforcement machinery was usually accompanied by the silence of constitutional law as to the binding force of international law within the domestic legal order. The original text of the 1952 Constitution mentioned international treaties only to the extent of vesting competence to ratify and denounce them with the Council of State, the then collegial Head of State.

This silence did not characterise Polish legal theory, which developed a concept of ex proprio vigore *binding force of international treaties within the domestic legal order. According to this, the ratification of a treaty by the Council of State, which acted* inter alia *also as a substitute for Parliament, and its subsequent publication in the Journal of Laws, made treaty norms binding and applicable within the domestic legal order.*[8] *There were different views as to the place of these treaties in the hierarchy of legal sources. Some specialists wanted to see them on the same*

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[8] *Cf. comments on this concept by K. Skubiszewski, Das Verhältnis zwischen Völkerrecht und polnischem Recht, Festschrift für Rudolf Bindschedler (1980), p. 241 et seq.*

level as parliamentary statutes, others at the level of delegated or subordinate legislation. Unfortunately, this approach was not generally shared by the courts which, until 1980, refused to directly apply any norm of public law,[9] let alone norms of public international law.[10]

In June 1982, one of the exceptional decisions in this regard was taken by a Court in Olsztyn, declaring a man innocent who acted contrary to martial law. The Court explained that although the deed had been committed one day after the imposition of martial law, the particular Decree which had made this deed punishable was first published two days later. The Court based its verdict on Article 15 of the International Covenant on Civil and Political Rights,[11] laying down the principle lex retro non agit.

In 1981, ILO Convention No. 87 was also mentioned by the competent Court in decisions concerning the registration of trade-unions. But, in this case, the court did not fulfil functions characteristic of the administration of justice but acted as a registration body.

The situation remained unchanged until the judgment of the Supreme Court of 25 August 1987.[12] This was the final step in several proceedings that had been commenced by some units of the Trade Union "Solidarity" (banned after the imposition of martial law in 1981) for the purpose of applying for registration with the district courts. The courts refused to do so, referring to the provision of the Trade Union Law of 1982 which prohibited the establishment of more than one trade union within one employer. The Supreme Court dismissed the complaint, refusing to accept the argument raised by the trade unions that the Trade Union Law of 1982 was inconsistent with ILO Convention 87 and Article 22 of the International Covenant on Civil and Political Rights. The Court indicated that in the absence of any mechanism for the transformation of international law, the ratified treaties bound Poland externally and could not operate to provide a legal basis for a court decision. This verdict was strongly criticised in the legal literature.[13] Nevertheless, one might have assumed that it actually put an end to the concept that treaties had binding force ex proprio vigore. *Indeed, the Court did not mention this concept at all. After a few years, however, it turned out that this conclusion was somewhat premature. Let us come back to it at a later stage.*

b. New constitutional regulations

The amendment to the Constitution adopted after the Round Table Talks between the Government and the then opposition, on 7 April 1989,[14] created a new situation. By virtue of this new regulation, the President of the State was now competent to ratify and denounce

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9 *In 1980, the High Administrative Court was established with the competence to control the legality of administrative acts.*

10 *Some scholars tried to encourage courts to apply international human rights treaties ratified by Poland - see e.g. K. Skubiszewski, Individual Rights, International Treaties and the Legal Order of the Polish Peoples Republic, "Pa_stwo i Prawo", No. 7, 1981, p. 9 et seq. (in Polish).*

11 *See J. Kochanowski, T. de Virion, "Pa_stwo i Prawo", No. 9, 1982, p. 148 et seq.*

12 *Case : I PRZ 8/87, published in OSN (Decisions of the Supreme Court) 12/1987.*

13 *See T. Zieli_ski, "Palestra" No. 6 1988, p. 88; K. Skubiszewski, "Pa_stwo i Prawo", No. 6, 1988.*

14 *See Article 32 "g" of the 1952 Constitution.*

international treaties. In the event that the treaty under consideration imposed significant financial obligations on the state or required changes in existing legislation, the President was obliged to get authorisation from the Sejm (the central chamber of the Polish Parliament) prior to ratification.

This provision was similar to the regulation contained in the Polish Constitution of 1921. At that time the Parliament used to express its authorisation for ratification in the form of a parliamentary statute (a law). This continuing practice led to a change in the courts' interpretation of statutory transformation. In 1923, the Supreme Court stated : "Rules of international law constitute neither a direct source of rights or duties for Polish citizens against their own state nor may they become a source of this kind. They may and should, however, serve as an auxiliary source of material for the interpretation of legislation of the Republic of Poland; they cannot replace or derogate from this legislation".[15] *But subsequently the courts withdrew from this position and, although with some reservations, accepted the direct domestic applicability of international treaties ratified by Poland with the authorisation of the Sejm.*[16] *In this way, treaties indirectly became sources of domestic law with the rank of a statute. Moreover, apart from some cases the usual derogation rules applicable to statutes determined also the position of treaties within the hierarchy of legal sources. The practices described above found explicit expression in the Constitution of 1935.*

At the moment of the adoption of the Constitutional amendment of 1989, it was certainly not precluded that future practice would follow the one of 1921. But, finally it did. The first request for parliamentary approval of the ratification of an international treaty was submitted to the Sejm in the Spring of 1990 and concerned the Convention on the Rights of the Child. While asking for approval for ratification, the Government submitted to the Sejm a draft statute in the form of which it expected the Sejm to express its authorisation. The Foreign Minister who introduced the Government's proposal referred inter alia *to the practice under the 1921 Constitution.*[17] *In his opinion, the approval for ratification in the form of a statute might have provided the courts with a basis for interpreting treaties ratified in this way as having been transformed into the domestic legal order.*

The Parliament finally accepted the government motion[18] *and Poland ratified the Convention on the Rights of the Child in the first months of 1992. On 31 March 1992, the President of the Supreme Court asked his court for clarification of some legal questions which required a prior interpretation of the binding force and applicability of the said Convention within the Polish legal order. The Supreme Court used this opportunity to clarify its position towards this question generally. The Resolution of the Bench of 7 judges of the Supreme Court of Poland of 12 June 1992*[19] *read* inter alia *as follows : "The new Polish Constitution and the planned*

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15 *Decisions of the General Assembly of the Supreme Court, 1922-1925, No. 14.*

16 *See J. Barcz, Die Beziehungen zwischen Völkerrecht und Landesrecht in der Volksrepublik Polen - Probleme de lege lata et de lege ferenda, 1988, p. 6 et seq.*

17 *Minutes of the Sejm, Xth term, 30th Meeting of 24 July 1990.*

18 *On the relationship between both chambers and various proposals concerning the ratification procedure made during the consideration of this motion - cf. Z. Kedzia, The Place of Human Rights Treaties in the Polish Legal Order, European Journal of International Law, Vol 2, 1991, p. 136-137.*

19 *Case : III CZP 48/92.*

statute on the procedure for signature and ratification and on the binding force of international treaties should explicitly decide upon the relationship of treaty norms and domestic law. The proposed solution in this regard assumes a decisive supremacy of treaty law over domestic law. As long as it has not happened (the adoption of a new Constitution -ZK), it can be approved of in a manner similar to the jurisprudence of the inter-war years namely that the adoption of a parliamentary statute authorising ratification of an international treaty results in the transformation of that treaty into domestic law, and vests that treaty with the status of a statute. Since the Sejm has adopted the Statute authorising ratification of the Convention of the Rights of the Child and since it has been published in the Journal of Laws, it means that this Convention has been levelled with parliamentary statutes and may be applied by the courts like a statute, with all the consequences resulting therefrom". This resolution is the crowning piece in the process to date leading to the transformation of ratified international treaties into the domestic legal order.

On 17 October 1992, the Constitutional Act on the mutual relations between the legislative and executive institutions of the Republic of Poland and on local self-Government (the so-called "Small Constitution") was adopted.[20] Generally, it follows the concept of Article 32 "g" of the 1952 Constitution, as amended in 1989. Also at present, according to Article 33, paragraph 1 of the Constitutional Act, the President is competent to ratify and denounce international treaties. In this respect, he notifies both chambers of the Parliament (Sejm and Senate). Paragraph 2 of the same article provides that ratification and denunciation require authorisation by statute in cases of "international treaties relating to the borders of the State, to defensive alliances and to treaties which would burden the State with financial liabilities, or which would involve changes in legislation [...]" In the case of other treaties, this kind of authorisation is not necessary. Since human rights constitute a so-called "statutory matter" (regulations relating to human rights must have statutory rank), human rights treaties should be ratified with the authorisation of Parliament.

c. The categories of treaties

From the point of view of their incorporation into and enforcement within domestic law, international treaties can be differentiated as follows :

- *treaties which have been transformed either on the basis of the 1921 or the 1935 Constitution or on the basis of the regulation adopted in 1989 and replaced in 1992, e.g. the European Convention on Human Rights, the Convention on the Rights of the Child, and the Convention relating to the Status of Refugees belong to this category of treaties;*

- *treaties to which Polish law refers explicitly ;*

- *treaties which do not meet the criteria of Article 33, paragraph 2 of the "Small constitution" (formerly of Article 32"g" of the 1952 Constitution as amended in 1989) and have been ratified without the authorization of Parliament ;*

- *treaties ratified on the basis of the 1952 Constitution.*

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[20] *Journal of Laws, 1992, N°. 84, item 426.*

d. Case Law

Since the political change in 1989, the High Administrative Court, the Supreme Court and the Constitutional Tribunal have been clearly inclined to refer to and even to directly apply norms of international human rights treaties.[21] *However, despite the above resolution of the Supreme Court of 12 June 1992 concerning the transformation of international treaties the concept of* ex proprio vigore *binding force of international treaties may be seen to be making an authentic comeback.*

The lead in this regard had already been taken by the High Administrative Court before the political turnaround of 1989.[22] *It referred to international standards in a number of judgments. Initially, the Court recalled them as auxiliary sources of law only, in addition to Polish norms. For the Court accepted generally that there was no possibility of an effective claim against a decision based on a Polish norm because of its inconsistency with international law.*[23] *Simultaneously, however, the Court frequently put forward legal questions related to the binding force and applicability of international human rights standards to the Supreme Court and Constitutional Tribunal. A very interesting construct was formulated in the judgment of 29 November 1988. The Court stated : "Non-compliance by state organs with international obligations binding on them in the field of freedom of speech and publishing could be recognised as a violation of the constitutional principles of the foreign policy of the People's Republic of Poland.*[24]

In the judgment of 20 November 1990, the High Administrative Court made a clear, perhaps too optimistic, interpretation that "it is a generally accepted view that international treaties ratified by Poland and published in the Journal of Laws require neither transformation nor incorporation and are binding ex proprio vigore. *Moreover, in case of conflict between such treaties and domestic law, the principle of priority of international treaties over domestic law is to be applied".*[25] *In a case concerning the dismissal of a policeman,*[26] *the Court interpreted the right to judicial protection, in a manner which was decisive for its own determination of the case in the light of Article 14 of the International Covenant on Civil and Political Rights and of Article 10 of the Universal Declaration. The Court stated : "In any case, fundamental international norms concerning human rights protection should be relevant interpretative directives in regard to domestic law". Another very interesting judgment was passed by the Court on 10 August 1992,*[27] *concerning the refusal by the competent authority of permission to*

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21 *Cf. also L. Wi_niewski, Application of International Human Rights Treaties (In the light of the jurisprudence and of the activities of the Commissioner for Citizens' Rights), Pa_stwo i Prawo, No. 12, 1992, p. 52 et seq (in Polish).*

22 *Is it a coincidence that the former President of the High Administrative Court, Prof. Adam Zieli_ski, used to be a member of the Human Rights Committee under the International Covenant on Civil and Political Rights at that time?*

23 *Case I SA 1104/88.*

24 *OSP 9/1990, p. 695.*

25 *II SA 759/90.*

26 *II SA 35/91.*

27 *V SA 78/92.*

permanently reside to a Chinese citizen. The Court starts the reasoning of the judgment with a sentence : "No provision of any international treaty imposes on Poland the obligation to issue permission to permanently reside to Chinese citizens." It is remarkable that reference to Polish Law only follows this consideration of binding international law. It is not, however, entirely clear whether this judgment puts treaties ratified with and without the authorization of Parliament on an equal footing. It considers first the European treaties and then goes on to universal treaties without any distinction being drawn as to their direct applicability in Poland.

An important illustration of the position taken by the High Administrative Court and by the Commissioner for Citizens' Rights is to be found in their joint motion to the Constitutional Tribunal concerning the examination of the consistency of art. 36 of the Statute on the Frontier Guard with Articles 1 and 67 of the Constitution as well as with Articles 14 and 26 of the International Covenant on Civil and Political Rights[28]*. The organs based their question, inter alia, on Article 1 of Chapter I of the Constitution which lays down the principle of the rule of law in a democratic state. In their view, this principle requires that legislation and case law should both conform to standards approved of by democratic states, including human rights standards. They drew the attention of the Constitutional Tribunal to the fact that the Supreme Court in 1974 accepted (to a limited extent) the concept of* ex proprio vigore *binding force of international treaties and recognized its application to the control over the consistency of administrative acts with international treaties binding on Poland.*

The position taken by the Supreme Court in regard to the transformation of international norms was presented at the earlier stage. From the point of view of the applicability of untransformed treaties, the judgement of 17.10.1991 is worth mentioning here. The Court, acting within the framework of the extraordinary appeal procedure, stated that the conviction of a person by virtue of the Decree on martial law of 1981 violated the principle of lex retro non agit *as laid down in article 15 of the International Covenant on Civil and Political Rights and therefore was to be quashed. The Supreme Court thereby decided to apply an international norm which had not been transformed into Polish law and, in doing so, must be taken to have accepted one of the two following assumptions: i) international norms ratified and published in the Journal of Laws bind Polish courts directly and, in case of inconsistency with Polish statutory norms, prevail over them, or: ii) international norms are incorporated into Polish law by means of ratification and publication in the Journal of Laws and thereby occupy a place in the hierarchy of legal sources higher than that accorded to a statute. The conclusion concerning the rank of international treaties follows from the fact that Poland ratified the Covenants in 1976 whereas the Decree on martial law was adopted in 1981.*

The Constitutional Tribunal takes a clearly different view of the place of international treaties within the Polish legal order and its own competence to base decisions on international norms. On the one hand, in its decision on the aforementioned motion by the High Administrative Court and the Commissioner for Citizens' Rights[29]*, the Tribunal concluded: "The position of the Constitutional Tribunal is that the Republic of Poland, by ratifying the Covenants (treaties), is bound by them and therefore they should be applied, also by courts and according to the principle* proprio vigore*, unless it results from the content or formulation of the international (Covenant) treaty that it is not self-executing." On the other hand, the Constitutional Tribunal*

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[28] *RPO/72768/III/91.*

[29] *Decision of 7.1.1992 of the Constitutional Tribunal in the Frontier Guard case: K.8/91 - published in OTK (Jurisprudence of the Constitutional Tribunal) 1992, vol. 1, p. 76 - 84.*

pointed out several times that it was competent to examine neither the conformity of Polish law to international treaties[30] nor the conformity of international norms to the Polish Constitution prior to their ratification. Indeed, the relevant art. 33 "a" of the Constitution (1952), speaks exclusively about statutes and other normative acts issued by main and central State organs. This was the point of departure for the recent legislative initiative by the President of the state, according to which the Constitution should establish the competence of the Tribunal in the aforementioned areas. Moreover, in the course of the "travaux préparatoires" of the Statute on the Constitutional Tribunal, proposals concerning the competence of the Tribunal in respect of international treaties (in both aforementioned dimensions) were made and, after a debate, clearly rejected[31]. However, the generic interpretation has been certainly weakened by the fundamental change of the role that international law is now to play in the domestic legal order. Taking this change into account, the Constitutional Tribunal considers international human rights norms exceedingly often, in either of two ways. Usually, the Tribunal refers to them as a supplement to Polish norms in order to clarify the content of the domestic legal situation[32]. The Constitutional principle of the rule of law is the point of departure for this approach.

In the Frontier Guard case[33], the Tribunal found a particular way to refer directly to the question of conformity of domestic norms to international treaties. It does not base its decision on an international norm but expresses its opinion about the conformity of the Polish law with international law when the opportunity occurs and circumstances require it. In the second paragraph of the sentencing part of the decision, the Tribunal stated: "The Constitutional Tribunal concludes: for the purposes of determining what orders to make that article 36 para 2 of the Statute of 12 October 1990 on the Frontier Guard is inconsistent with articles 14 and 26 of the International Covenant on Civil and Political Rights [...]"[34].

So, the Constitutional Tribunal maintains its principal position that it lacks competence in respect of international law although it refers to this body of law in diversified forms more and more frequently. Nonetheless, is the present interpretation of the Tribunal's competence legitimate? Doubts might be raised in particular while considering certain new developments which have already been referred to. The ratification of important treaties by authorization creates a qualitative new situation. Article 18 para 4 of the Constitutional Act of 1992 reads:

> *"The President of the State may, before signing a statute, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution. The reference by the President to the Constitutional Tribunal shall suspend the time allowed for signing a*

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30 *The Constitutional Tribunal confirmed this in one of its earlier decisions - compare case: P. 1/87, OTK 1987, p. 16. The Constitutional Tribunal corroborated this position also after the amendment of art. 1 of the Constitution (principle of rule of law) in the Frontier Guard case K.8/91 - see note 22.*

31 *In the Frontier Guard Case (note 22), the Tribunal stated: "The exclusion of international treaties from the competence of the Tribunal became clear after the Statute on the Constitutional Tribunal entered into force [...]".*

32 *Case K. 1/88, 6/89; in particular: Frontier Guard case (note 22) where the Tribunal stated: "Taking into account the fact that the Covenants (treaties) have binding force, the Tribunal considers them but exclusively within the interpretation of the Constitution".*

33 *note 22*

34 *Ibid, (emphasis supplied)*

statute. The President cannot refuse to sign a statute which has been judged by the Constitutional Tribunal as conforming to the Constitution."

There is no reason to say that statutes authorizing ratification are excluded from this provision. The scope of the examination by the Constitutional Tribunal in this case - putting aside here the procedural aspects - may be interpreted having regard to the purpose of the statute, which is twofold, namely:

i) the authorization of the President to ratify the treaty concerned, and

ii) the transformation of the treaty into the domestic legal order - the statute plays the role of a vehicle for this transformation.

Taking the second of these purposes into account, one can conclude that if the President requests the Tribunal to examine the conformity of the statute authorizing the ratification of a treaty, the Tribunal should examine inter alia the conformity of the treaty itself to the Constitution. Otherwise, it would be impossible to adjudicate upon the constitutionality of the statute as the vehicle of transformation to domestic law. In other words, because of the need to consider form and substance together, a possibility of prior judicial review of the Constitutionality of international treaties to be ratified with statutory authorization has been indirectly installed in the Polish legal order. Unfortunately, there is no jurisprudences yet which could confirm or deny this interpretation.

In the light of this assumed interpretation of the authorizing statute as a vehicle for transformation of an international treaty, we should accept also another competence of the Constitutional Tribunal - that it is also competent to interpret which norm is binding in the case of conflict between a statutory norm and a treaty norm ratified with statutory authorization.

But what happens if the Tribunal refuses to accept that the resolution of the Supreme Court of 12.6.1992[35] *has the value of precedent? Firstly, the Tribunal can interpret* expressis verbis *the authorizing statute as a vehicle for transformation (in other words - it can follow the line of the Supreme Court and the jurisprudence before 1939). Secondly, the Tribunal is indubitably competent to examine the relationship between a domestic norm and the authorizing statute. While proceeding from the substantive point of view, the Tribunal should also deal with the international treaty which the authorizing statute refers to. It seems that it would be very difficult to argue that the Tribunal is not competent to follow this interpretation in the event that a competent person addresses the Tribunal for an interpretation of the binding law. This is because such competence would appear to follow the relationship between a domestic norm and the authorising statute, but again there is no jurisprudence yet which could assist us in these considerations.*

In conclusion, the Supreme Court, the High Administrative court, and the Constitutional Tribunal are of the opinion that, as a matter of principle, international treaties ratified by Poland are binding within the domestic legal order ex proprio vigore *and should be applied by state organs, including the courts. The lower courts are however, reluctant to follow this interpretation; probably not for conceptual reasons but because of a lack of experience in this regard. The Constitutional Tribunal does not recognize its competence in respect of*

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[35] *supra, n. 12*

international treaties although it refers to them as auxiliary sources of law. The Supreme Court interprets international treaties ratified with the authorization of Parliament as having been transformed into the domestic legal order with the rank of a statute.

Speaking about the advancement of the domestic applicability of international human rights treaties, attention should be drawn to the relevant and promoting role which the Commissioner for Citizens' Rights has played in this respect. In numerous interventions as well as in formal motions addressed to the Supreme Court or to the Constitutional Tribunal, the Commissioner has referred to the question of the consistency of Polish law with international human rights law[36].

e. The future Constitution

As it follows from the above analysis of the case law, the question of the binding force, and in particular of the direct applicability, of international treaties within the domestic legal order remains obscure, and sometimes even confusing. To solve this problem, a general regulation is required. A new Constitution is under preparation. Seven drafts have already been lodged with the Constitutional Committee of the National Assembly (both chambers jointly). In the current Constitutional debate, there are only marginal, if any, voices putting the direct applicability of the norms of international law into question. Differences occur, however, as to the way in which this desirable position is to be achieved. These differences can be related to the categories of international norms as well as to the place they have to occupy within the hierarchy of legal sources under the Constitution.

According to widely shared opinion, the President of the State should continue to ratify and denounce international treaties, which assumes that the Council of Ministers (the Government) should be empowered to conclude treaties. Also, the Constitutional Tribunal is expected to play an important role in the processes of ratification and application of international treaties. The idea of vesting the Constitutional Tribunal expressis verbis *with the competence to examine the conformity of international treaties with the Constitution and of statutes with treaties has numerous advocates. Similarly, support is given to the competence of the President to draw upon the opinion of the Constitutional tribunal as to the conformity of a treaty with the Constitution before ratification formally proceeds.*

As under present law, treaties of particular importance should require the prior authorization of the Sejm for their ratification, and with the consent of Parliament, international treaties should become, by virtue of the Constitution, directly applicable within the domestic legal order, and providing always that the given norm is self-executing as to its content. The advocates of this attitude vary, however, in their standings as regards what place international treaties should occupy in the hierarchy of legal sources. According to one opinion - that seems to be represented mainly by international lawyers - they should be put between the Constitution and parliamentary statutes. Others - mainly constitutional lawyers - think that treaties are to be placed on the same level as statutes[37]*. In this case all rules of derogation should be applicable,*

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[36] *See e.g. note 21*

[37] *Cf. L. Ka_ski, The Constitutional Regulation of the Individual's Status and the International Protection of Human Rights, in Z. Kedzia, (ed.), Rights, Freedoms and Duties of Man and Citizen in the new Polish Constitution, 1990, p. 81 et seq, (in Polish); also J. Jodlowski, Les traités internationaux dans la jurisprudence de la Cour Suprême de la République populaire de Pologne, in: J. Makarczyk (ed.), Etudes de droit international en l'honneur du juge Manfred Lachs, 1984, p. 135 et seq.*

in particular, the rules of lex posterior derogat priori *and* lex specialis derogat generali. *It is difficult to forecast the outcome of this dispute just now. One can say, however, that if the Parliament opts for the first variant, it will break the understanding of the place of international treaties in the domestic legal order which has hitherto dominated in Poland. On the other hand, to follow the line of current tendencies would seem to be encouraging as well as justified.*

The aforementioned solutions remain in line with the present ones. What is new is the "upgrading" of some of them, established by jurisprudence, to the constitutional level. However, the constitutional debate also covers additional aspects of the question. Firstly, they deal with the internal binding force and applicability of international treaties which had been ratified before the requirement of prior authorization by Parliament for ratification was established, and which would have demanded such an authorization under the present rule. It seems that it is an approach shared by the majority of commentators to treat this question generally (e.g. in the transitory provisions of the future Constitution) by saying that such treaties have an equal internal legal position to the treaties ratified under the new Constitution. Secondly, the rapprochement by Poland with the different forms of international co-operation - inter alia - *with the Council of Europe and the European Communities*[38] *- has made the drafters aware of the necessity to include also a so called "integration clause" into the proposed texts of the new Constitution. For instance, the draft prepared by the Legislative Council at the Prime Minister contains the following provisions in this regard:*

i) by virtue of an international treaty, legislative, executive competence as well as competence in administration of justice may be transmitted to an international organisation; it cannot, however lead to the violation of the democratic principles of the Constitution or of human and citizens' rights;

ii) the statute by which the Sejm gives its consent to ratification of such a treaty requires the majority provided for in the case of an amendment to the Constitution;

iii) if it results from the treaty establishing the international organisation, the norms of the organisation are applicable directly within the domestic legal order.

In spite of a specific solution which will be eventually adopted in the new Polish Constitution, one can already say that the application of international treaties has become a serious challenge to all, state organs as well as judges, attorneys and other practising lawyers. Poland has already entered into the process leading to the general applicability of international treaties, including human rights treaties, within the domestic legal order. In relation to the European Convention, ratified under the new Constitutional regulation, the situation complies with the opinion expressed by the European Court of Human Rights[39]*: "That intention (to secure rights and freedoms set out in Section I of the ECHR) finds a particularly faithful reflection in those instances where the Convention has been incorporated into domestic law". This is, however, only the beginning of an exciting but difficult experience.*

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[38] *Taking into account the scope of the Maastricht Treaty, the discussed question becomes also relevant in regard to a number of fundamental human rights, although, generally, article F (2) of the Maastricht Treaty refers to the European Convention on Human Rights.*

[39] *Ireland v. Great Britain, A/25, p. 90-91*

INSTEAD OF CONCLUSIONS

In 1989, following the developments in Central and Eastern Europe, the Swiss member of the European Commission on Human Rights proposed to consider the possibility of opening the Convention to non-member States of the Council of Europe. The Council asked me to prepare an expert opinion concerning this proposal and I would like to quote briefly the conclusion. Raising doubts in this regard I wrote: "The risk of both the "softening" of the existing European system of human rights protection and the destabilisation of the Council of Europe itself is too big; moreover, it is not counterbalanced by due advantages. It is hard to believe, for instance, that the adoption of the necessary amendments to the Convention will take less time than the obtaining of membership of the Council of Europe by the aforementioned countries which have already submitted their applications to the Council. Concluding, it would be difficult under present conditions to find the eventually convincing arguments for why the way to the Convention through the membership of the Council of Europe should no longer be the most required and, in effect, the only one. This opinion does not, of course, oppose the thesis that the accession to the Convention (even with reservations) should further encourage the respective state to accelerate the adaptation of its domestic law to the European standards."[40]*. It seems to me that this opinion continues to maintain its validity, taking into account the Polish experience as well. On the other hand, saying today that Polish law in general remains in conformity with the Statute of the Council of Europe and, consequently, with the European Convention, we have, of course, to admit that there are still some inconsistencies. A few of them have been identified (e.g. detention order issued by the public prosecutor, insufficient - as it seems - protection of conscious objectors). Others will probably become apparent during proceedings before the European Commission and the Court.*

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[40] *Cf. Z. K_dzia, Accession of Non-Member States to the European Convention on Human Rights, An expert study for the Committee on Legal Affairs and Human Rights of the Council of Europe, CoE doc. As/Jur (42)4, 1990.*

c.Summary of the discussions on the implementation of international human rights agreements

1. Treaties and national law

There was general agreement that treaties are binding on the States having ratified them. From the point of view of international law there can be no doubt about this and it has been established already in the case law of the Permanent Court of International Justice that no State can refer to its domestic law to escape obligations under international law.

The extent of this obligation has however become more problematic nowadays, in particular with respect to human rights treaties. Traditionally international treaties were interpreted restrictively: in case of doubt there was a presumption against a limitation of national sovereignty by the treaty. This rule however does not apply nowadays to international human rights treaties. In particular the organs of the European Human Rights Convention have developed a case law which often goes beyond the original wording. For example Article 11 of the Human Rights Convention has been interpreted not only to contain the right to join a trade union but also, under certain conditions, not to join a trade union. This progressive development of case law makes it difficult for States always to comply with international obligations and it might be asked if in certain cases the international tribunals might not have gone too far and whether there should be a body to which conflicts of interpretation between a State and an international tribunal could be referred. Similarly, it was argued that national statutes, like the Code Napoleon during the 180 years of its existence, have often been interpreted by courts in a way which goes beyond, or even against, the text of the statute. In the field of international law this was considered unacceptable since by ratification of the treaty national sovereignty has only been limited as far as the text of the treaty goes.

Others accepted that international judicial bodies, in particular in the area of human rights, have to develop a progressive case law. In order to prevent case law in this area from being too diverse it might however be advisable that national courts, in their interpretation of international legal instruments, do not go beyond the already established case law of the international judicial bodies. For example the Danish Supreme Court has refused to give a more far reaching interpretation of a provision of the European Convention of Human Rights than the one already established by the Strasbourg organs.

Another proposal was to set up an international court with the task of giving binding rulings on questions of international law. The European Court of Justice has established the principle of supremacy of Community law within the European Community, something which has been difficult for national courts to accept. It would be a huge step forward for international law if an international court existed to which a national judge could refer a question of international law arising in a case and which would then be able to give an interpretation binding for the national judge. This would be somewhat similar to the situation in Germany where the Bundesverfassungericht, under Article 100, paragraph 2 of the Grundgesetz, has to decide whether there is a rule of international law which is part of federal law. President La Pergola had, together with President Badinter of the French Constitutional Council, suggested the

setting up of such a court within the framework of the CSCE. However the majority had not accepted the proposal.

Other participants had doubts about this proposal. The institution of an international court with the power to give binding rulings was regarded as violating the independent character of national courts. In addition, the setting up of one single court with such a competence might inhibit the further development of legal norms.

Another question concerning the interpretation of treaties was which linguistic version should be taken into account. Traditionally in Sweden only the Swedish text of legal instruments was taken into account. In Finland the position is quite different and the Finnish courts give their rulings on the basis of the original text. For example the European Convention on Human Rights is applied on the basis of the English and French texts. Even if there exists an authentic Finnish version, the other linguistic versions are taken into account and might even be preferred if the negotiations have been conducted in the other language. Denmark occupies an intermediary position. In principle the Danish text is applied but versions in other languages are taken into account if difficulties of interpretation arise.

2. Customary international law and national law

Doubts were expressed whether customary international law is binding on States like ratified international treaties. If customary law is binding anyway, why bother to ratify treaties?

On the other hand it was pointed out that from the point of view of international law there is no doubt about the binding nature of customary law which is mentioned among the sources of law in the ICJ Statute. It is true however that nowadays customary law no longer has its previous importance since large areas of international law have been codified. But there are still some areas like state responsibility and the law of aliens which are largely customary. Moreover if one rejects the binding force of custom one also has to reject ius cogens.

Other participants accepted the binding character of customary law at the international level but questioned its applicability proprio vigore at national level, in particular with respect to individuals. Therefore it seems appropriate to provide in the constitution, as was done in many modern constitutions, that the generally recognised principles of international law apply as part of national law.

3. The application of international law within the Polish legal system

Article 1 of the Constitution of Poland reads as follows : "The Republic of Poland is a democratic State ruled by law and implementing the principles of social justice". This very broad and flexible provision opens the door to take into account also international law. The Polish Constitutional Tribunal has however not accepted the opinion that this article contains an incorporation of international law within the Polish legal system and it does not consider itself competent to verify the compatibility of Polish law with international law.

The Constitutional Act of October 1992 on the mutual relations between the legislative and executive institutions of the Republic of Poland and on local self-government (the so-called "Small Constitution") has introduced the possibility of the President referring a statute to the Constitutional Tribunal to obtain a ruling on its constitutionality before its coming into force. This possibility can also be used for international treaties.

It was pointed out that in 1985 more than 80 Polish international lawyers adopted a resolution according to which :

- *international law binding Poland is part of the Polish legal order;*

- *the courts are applying international law; physical and legal persons may have rights and duties resulting from international law and may avail themselves of such rights before the courts;*

- *in case of conflict, international law prevails.*

This resolution concerns not only treaties but also customary law.

SECOND WORKING SESSION

Chaired by Prof. Zdzislaw KEDZIA, Poznan Human Rights Centre, alternate member of the European Commission for Democracy through Law on behalf of Poland

THE ROLE OF THE CONSTITUTIONAL COURT IN THE INTERPRETATION OF INTERNATIONAL LAW

a. *Report by Mr Roger ERRERA, Conseiller d'Etat, Conseil d'Etat, Paris*

b. *Report by Prof. Tomasz DYBOWSKI, Judge at the Constitutional Tribunal*

c. *Summary of discussions*

a.The role of the constitutional court in the interpretation of international law within a domestic legal system - Report by Mr Roger ERRERA, Conseiller d'Etat, Conseil d'Etat, Paris

For nearly 40 years, the legal systems of most member countries of the Council of Europe have undergone what can be termed, without exaggeration, a twofold revolution. The first concerns the affirmation of constitutional law, and more especially, the institution of judicial review of the constitutionality of laws[41]. The second is the increasingly important position of international law in the law applied within each of the countries. Two categories of text should be mentioned in this connection:

i. First, as regards the twelve member States of the European Community, there exists to date the Treaty of Rome and subordinate legislation (regulations and directives), to which should be added the case-law of the Court of Justice of the European Communities. Community law assigns an important place to fundamental rights[42]. The Court of Justice bases itself on the international instruments for the protection of human rights signed by the member States, particularly the European Convention on Human Rights. The Court's case-law affirms and applies the general principles of law, a technique familiar to more than a few national courts, such as the French Conseil d'Etat[43]. *The scope of these principles is considerable: proportionality[44], legal certainty[45], right to an effective judicial remedy [46]etc.*

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41 *For an overall analysis, see Le controle juridictionnel des lois. Légitimité, effectivité et développements récents under the direction of L Favoreu et A J Jolowicz, Paris and Aix-en-Provence, 1984. The texts of the constitutions of the EEC member States have been collected together in Les constitutions de l'Europe des Douze, Texts assembled and presented by H Oberdorff, Paris, 1992.*

42 *The bibliography on this theme is a very long one. The following recent studies may be singled out: Joseph H H Weiler, "Protection of fundamental human rights within the legal order of the European Communities", in International Enforcement of Human Rights, under the direction of R Bernhardt and A J Jolowicz, Berlin, 1986; O Due, "Le respect des droits de la défense dans le droit administratif communautaire", Cahiers de droit européen, 1987, 383; Russel M Dallen Jr, "An overview of the European Community protection of Human Rights with some special reference to the United Kingdom", 27 CMLR (1990), p. 761; J Schwarze, "The administrative law of the Community and the protection of human rights", 23 CMLR (1986), p. 401; H G Schermers, "The European Communities bound by fundamental human rights", 27 CMLR (1990), p. 249.*

43 *On the general legal principles of Community law, see J Boulouis, Droit institutionnel des Communautés européennes, Paris 1990, p. 179 et seq; J Boulouis and R M Chevallier, Grands arrêts de la Cour de justice des communautés européennes, I, 5th edition, Paris, 1991, No. 15, p. 78 et seq; J Schwarze, "Tendencies towards a common administrative law in Europe", ELR, 1991 p. 3.*

44 *Cf case 8/55, Federation Charbonnière de Belgique v. ECSC, [1956], ECR 245; case 154/78 Ferriera Valsabbia and others v. Commission, [1980], ECR 907.*

45 *For an analysis, see Boulouis and Chevallier, op cit, note 3, p. 82 et seq.*

46 *Case 222/84, Johnston v. Chief Constable of Royal Constabulary, [1986] ECR 1651; concl. Darmon p. 1654.*

ii. Secondly, there are the main instruments for the international protection of human rights[47], namely the European Convention on Human Rights[48], the United Nations Covenant on Civil and Political Rights[49] and the 1951 Geneva Convention relating to the Status of Refugees[50].

For all the parties concerned - legislators, governments, courts and protagonists on the social scene - these two revolutions are producing and will increasingly continue to produce significant effects, extending to the teaching of law and the training of members of the judicial professions. Moreover, these are not merely two parallel developments: the position of international law, including treaties, in relation to national law and the procedures for incorporating it in the domestic legal system are usually the subject of constitutional provisions[51]. Given the specific nature of the distinctive legal system it represents, Community law raises particular problems[52], which will not be studied in detail in this report. The relative weight given to case-law of the European Court and Commission of Human Rights in domestic law is governed by the particular procedures laid down by national legal systems[53].

In view of the particular features of the legal system and the organisation of the courts in France, this report will be divided into three parts:

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47 *Texts in L Brownlie, ed. Basic Documents on Human Rights, 2nd ed, Oxford, 1981, and F Sudre, Protection internationale des droits de l'homme, Paris, 1989.*

48 *Cf. J E S Fawcett, The application of the European Human Rights Convention, 2nd ed, Oxford, 1987; A Z Drzemczewski, European Human Rights Convention in Domestic Law. A comparative study, Oxford, 1985; G Cohen - Jonathan, La Convention européenne des droits de l'homme, Paris, 1989; Raisonner la raison d'Etat, under the direction of M Delmas-Marty, Paris, 1989. For a comparative study of its application see, in addition to Drzemczewski op cit, J Polakiewicz, "The European Human Rights Convention in Domestic Law: The impact of Strasbourg case-law in States where direct effect is given to the Convention", Human Rights Law Journal, 1991, pp. 65-85 and 125-142; by the same author, "La mise en oeuvre de la Convention européenne des droits de l'homme en Europe de l'Ouest. Aperçu du droit et de la pratique nationaux", Revue universelle des droits de l'homme (hereafter RUDH), 1992, p. 359; and "La mise en oeuvre de la Convention européenne des droits de l'homme et des décisions de la Cour de Strasbourg en Europe de l'Ouest". Une évaluation, ibid p. 418; see also "La mise en oeuvre de la Convention européenne des droits de l'homme en Europe de l'Est et de l'Ouest", RUDH, volume 4, No. 10/11, 1992.*

49 *The International Bill of Rights, the Covenant on Civil and Political Rights, under the direction of L Henkin, New York, 1981.*

50 *Cf G S Goodwin - Gill, The refugee in international law, Oxford, 1983; on French law and practice: F Tiberghien, La protection des réfugiés en France, 2nd edition, Paris 1988.*

51 *J Rideau, "Constitution et droit international dans les Etats membres de la Communauté européenne", Revue française de droit constitutionnel, 1990, pp. 259-296 and 425-434.*

52 *M Darmon, "Juridictions constitutionnelles et droit communautaire". Revue trimestrielle de droit européen, 1988, p. 217.*

53 *See J Polakiewicz, loc. cit.; F Gölcüklu, "La hiérarchie des normes constitutionnelles et sa fonction dans la protection des droits fondamentaux", RUDH. 1990, p. 289 (see p. 299 et seq).*

I. *Given the position of the* Conseil Constitutionnel *(Constitutional Council) in French law, the first part will be devoted to the case-law of the* Conseil Constitutionnel *in relation to international law;*

II. *Part II will examine the case-law of the* Conseil d'Etat *from the standpoint of decisions relating to foreigners, as measured against that part of Article 8 of the European Convention on Human Rights which deals with the right to respect for family life;*

III. *The third part will be concerned with the law relating to refugees, ie the application and interpretation of the Geneva Convention by the national courts.*

I

The Conseil Constitutionnel *and international law*

Since 1991, the Constitutional Council has delivered five important judgments concerning the relationship between international law and national law, three of them in 1992 in connection with the Maastricht Treaty[54]*. It is therefore appropriate, bearing in mind the title of this report and the subject of the seminar, to make some comments here on the decisions taken by the Council and their consequences.*

After first looking at the relevant texts of the Constitution, I shall go on to consider the essential features of the case-law of the Constitutional Court.

A. *The relevant provisions of the Constitution*[55]

Under the terms of the 14th paragraph, first sentence, of the preamble to the 1946 Constitution, incorporated in that of 1958, "The French Republic, faithful to its traditions, shall observe the rules of public international law". This wording is reminiscent of Article 38.1.c of the Statute of the International Court of Justice, which states that the Court shall apply "the general principles of law recognised by civilised nations".

It may also be compared with clauses appearing in the constitutions of other European countries, such as Article 25 of the Basic Law of the Federal Republic of Germany: "The general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory".

The 15th paragraph of the same preamble provides as follows:

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[54] *Decisions 91-293 DC of 23 July 1991 on access to the civil service by Community nationals; 91-294 DC of 25 July 1991 on the ratification of the convention for the application of the Schengen agreement (hereafter: Schengen); 92-308 DC of 9 April 1992 (Maastricht I); 92-312 DC of 2 September 1992 (Maastricht II); 92-313 DC of 23 September 1992 (Maastricht III).*

[55] *Constitution. Lois organiques et ordonnances relatives aux pouvoirs publics. Journal officiel, Paris, 1992. For a translation of the French Constitution into four languages, see La Constitution française. Français, anglais, allemand, espagnol, italien, under the direction of O Duhamel, A de Moor, C Pollmeier, P Vilanova, J Varnet and M Portelli, Paris, 1992.*

"Subject to reciprocity, France will consent to such limitations of sovereignty as are necessary for the realisation or the defence of peace".

Under Article 54, the Constitutional Council, upon referral of a matter to it by the President of the Republic, the Prime Minister, the President of one or the other House or 60 deputies or 60 senators, is authorised to declare that an international commitment contains a clause contrary to the Constitution. In that case, authorisation to ratify or approve the commitment in question may be given only after the Constitution has been revised.

Article 55 states clearly that treaties, once ratified and published, have an authority superior to that of laws.

Articles 88 (1) to 88 (3) are the fruit of the constitutional revision of 1992 made necessary by the Maastricht Treaty: Article 88 (1) affirms the participation of France in the European Communities and in European Union. Article 88 (2) provides that, subject to reciprocity and in accordance with the procedures laid down by the Maastricht Treaty, France consents to the transfer of the necessary powers for the establishment of European economic and monetary union, as well as for the determination of the rules governing movement across the external frontiers of the EEC member States. Article 88 (3) deals with the right of citizens of the European Union to vote and to stand as candidates in municipal elections.

B. The essential features of the Constitutional Council's case-law may be summed up as follows[56]:

a. In addition to its powers under Article 54, referred to above[57], when legislation authorising the ratification of a treaty is referred to it under Article 61 of the Constitution, the Constitutional Council reviews the constitutionality of the treaty. [58]

b. Once an international commitment has been incorporated in the domestic legal system, its constitutionality can no longer be disputed.[59]

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[56] *Some recent studies may be cited from among an abundance of reference works: P Gaïa, Le Conseil constitutionnel et l'insertion des engagements internationaux dans l'ordre juridique interne , Paris, 1991; "La Constitution française et le Traité de Maastricht", Revue française de droit constitutionnel, special edition 1992, No. 11; J Rideau, "La recherche de l'adéquation de la Constitution française aux exigences de l'Union européenne", Revue des Affaires européennes 1992, page 7; E Picard, "Vers l'extension du bloc de constitutionnalité au droit européen?", Revue française de droit administratif, 1993, page 47; C Grewe and H Ruiz- Fabri, "Le Conseil constitutionnel et l'intégration européenne. Jurisprudence de juillet 1991 à septembre 1992", RUDH, 1992, p. 277.*

[57] *The Constitutional Council has had cases referred to it on five occasions by virtue of this article: cf its decisions of 19 June 1970, page 15 (Luxembourg Treaty), of the same date (decision of the Council on the Community's own resources); of 30 December 1976 (election of the members of the European Parliament), 20 January 1985 (ratification of Protocol No. 6 to the European Convention on Human Rights) and 9 April 1982 (Maastricht I).*

[58] *Cf 17 July 1980, page 36.*

[59] *Cf. 30 December 1977, page 44 (case concerning Community regulations).*

c. The Constitutional Council refuses to review the conformity of the law with a treaty[60]*. Responsibility for such review lies with the ordinary courts.*

d. Nor does it monitor the conformity of a treaty with another international undertaking[61]*.*

e. The Constitutional Council has on several occasions considered arguments based on the violation of the above-mentioned 14th preambular paragraph of the Constitution concerning the rules of public international law, ie unwritten international law[62]*.*

The decision of 9 April 1992[63] *is the first one to use this clause in relation to the merits of a case. In it, the Council affirms that "these rules include the* Pacta sunt servanda *rule, which implies that any treaty in force binds the parties and must be implemented by them in good faith". This affirmation or reminder made it possible to preserve in this case what is known as the "*acquis communautaire" *(sum total of Community experience and achievements). It may be recalled that these are rules of constitutional value.*

f. According to the Council's case-law, it is necessary to amend the Constitution before the ratification of an international undertaking can be authorised in cases where:

- *One or more clauses of the treaty are inconsistent with the Constitution. As far as the Maastricht Treaty is concerned, this was the case with the right of nationals of EEC member States to vote and stand as candidates in municipal elections, taking into account Article 3, together with Articles 24 and 72, of the Constitution, but the same was not true of the exercise of these rights in the election of members of the European Parliament. Indeed, the Parliament does not participate in the exercise of national sovereignty and is not part of the institutional framework of the Republic;*

- *A clause affects or calls in question "the essential conditions for the exercise of national sovereignty". This concept has been used by the Constitutional Council*[64] *since 1970*[65]*. It includes in particular the State's duty to guarantee respect for the institutions of the Republic, the continuity of national life and the rights and freedoms of citizens.*

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60 *See its decisions of 15 January 1975, 20 July 1977 and 17 July 1980. The situation is different when the Constitutional Council rules as a court on the lawfulness of parliamentary elections (cf its decision of 21 October 1988 where it examined a claim based on the conformity of the Electoral Provisions Act with a treaty).*

61 *17 July 1980.*

62 *Cf 30 December 1975 (self-determination of the Comoro Islands); 16 January 1982 (extra-territorial effect of nationalisation laws); 8 August 1985 (Act concerning New Caledonia).*

63 *Maastricht I.*

64 *id.*

65 *See the following decisions: 19 June 1970, p. 15; 17 July 1980, p. 36 (Franco-German convention on mutual assistance in judicial matters); 22 May 1985 (Sixth Additional Protocol to the European Convention of Human Rights); 25 July 1991 (Schengen).*

In 1992, the Constitutional Council found that the provisions of the Maastricht Treaty concerning the establishment of a unified monetary and exchange policy and the measures concerning the entry and movement of persons modified or called in question these "essential conditions"[66].

g. Up until quite recently, only limitations of sovereignty (mentioned in the 15th paragraph of the preamble) were in conformity with the Constitution, not transfers of sovereignty[67].

Since the Maastricht I decision, the reference standard has become that of the transfer of responsibilities. Such transfers do not violate the Constitution unless, of course, they interfere with the essential conditions for the exercise of national sovereignty, referred to above. It is for this reason that the same formula is found in the new Article 88 (2) of the Constitution, since its revision in 1992.

II

The right to respect for family life and the application of Article 8 of the European Convention on Human Rights to decisions concerning aliens

For reasons that are obvious, the rights of aliens were accorded very little importance in the elaboration of the European Convention on Human Rights. This is attested by the preparatory documents and justified by the circumstances prevailing at the time. The same is no longer the case today: the Convention is increasingly relied upon in national legal proceedings. In Strasbourg, the cases brought before the Commission and the Court refer more and more frequently to decisions taken in respect of aliens (eg expulsion, extradition, refusal of entry).

Some general remarks will be made at this point as a prelude to comments on the application of Article 8.

General observations

The Convention is based on the principle of non-discrimination with regard to the rights it guarantees (Article 14). It is applicable to "everyone within the jurisdiction" of States Parties. The Commission may receive petitions "from any person" claiming to be the victim of a violation by one of the Contracting Parties of the rights set forth in the Convention.

Certain articles of the Convention authorise only restrictions on the rights of aliens : this is the case in particular with Article 5 para 1f concerning the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition, and Article 16.

When aliens are mentioned elsewhere in the Convention, the aim in most cases is to secure their protection: this is true of Article 2 para 1 of Protocol No. 4 ("Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom

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66 *Maastricht I.*

67 *Cf 30 December 1976, 29 April 1978 and Schengen.*

to choose his residence"), Article 4 of the same Protocol (prohibition of collective expulsion) and Article 1 of Protocol No. 7, which concerns procedural guarantees in cases of expulsion.

The application of Article 8

There is a substantial body of case-law of the Court and the Commission concerning the application of Article 8 on measures taken with regard to aliens. It may be summed up as follows:

- *The Convention does not guarantee the right of an alien to reside in a given country or not to be expelled from that country;*

- *Measures taken in respect of aliens must not disregard the rights secured for them under the Convention;*

- *When it comes to checking the conformity of a measure with Article 8, four questions have to be answered: a. Does a family life exist in the case under consideration? This is a question of fact.* De jure *and* de facto *relationships are duly taken into account. b. Does the* decision *constitute interference with the right guaranteed by Article 8? The answer is affirmative when the decision is likely to prevent family life from continuing elsewhere, for instance in the country of origin, for economic, social or cultural reasons. The case-law takes into account the existence of effective links with the country of residence, the length of stay and the absence or loosening of such links with the country of origin (language; presence of other family members). c. Is the interference based on one of the grounds set forth in Article 8 para 2? d. Last but not least, was the interference "necessary in a democratic society" for the achievement of the above-mentioned legitimate aim?*

It is the latter point to which the Court gives its most careful attention, with a view to applying the proportionality rule, one that is essential to monitoring the conformity of measures taken by the public authorities with the Convention[68].

French administrative case-law

a. Irrespective of Article 8, the law applicable to aliens already recognised and protected their family life, at least in part, as is shown by the following illustrations:

- *As early as 1978, the* Conseil d'Etat, *in a landmark decision*[69]*, recognised the right of aliens to a normal family life as a general principle of law which derived its justification from the preamble to the Constitution. This meant that an alien lawfully resident in France was entitled to be joined by his spouse and dependent children. This right can be regulated only for reasons based on either public*

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[68] *Cf the following decisions of the Court: 28 May 1985, Abdulaziz, Cabales and Balkandali v. United Kingdom; 21 June 1988, Berrehab v. Netherlands; 18 February 1991, Moustaquim v. Belgium; 26 March 1992, Beldjoudi v. France, RUDH, 1993, p. 40.*

[69] *Conseil d'Etat, GISTI, 6 December 1978, p. 493; concl. Dondoux, RGDIP, 1979, p. 139; D 1979, p. 661, note Hamon.*

order or the social protection of the alien and his family (means test and housing criteria). This right was subsequently confirmed by the applicable regulations. The courts clarified in their case-law the meaning of the words "spouse"[70], "dependent child"[71] and "means test and housing criteria".[72] Various bilateral conventions specify the upper age limit for children;

- *The Order of 2 November 1945 concerning aliens lists several categories of aliens who, on account of social or family status, can be neither deported nor removed from the territory (Section 25);*

- *Lastly, the case-law relating to removal (order given to an alien whose legal situation is not in order to leave the territory) took account of the personal or family situation of the individual concerned, if the decision entailed consequences "of exceptional gravity"[73] for him.*

b. Since 1991 the courts have discontinued adherence to the previous line of authority which refused to take account of Article 8 of the Convention in such cases. Now, when this defence is raised, a review is made of the conformity of the measures taken in respect of aliens with Article 8 para. 1. This judicial practice is applicable to all measures: deportation; refusal of entry or of a visa or residence permit; removal from the territory.[74]

These precedents are very important for the reason that they cover the full range of measures that can be applied to aliens. The administrative courts are inclined increasingly to take account of the case-law of the European Commission and Court of Human Rights. However, as has already been said, this case-law relies on the essential concept of proportionality. The national courts must obviously do the same. As a result, the scope of the judicial review process is broadened and intensified. It was a fairly limited procedure up to 1991, but that is no longer the case, and this development should not stop there. This illustration of the concrete influence of international law on national law is as spectacular as it is welcome.

III

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70 *In a decision of 11 July 1980, Minister of the Interior v. Montcho p. 315, concl. Rougevin - Baville, RCFIP, 1981, p. 665, it was held that polygamy did not constitute statutory grounds for refusing a residence permit.*

71 *Cf Limoges administrative tribunal, 17 December 1987, Mme Khattouf, p. 501: decision to set aside the refusal of family reunion in respect of a child who was not the applicant's legitimate child but had been given into the applicant's custody by a Moroccan judgment.*

72 *With regard to housing criteria, see 24 November 1989, M. et Mme Masamba; on the means test, 12 January 1990, Moncef; 7 December 1990, Keles.*

73 *Cf 29 June 1990, Préfet du Doubs c. Olmos Quintero.*

74 *With regard to deportation, see Beldjoudi, 18 January 1991 (in a ruling preceding that of the court, the Conseil d'Etat confirmed the lawfulness of the measure); Belgacem, 19 April 1991 (nullification); Serend, 13 May 1992. For refusal of a residence permit, see Ministre de l'Intérior c. Mme El Khalma, 22 May 1992; for a case of removal from the territory, see Préfet de la Haute Loire c. Cifci, 15 April 1992; for refusal of a visa, see Aykan, 10 April 1992; for refusal of a residence card, see Marzini, same date.*

The contribution of national courts to the protection of refugees: interpretation of the Geneva Convention

Designed as a follow-up to the special instruments for the protection of refugees elaborated between the two wars and based on the lessons of past experience, the 1951 Geneva Convention, completed in 1967, an instrument of consummate legal workmanship, requires interpretation - like any other convention - by the competent national courts. The relevant bodies in the case of France are the Commission des recours des réfugiés *(Refugee Appeals Board), a specialised court set up under the 1952 Act establishing the French Office for the Protection of Refugees and Stateless Persons (*Office français de protection des réfugiés et apatrides*) and the* Conseil d'Etat *(Council of State), which hears appeals from the decisions of the Board*[75].

Four illustrations are given below of the contribution of administrative case-law to the legal protection of refugees:

A. The origin of persecution

Article 1 of the Geneva Convention states that the definition of the term "refugee" covers any person who, owing to well-founded fear of being persecuted for one of the reasons listed, is unable or unwilling to avail himself of the protection of the country of his nationality. It says nothing about the origin of persecution. In most cases, the responsible party is the government or the public authorities of the country concerned. But that is not always the case. In many countries, individuals or members of certain groups are exposed to persecution by "unidentified" groups which are frequently supported or tolerated by the government. The restrictive interpretation of the Appeals Board, which refused to take account of "private" persecution, was overruled by the Conseil d'Etat, *which held that persecution by private individuals or groups could be taken into account when in fact it was encouraged or knowingly tolerated by the public authorities*[76].

B. The concept of membership of a social group as a reason for persecution

One of the reasons for the persecution feared by a refugee, according to Article 1 of the Convention, may be "membership of a particular social group". The Appeals Board referred to this concept in cases concerning persons coming from the communist countries of Central and Eastern Europe and from Indo-China after 1945, who had been persecuted on account of their allegedly "bourgeois" social origin or professional activity. A recent decision of the Appeals Board broadened the definition of "social group".

This was in the case of women threatened with circumcision in certain African countries, who feared persecution if they did not comply. It was held that a woman from Mali who had asked to be granted refugee status on account of the danger of circumcision in her country could obtain that status if she had personally been exposed to that type of mutilation and deprived of official government protection. Although the decision does not explicitly use the term "social group", it

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[75] *On the rules applicable to refugees in France, cf. Tiberghien, op.cit.*

[76] *Dankha, 27 June 1983, page 220; concl. Genevois, AJDA, 1983, page 431; JDI, 1984, page 117, note Julien - Laferrière; Davoudian, 31 July 1992.*

implies that women who find themselves in the above-mentioned situation may be recognised as belonging to such a group for the purpose of the application of the Convention[77].

C. Can a refugee be extradited to his country of origin?

*At first sight, this question calls for a negative answer, in view of the importance of the rule of non-repatriation (*non refoulement*) in the law relating to refugees (Article 33 of the Geneva Convention). In fact, Article 33 does not mention extradition, which is a specific procedure, and the preparatory documents indicate that it had been deemed necessary to leave extradition outside the scope of the law applicable to refugees. In those days, extradition was governed exclusively by bilateral treaties. Such is no longer the case today in Europe, on account of the European Convention on Extradition and the supplementary guarantees it contains. When it was faced with this question, the* Conseil d'Etat *could not cite Article 33 as grounds for a negative reply, for the reason given above. It set aside a decree ordering the extradition of a refugee to his country of origin on the grounds of (i) the definition of the term "refugee" as it emerged from Article 1 of the Geneva Convention and (ii) the general legal principles applicable to refugees which bar a state from delivering up a refugee whom it recognises as such to the authorities of his country of origin, in any manner whatsoever, subject only to reasons of national security provided for in the Convention.*

The judicial approach adopted by the Conseil d'Etat*, combining the interpretation of the Convention with the affirmation of general legal principles, is particularly clear in this decision*[78].

D. The rights of asylum seekers

Neither the 1951 Geneva Convention nor French legislation deal clearly with the situation of asylum seekers. The Convention does not grant them a right of residence. French law is silent on the subject and only a 1985 circular issued by the Prime Minister settles certain aspects of the question, on fragile legal grounds. In 1991, the Conseil d'Etat *tried a case which led it to lay down important principles. The decision cites Article 31 para. 2 of the Geneva Convention which states that the States Parties may apply only the necessary restrictions to the movements of refugees unlawfully in their territory "until their status in the country is regularised or they obtain admission into another country". Reference is then made to the role of the French Office for the Protection of Refugees and Stateless Persons, which is responsible for granting refugee status. The* Conseil d'Etat *draws the following conclusion: these provisions necessarily imply that an alien who asks to be granted refugees status is in principle authorised to remain provisionally on national territory until a decision has been taken on his application. In the absence of laws or regulations specifying the procedures for the application of this principle, the administration is required to take the measures necessary for its implementation.*

Conclusion: Asylum seekers must be given official residence papers unless their application is manifestly intended solely to thwart a deportation measure[79].

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77 *Commission des recours des réfugiés (Refugee Appeals Board), Mlle X, 19 September 1991.*

78 *1 April 1988, Bereciaurta - Echarri, p. 135.*

79 *Préfet de l'Hérault c. Dakoury, 31 December 1991; concl. Abraham, RUDH, 1992, p. 117.*

A P P E N D I X

FRENCH CONSTITUTION
Extract

The French Republic, faithful to its traditions, shall observe the rules of public international law. France will not engage in any war of acquisition and will never use its forces against the liberty of any people.

Subject to reciprocity, France will consent to such limitations of sovereignty as are necessary to the realisation or the defence of peace.

TITLE VI
Treaties and International Agreements

Article 52

The President of the Republic shall negotiate and ratify treaties.

He shall be kept informed of all negotiations leading to the conclusion of international agreements not subject to ratification.

Article 53

Peace treaties, trade agreements, treaties or agreements concerning international organisations, those implying a commitment of national resources, those amending rules of a legislative nature, those concerning personal status and those calling for the transfer, exchange or annexation of territory, may only be ratified or approved in pursuance of an Act of Parliament.

They shall take effect only after having been ratified or approved.

No transfer, exchange or annexation of territory shall be valid without the consent of the population concerned.

Article 54[80]
(Constitutional Law N°. 92-554 of 25 June 1992)

If upon the demand of the President of the Republic, the Prime Minister or the President of one or other House or sixty deputies or sixty senators, the Constitutional Council has ruled that an international agreement contains a clause contrary to the constitution, the ratification or approval of this agreement shall not be authorised until the constitution has been revised.

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[80] *Former Article 54 :*

If upon the demand of the President of the Republic, the Prime Minister or the President of one or other House, the Constitutional Council has ruled that an international agreement contains a clause contrary to the constitution, the ratification or approval of this agreement shall not be authorised until the constitution has been revised.

Article 55

From the moment of their publication, treaties or agreements duly ratified or approved shall prevail over Acts of Parliament subject, for each agreement or treaty, to reciprocal application by the other party.

b.The role of the Constitutional Tribunal in the interpretation of international law in Poland - Report by Prof. Tomasz DYBOWSKI, Judge at the Constitutional Tribunal

Introduction

1.1 The task of monitoring the constitutionality of legislation lies with the Constitutional Tribunal. The necessary legal conditions for its establishment were fulfilled by the revision of the 1952 Constitution, as adopted by the Sejm on 26 March 1982[81] *Following lengthy discussions and preparatory work, the Constitutional Tribunal was actually established by virtue of the Act of 29 April 1985*[82]*, while it began functioning officially on 1 January 1986.*

Under the act, the question of the referral of cases to the Constitutional Tribunal was settled by the parliamentary decree of 31 July 1985 on the detailed method of referral to the Constitutional Tribunal[83]*.*

The Constitutional Tribunal was set up primarily to monitor normative instruments (establishing laws) in the field determined by the Constitution and by the Act on the Constitutional Tribunal. The changes taking place in the legal system, especially as a result of the transformation of the political scene set in motion by the constitutional amendment of 29 December 1984[84]*, involve the assignment of particular significance to the essential functions of the Constitutional Tribunal, namely those of establishing judicial case law, signalling infringements and formulating binding interpretations of laws.*

The establishment of case law constitutes by itself the essential feature of the Constitutional Tribunal's activity. Most of the Tribunal's decisions concern the conformity of laws with the Constitution after they have been adopted and have entered into force (ex post facto) except - since 8 April 1989 - in the case of the right of referral of the President of the Republic of Poland who, before signing an act into law, may ask the Tribunal to confirm its conformity with the Constitution[85]*. Moreover, the Tribunal is empowered to give rulings on whether prescriptive instruments of lower status are compatible with the Constitution or with ordinary laws.*

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81 *Article 33 of the Act amending the Constitution of the Republic of Poland (Official Gazette No. 11, p. 83).*

82 *Uniform text of the Act - Official Gazette No. 109, 1991, p. 470.*

83 *Official Gazette No. 39, p. 184.*

84 *Official Gazette No. 75, p. 444.*

85 *Article 27 para. 4 of the Constitution of the Republic of Poland and Section 1 para. 1 (1) of the Act concerning the Constitutional Tribunal.*

One responsibility of the Constitutional Tribunal is an offshoot of its task of establishing case law namely that of informing the Sjem of shortcomings and gaps in legislation, the elimination of which is essential to the cohesion of the legal system.

Legal questions relating to judicial or administrative proceedings already in progress may be submitted to the Constitutional Tribunal when they concern the constitutionality of such proceedings or the conformity of another prescriptive instrument with the Constitution or the laws. Such questions may be asked when the outcome of the proceedings depends on the reply.

Changes in the system have resulted in two new responsibilities for the Tribunal: the first is that of monitoring the constitutionality of the objectives and activities of political parties, although the Constitutional Tribunal has not yet been required to make rulings in this field; the second is that of formulating binding interpretations of the laws in force. The latter function was inherited by the Constitutional Tribunal from the now defunct Council of State.

1.2 Poland signed the European Convention for the Protection of Human Rights and Fundamental Freedoms in Strasbourg on 26 November 1991, when it joined the Council of Europe. On 2 October 1992, the Sejm of the Republic of Poland expressed its agreement through the adoption of a law ratifying the Convention.

1.3 Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were ratified by Poland on 3 March 1977[86].

1.4 It can be said that, in general terms, Polish legal rules are closely akin to the basic principles of the Convention for the Protection of Human Rights and Fundamental Freedoms. The statutes enacted after the debates of the 1989 "Round Table" reflect the approach of the Convention.

Following the introduction of decisive changes in the Polish Constitution in 1989, including in particular the adoption of the principle of democracy and the rule of law, the Constitutional Tribunal has been responsible for the most recent case law reflecting the limited but precise re-interpretations of the philosophical principles underlying the constitutional conception of the law.

This is particularly clear from the way in which the Constitutional Tribunal deals with the categories of fundamental freedoms, as distinct from essential rights.

The Constitutional Tribunal follows a powerful current of Polish legal opinion in considering the categories of freedoms as a field of unrestricted behaviour, not defined by the State, and closely bound up with the nature of the individual. This philosophy enables the Tribunal to declare that the legislator has a distinctly limited role to play in the regulation of fundamental freedoms, one circumscribed in effect by the system of guarantees for the enjoyment of freedoms and the restrictions on their enjoyment imposed by the public interest.

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[86] *Official Gazette No. 38, 1977, pp. 167 and 169.*

In its activities connected with the protection of fundamental rights and civil liberties, the Constitutional Tribunal has drawn up a set of basic constitutional concepts and principles which serve to guide it in the process of monitoring the constitutionality of legislation.

One particular result of the Constitutional Tribunal's case law is the precise definition of the concept of equality before the law and the constitutional principle of social justice.

While developing the principles of democracy and the rule of law, the Constitutional Tribunal has also elaborated - for the sake of practical protection of civil rights - the principle of protection of acquired rights and, by extension, that of citizens' confidence in the State and the non-retroactivity of laws.

I. Conditions for the introduction in the domestic legal system of international rules relating to human rights

1.1 Description of applicable procedures

a. The Constitution currently in force contains no rules defining the position of international law in the domestic legal system of the State. It contains only the rule of competence, determining the capacity of the President of the Republic of Poland with regard to the ratification of international agreements. If the ratification of such agreements entails heavy financial burdens for the State, or the need to amend legislation, the prior agreement of the Sejm is essential. In the discussions currently under way on the form of the new Constitution, emphasis is being placed on the necessity of defining the constitutional rules capable of providing a solid basis for the institutions which apply domestic law in conjunction with international law.

In the international legal doctrine, there is a strong tendency in Poland to assign absolute priority to the rules of international law in relation to national rules. This means that the rules contained in international agreements - following their adaptation or ex proprio vigore - *would occupy a position midway between the Constitution and ordinary statutes in the hierarchy of legal rules.*

In any event, under this doctrine, there is seen to be a need to include in the Constitution rules concerning compliance with the State's international commitments, as well as rules concerning the merits of the principle requiring the Sejm to approve international agreements, especially those in the sphere of civil rights and freedoms.

Special importance is attached to the catalogue of principles which exercise a direct influence, in constitutional practice, on the content of established law and the means of prescribing constitutional rules. The list of such principles and their content in the constitutional context are the subject of dispute in the teaching of legal theory. Allowing for this restriction, the fundamental principles of constitutional law may be considered to include individual freedom, social justice, equal rights (and equality before the law), the correlation of rights and

duties, the evolutive nature of rights and freedoms, protection of acquired rights and non-retroactivity of legislation.

The legal scope for the direct application of constitutional rules concerning the fundamental freedoms of citizens is determined by the content of particular constitutional freedoms which in Poland include the following: liberty and inviolability of the person (Article 87 para. 1 of the Constitution), inviolability of the home and confidentiality of correspondence (Article 87 para. 2), freedom of conscience and religion (Article 82 para. 1), freedom of speech and freedom of the press (Article 83), freedom of assembly and gatherings, of processions and demonstrations (Article 83), freedom of association (Articles 84 and 85), and freedom of economic activity (Article 6).

The more detailed clarification of these freedoms is a matter of the practice of governmental organs in the process of implementing the law, backed up by legal theory.

The second set of constitutional rules governing fundamental civil rights, defined as rights justifying certain actions by the State, includes regulations concerning in particular the following social rights of citizens: the right to marriage and motherhood and that of the family to be assisted and protected by the State (Article 79 para. 1), the right to benefit from cultural achievements (Article 73) and certain elements of the right to social protection and the right to work.

The current Constitution disregards certain fundamental civil rights which should have a place in the basic law in view of the importance attached to them by the rules of international law. The following may be mentioned by way of an example: the right to life, the right to a fair trial, the right to leave one's country and return to it, the right to choose one's place of residence freely, the right to privacy, the right to the unrestricted development of the personality in the various fields of spiritual life, the prohibition of forced labour and the rights of persons deprived of liberty. These rights are mentioned in sub-constitutional instruments (ordinary laws), although this cannot be considered to be sufficient. Given the lack of clear prescription of these rights in the Constitution, they now have to be established by means of interpretation, especially with regard to Article 1 of the Constitution which reads as follows: "The Republic of Poland is a democratic State ruled by law and implementing the principles of social justice".

b. *It may be noted that certain statutes resolve the problem of the relationship between Polish law and international law by specifying the position of international agreements in the system of legal rules and the procedures for their application. The statutes refer to international law in various ways and usually recognise its superiority over national law.*

This occurs in cases where:

i. *the ordinary statute refers to an international agreement specifying the scope and conditions of the application of rights expressed in the law. For example, the codes of civil and criminal procedure refer to*

agreements defining the category of persons authorised to enjoy the benefit of diplomatic immunities;

ii. *the statute determines whether domestic law or the terms of the international agreement should be applied in a given matter, and decides on the question of precedence in the event of a conflict of rules, eg Sections 1 and 2 of the Act on private international law[87], Article 1096 of the Code of Civil Procedure, Article 541 para. 1 of the Code of Criminal Procedure, or Section 29 of the Aliens Act[88];*

iii. *the statute finds that it does not infringe the corresponding agreements, eg Section 15 para. 1 of the Aviation Act[89], Section 2 of the Act on the conditions of international road transport[90];*

iv. *the statute refers to a treaty in a field where there are no national regulations.*

With regard to the binding nature of treaties in domestic law, Polish legal writers point to the following:

a. *the principle that a State which has legitimately entered into an international undertaking should incorporate in its domestic legislation the amendments needed to enable it to fulfil its obligations;*

b. *Article 27 of the Vienna Convention on the Law of Treaties, which provides that a party may not effectively invoke its internal law as justification for its failure to perform a treaty;*

c. *the principle* "pacta sunt servanda" *(Article 26 of the Vienna Convention).*

These points do not establish the pre-eminence of international law in relation to national law, but merely the need to fulfil the international commitments incurred, through amendments to domestic legislation where appropriate. Already in the preliminary work on certain covenants (eg the Covenant on Civil and Political Rights or the one on economic, social and cultural rights), it was assumed that the basic means of incorporating their provisions would be through legislative instruments in the contracting countries. Indeed, the provisions of these covenants cannot all be expected to be self-executing (directly applicable). As far as the covenants are concerned, therefore, the State will have fulfilled its obligations under them even without making them directly applicable, by

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87 *Official Gazette No. 46, 1965, p. 290.*

88 *Official Gazette No. 7, 1992, p. 30 (uniform text).*

89 *Official Gazette No. 32, 1962, p. 153*

90 *Official Gazette No. 75, 1991, p. 332.*

adopting measures in its domestic legal system which conform to the rules laid down by international agreements. This is an important problem from the standpoint of the protection of civic rights.

1.2 *The Act concerning the Constitutional Tribunal does not directly empower the judges on the Tribunal to monitor the conformity of national legal instruments with the international conventions ratified by Poland, since such conventions remain outside the jurisdiction of the Tribunal. In the past, this exclusion was justified by the existence of a gap in the Constitution on the subject of the relationship between international law and domestic law; unless that gap is filled, it is impossible to introduce checks on the constitutionality of international agreements. In practice, however, the Constitutional Tribunal refers to these agreements subsidiarily in its judgments.*

By way of example, in case K 8/91, noting the incompatibility with the relevant constitutional rule of that part of the Act concerning frontier guards which excludes the possibility of submitting claims in court in connection with the conditions of service of the officials concerned, the Constitutional Tribunal decided - outside the context of its judgment - that the provision in question was incompatible with Articles 14 and 26 of the International Covenant on Civil and Political Rights.

The Constitutional Tribunal referred to several human rights covenants in the recitals of case K 11/90 concerning religious education in State schools.

In case K 1/89 concerning the acquisition of entitlement to an invalidity pension, particularly with regard to the requirement of proof of a minimum period of professional activity, the Constitutional Tribunal expressed the opinion - in the recitals of the judgment - that the provisions of Article 5 paras. 1 and 2 of ILO Convention No. 37 ratified by Poland prescribe 60 months as the maximum qualifying period of professional activity. It is therefore impossible to deny the importance of these provisions for the creation of an entitlement to an invalidity pension.

On that occasion, the Constitutional Tribunal maintained its opinion that the ratification of covenants (agreements) places a binding obligation on the Republic of Poland, meaning that even the courts must apply them, in accordance with the principle ex proprio vigore, *unless it emerges from the content and wording of a covenant (agreement) that it is not directly applicable. "Considering the binding nature of covenants (agreements), the Constitutional Tribunal takes account of this aspect in its interpretation of the rules. However, as the law stands at present, international rules cannot by themselves constitute grounds for a judgment".*

II. Consideration of international rules by the constitutional judge in the exercise of its functions

As the law stands at present, the Constitutional Tribunal is not in a position to apply international rules directly, but when monitoring the constitutionality or legality of domestic statutes, it takes account of the instruments of international law and the tendencies to which they give expression. This is particularly true in the fields of human rights and fundamental freedoms, as such instruments guide the establishment of case law and the interpretation of the laws in force.

The Constitutional Tribunal's main aim in establishing case law is to guarantee the values protected by the Constitution, while at the same time promoting their integration into the legal system of the Republic. The interpretation of constitutional rules adopted by the Constitutional Tribunal takes account of the circumstances surrounding the change of system and political pluralism, but serves chiefly to protect human rights and freedoms on the basis of the principle enshrined in Article 1 of the Constitution: "The Republic of Poland is a democratic State ruled by law and implementing the principles of social justice".

As was said above, the constitutional principles and values applied by the Constitutional Tribunal, and the main constitutional rules in particular, are the following: equal rights and equality before the law, social justice, citizens' confidence in the State, non-retroactivity of laws, protection of acquired rights, freedom of religion and conscience, freedom of association, freedom to exercise an economic activity, protection of private property, coherence and stability of the legal system, and regulation of rights and duties by statute.

In the judgments it has been delivering for six years now, the Constitutional Tribunal has had the opportunity to explain how the content of certain constitutional principles mentioned in this chapter should be construed. The Tribunal referred to these principles when it interpreted the relationship between fundamental rights and other constitutional rules, in order to achieve harmonisation. On a number of occasions, the content of international conventions (covenants) has served as a basis for the legal solutions adopted.

This has occurred frequently in its practice of establishing case law, for example when it has interpreted fundamental rights with the help of general constitutional principles, particularly the principle of social justice and equal rights. The latter principle is not at variance with the content of Article 26 of the Covenant on Civil and Political Rights.

In its judgment of 3 March 1987 (case P 2/87) on the consistency of the provisions of decrees by the Minister of Health and Social Welfare between 1985 and 1987, defining admission quotas for women and men in the academies of medicine, the Constitutional Tribunal used the general formula of equality in relation in particular to the question of legal discrimination on the grounds of sex. The Tribunal acknowledged that "in the legal field, the principle of equality is respected when each citizen can become the beneficiary of each of the rules granting a specific civil right. From the point of view of equality, therefore, it is inadmissible to discriminate between citizens on the basis of differences in their legal status".

In accordance with the constitutional interpretation of the rights and freedoms of citizens, the Constitutional Tribunal also emphasised the fundamental nature of the principle of equality before the law. "It enjoys the status of a general principle covering all rights, freedoms and civic duties. Any restrictions placed upon it for a purpose other than the achievement of social harmony are inadmissible".

The Constitutional Tribunal used the broadest possible terms in its judgment of 9 March 1988 (U 7/87): "the constitutional principle of equality before the law (equal rights), in accordance with the broadest acceptation of Article 67 of the Constitution, consists in

the fact that all persons recognised as having legal personality (the persons to whom rules of law are directed) possess the same characteristic trait of identical importance and must be treated equally, that is to say according to the same criteria, with no discrimination or partiality".

In the preliminary paragraphs of the decision of 24 October 1989 in case K 6/89 concerning the system of pensions for miners and their families, considered from the standpoint of equality before the law in the field of social insurance, the Constitutional Tribunal referred inter alia to the provisions of Article 3 in conjunction with Article 9 of the International Covenant on Economic, Social and Cultural Rights requiring States Parties to the Covenant to ensure equality of rights for men and women, and considered in addition "that from this point of view reference should be made to Article 26 of the International Covenant on Civil and Political Rights, which prohibits all discrimination". Thus, the Constitutional Tribunal did not disregard international legal instruments to which Poland is required to adhere, and it accepted the submissions based on their content as an additional argument, albeit a very important one for the interpretation of domestic law.

The principle of equality before the law, as the basis of reviews of either the constitutionality or the legality of legal instruments, was often looked at separately or in juxtaposition to other principles in the decisions of the Constitutional Tribunal.

In case K 5/91, the Constitutional Tribunal stated that the constitutional principle of equal rights for citizens meant that it was inadmissible to enact statutes or other legal instruments which introduced privileges or discriminatory treatment of citizens on the grounds of their sex, birth, education or profession, as well as on account of their origins or their social status. The principle of equality ranks as a general principle concerning fundamental rights, civil liberties and civic duties. The Constitution makes particular reference to the equal rights of men and women, guaranteeing them equal opportunities, including opportunities in the professional sphere. This means that for certain professional groups (eg judges, prosecutors, researchers), the lowering of the retirement age for women must be considered as a particular right of access to early retirement, while the inclusion in the law of provisions entailing the premature compulsory termination of the employment contract constitutes a restriction of the professional opportunities of women compared with men. The stipulation of an early retirement age for women thus becomes a factor of discrimination against the latter in comparison with men possessing the same occupational status. The limitation of professional opportunities for women, eg university lecturers, at a time when biological and social differences are no major impediment to the effective pursuit of occupational activities and the achievement of scientific advances, is sharply at variance with the principle of equality before the law and equal rights for men and women.

In its decision of 9 March 1988 (case U 7/87), the Constitutional Tribunal expressed the view that, given the lack of objective and unequivocal legal criteria, as well as the lack of an exhaustive definition in the Constitution, it lay with the Constitutional Tribunal to evaluate the criteria used in law.

According to the Tribunal, among all the possible criteria, "the main legal criterion for determining the classification of persons (to whom legal rules are directed) is the fact that such classification (...) must be socially equitable". "The concept of justice, which is

of fundamental and paramount importance, serves to evaluate the legitimacy of social differences. If unfair differences come to light in the division of property and the corresponding classification of people, these differences are considered as inequalities".

The Constitutional Tribunal first of all concerned itself with the principle of social justice in direct connection with the principle of equal rights, which must constitute the basis of the regulation of social relationships.

The principle of social justice was defined in broader terms by the Constitutional Tribunal in its declaration of 11 February 1992 in case K 14/91, concerning the upward adjustment of retirement and other pensions under the Act of 27 October 1991[91]*. The Constitutional Tribunal adopted this as the fundamental principle of the system of social insurance. It exists primarily as a formula for the award of benefits based on the period of employment (essentially as regards retirement pensions), but also involves apportionment according to needs (particularly in the case of persons who receive disability pensions, family allowances or accident benefits).*

From the point of the view of the evaluation of the Act in question, the Constitutional Tribunal adopted the following ideas as fundamental elements of the principle of justice:

i. *There is a correlation between the size and length of payment of contributions (employment input) of insured persons and the establishment and amount of entitlement to retirement and other pension benefits.*

ii. *The principle of social justice in the system of social insurance is applied with due regard to its redistributive function. In short, this principle consists of a precise levelling of the amount of benefits in aid of persons with a low base level of benefits and to the detriment of those with a high base level of benefits. The principle of social solidarity justifies this conception of the function of social redistribution which makes it necessary to spread the weight of benefits to a broad range of persons concerned by social insurance.*

However, the reduction of the level of benefits for persons with a high basis of assessment makes it necessary to take into account the principle of the proportionality of benefits and contributions, ie the participation of the insured person in the accumulation of insurance funds. From this standpoint, the principle of proportionality is consistent with and justified by the principle of justice based on the sharing of benefits according to merit. This principle is also expressed in the ILO conventions ratified by Poland, No. 35 (Article 7), No. 37 (Article 7) and No. 39 (Article 9).

iii. *The principle of social justice calls for preferential treatment for insured persons who have worked under particularly difficult conditions or have carried out work of a special nature, if their employment input has not been appropriately taken into account by means of a higher level of benefit, depending on the level of remuneration (income). Preferential treatment should also be given to*

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[91] *Official Gazette No. 104, p. 450*

insured persons incapacitated by industrial accidents or occupational diseases, if the law makes no provision for special compensation for them.

The principle of social justice requires that protection be provided for persons receiving the lowest or a slightly higher level of benefit, even if such benefit should be lower on the basis of the rules of calculation. In such cases, the principle of proportionality as the foundation of social insurance must be amended in the name of the principle of justice, to be achieved through the application of the rule of apportionment according to needs and in accordance with the redistributive function of social insurance.

The Constitutional Tribunal has adopted the principle that social insurance is a system of compensation for the loss or substantial diminution of a person's capacity to meet his needs. For this reason, it is impossible in principle to reconcile the receipt of benefits on these grounds with the unrestricted possibility of paid employment. The high-level of State participation in the financing of social insurance benefits (with a limitation concerning insurance schemes where contribution funds are the main source of paid benefit) justifies suspension of the payment of benefit in cases where the insured person's income is not limited, as well as a reduction of the level of benefit received where a specific amount of income is exceeded. In terms of principle, this situation is compatible with the nature of social insurance, the constitutional basis for such insurance (Article 70 paras. 1 and 2 (1) of the Constitution) and ILO conventions Nos. 35 to 40 which also authorise the suspension or reduction of benefits under defined circumstances.

The above-mentioned ILO conventions which - together with other instruments of international law ratified by Poland - constitute the basis for checks on the constitutionality of the provisions of domestic law under Article 1 of the Constitution (principle of the rule of law), are important for the interpretation of the appropriate rule of the Constitution (Article 70 paras. 1 and 2 (1)). Most of these conventions have in common more particularly the rule that insurance benefits can be suspended or reduced (partially suspended) in situations where the insured person continues his employment involving compulsory insurance (Article 8 para. 2 of Conventions Nos. 35 and 36, Article 8 para. 2 of Conventions Nos. 37 and 38), or (in the case of widows' pensions under the insurance scheme for employees) where his remuneration exceeds a prescribed rate (Article 11 para. 2e of Conventions Nos. 39 and 40).

The constitutional principle of the rule of law (Article 1 of the Constitution) provided the basis for the Constitutional Tribunal's judgment of 19 June 1992 in case U 6/92, where the Tribunal found that a resolution of the Sejm committing the Minister of the Interior to supply full information on certain civil servants and other persons who had previously collaborated with the security services, was not in conformity with the Constitution. In the passages based on this principle, the judgment and the recitals emphasised the right to protection of personal honour and dignity, as defined in Article 17 of the International Covenant on Civil and Political Rights which stipulates that no one shall be subjected to arbitrary or unlawful interference with his private or family life, nor to unlawful attacks on his honour and reputation. The Constitutional Tribunal stressed that "everyone is entitled to legal protection against interference and attacks of this type". There is no doubt that this is a personal right, to special protection in a democratic system.

A government body can only be authorised to intervene in the field of personal rights through a legal instrument with the force of law. "This is an absolute requirement which falls within the domain of the principle of democracy and the rule of law".

It lies with the legislator to indicate matters reserved for the law, and such legal limitation must be admissible under the Constitution. Consequently, in cases constituting legal subject matter, the Sejm cannot choose arbitrarily between a law and a resolution - indeed, the latter is a legal instrument of lower status. As a result of the principle of democracy and the rule of law, legal regulations authorising interference in the field of civil rights and freedoms must fulfil the requirement of adequate definition. This means the precise definition of the admissible area of interference, as well as the method of such interference, following which the person whose rights and freedoms have been limited can defend himself against an unjustified violation of his personal interests. As regards attacks on reputation or honour, Article 17 of the International Covenant on Civil and Political Rights provides for the principle of legal protection against that type of interference.

In case K 1/91, which was concerned with the right of individual ownership, the Constitutional Tribunal also emphasised the particular importance of Article 1 of the Constitution, which proclaims that Poland is a democratic State ruled by law, which applies the principle of social justice. Although Article 7 of the Constitution was of major importance to this particular case, as far as the merits of the case and the issue of the protection of the right to ownership were concerned, this article should nevertheless be considered in conjunction with other provisions of the basic law, especially Article 1 of the Constitution.

In case K 11/90, the Constitutional Tribunal explained the principle of the secularity and neutrality of the State. In the field of the enjoyment of the fundamental rights of freedom of religion and freedom of conscience, together with the principle of equality before the law, it found that State secularity and neutrality could serve as a basis for voluntary religious education in State schools and could not mean that such education should be banned if the citizens concerned wished it to be dispensed.

Indeed, there is no disregarding the fact that the instruments of international law and international agreements ratified by Poland require the State to respect the inalienable and natural rights proper to each individual, including the right freely to secure religious and moral education for his children in accordance with his convictions.

The question of freedom of conscience is also touched upon in the Constitutional Tribunal's judgment of 15 January 1991, in case U 8/90, concerning the issue by a doctor of a certificate of eligibility for abortion. The Polish legal system contains no provision requiring the issue of a certificate of eligibility for abortion which might allow of exceptions authorising non-compliance with this obligation. In particular, this obligation is not imposed by the Act currently in force on the conditions of eligibility for abortion. The certificate of eligibility for abortion contains elements of medical knowledge and social and ethical judgment, which means that a judgment as to possible eligibility for the operation can only be considered in terms of ethical categories, in the same way as the performance of the operation itself. The doctor's right to avoid issuing such a certificate or carrying out the operation can be deduced from Article 82 para. 1 of the Constitution, which proclaims freedom of conscience. Freedom of conscience

does not mean only the right to represent a specific point of view about life, but above all the right to act in accordance with one's own conscience; the right to be free from the constraint of acting against one's own conscience. This definition of freedom of conscience is confirmed in Article 18 para. 2 of the Covenant on Civil and Political Rights.

In case K 6/90, the Constitutional Tribunal took a stand on the subject of the freedom of association of citizens, stating that the purpose of this fundamental right is to develop civic, political, social, economic and cultural activities. This right covers the very general categories of civic activities, but that having been said, it does not cover every collective activity, only organised activities lasting some length of time. It finds concrete expression in ordinary legislation. The principle of freedom of association is not restricted to private individuals and may also extend to basic organisations.

The principle of freedom of association for citizens is not absolute in nature. Article 84 para. 3 of the Constitution prohibits the establishment of associations whose purpose or principal activity threaten the political and social system or the legal order of the Republic of Poland. The exceptional nature of this normative principle of freedom of association cannot be interpreted broadly.

The range of legal and structural forms of association and the legal consequences attached to them by the legislature are important, as is shown by the example of political parties, trade unions and associations. As regards the achievement of economic objectives, the legislator has made provision for forms of organisation such as co-operatives, companies, foundations authorised to engage in economic activities, trade federations, lawyers' offices, etc. Co-operatives are one of the concrete manifestations of the constitutional principle of freedom of association. This principle could not be achieved if, in a given situation, it was to nullify the principle of freedom of economic activity.

As regards the freedom to engage in economic activity, the Constitutional Tribunal has stated - in case U 9/90 - that restrictions on this freedom can only be established by statutes, and then only when it interferes with an interest which the legislator would consider deserving of protection. Anti-trust legislation is one possible example of such restrictions.

The limitation of this constitutional principle cannot be decided freely; in principle, it is a practical matter and concerns the sphere of the protection of life and human health in the broad sense of the term. On the other hand, none of the laws provides for general exclusions which would eliminate certain categories of persons from the circle of those who are authorised to engage in an economic activity.

3.4.1 In a democratic and constitutionally-governed State, the legal system must be based on the principle of independence. Indeed, such independence constitutes a fundamental guarantee for securing human rights and freedoms. One of the particularly important aspects of the concept of autonomy (leaving aside functional and structural autonomy) is the personal independence of the judge. The traditional and characteristic solution adopted in the constitutional legislation of many countries is the stipulation that the judges are independent and are subject only to the laws. The particular status of the

judges of the Constitutional Tribunal is defined in Article 33a of the Constitution, according to which Members of the Constitutional Tribunal shall be independent and subject only to the Constitution".

The requirement of political neutrality, as reflected in the ban on membership of political parties and organisations and the ban on engaging in political activities, is of capital importance for the definition of the position of judges.

This ban was introduced in Polish legislation in 1989, when the system of government changed. With regard to the members of the Constitutional Tribunal, there is also a ban on simultaneously "holding office as a deputy in the Sejm or senator, working in the civil service or carrying out any other activity likely to impede the exercise of the functions of a member of the Tribunal, put a slur on its honour, or undermine confidence regarding the impartiality of its judgment".[92]

*One of the important factors helping to guarantee the independence of the Constitutional Tribunal is the publication of separate votes or opinions (*votum separatum*) in the recitals of judgments. The Constitutional Tribunal took this decision in plenary session, in a resolution of 3 October 1990, laying down the specific procedure under which a separate vote or opinion concerning "the judgment and not just the recitals, shall be subject to publication, together with the judgment, by the President of the session of the Tribunal who shall indicate which judge has expressed a separate opinion and orally present the main reasons for that opinion, as expressed by the judge in question". A copy of the separate opinion of the Constitutional Tribunal judge is given to the participants in the proceedings together with a copy of the judgment.*

This has occurred on several occasions in the judicial practice of the Constitutional Tribunal, for example in case U 8/90 concerning consideration of the conformity of certain provisions of the 1990 Decree by the Minister of Health and Social Welfare on the method of issuing medical certificates of eligibility for abortion with the 1956 Act determining the conditions for such an operation in case K 11/90 concerning consideration of the conformity of the Ministry of Education's instruction on the restoration of religious education in State schools with the Constitution and other laws, in case U 6/92 concerning consideration of the conformity with the Constitution and certain other laws of the resolution of the Sejm of the Republic of Poland, dated 28 May 1992, requiring the Minister of the Interior to supply information on certain civil servants and other persons with regard to their past collaboration with the security services; and in case U 1/92 concerning consideration of the conformity with the Constitution of the provisions of the 1963 Aliens Act, in the part thereof governing the circumstances and procedure of imprisonment, for a period not exceeding 90 days, in respect of aliens to be expelled from Poland.

It should be emphasised that the judgments of the Constitutional Tribunal in these cases, together with the grounds for the separate opinions expressed by the judges of the Tribunal, have frequently given rise to serious controversy in journals and in legal and scientific circles.

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92 *Section 15 para.5 of the Constitutional Tribunal Act*

III. Right of international control organs to monitor the activity of the Constitutional Tribunal

Given the methods and area of jurisdiction of the Polish Constitutional Tribunal, as described above, there is currently no possibility of lodging appeals against judgments with the international control organs.

Foreseeably, the perceived need for constitutional regulation of human rights and fundamental freedoms as inviolable principles corresponding in scope to the covenants ratified by Poland, especially the European Convention for the Protection of Human Rights and Fundamental Freedoms, will open up a new means of appeal enabling citizens to assert their rights.

CONCLUSION

It can be seen that, in general terms, the legal status of citizens under the system of protection of human rights in the Republic of Poland is close to the basic principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. From 1989 in particular, favourable conditions have been introduced as a result of democratic changes in the system.

The most important of the constitutional changes undertaken is the new wording - set forth for the first time in the constitutional history of Poland - of Article 1, which has been in force since 31 December 1989, and which states that "the Republic of Poland is a democratic State ruled by law, implementing the principles of social justice". This wording assigned the highest importance to the whole range of axiological problems - in addition to the legal problems - connected with the status of the individual and the scope of his freedoms guaranteed by law. The rule of law presupposes not only the protection of the precise sphere of the inviolability of individual freedom, but also the protection of the essential and inviolable values covered by fundamental civil rights.

With reference to the contemporary model represented by the standards of international agreements, the Polish traditions of tolerance and humanism may go further than the regulations contained in covenants and conventions. The imperfections and legal shortcomings in the 1952 Constitution, a legacy of the past, will certainly be eliminated in the new Constitution.

The most worthwhile international rules from the standpoint of the protection of individual rights will most certainly be included in the Polish system of basic constitutional rights and developed in ordinary legislation.

The role of the Constitutional Tribunal would be substantially increased if its jurisdiction was extended to include monitoring the conformity of laws and other legal instruments with international agreements and the conformity of international agreements with the Constitution. This would provide legal scope for binding arbitration in situations where international legal instruments refer to principles which differ in substance from constitutional rules or ordinary

statutes. This problem cannot be solved on the basis of the laws currently in force in Poland and the established jurisdiction of the Constitutional Tribunal in the field of legal supervision.

*The existing legal guarantees in Poland which relate to the autonomy of the judges on the Constitutional Tribunal in the matter of jurisdiction, including the possibility for them to express separate opinions (*votum separatum*), are at the same time a guarantee of respect for the range of individual rights, freedoms and duties under the Constitution, which are an intrinsic feature of democracy and the rule of law.*

c.Summary of the discussions on "The role of the constitutional court in the interpretation of international law"

1. National judicial procedures and international law

It was pointed out that the system of preventive control of the constitutionality of international treaties, as practised in France or Spain, has some advantages. It establishes legal certainty before the coming into force of the treaty and the treaty can no longer be challenged after its ratification. If the French Conseil constitutionnel decides, before the ratification, that the treaty is unconstitutional, either the treaty provision concerned has to be abandoned or the constitution has to be amended.

In countries like Italy or Germany where the constitutionality of the act of Parliament giving internal effect to the treaty can be challenged afterwards, the constitutional courts have tried to establish conformity between the national constitution and the international legal instrument.

As regards conflicts between national statutes and international treaties, national courts have applied a presumption that the national legislator wanted to comply with its international obligations. The Italian Corte di cassazione has used the rule of lex specialis as a basis for this presumption. An international treaty can usually be regarded as a lex specialis with respect to a national statute.

An interesting solution if one wants to give effect to international legal rules at national level is Article 100, paragraph 2, of the German Grundgesetz. The Grundgesetz provides that the generally recognised principles of international law are part of German law. Since it is often very difficult for a national judge to establish which rules are in effect generally recognised principles of international law, Article 100, paragraph 2 provides : "if, in the course of litigation, doubt exists whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual, the court shall obtain a decision from the Federal Constitutional Court."

2. Conflicts between treaties

Cases of direct and real conflict between two treaties are rare. For example, if among several treaties like e.g. a bilateral treaty, the Geneva Convention on the status of refugees and the European Convention on Human Rights, only one of these treaties gives the individual concerned a right to obtain a residence permit or at least not to be expelled, then this treaty has to be applied without any real conflict arising. If such a conflict however arises, the treaty guaranteeing a basic human right should prevail. This might be based on the argument that the human right is part of ius cogens within international law or one might use the argument that this right is part of the generally recognised principles of international law.

3. Reciprocity

It was pointed out that few constitutions provide as clearly for the superiority of international treaties as does Article 55 of the French Constitution. Doubts were however voiced about the condition of reciprocity contained in Article 55. All parties have to apply a treaty and to

provide for a condition of reciprocity seems to imply a lack of faith in the principle "pacta sunt servanda".

On the other hand it was pointed out that Article 60 of the Vienna Convention also contains sanctions if one party fails to carry out the treaty and that there had been unequal treaties, for example between the Western powers and China. There are however some problems of interpretation of the reciprocity clause like :

- *how to apply the concept of reciprocity with respect to multilateral treaties,*

- *who decides whether the other party respects the treaty, the national judge or the Ministry for Foreign Affairs?*

- *is the principle of reciprocity to be applied for the treaty as a whole or article by article, and what about the treaty being correctly applied during some time and not being applied at another moment.*

With respect to international human rights treaties reciprocity seems not justified or even dangerous, and it also has no place within Community law which has its own specific procedures.

4. Transfer of sovereignty

It was pointed out that accession to the European Community implied the transfer of sovereign powers to the Community. Some Western constitutions have contained from the beginning provisions in this direction, for example Article 24 of the Grundgesetz allows for the transfer of sovereign powers and Article 11 of the Italian constitution states that Italy agrees to a limitation of its sovereignty. This provision has been interpreted extensively so as to allow integration within the European Community. Still there remain some questions even if such a provision is contained in a national constitution, i.e. :

- *what about derived law like Community regulations and directives?*

- *is there not an essence of national sovereignty which has to be safeguarded and cannot be transferred in this way?*

THIRD WORKING SESSION

Chaired by Prof. Constantin ECONOMIDES, Athens University, Legal Adviser to the Minister for Foreign Affairs of Greece, Chairman of the Working Group on the relationship between international law and domestic law of the European Commission for Democracy through Law

SUPRANATIONAL LAW

a. *Report by Professor Prof. Jan KOLASA, Director of the Institute of Public Law, Wroclaw University*

b. *Report by Prof. Luigi FERRARI BRAVO, Rome University, Legal Adviser to the Minister for Foreign Affairs of Italy*

c. *Summary of discussions*

a.The supranational character of Community law - Report by Prof. Jan KOLASA, Director of the Institute of Public Law, Wroclaw University

The creation of the European Communities and the new legal system arising from them have led, both in theory and in practice, to legal problems of various types that have not previously been encountered. The scale of these problems is extensive - starting from the occurrence in practice and theory of completely new terms for the most basic legal concepts and institutions having no adequate equivalent either in the sphere of international law or in the domestic law of the countries. Although similar or even identical legal terms and concepts sometimes occur, often in the practice of the Communities they take on a completely different sense and significance.[93]

In a word, both international lawyers and specialists in domestic law are confronted by a new legal phenomenon of unparalleled potential. Although it has already been active for about forty years and has gathered great momentum, practitioners have not yet reached a final formulation nor have legal theoreticians catalogued and evaluated all its aspects. Practice in the Communities is running well ahead of theory and rules out any attempt to express its essence in some sort of general, full and generally accepted theoretical scheme.

The crux of the matter seems to lie in the fact that the European Communities did not grow up alongside the existing well-defined international and domestic legal systems. Instead they seated themselves deeply within both and are heading more and more clearly and irreversibly in a completely new direction. This entails many unusually intriguing fundamental problems, both practical and theoretical, for the lawyer. One of them is the supranational nature of the European Communities and their legal system.

In my short introduction to the discussion on the supranational nature of European Community law it is impossible to address the whole body of associated problems. My remarks of necessity must be confined to a couple of legal features selected from amongst those that are most general and characteristic.

These are:

1. The supranational nature of the European Communities as international organisations;

2. the sources and hierarchy of the Communities' legal rules; and

3. the place of the Communities and their legal system relative to international law and organisations and also to the domestic law of the member States.

Naturally, particular attention should be paid to the practical considerations of our conference. However I believe that they will become evident of their own accord, in the process of clarification of the legal essence of this international undertaking.

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[93] *For example, the term "derived" or "secondary law" has a quite different meaning in the Communities. In the institutional law of universal international organisations it means their internal, procedural rules.*

I. THE COMMUNITY AS A SUPRANATIONAL ORGANISATION

International organisations formed by States (inter-governmental organisations) are not a completely new phenomenon, but neither did they start so very long ago. They began to appear towards the end of the nineteenth century, but they really began to spread only after the second world war. The most important and best known of them is undoubtedly the UN with the whole of its system of more than a dozen different specialised organisations such as UNESCO, ILO, IMCO, and so on.

These are classical international organisations created voluntarily by States against the background of international law. The basis for their formation and activities has always been a solemn multi-lateral international treaty. Tasks have been mapped out for them and their objectives have been achieved by permanent organs. In principal the activity of these organisations is limited to co-ordination of the operations initiated by the member States in definite areas of international relations. These organisations function within limits which are essential for the achievement of the tasks and objectives laid down for them; they are subjects of international law as distinct from that of the member States. Only some of the traditional international organisations can adopt resolutions which impose new obligations on the member States, and this only in clearly and very narrowly defined areas. But even then the member States normally leave themselves the possibility of avoiding the binding force of such resolutions - for example through the contracting out system. That is, within an appropriate period they follow a definite procedural method for not accepting the resolution.

By contrast the foundation of the European Communities has been recognised as the appearance of a completely new type of organisation of States in the international field - a supranational organisation. In principle this is a new term, coined in the subject literature. The three treaties setting up Communities do not apply such a name to them at all.[94]

On the contrary there is the impression that they even go out of their way to avoid using such a term, for there is a fear that the public might react adversely to an organisation with that type of name, associating it with some sort of authority set above sovereign States. It is difficult to find another more appropriate term reflecting the legal nature of the Communities. In any case, the literature has not so far provided a full, unequivocal and generally accepted definition of the legal essence of a supranational organisation.

Discussion of this phenomenon still continues, in the wake of swiftly developing practice.

Some theoreticians see in the European Communities not merely a proper international organisation but rather a confederate or federal form of union of States. Strong emphasis is continually placed on the fact that the founding States formed, in an irreversible way, a new international institution, giving it the status and attributes of a legal entity separate from them. The founding treaties laid down principles regulating on the one hand the mutual relationships between the Communities and their members and on the other hand the mutual relationships between the member States. In the literature such a treaty is sometimes compared with the

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[94] *In article 9 of the ECSC-Treaty this term occurred, but only as applied to the members of the High Authority as international officials.*

constitution of a federal state or even it is stated that the treaty setting up the European Economic Community followed the pattern of federal constitutional foundations. The principal authority lies in the hands of political organs and there is an appropriate distribution of powers: the European Parliament, the Council of Ministers, the Commission and the European Court of Justice.

It appears that the suggested similarities of the European Communities to a federal State are on the whole of a purely formal nature. For at bottom the distribution of authority and powers is diametrically different. And anyhow it is neither fully nor finally enacted, nor clear and consistent. This is frequently the cause of various misunderstandings and disputes as to competence between individual organs of the Communities. Apart from that, in spite of their supranational nature, the Communities are based on an international agreement and are subject to international law, particularly the law of international organisations which is one of the branches of contemporary international law.

In contradistinction to the division of power in a State, the European parliament has been allotted a completely marginal role in the legislative process. It carries out political checks and acts as a deliberative and consultative body.

After the Single European Act came into force, which institutionalised the existing practice for meetings at the summit, the Council became de jure the highest organ of the Communities representing both the sovereignty of the member States and the legal subjectivity of the Communities. It functions in two forms, differing in composition and in powers. One of its compositions comprises the Heads of State or of government of the member States and the President of the Commission. When so constituted the Council concerns itself only with the most important and rather exceptional matters and also issues general guidelines for the direction to be followed by the Communities. Meanwhile the Council when made up of Ministers representing the member States retains its position as the highest working organ. This Council bears full responsibility for carrying out the tasks laid down in the constitutional treaties. When constituted in this form the Council takes the most important of the legislative decisions. However it cannot carry out this function completely independently. The co-operation of the Commission is required here as laid down precisely in the treaties.

The Commission is a special organ of the Communities. It should be emphasised that its members are not delegated representatives of the member States but persons chosen for this organ by reason of their general personal competence and political independence. They are international officials. Consequently this is an organ which is independent in its activity of the States and so an organ of a supranational nature. The powers of this organ are however of a particular type. In principle it is limited to the initiation and preparation of decisions for the Council of Ministers as a political organ. Although the powers of the Commission may appear to be of a purely procedural nature, none the less without its co-operation the Council cannot carry out its basic legislative activity. Basic legislation is therefore the common work of both these organs although to a different extent and in different spheres.

The judicial authority of the Communities resides in the European Court of Justice, the main general function of which is to "ensure that in the interpretation and application of this Treaty the law is observed" (Article 164 EEC Treaty). The Court is made up of thirteen independent judges and six advocates general. However it is not an international court in the proper sense. It does not resemble the International Court of Justice in The Hague. It more brings to mind a

court of the federal type. It is an internal Court of the European Communities with unusually wide and diverse powers.

The supranational element of the European Communities is found not so much in their structure as in their legislative, executive and judicative powers. It has a functional nature. Here it is sufficient to indicate that the Communities, in a defined range of matters, enact law which is directly binding over the whole area of all the member States, and that in the event of conflict it always has priority over the internal law of the member States. This aspect of their legislative powers follows from the transfer of a range of sovereign rights to the Communities from the member States.

Obviously this is only partial and limited to certain areas where the member States have withdrawn from their sovereign rights. However the fact is that the Communities have been equipped with certain sovereign rights which hitherto have belonged exclusively to the States. Here the best authority is the opinion of the European Court of Justice concerning the legal nature of the Communities. It reads as follows:

> *"By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves." (Case 6/64 Costa 1964 ECR 585, p.593).*

It follows that in the opinion of the Court the particular legal nature of the Communities, that is their supranational nature, is based on a definite and in principle irrevocable transfer to them of a certain range of sovereign powers from the member States. It is true that these are rights which are limited to a narrow range of matters, but none the less they are sovereign rights. This means that in a certain defined area the Communities hold exclusive powers of legal regulation. Competition between the Communities and individual member States cannot possibly take place.

Consequently the Communities are a new type of international organisation equipped with a definite range of sovereign legislative, executive and juridical powers. The supranationality of the Communities is particularly emphasised by the new autonomous legal system created by them, the rules of which take the place of the domestic laws of the member States or are mandatory alongside them.

II. SOURCES AND HIERARCHY OF THE COMMUNITIES' LEGAL RULES

One may agree with the doctrine dealing with the Communities that they created a completely new legal system separate from traditional international law and the domestic law of the States. The same opinion is held by the European Court of Justice. However discussions still continue, and nothing indicates that they might ever come to an end, concerning the proper definition of the nature of this law and its place amongst traditional legal systems - international law and the domestic law of the States.

The law of the Communities is not a completely homogeneous legal system. Two basic groups of legal rules can be distinguished in it. These are, firstly, legal rules of a basic constitutional

nature known as primary law and in the second place secondary or derived law. This distinction is fundamental and generally recognised, although certain differences do arise when mapping out the range of sources for the two groups of legal rules. The distinction is very important both from the theoretical point of view and also in straightforward practice.

The primary constitutional law is laid down in the constitutional treaties establishing the three Communities. It forms a fundamental basis and sets out general guidelines for the whole new legal system of the Communities. It is as is sometimes said to be the "fons et origo" of the whole legal system.

In the first rank of the basic constitutional Acts we have the multilateral treaties setting up the three European Communities together with the supplementary annexes and protocols attached to them and also various later Acts introducing amendments, as for example the Merger Treaty (1965) or the Single European Act (1986).

These three founding treaties and the documents associated with them are generally recognised to make up the basic constitutional law for the Communities and are therefore called the basic primary sources of Community law, while the law established by them is known as the primary law. It is characteristic of this basic primary layer of the law that its source is the solemn international treaties concluded between the member States and formally ratified by them in accordance with their domestic procedure. Therefore these rules are contractual international law created without the participation of the Communities themselves.

These constitutional treaties have an important feature. They are basically self-executing treaties which means that on their ratification they automatically become the law which applies within the territory of the member States. This is in contrast with traditional ordinary treaties which require certain legislative operations in a country in order that they should be applied in its territory like domestic law (non self-executing treaties). Self-executing treaties have to be applied directly by the domestic Courts like domestic law. In fact their legal rules take the place of the appropriate domestic law. But it does not mean that in becoming the domestic law of the member States, they thereby loose the nature of international treaty law. Here we see their complicated dual legal nature. They are applied like domestic law but retain the character of international law subject to final evaluation of their validity by the European Court of Justice according to criteria laid down in the constitutional treaties.

The primary constitutional treaties constitute a source of powers for the States and the Communities to conclude two further types of international treaty of a different nature. These are:

1. Treaties concluded between member States or, less frequently, with third party States, and

2. Treaties concluded by the Communities with the participation or without the participation of member States on the one side (mixed treaties) and third party States on the other side, or with other international organisations. Such agreements are connected with the functioning of the Communities and must have a legal basis in the constitutional treaties with which also they must be in accordance.

Apart from the layer of treaty law, the basic law of the Communities includes "the basic principles of international law" and "the basic principles of law of the member States".

Formally, this roughly outlined constitutional law for the Communities lies within the sources of traditional international law. Article 38 of the Statute of the International Court of Justice also refers to "the general principles of law" without limiting them to the principles of international law.

The second basic group of rules going to make up the legal system of the European Communities is what is known as secondary or derived law. This is law which the Communities themselves have created according to the powers defined in the constitutional treaties, in order to implement their provisions and attain their objectives.

As is known a treaty is in essence a contract concluded between two or more subjects of international law (States and international organisations). Therefore it is not a legislative act in the strict common meaning of that word. As distinct from the constitutional law arising in a contractual way, the source of secondary law is in principle a resolution of the collegiate organs of the Communities. In other words it is a unilateral act and therefore a legislative act sensu stricto. It is called secondary or derived law since its authority stems from the provisions of the constitutional treaties, which it may not contradict. So it takes second place in the hierarchy of law after the body of rules of the primary, constitutional law. Both the powers to create secondary law and its validity must be based on clear provisions of the constitutional treaties.

The making of secondary law is rather reminiscent of what is known as delegated competence (delegated powers) although the treaties do not employ this expression at all. From this point of view the constitutional treaties and court decisions are more than restrained. They carefully and on purpose avoid the term "legislation ", contenting themselves with the term regulation or pouvoirs réglementaires. Neither do the concepts or terms of "secondary", "derived" or "primary law" occur in them. This terminology has been introduced in the subject literature.

The legislation of the Communities can take various forms - they may be regulations, directives[95] or decisions adopted by the Council and Commission.

1. Regulations are of general application and are directly mandatory as to the whole of their content in all member States, becoming a law common to these States as to the entirety of their content and form. Through them unification of the law is brought about over the whole territory of the Communities.

2. Directives, in contrast to regulations, are binding only as to the results which are to be accomplished by them in the member States to which they have been addressed. The choice as to method and form of attaining the desired objective is in this case left to the States. Directives may be directed only to States.

3. Decisions, in the same way as regulations, are binding to their full extent on all addressees, which may be not only States but also individuals and legal entities.

These three types of mandatory legislative acts must contain appropriate justification and be directly based on a definite provision of a constitutional treaty. With the aid of these legislative acts the Communities are developing a wide legislative activity and some internationalists see in this the essence of supranational European Communities.

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95 *In the ESCE Treaty "recommendation".*

As for the subject matter of community law, it is made up of two different categories of rules. The first group covers institutional and constitutional law which in principle is the same for the three Communities. It covers such matters as legal personality, competence, privileges and immunities, the composition of particular organs, their particular powers and the like. The second group is the substantive or economic law of the Communities which is different for the individual Communities. Each of them has its own substantive law although they have many elements in common.

III. COMMUNITY LAW, INTERNATIONAL LAW AND DOMESTIC LAW

In contrast to international law, the law of the European Communities, both primary and secondary, is a full and self-sufficient legal system. These features should be understood in the sense that it does not only establish appropriate institutions, and substantially determine their powers, rights and duties for a wide circle of their subjects, but it also forms a full system of legal means and procedures and provides for definite sanctions. At the same time it gives their subjects the possibility of claiming their rights effectively and gives them effective protection against illegal imposition of duties on them.

Also, in contrast to traditional international law, the Communities have developed their judicature widely, entrusting the European Court of Justice with wide ranging and diverse powers. Above all it has been granted the power to investigate the legality of the activities of Community institutions and of member States. It is also competent to interpret the law of the Communities, settle disputes, and rule on the constitutional legality of legislative acts adopted by the Communities. The parties to a dispute before this Court may equally well be States, Community organs, legal entities and individuals. Here the jurisdiction of this Court is obligatory. A case may be laid before the Court by any of the parties to a dispute. The decision then has to be carried out in the territory of the member States like the sentences of the domestic courts.

Thus the European Court does not at all resemble an international court in the style of the International Court of Justice. It assumes a role and develops completely new agendas characteristic only of the law and judicature of the Communities. It is actually at the same time an international court and an administrative court, it has the powers of a constitutional court and of a civil court. It also acts as a disciplinary and even arbitration tribunal. In practice, however, there is a decided preponderance of administrative and constitutional jurisdiction which ensures the uniform application and interpretation of Community law.

So there is no doubt that the Communities and their law are something new, departing fundamentally from traditional international law and international organisations. None the less some international lawyers continue to hold the view that, in spite of fairly important differences, Community law and the Communities themselves still fit within the framework of contemporary international law in the wider meaning of the term. However it appears that this view is based on purely formal premises, that Community law is formed against the background of the formal sources of international law - in principle, treaties and resolutions of international organs. In this sense it is undoubtedly international law. Even the European Court states that the Communities have established "a new legal order of international law". However the question remains open, how one should understand the term "international". The international factor is undoubtedly predominant but mainly in the sense that Community law must be understood in the context of its international conditions. For neither the treaties nor the

resolutions of the Communities lose their character of international legal acts through the fact that their rules are incorporated in domestic law.

However one should agree with those who consider that community law forms a new, original and exceptional legal system which, from the substantive point of view, departs fundamentally from traditional international law and also is certainly not domestic law. It is a supranational legal system, the subjects of which are not only States (as is the case with international law), nor only legal entities and individuals (as for the law within a State), but equally States, legal entities and individuals. This system therefore has its own range of legal subjects, peculiar only to itself.

In this system, in many points not spelt out in the constitutional treaties, a great role is played by doctrine and the judicature in refining precisely those principles which show the supranational nature of the Communities and their legal system. In particular the principle of "direct effect" of community law in the member States, like the no less important principle of absolute priority for community law when in conflict with the rules of domestic law of a member State, have been well grounded in practice through doctrine and judicature. The Court states clearly that in the event of conflict community law has priority and this is independent of whether it is earlier or later than domestic law. Here the Community Court leaves no room for doubt, stating very generally and expressis verbis: "no provision whatsoever of national law may be invoked to override" community law (case 48/71 Commission versus Italy (1972)ECR 527 p. 532). In this context one should remember that the principle of superiority of community law by comparison with domestic law covers not only treaty and constitutional law but also secondary law created by collegiate organs of the Communities. What is more, this superiority extends to all branches of domestic law including the constitutional law of the member States.

It is also important that all the member States accept the treaties definitively and on the same conditions without any reservations and therefore uniformly over the whole area of the Communities. For their effective application may not follow a different course in different countries as is the case with traditional treaties.

Nor is it anything strange that community law which has its own peculiar features and principles, does not fit the generally accepted classification for international law and the domestic law of States. For it is partially international law and simultaneously domestic law, public and private, substantive and procedural, created both by treaties and by purely legislative acts and supplemented by general principles of law and practice.

To sum up therefore one may say that, as follows from the review that has been presented of the basic problems of the subject, the European Communities with their legal system no longer fit within the traditional categories of international law. However this is not a system which lends itself to easy and clear characterisation. An example of this may be the definition in "The Oxford Encyclopedia of European Community Law" (1991, volume I, page 101). This is a definition with a whole litany of different adjectives. In extenso it reads as follows: "....Community law as a whole constitutes a new, independent (autonomous), supranational, self-contained, uniform, and unitary legal system of a sui generis nature, with a limited field of application". Thus this long definition (with seven adjectives!) leads to the final conclusion that community law is of sui generis nature.

b.National constitutions and supranational law - Report by Prof. Luigi FERRARI BRAVO, Rome University, Legal Adviser to the Minister for Foreign Affairs of Italy

1. First of all, we shall delimit the meaning of "supra-national law" for the purposes of this Report. In theory, the term may extend to any legal provision produced by an organised system which is based on an international agreement and which, in the particular manner provided for, aims at regulating situations which are usually covered by national law. The provision of international origin intervenes so as to effect a uniform operation of law within the national legal systems.

This is the pattern followed by some acts of the United Nations, such as those Resolutions of the United Nations Security Council which are adopted pursuant to Chapter VII of the Charter, on the basis of which States are, for example, to respect an embargo or an economic boycott against a country, and which accurately define the activities to be prohibited in each juridical system. But, in our opinion, this is not a real supra-national law, as the intention of the international organisation can be effectively implemented only if the provision is incorporated into each national system by means of a legislative act specific to that system. In the absence of such incorporation, whereas the defaulting State bears the international responsibility, the obligation is not binding on national administrative authorities or upon physical or legal persons.

The same is true of the decisions produced by most international courts, such as the International Court of Justice and the European Commission and the European Court of Human Rights. Obligations deriving from their decisions are addressed to States, which must implement them in the manner established by each system. It might be - and may even be advisable - that some juridical systems of member Countries of the Council of Europe will decide, in the course of time, to receive some parts of the contents of those judgements without any particular transformation. For instance, the interpretation given by the Court of Strasbourg to the provisions defining fundamental human rights can "directly" oblige national judges to comply with them. But the Rome Convention does not impose such a result, which is left instead to the free decision of the legal systems of the member States of the Council of Europe. In any case, even in the States where the so-called "direct effect" of the Strasbourg organs' decisions is admitted, such "direct effect" does not apply to those parts of the judgments, such as the rulings on compensation granted to claimants, which demand a positive action by the respondent State to enforce the obligation to pay.

The position of some acts of various international bodies such as ICAO or other smaller or sectorial organisations is different.

The States have provided for these acts (as for instance rules on the safety of air navigation) to be imposed, for practical reasons and without transformation, on the subjects of national systems. But due to the limited number and quality of these acts, as well as to the lack of any system (even of a non-judicial nature) which operates to secure compliance with the relevant juridical values in the agencies issuing them, the aspects of trans-nationality (or supra-nationality) are hardly perceived in these acts.

Such being, today, the state of international juridical affairs, the scope of our research shall be confined to the relation between constitutions and European Community law, and more particularly to the constitutions of EC member countries.

It is only within this framework that the pattern of "supra-nationality", as defined above, can be identified, i.e. a complete juridical system originating from a source of international law (Treaties instituting the Community and Treaties which, in the course of time, have revised them) consisting not only of such treaty provisions themselves but also of other provisions which are the product of a constant juridical process. Most provisions contained in the Treaties instituting the Community, as well as many other provisions produced by the Community institutions, when construed in order to ascertain the mens legis which has inspired them, indicate that they are clearly intended to be included, as uniform law, in the domestic legislation of member States, either together with or in substitution for them, while at the same time maintaining their character as provisions belonging to another system endowed with a well-defined mechanism of control and law enforcement. The purpose of these provisions is to implement in compliance with the Treaties instituting the Community a real transfer of legislative power from the States to the Community within its sphere of competence. They therefore are addressed not to EC member States, but to private or public subjects operating within them. To be enforced, these provisions do not need any transformation on the part of national systems: they are meant to produce a"direct effect" on their addressees.

Not all European Community law follows this pattern, as it also contains other provisions which follow the so-called traditional scheme of relations between a system having an international origin and domestic systems. These provisions need the State system in order to be implemented: if the State system does not co-operate, they cannot take effect. Naturally, they can benefit from jurisdictional aid, and the State's default can be established together with appropriate declarations and orders. But, unlike in the former case, the declaration of non-compliance and/or condemnation must be executed by the respondent State, whereas for the above-mentioned provisions the intention they express entails self-execution, i.e. the recognition of the fact that they can be directly enforced.

These are the provisions - which today cover most aspects of European Community law - that are called "supra-national" even if, perhaps, a better designation might have been found.

Their characteristics are the following:

a) they tend to replace national provisions in sectors usually reserved to the national competence;

b) they have a self-implementing power which requires little support from domestic systems;

c) they are provided with an autonomous jurisdictional system controlling their validity and their correct interpretation, including the extent to which they may be said to be self-implementing.

This is the innovative character typical of supra-national law and which had to be recognised by the Constitutions of EC member States. This has been done according to patterns that we are going to briefly describe in general. After that, however, we want to concentrate on one or two national systems whose characteristics we can better analyse.

2. The response of constitutional systems of member States to the needs of "supranational provisions" in European Community law has been quite different, according to the characteristics of each constitutional system.

In the Europe of the Twelve, many States have a written constitution (although with very different characteristics), except for one State (the United Kingdom) which has never had one. Some States, to allow a harmonious functioning of their domestic system in subjects covered by the European Community law, have revised their constitution (The Netherlands, Belgium, Luxembourg, Ireland, Portugal and, recently, France), whereas others had recourse to case-law in order to achieve an acceptable result (Denmark, Greece and Spain). In Germany, the process of adjustment of the Constitution to the needs of the European Community law has been quite fast, due to the availability of juridical instruments not to be found elsewhere; in Italy, the process was slower owing in part to the lack of such mechanisms. Nevertheless, it is generally agreed that today the balance is acceptable.

It is not possible in this Report to give a detailed and accurate analysis of how the constitutional systems of the Twelve have adjusted to the needs of the European Community law. We shall confine ourselves to providing brief remarks on the more important types of solutions adopted. We shall then examine in more detail the evolution of the Italian constitutional system which we obviously know better, keeping in mind that the "path" followed by Italy has been slower and more tortuous than elsewhere and that the evolution of the Italian constitutional system is not yet finished.

3. As mentioned before, Great Britain has no written constitution. It is unanimously acknowledged, however, that some laws, de facto, enjoy a higher rank and that these, together with certain well-known dicta, form the basis of British constitutional law. After all, this is not so surprising if we consider that in constitutional matters a more useful distinction is rather between rigid constitutions and flexible ones. The 1848 Italian Statute was a flexible constitution, and its evolution was not so different from that of British constitutional law.

Now in Great Britain international law has always been considered - as Blackstone used to say - "as a part of the law of the land". Thus, the system in itself is open to international values. On the other hand, what is inherent in "the rights of British citizens" is part of the prerogatives of Parliament - which is equally sovereign as the Crown.

Under these circumstances, we can understand why the provisions of the 1972 European Communities Act - which is the law supporting the Act of accession to the Communities (and its subsequent amendments enacted on the occasion of the ratification of treaties, subsequent to changes to the Community Treaties, such as the 1986 Single Act or the recent Maastricht Treaty) - are generally considered as true constitutional provisions. They meticulously mention all the powers envisaged by the Community Treaties and "transform" them into the same number of regulatory powers at the level of the British system, according to a technique followed in Great Britain, where - unlike in Germany and in Italy - the adjustment to an international provision does not take place through a single section contained in a law (the so-called Mantelgesetz), but is provided for in much greater detail. As a consequence, in the British system the risk of clashes between the domestic system and the Community system - and above all the jurisprudential clashes - is extremely remote in that it is the very law accompanying ratification which establishes the "primacy" of Community law with respect to past and present domestic law (helped, in the last respect, by the non applicability of the

principle of stare decisis). Moreover - and here lies the merit of the British system - the enactment of a law accompanying the ratification of a treaty (which per se would be a "prerogative of the Crown" and thus of the Government) is a very deeply felt procedure because it involves a meticulous analysis - at the Parliamentary level - of all implications and potential consequences of the treaty. Yet, once the hindrance is overcome, the system runs smoothly.

In France the situation was less clear. Here, the supremacy of international treaties over domestic law is sanctioned by Article 55 of the 1958 Constitution (as well as by its Preamble, which is the same as that of the 1946 Constitution), but does not explicitly mention Community Law[96]. As to Community Treaties, they were ratified by law (if they fall under the categories for which a law is foreseen) or by referendum. The primacy of rules enacted by Community institutions over French law asserted itself through the jurisprudence without any sensational clashes, at least at the level of ordinary judges. For the Council of State, it was maybe a little more difficult, as shown by the 1964 decision in the case of the French oil monopoly [97]. In time, however, even this superior jurisdiction adjusted itself to the supremacy of Community Law, as finally sanctioned by a series of decisions commencing with the Nicolo case, dated October 20, 1989[98]. The system was thus ripe for a constitutional reform, enacted in June 1992.

In Germany, by contrast, there is a specific constitutional provision, Article 24 of the Grundgesetz, allowing for the transfer of sovereign powers from the Bund to international institutions[99]. This provision has an origin similar to that of Article 11 of the Italian Constitution (see below)[100], in that it was also conceived in contemplation of the political and

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[96] *Art.55 of the French Constitution of 1958 states: "Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party".*

The translations of Constitution provisions into English in this Report are taken from the loose-leaf services, Constitutions of the Countries of the World (A. Blaustein and G. Flanz Eds.)

[97] *Conseil d'Etat, Dec. of 19 June, 1964 (Soc. des Pétroles Shell v. Berre), in Clunet, 1964, 794 ff.*

[98] *The text of the Decision is reported in Common Market Law Reports, 1990, 173 ff.*

The Nicolo Jurisprudence was followed in the Boisdé case (24 September 1990) and in the Société Rothmans et Philip Morris case (28 February 1992). Helped by these developments, as well as by a decision of the Conseil constitutionnel of 9 April 1992, France adopted, on 25 June 1992 an amendment to the Constitution which consists, inter alia, of the addition of a Chapter XIV entitled "The European Community and the European Union". The 20 September 1992 referendum on the ratification of the Maastricht Treaty was the logical consequence of these developments.

[99] *The text of Article 24, paras. 1 and 2, of the German Constitution of 1949 is the following:*

"The Federation may, by legislation, transfer sovereign powers to international institutions.

In order to preserve peace, the Federation may join a system of mutual collective security; in doing so, it will consent to those limitations of its sovereign powers which will bring about and secure a peaceful and lasting order in Europe and among the Nations of the World".

[100] *Art. 11 of Italian Constitution states that "Italy condemns war as an instrument of aggression against*

military security requirements of a defeated nation. However, partly because the German provision has a more favourable wording, which can be more easily adjusted to Community requirements if compared to the Italian one, and partly because - unlike the Italian system - the German constitutional law granted to the Constitutional Court more pervasive powers than those of the Italian Court[101]*, the German system is much more responsive to the requirements stemming from the development of Community powers. On the other hand, in Germany the latter is perceived as being far more compatible with national interests than in Italy. Briefly, it may also be noted that also in Germany the idea of the supremacy of Community law over domestic law asserted itself more easily than in Italy*[102]*.*

4. In spite of the similarities between the Italian and the German Constitutions, the process leading the Italian judges to acknowledge the primacy of Community Law was extremely long and thorny.

First of all, the wording of Article 11 of the Italian Constitution, upon which today the decisions of the Constitutional Court bases the doctrine of primacy, is less clear-cut than the wording of Article 24, para. 1 of the German Constitution. In fact, the former speaks of a "limitation of sovereignty", while in the latter mention is made of "transfer (of) sovereign powers". Moreover, Article 5 of the Italian Constitution declares that the Republic is "one and indivisible", and this certainly does not help the process. Besides that, it is evident that - as borne out by the "travaux préparatoires" of the Italian Constitution - Article 11 was introduced only with a view to membership of the United Nations and to facilitate the entry of Italy into the Organisation. Thus, the juridical system at its highest level could guarantee the peaceful nature of the new Italian Republic, born after the destruction of the war.

It is also worth recalling that, on the occasion of the ratification of the ECSC Treaty, as well as during the preparation for the ratification of the Treaty on the European Defense Community (EDC) - which was subsequently aborted - and finally on the occasion of the ratification of the EC Treaty, both the Government and the opposition carefully avoided tackling the problem of the relation between Community Law and the Constitution, thereby evading a harsh debate between an uncertain majority and a well-decided opposition. As a consequence, Italy ratified the European Treaties, trying to hide - above all to its own eyes - their real implications. It woke up only when it was brought back to reality by the dangerous case-law developments which surfaced as Community integration progressed and the Italian system unveiled its shortcomings.

In the following paragraphs we will try to summarise as briefly as possible the development of the decisions of the Italian Constitutional Court in Community matters.

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the liberties of other people and as a means for settling international controversies; it agrees, on conditions of equality with other States, to such limitation of sovereignty as may be necessary for a system calculated to ensure peace and justice between nations; it promotes and encourages international organisations having such ends in view".

101 *In Germany, unlike in Italy, even a private citizen can apply to the Constitutional Court.*

102 *Bundesverfassungsgericht, Internationale Handelsgesellschaft v. EVGF, Decision of 29 May 1974, in Common Market Law Reports, 1974, 540 ff.; Bundesverfassungsgericht Wunsche Handelsgesellschaft Case, Decision of 22 October 1986, in Common Market Reports 1987, 225 ff.*

The 1964 decision in the ENEL case provided a very bad start (ENEL was the agency originating from the nationalisation of the Italian electric power enterprises, which had set off a fierce political and parliamentary fight)[103]*. In this case, the Italian Constitutional Court superficially got rid of the problem of supranationality of Community Law, pointing out that the question was irrelevant in view of a possible declaration of unconstitutionality of the law nationalising electrical power. In fact, even in the presence of a clash between Community law and Italian law, the latter would prevail in circumstances where, as in this particular case, it was subsequent to the former*[104]*. As could be easily expected, this provoked a violent reaction by the EC Court of Justice which, pursuant to Article 177 of the EC Treaty, had been called upon to deal with the same question*[105] *and, since 1962, had already begun to develop its own jurisprudence on the supremacy of Community Law*[106]*.*

Since 1964 to the present day, the Italian Constitutional Court has progressively backed down. At first, in 1965, it acknowledged the autonomy of the Community system with respect to the domestic system, and since 1973, it has been stretching the interpretation of Article 11 of the Constitution to the point that, in Italy, it has become the constitutional juridical basis for the supremacy of Community law, increasingly recognised in a more and more extensive way[107] *(the*

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[103] *Corte Costituzionale, Costa v. ENEL, Decision n.14 of 7 March 1964, in Rivista di diritto internazionale, 1964,295 f.*

[104] *The law nationalising electrical power was drafted in 1962, whereas the Rome Treaties and their implementation law dated back to 1957.*

[105] *European Court of Justice, Costa v.ENEL, Case 6/64 of 15 July 1964, European Court Reports, 1964, 585.*

Art. 177 of the EEC Treaty states:

"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaty;
(b) the validity and interpretation of acts of the institutions of the Community;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a member State, against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice".

[106] *European Court of Justice, Van Gend en Loos, Case 26/62, European Court Reports, 1963, 1.*

[107] *Suffice to recall, among the numerous decisions of the Corte Costituzionale, Dec. n. 98 of 27 December 1965 (Acciaierie San Michele v. CECA) in Rivista di diritto internazionle privato e processuale, 1966, 106 ff.; Dec. no. 183 of 27 December 1973 (Frontini v. Ministero delle Finanze), in Common Market Law Reports, 1974, 372 ff.; Dec. no. 232 of 22 October 1975, in Rivista di diritto internazionale, 1975, 766 ff.; Dec. no. 170 of 5 June 1984 (Spa Granital v. Amministrazione delle Finanze dello Stato), in Common*

latest relevant decision in this connection dating back to 1991). Thus, an authentic constitutional custom emerged which re-interpreted Article 11 of the Constitution, following Article 24 of the German constitution, and in any case construed it in a way the authors of the text had never contemplated. The author of this Report believes that this occurrence, as well as the new requirements of Community law ensuing from the ratification of the Maastricht Treaty, should induce the Italian Parliament - which has undertaken a global reform of the 1947 Constitution - to tackle the problem systematically and determinedly, and all the more so in that today, unlike in the past, European ideals are widely accepted in Italy.

5. Before concluding this report, it seems advisable to make some remarks on the best possible relations between supranational law and national laws. To this end, it seems appropriate to continue to apply the model established by the European Communities.

The provisions of the Community Treaties addressing domestic laws have two different characteristics. Some of them only prescribe the behaviour that Member States must have; others, more penetrating - and called by many "self-executing" - directly establish subjective rights which are vested in individuals and whose observance can be asserted before courts in member states.

In the former case, if the member State does not comply with its obligations, the individual seeking compliance can only appeal by way of petition to the Commission, which can refer the matter to the Court of Justice under Article 169 of the EC Treaty. The Commission's initiative, once taken, can result in a decision condemning the State and, if the non-fulfilment persists, in a second judgement, based on the non-implementation of the Court's decision by the defaulting State. However, in order to protect the interests of the individual and to correctly implement Community law, the State's co-operation is indispensable. It is therefore advisable that, in the reform of the Community system - started by the Maastricht Treaty - the possibility of also imposing pecuniary penalties on the defaulting State be considered. And yet, if even this possibility turns out not to be a deterrent, this might not be enough.

In consequence, in order to guarantee the harmonious functioning of Community and domestic laws, it may be necessary to conceive of a different kind of penalty, even in the nature of a reprisal against the economic interests of the defaulting state, in order to ensure compliance.

On the other hand, if the Community provision is self-executing, according to the Community law rationale, the domestic jurisdictions themselves should consider the question of non-implementation and annul its effects. If possible, this should occur through the instruments provided for by domestic law, or if not, through the provision of appropriate compensation to the individuals concerned. In this connection, it should be noted that, in the last few years, domestic case-law, under the pressure exerted by the case-law of the EC Court of Justice, has made considerable breakthroughs.

Obviously, it is often necessary to first know the precise meaning of the Community provision. This task may be carried out by the Luxembourg Court in its replies to the questions of interpretation raised by national judges. It would be a harsh blow to the Community system if

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Market Law Reports, 1984, 756 ff.; Dec. no. 113 of 19 April 1985 (Spa B.E.C.A. v. Amministrazione delle Finanze dello Stato) in Rivista di diritto internazionale, 1985, 388 ff.; Dec. no. 168 of 18 April 1991.

the stress currently laid on the idea of subsidiarity brought about a reform of Article 177, so that it could be enforced only by national judges of final jurisdiction who, often, will not even be involved in the particular disputes. Should this development take place, it would be necessary to envisage at least an appeal to the Luxembourg Court, in the interest of Community law, so as to avoid misinterpretations of Community provisions in the domestic jurisdictions.

What has been said of Community provisions included in the Treaties can also apply to the measures taken by Community institutions in compliance with the Treaties themselves. Such measures can either be "directly applicable" in the member States or they can call for a national system as an intermediary. Regulations belong to the first case, whereas directives belong to the second case[108].

However, not all forms of regulations can be directly applicable. Suffice it to think of the many instances in which they envisage the setting up of administrative mechanisms in domestic systems. In these cases too, some domestic measures are necessary, in the absence of which the functioning of the Community provision would be altered.

As to directives, many of them - as acknowledged by both Community and domestic case-law in turn - contain "self-executing" provisions. This trend has recently become more marked through the practice of what are known as "detailed directives", a practice favoured by the Court of Justice but brought into question again after Maastricht.

In reality Community law was intentionally distorted so as to allow for its development, and in particular to overcome the resistance of national Governments, too often prone to a policy of postponement.

Be that as it may, if, as with Community directives, there is a step back to the past, the problem will remain - and worsen - as to the length of time it will take to implement them at the national level. This question goes to the heart of the viability of the Single Market. One is led to think that such a problem - which is the source of uncountable delays and misunderstandings between the EC Commission and the member states - can only be solved by widely resorting to delegification[109] *at the national level. This should however be offset by a different role to be played by national Parliaments in the management of EC policy, currently carried out by the executive in each member State. Once again, the need is looming to adequately amend national constitutions.*

It is necessary to add a final remark. The development of the European Union does not automatically entail widening the scope of supranational law. In fact those matters which relate to a common foreign and security policy, as well as to judicial co-operation between the EC member States - concepts today enhanced by the Maastricht Treaty - do not fit in well with the ideas of supranationality and of control by the Luxembourg Court.

Unless the role of the Court is radically changed - which, for the time being, is neither practical nor likely - the future EC will be a mix between supranationality and intergovernmental co-operation. This will open up new and different outlooks even in the evolution of the member

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[108] *Other types of measures will not be considered here, so as to streamline the presentation.*

[109] *i.e. the issuing of governmental decrees on the basis of framework legislation.*

Countries' constitutional systems which, even if not bound to converge toward the idea of a European federation - which is at present not well accepted by the public at large - will nevertheless all proceed in the direction of convergence. If this does not occur, the very idea of a European Community will eventually weaken and the threat of a non-Europe, i.e. of an insufficient solidarity between its components, will fall upon each of its member States, none of whom can afford to be self-sufficient or, even worse, isolated.

c.Summary of the discussions on "Supranational law"

1. The definition of supranational law

There was agreement that it is very hard to clearly define the notion "supranational law". The characteristics mentioned in the report by Mr Ferrari Bravo partly also apply to the European Convention on Human Rights and the case law developed under it though it has to be taken into account that not all member States give direct effect to the Convention within their domestic law. Further characteristics of supranational law would be its primacy (which is linked to the fact that it tends to replace national provisions) and the fact that derived law can be developed unilaterally.

2. Supranational law and the Federal State

For federal States it is difficult to become integrated into a supranational community. With respect to the European Community, it is always the national State which is responsible for complying with Community rules even though at national level the subject matter may be within the competence of the region. In Italy it is therefore possible for the national Government to substitute itself to the region in such cases.

There is now an increased tendency towards interregional co-operation and within the framework of the Maastricht Treaty a Committee of the Regions has been set up. It remains to be seen how far this will effectively increase the role of the regions within the European Community.

3. The development of Community law and the response of national constitutions

Some constitutions contained even before the setting up of the Community provisions allowing for the limitation of national sovereignty in favour of international institutions. Apart from Italy and Germany, Denmark should be mentioned in this context where a transfer of sovereign powers can be decided either by a five-sixths majority of all members of Parliament or by referendum.

On the basis of such constitutional provisions a dialogue developed between the European Court of Justice in Luxembourg and national constitutional, but also ordinary, courts and this dialogue permitted an adaptation of the national legal systems to the growing demands from Community law. On the other hand national constitutional courts, especially in Italy and Germany, maintained certain limits on the transfer of sovereign powers and required that the Community had to respect fundamental rights and that it could not be in contradiction to the basic legal structure of the State.

National constitutional rules can however not be stretched indefinitely to accommodate the growing importance of Community law. In particular, the Maastricht Treaty aims at a European Union based on common citizenship, which includes the right of citizens of the Union to vote in local elections, their right to diplomatic protection by any member State, to protection by a European Ombudsman and the setting of European political parties. It seems therefore necessary to revise constitutional provisions like Article 11 of the Italian Constitution.

For the new democracies in Central and Eastern Europe which, according to the general wish of the participants, should become members of the European Community in the future, it seems therefore advisable to include in their constitutions both a rule on the relationship between national law and international law in general and a separate rule allowing for future accession to the European Community.

The role of the European Court of Justice had been very important for the development of Community law. This was not due to a usurpation of powers by the court but to the fact that it has been obliged to become active in the areas where the Council had not fulfilled its tasks. It would therefore be very dangerous to limit the role of the Court by restricting the scope of Article 177 of the EEC Treaty. In that context it has to be borne in mind that according to Article L of the Maastricht Treaty the Court is competent with respect to the Treaties establishing the European Community but not with respect to aspects of the European Union like foreign affairs, security policy and legal co-operation.

FOURTH WORKING SESSION

Chaired by Prof. Krzysztof WOJTOWICZ, University of Wroclaw

THE ELABORATION OF MODEL CLAUSES ON THE RELATIONSHIP BETWEEN INTERNATIONAL AND DOMESTIC LAW

a. *Report by Prof. Constantin ECONOMIDES, Athens University, Legal Adviser to the Minister for Foreign Affairs of Greece, Chairman of the Working Group on the relationship between international law and domestic law of the European Commission for Democracy through Law*

b. *Summary of discussions*

a.The elaboration of model clauses on the relationship between international and domestic law - Report by Prof. Constantin ECONOMIDES, Athens University, Legal Adviser to the Minister for Foreign Affairs of Greece, Chairman of the Working Group on the relationship between international law and domestic law of the European Commission for Democracy through Law

This study was carried out on the basis of national replies to the questionnaire on this subject, adopted by the Venice Commission.

27 States have replied to the questionnaire: Albania, Croatia, Czechoslovakia, Denmark, Germany, Greece, Liechtenstein, Lithuania, Norway, Poland, Sweden, Switzerland, the United Kingdom, the United States, Finland, Hungary, Luxembourg, Slovenia, Bulgaria, Italy, Portugal, Turkey, Austria, France, Romania, Russia and San Marino. In the preparation of this study, account has also been taken of the replies by 22 States to the questionnaire on the expression by States of consent to be bound by a treaty (see the relevant Council of Europe publication, Strasbourg 1987)[110], drawn up by the Council of Europe's Committee of Experts on Public International Law.

This comparative study comprises five parts:

1. International treaties and domestic law

2. International customs, general legal principles and domestic law

3. Decisions of international institutions and domestic law

4. Judicial and arbitral rulings and domestic law

5. Other questions of international law contained in national constitutions

I. INTERNATIONAL TREATIES

Nearly all constitutions contain provisions concerning international treaties, but these provisions differ in a number of respects.

1. The organ invested with treaty-making power

1.1 The Head of State

The organ authorised to bind the State on the international level by means of treaties, which thus possesses treaty-making power, is usually the Head of State (King or President). It is

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[110] *The States in question are the following: Austria, Belgium, Cyprus, Denmark, Spain, France, Greece, Iceland, Ireland, Italy, Luxembourg, Norway, the Netherlands, Portugal, the Federal Republic of Germany, the United Kingdom, Sweden, Switzerland, Turkey, Australia, Canada and the United States.*

therefore he who "ratifies"[111] treaties and thereby establishes on the international plane the consent of his country to be bound by the treaty thus ratified[112]. That is the case for the following countries: Austria, Denmark, Greece, Italy, Luxembourg, the United States, Finland, Norway, the United Kingdom, Turkey, Czechoslovakia, Germany, Spain, France, Iceland, the Netherlands, Portugal, Albania, Poland and Liechtenstein.

For example, Article 68 of the Belgian Constitution provides that "the King makes treaties", whereas Article 87 para. 8 of the Italian Constitution provides that "the President of the Republic ratifies international treaties"[113].

1.2 The Government

In exceptional cases, however, treaty-making power is vested in the Government: for example, under the Swedish Constitution, "any international agreement with another State or with an international organisation shall be concluded by the Government". In Switzerland, the Federal Council is responsible for the ratification of international treaties.

1.3 The Parliament

Consequently, treaty-making power is nearly always a prerogative of the executive: the supreme organ of the State (as a rule) or the Government (in exceptional cases). However, some States assign the right to conclude treaties to the legislature, ie the Parliament. Bulgaria is one such State. Similarly, in Russia, the most important treaties are ratified by the Supreme Soviet of the Federation. In Hungary too, the Parliament "concludes international treaties of primordial importance from the standpoint of external relations". It is worthy of note that this approach which, all things considered, is relatively exceptional, is followed by emerging democracies which previously belonged to the socialist bloc.

1.4 Apportionment of responsibilities between the Head of State and the Government

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111 *The same is true of accession which is another method of concluding treaties equivalent in several respects to that of ratification.*

112 *See Article 2, section 1, para b, of the Vienna Convention on the Law of Treaties.*

113 *Ratification - like the other methods of concluding treaties - is an act of international law whereby the State, through its competent organs invested with treaty-making power, expresses its wish to be bound internationally by the treaty concerned. It is also an optional act which depends on the discretionary authority of the State; the latter may thus legally refuse to ratify a treaty without being exposed thereby to any claim of international liability. In practice, there are instances of conventions which, though signed, have ultimately not been ratified. In fact, however, refusal to ratify is the exception rather than the rule. Normally, once conventions have been signed, especially bilateral ones, they are ratified promptly. Thirdly, unless the treaty itself provides otherwise, ratification is comprehensive and must relate to the convention as a whole, not just one of its parts. Reservations, of course, are a case apart, as they enable States legally to limit their treaty obligations, for example by excluding particular provisions of the treaty or by restricting its scope. Lastly, ratification cannot be made subject to conditions which are not authorised by the treaty itself.*

With few exceptions (Luxembourg, for example), the Head of State does not conclude all treaties, only the most important ones, and in so doing he acts on the proposal of the Government, at least in the republican systems. Other treaties are concluded - with or without the authorisation of the Head of State - by the Government and, in particular, by the Minister for Foreign Affairs, acting on behalf of the Government. Some countries (France, Portugal) distinguish between formal treaties which are concluded by the President of the Republic on behalf of the State and treaties in simplified form which are concluded by the Minister for Foreign Affairs on behalf of the Government. Other countries (Germany, Austria) distinguish between State treaties concluded by the Head of State, intergovernmental agreements concluded by the Federal Government, and interministerial agreements concluded by the Federal Ministers. In another case (Ireland), treaties concluded between Heads of State are distinguished from other treaties concluded by the Government. Constitutional provisions in other countries expressly define the categories of treaties which can only be concluded by the Head of State. For example, the Greek Constitution provides that the President of the Republic shall conclude "treaties of peace, alliance, economic co-operation and participation in international organisations or unions".

As a rule, therefore, treaties which neither require ratification by the Head of State, according to domestic law, nor themselves provide for such ratification, may be concluded by the Government[114], by acceptance or approval, by exchange of notes or letters or by simple signature[115]. The treaties in question are usually the least important ones. Responsibility for assessing their importance lies, of course, with the individual State. The following examples of such treaties may be mentioned:

- *those relating to questions which, according to domestic law, come within the exclusive purview of the Executive;*

- *treaties concluded for the implementation of a duly approved prior agreement;*

- *administrative and technical agreements of secondary importance[116].*

1.5 <u>Legislative approval and administrative approval</u>

As has already been noted, leaving aside exceptional cases where the Parliament possesses treaty-making power, this prerogative belongs to the executive, to the Head of State in the case of important treaties and to the Government for treaties of lesser importance. However, as will be shown below, in order to be lawfully concluded[117] under domestic law, some categories of treaties require the authorisation or approval of Parliament, which is usually granted by means of a statute. This is particularly true of treaties which come under the responsibility of the Head of State and are concluded by means of ratification or accession, as well as treaties which are

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114 *This is also the case where the Head of State delegates his authority to the Government, provided that such delegation is permissible under the law of the country concerned.*

115 *See Article 11 et seq of the Vienna Convention on the Law of Treaties.*

116 *See, for instance, the replies of Switzerland, Liechtenstein, Turkey, Greece etc.*

117 *Conclusion of a treaty comprises the following stages: negotiation for the sake of its elaboration, signature and the act whereby the State establishes on the international plane its consent to be bound by the treaty.*

the responsibility of the Government and are in most cases concluded by means of acceptance or approval.

It should be emphasised at this point, however, that even treaties which are concluded by simple signature, and do not therefore need legislative approval, are usually approved by the Government by means of a decree or ministerial decision (administrative approval) and are then published in the Official Gazette for subsequent application within the country concerned (Italy, Germany, Finland, Austria, Liechtenstein, Greece).

In fact, only agreements of genuinely minor importance, requiring no enforcement, and those of a confidential nature, are not published in the Official Gazette. The constitutions of several countries authorise the conclusion of confidential agreements which are more or less a relic of the past.

Thus, agreements which the Government concludes independently are incorporated in domestic law by means of publication in the Official Gazette of the administrative act approving them. In some cases, the mere publication of the agreement is sufficient.

1.6 Self-executing agreements

The term "self-executing agreements", irrespective of the required method of conclusion (ratification or approval, with or without parliamentary authorisation, or simple signature), refers in principle to agreements which are in themselves sufficiently explicit and precise to permit of easy application in domestic legal systems. In a sense, all agreements should be self-executing and those which are not usually exhibit defects from the standpoint of legal technique, usually due to a lack of political willingness on the part of parties to the treaty. In practice, however, States sometimes deliberately draw up their agreements in very general terms, thereby giving rise to extremely flexible and supple conventions. These agreements are a little like European Community directives, which give a general outline of the aims to be pursued "leaving the decision as to form and means up to the national courts". It goes without saying that in all these cases, these incomplete agreements must nevertheless be clarified and completed as far as possible by the Contracting States, by means of internal implementing provisions, whether legislative or administrative.

1.7 Recommendations

a. The assignment of treaty-making power to the executive branch (the Head of State in most cases) is a logical and effective policy, and one that is backed up by long years of constant practice. It is the pre-eminent formula adopted by the Western democracies. This formula is indeed logical, as it is the executive which governs and therefore also bears responsibility for the management of the external affairs of the State, rather than Parliament as a rule - at least directly - or the judiciary.

In the final analysis, this traditional approach, which has proved its worth, is based inter alia on the principle of the effectiveness of State action in the international sphere[118].

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[118] *It is essentially for this reason that Article 7 para. 2 of the Vienna Convention on the Law of Treaties provides as follows:*

"By virtue of their functions and without having to produce full powers, the following are considered as representing their State:

b. It is desirable for agreements signed subject to ratification or approval, and bilateral agreements in particular, to be ratified or approved promptly by States.

c. It is also desirable that all agreements not requiring legislative approval should nevertheless be approved by administrative means and/or published in the Official Gazette or elsewhere, so that the authorities and private individuals may take note of them and conform to them.

d. Whenever additional measures of a legislative or administrative nature are required for the enforcement of a treaty within a State (as in the case of treaties which are not self-executing), such measures must be taken as quickly as possible by the State concerned, in order for the latter to give full effect - as required - to its contractual commitment.

2. Parliamentary intervention in the procedure for the conclusion of treaties

2.1 Introduction

As mentioned above, it is the executive which as a rule possesses the power to conclude treaties, but Parliament nevertheless intervenes in the conclusion procedure to give its consent, its authorisation or its approval of the treaty to be concluded.

2.2 Extended parliamentary intervention

In some cases, the Parliament has broad powers of intervention which, apart from some more or less minor exceptions, are applicable to all international treaties. This is the case with Luxembourg, Cyprus, Switzerland, Turkey and Russia, among others.

2.3 Categories of treaties subject to approval

In other cases, which are much more numerous in practice and constitute the rule so to speak, the consent or authorisation of Parliament is required for certain categories of more or less precisely defined treaties[119]. The categories most frequently referred to in constitutional provisions are the following:

- *peace treaties;*
- *political and military treaties (in particular alliances);*
- *treaties with territorial implications;*

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a. Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty".

[119] *Some Constitutions require the consent of Parliament for conventions "of particular importance", with no further clarification (Norway, Denmark, Sweden). Consequently, the question whether a treaty obligation is or is not of particular importance depends on a political assessment by the State concerned. However, in cases of doubt about the importance of the treaty, consent will normally be required, which is a point in favour of the Parliament.*

- *treaties concerned with matters that fall within the purview of the legislature[120];*

- *treaties concerning participation in the work of international organisations;*

- *treaties entailing a burden on State finances.*

In other cases and more rarely, parliamentary approval is also required for treaties in the following fields:

- *trade;*
- *economic co-operation;*
- *personal status;*
- *settlement of disputes by arbitration or legal proceedings.*

2.4 Significance of parliamentary approval

Unlike ratification and other means of concluding treaties which are acts of international law, parliamentary approval is a measure of domestic law. By this measure, Parliament approves the treaty and authorises the executive to go ahead with ratification or acceptance, ie to bind the State on the international plane[121]. Strictly speaking, the legislature does not itself have a hand in the act of ratification which as a rule is the exclusive responsibility of the executive[122], but its intervention is nonetheless an essential condition for the legality of the treaty under domestic law. Without parliamentary approval, the treaty will not be valid and will produce no effects in the domestic legal system. That is the general rule[123].

2.5 Anteriority of approval

As parliamentary authorisation is a necessary condition for the conclusion of a treaty, it follows that such authorisation must be granted before ratification or acceptance. If it is to act within the framework of the law, therefore, the executive needs the prior consent of the Parliament. In

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120 *This is a very broad category comprising several sub-categories of international conventions: eg conventions for the recognition and enforcement of foreign judicial decisions, conventions on mutual assistance in civil and criminal matters, extradition treaties, conventions on establishment, consular treaties (especially in so far as they provide for privileges and immunities) etc.*

121 *According to United Kingdom practice, parliamentary intervention is less concerned with authorisation than with the enforcement of the treaty through the adoption of all statutory provisions needed for its application.*

122 *This explains the executive's power to reject ratification of a treaty, even one approved by Parliament, or to postpone such ratification for a variable length of time, if the national interest so requires. The executive may also, as a rule, accept the treaty after it has been approved by Parliament, with certain reservations, provided of course that the latter are admissible from the standpoint of international law. It may also denounce the treaty - provided that such denunciation is admissible from the standpoint of international law - without normally needing the authorisation of Parliament, even if such authorisation had been required for the conclusion of the treaty.*

123 *The situation is different, however, from the standpoint of international law. Under international law, a treaty is valid unless there has been a manifest violation of internal law concerning a rule of internal law of fundamental importance (Article 46 of the Vienna Convention).*

fact, however, there are occasional - not to say frequent - instances where the executive, in order to cope with emergency situations, concludes treaties and only submits them to Parliament afterwards.

It is true that, for the most part, this can be put down to the habitual slowness of the parliamentary approval procedure. Nevertheless, this modus operandi is unacceptable in a democracy. Indeed, it is obvious that Parliament's right to approve a treaty also includes the right not to approve it. Consequently, if the treaty is concluded by the executive prior to its approval by Parliament, there is a fait accompli and a fundamental responsibility of Parliament as a representative body is ignored. In such cases, Parliament loses its real powers and becomes a rubber stamp.

2.6 Form of approval

Parliamentary authorisation or approval usually takes the form of a statute which, subject to exception, is adopted in accordance with the customary procedure applicable to the passage of any legislation and is then published in the Official Gazette. The Parliament approves the treaty as a whole. Needless to say that it cannot approve it partially or conditionally, or amend some of its provisions. The approving statute may, on the contrary, contain special provisions to facilitate the application of the treaty within the State.

Thus, as a rule, it is by means of a single measure, namely the adoption of the approving statute, that: a. Parliament authorises the executive to conclude the treaty; b. the latter is incorporated in the internal legal system of the State; and c. the authorities and the citizenry are required by law to implement the treaty within the country.

In other more or less exceptional cases, however, parliamentary authorisation may take the form of a resolution or a decision, or even a letter. In some cases, mere publication of the treaty may be sufficient.[124]

2.7 Tacit approval

In nearly all cases, Parliament gives its express authorisation, but in particular instances such authorisation may be tacit if, after a certain period of time following the deposit of the treaty with the legislative authorities, the latter do not request the application of the customary legislative procedure. The treaty is then deemed to be tacitly approved. This simple and rapid formula is applied on an extremely limited scale (Netherlands).

2.8 Federal States

In the case of federal States, when treaties affect the rights and obligations of the component States, or are of particular importance to them, the latter must also give their consent or participate in some other way in the procedure for adoption of the treaty. This is particularly true of the German Länder and the Swiss cantons.

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124 *However, in certain countries (Finland, for example) the State takes measures, apart from the act of approval which is relatively formal and if the treaty so requires, necessary for the integration and application of the treaty within the domestic legal system. More often than not, this is in the form of a separate statute.*

2.9 Referendum

Lastly, as regards certain treaties of the utmost importance, the people themselves are required to give their consent through a referendum. The Swiss Constitution provides for recourse to referenda, either optionally or on a compulsory basis. Referenda are compulsory in respect of treaties providing for accession to collective security organisations or supranational organisations[125]. In France, a referendum is possible for treaties which have "implications for the functioning of institutions". This is also the case in Austria.

2.10 Legislative authorisation

It should be pointed out that Parliament may as a rule grant its consent in advance, by authorising the Government to conclude a specific agreement or agreements of a specific type. Such legislative authorisation must, of course, be specific, clear and precise. In such cases, agreements concluded on the basis of prior legislative authorisation obviously do not require parliamentary approval, since such approval has already been bestowed by the enabling act. This practice is undeniably useful, particularly for certain categories of agreements which are more or less identical and are frequently repeated in practice. The jurisdiction of the Parliament is preserved and the Government is enabled to act quickly on the international level.

2.11 Approval of treaties establishing international organisations of a supranational nature

When issues of major importance are at stake, the Parliament does not content itself with the usual voting rules for the purpose of giving its authorisation, but takes its decision on the basis of an increased majority, that is to say a special majority which is more difficult to achieve. For example, treaties establishing international organisations of a supranational nature, which assign national responsibilities to such organisations, are often approved by a special majority. In Greece, an increased majority is required for the approval of such treaties, namely three-fifths of the total number of deputies. The same is true of other countries (Norway, Luxembourg, Denmark, Finland, Croatia and Austria). Elsewhere (Switzerland, Austria), a referendum is held on the question of acceptance of such a treaty. In other cases, before a treaty setting up a supranational organisation can be ratified, the Constitution has to be revised, in accordance with the customary procedure, in order to bring it into line with the provisions of the treaty (France).

2.12 Recommendations

a. The extensive participation of Parliament in the State's international treaty-making activity is on the face of it a positive factor which must be approved and encouraged. Parliament should play a role, at least as far as agreements of some importance are concerned. The even indirect involvement of the general public in the process of concluding treaties is a requirement of democracy.

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[125] *In Liechtenstein also a referendum can be required at the request of a certain number of citizens or the Parliament itself.*

b. It lies with each State to strike its own balance in this field - in accordance with its traditions, its needs and the principles of democracy - with regard to the apportionment of responsibilities between the executive and the legislature.

c. The treaties listed above (see para. 2.3), for which parliamentary approval or authorisation is required, represent a satisfactory solution on the whole, which is based on long years of practice.

d. In nearly all cases, parliamentary authorisation should be a preliminary, that is to say that it should come after the signature of the treaty and before the act of ratification, accession, approval or acceptance.

e. It is natural for States to take greater precautions for treaties which substantially limit their sovereignty and, more particularly, for those which set up international organisations of a supranational nature.

It is therefore only logical that, in such cases, parliamentary votes on approving statutes should be subject to special majorities.

f. If secret agreements are permitted by the Constitution or in State practice, they must in no case belong to the category of treaties that come within the purview of Parliament, ie treaties for which the approval or authorisation of the latter is needed.

g. All States should take appropriate measures to shorten, as far as possible, the length of the parliamentary procedure for approval of international treaties, which is often too slow, complex and surrounded by excessive formalism.

h. Legislative authorisation for the executive to conclude treaties belonging to certain specific categories is a useful and efficient instrument for States in their international treaty-making activities and should be more widely used in practice.

3. The standing of an international treaty in domestic law

3.1 Introduction

The legal standing of international treaties within States varies considerably. For example, their level of importance in relation to the rules of domestic law is far from uniform. In some cases, national solutions are based on the Constitution itself (eg France, the Netherlands, Spain, Greece, Portugal), while in others they have emerged from practice and in particular from the case-law of the higher courts (Belgium, Italy, Switzerland, Luxembourg, etc).

3.2 Superiority over domestic law

In some States - though not many - a duly concluded treaty takes precedence over domestic law as a whole, including the Constitution (the Netherlands, Belgium, Luxembourg).

In the relatively exceptional cases where a treaty has a direct impact on the Constitution (for example, if it amends the Constitution or provides for derogations from it), other States recognise the treaty's status as superior or equal to the Constitution, provided that it has been approved by Parliament by an increased majority (Finland, Austria). Finally, particular

treaties of the utmost importance, such as those establishing the European Community, sometimes occupy a position within the State which is often superior to that of certain provisions of the Constitution (Italy).

3.3 Superiority over statutes

Another category of States recognises the superiority of treaties over both previous and subsequent legislation (France, Spain, Switzerland, Portugal, Greece, Bulgaria, Cyprus, Croatia, Slovenia). The States in question lay down certain conditions for this purpose: approval of the treaty by the legislature, entry into force and, in many cases, fulfilment of the condition of reciprocity, ie application of the treaty by the other party.

Other States close to this category do not give precedence to all treaties over their own legislation, but only to some of them, such as treaties for the protection of human rights, which thus prevail over any contrary statute (Liechtenstein, Russia, Romania, Czechoslovakia).

3.4 Equality with statutes

Most States adhere to the rule that treaties simply have the force of law. Thus, by virtue of the principle lex posterior derogat priori, *treaties take precedence of earlier statutes, but may be affected by later statutes (Germany, Austria, Denmark, Finland, Hungary, United States, Ireland, Italy, Sweden, United Kingdom, Turkey, Norway, Iceland, Liechtenstein, San Marino, Romania, Albania, Czechoslovakia, Poland and Lithuania).*

Although these countries do not formally recognise the superiority of treaties over subsequent national legislation, they accept it in fact and take various steps to prevent any conflict between domestic law and the international treaty concerned.

Those steps include the following:

- *a priori monitoring, particularly by constitutional courts, of the constitutionality of the treaty, so that in the event of conflict between the treaty and the Constitution, the latter can be amended before the international commitment is accepted (France, Hungary, Italy, Bulgaria, Spain, Romania);*

- *incorporation in specific statutes of a clause stipulating that they will only be applied if they do not conflict with international conventions governing the same question or questions, to which the States concerned are Parties (Romania, Czechoslovakia, Albania);*

- *interpretation of the statute by the administration and, more particularly, by the courts, so that it is in harmony with the treaty, thus taking for granted the State's determination to respect the international obligation and secure pride of place for that obligation in its domestic legal system. This measure, which consists in interpreting laws in a manner consistent with treaties, is widely applied in practice (Finland, Luxembourg, United States, Denmark, Romania, Norway, Sweden);*

- *a posteriori checks, mainly by the courts, on the constitutionality of treaties and a priori checks, mainly by the administration, on the conformity of draft legislation with existing treaties, so as to exclude any conflicts between the international treaty and domestic law*

which might involve the international liability of the State in the event of violation of the provisions of the treaty.

3.5 Inferiority in relation to statutes

Lastly, the status of some treaties may be inferior to that of statutes. This is the case with treaties which come under the exclusive responsibility of the administration, or which are concluded by the latter on the basis of parliamentary authorisation. In such cases, the treaty has the force of the executive act (decree, ministerial decision, etc) through which it is applied in the domestic legal system (Austria, Sweden, Denmark, Ireland, Germany, Greece). However, this is a relatively exceptional solution which usually concerns treaties of secondary importance.

3.6 Recommendations

a. The fact that international law has priority over domestic law is not at all contested. This self-evident truth is a requirement of international law.

Suffice it here to recall Article 26 (pacta sunt servanda) *and Article 27 (internal law and observance of treaties) of the 1969 Vienna Convention which codified the rules of international law in relation to Conventions. Moreover, all international law, and the rules concerning the international liability of States in particular, are based on this fundamental principle.*

As was shown above, the pre-eminence of international law is fully accepted by States, either in law or in fact.

This state of affairs is made even clearer and more significant by the existence of more select international legal systems, such as that of the European Community. The particularity of international law is that it is legally binding on States, but leaves to them the task of application within their domestic systems. They are therefore not required - at least formally - to recognise its pre-eminence in relation to national law, but they must conform to it fully, in the manner they themselves decide.

However, it would be desirable and would no doubt constitute a step forward if States - and the new democracies in particular - increasingly recognised the superiority of international law over domestic law in their constitutions and legislation. One of the advantages of such an internationally-minded approach would be to bring States closer together on the basis of international legal principles and to facilitate the application of international law in the domestic legal systems.

b. Before accepting an international treaty obligation, every State must make sure that it is compatible with its domestic legislation and, more particularly, its Constitution. If there is any incompatibility and the State wishes to become a party to the treaty, it must first adapt its Constitution or legislation to eliminate any conflict with the rule of international law.

c. All States, especially those which place international treaties on an equal footing with domestic statutes, must take steps through their executive and legislative powers to ensure that no new laws are adopted which could infringe the provisions of current treaties already accepted and in force.

d. When applying and interpreting an international treaty, every State - and its judiciary in particular - should ensure the pre-eminence of the treaty whenever that is feasible. Otherwise, it should make every possible effort to reconcile the rule of domestic law and the international treaty, so that the former does not violate the latter.

e. If conflict between an international treaty and a rule of domestic law is inevitable, the State must amend the latter as quickly as possible in order to bring it into line with the international obligation.

f. When adopting legislation to regulate the relations which are or may be governed by the international treaty to which it is or may become a party, every State should include in such legislation saving clauses to protect the international treaty: for example, non-applicability of the statute in so far as it runs counter to the treaty.

II. INTERNATIONAL CUSTOMS AND GENERAL LEGAL PRINCIPLES

4.1 Introduction

National constitutions establish a major distinction between international treaties, on the one hand, and international customs and general legal principles, on the other.

4.2 Inadequate recognition in constitutional texts

While nearly all constitutions - as has already been mentioned - deal expressly with treaties, the same is not true of customs and general principles. Furthermore, even if these two sources are recognised by constitutional provisions, their role is on the whole more limited than that of treaties. The reason no doubt lies in the fact that customs and general principles are classed as unwritten international sources of law, and the degree of clarity, precision and -in the final analysis - security which they bring to legal relationships in general does not even remotely rival the corresponding qualities of international treaties.

4.3 Part and parcel of domestic law

It is true that the constitutions of some countries recognise international customs and general legal principles at the outset as an integral part of their internal law. The German Constitution provides that "the general rules of public international law shall be an integral part of federal law". Similarly, the Greek Constitution contains the following provision: "the generally accepted rules of international law shall be an integral part of internal Greek law". The same is true of other countries (Austria, Italy, Albania, Slovenia, San Marino, Hungary, Portugal).

In other cases, the same approach emerges from the constitution, albeit implicitly (France, Bulgaria), while other countries refer to the "universally recognised rules of international law", not in general terms, but in relation to certain specific questions concerning the protection of human rights. In Russia, these rules of international law relating to human rights "are directly productive of the rights and duties of citizens".

Other countries settle this matter by statute, in connection with specific questions as well. Romania does so for certain questions relating mainly to the law of the sea, Sweden for certain criminal law matters and Norway for other specific subjects.

4.4 Recognition in judicial case law

On the other hand, the constitutions of many countries remain silent with regard to international customs and general legal principles, and their recognition - when they are recognised - is left to judicial case law (United States, United Kingdom, Switzerland, Poland and others).

4.5 Automatic application

As a rule, international customs and general principles are automatically incorporated in domestic law. This automaticity is their distinguishing feature. Indeed, no act or procedure of incorporation is necessary. Contrary to the situation as regards treaties, the solution adopted in this case is therefore based on monistic theory. In most cases, the courts have recourse to international customs and general legal principles and apply them directly within the State.

There are, however, highly exceptional cases of countries which do not adhere to the principle of automaticity and, on the contrary, require an act of incorporation for customs and general principles, which may take the form of, say, an international treaty or a domestic statute (Norway, Denmark and Russia - where human rights principles are not involved).

4.6 Equality of treatment or differentiation

In constitutional terms, several countries adopt a comprehensive approach to international customs and general principles, place them on an equal footing and frequently include them in general expressions such as "general rules of public international law" (Germany), "generally accepted rules of international law" (Greece), "rules of general international law" (San Marino) and "generally accepted principles of international law" (Slovenia).

On the other hand, some countries draw a more or less clear distinction between international customs and general principles, according pride of place to the former in relation to the latter which are left with an essentially subsidiary role (Luxembourg, Hungary and to a lesser extent France).

4.7 Treaties and other sources: their respective roles

An important distinction can be made between international treaties on the one hand and customs and general principles on the other, in respect of their scope and their overall function as sources of law. Treaties are undeniably the pre-eminent international source whose function is considerable and constantly expanding, whereas international customs and general principles occupy a more or less secondary position - distinctly subordinate to treaties - in the classification of sources[126].

However, the latter two sources, and customs in particular, frequently play a relatively important role, which is referred to by the domestic courts, in respect of areas of international law which have not yet been codified, such as State immunity, international liability, the status

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[126] *It should be noted that, in international law, although treaties are the first of the sources listed in Article 38 of the Statute of the International Court of Justice, it is acknowledged that there is no difference in rank between the three sources (treaties, customs and general principles), which are thus equal and identical in value from the legal standpoint.*

of aliens etc (Luxembourg and Poland). Apart from these cases, however, the sources in question - and general principles in particular - fulfil a relatively limited function.

Indeed, their role is essentially subsidiary, supplementary and interpretative. They are used mainly to fill in gaps in domestic legislation or to interpret the latter in relation to questions of international law (United Kingdom, Norway, Sweden, Finland).

4.8 Status in domestic law

With regard to the standing of international customs and general legal principles in domestic law, the responses vary even more considerably than in the case of treaties.

A number of countries explicitly or implicitly recognise customs and general principles as taking precedence over all statutes, whether adopted earlier or later (Germany, Italy, San Marino, Greece, Switzerland, Slovenia, Bulgaria, Portugal, Albania and Russia - the latter solely in respect of human rights).

In contrast, other countries - the majority - assign a lower status to customs and general principles than to statutes (United Kingdom, United States, Sweden, Finland, Luxembourg, etc).

*Lastly, some countries (Hungary, Switzerland) rightly observe that the peremptory rules of general international law (*jus cogens*) should be given a higher status than other international rules, including treaties.*

4.9 Recommendations

a. In the context of constitutional provisions, the pre-eminence of international custom and general principles in relation to domestic legislation is not as widespread and as clearly stated as in the case of treaties. However, this pre-eminence is established under international law and the recommendation made in respect of treaties (see para. 3.6 a.) is just as valid for customs and general principles, although the role of these two sources - as has already been mentioned - is not as important as that of treaties. It would therefore be desirable for States, especially those which are adopting new constitutions, increasingly to recognise this pre-eminence.

b. In addition, States should ensure that their domestic legislation - including statutes and administrative measures - is compatible with international customary rules and general legal principles.

c. States should give preferably automatic effect to international customs and general legal principles in their domestic legal systems. All categories of courts - and the ordinary courts in particular - should use these sources more frequently, especially in areas of international law that have not yet been codified. The generally limited use made of these sources is largely attributable to the fact that they are not sufficiently familiar to the national courts. In any event, it is sound policy on the part of some States (Greece, Bulgaria) to have a specialised judicial authority (Constitutional Court) settle any disputes concerning the existence or exact scope of a custom or general legal principle.

*d. All States, especially those adopting new constitutions, should give absolute priority to the peremptory norms of general international law (*jus cogens*) over their domestic legislation, including their constitutions. This requirement is today almost universally accepted.*

III. DECISIONS OF INTERNATIONAL ORGANISATIONS

5.1 Non-recognition in constitutional texts

In contrast to the situation regarding the other sources of international law (especially treaties and, to a much smaller extent, customs and general principles), the national constitutions, except that of Portugal, make no mention of the decisions of international organisations which constitute international institutional law. The Portuguese Constitution allows for the automatic incorporation of such decisions in domestic law, provided that their direct applicability is prescribed in the treaty setting up the organisation. The other constitutions ignore the problem, and no doubt because the question of international institutional decisions is a relatively recent one and Article 38 of the Statute of the International Court of Justice does not mention them as a source of international law.

5.2 Transfer of responsibilities to supranational international organisations

The constitutions of some States, however, contain special provisions relating to the transfer of national responsibilities to international organisations. For example, the German Constitution provides that "the Federation may by a formal law transfer sovereign powers to intergovernmental institutions".

Similar provisions are found in some other constitutions (Austria, Greece, Luxembourg). Such provisions, like the domestic instruments for the approval of treaties setting up international organisations of this type - in practice, only the European Community is concerned - constitute the legal basis, from the standpoint of internal legislation, for the transfer of national responsibilities and the direct and automatic applicability of European Community decisions in the legal systems of its member States. In fact, in this particular case, it is the treaty setting up the organisation itself, covered by the above-mentioned internal instruments, which settles the question of the direct application of Community decisions.

5.3 Other international organisations

On the other hand, the situation is different for the other international organisations known as organisations of inter-State co-operation. In their case, even when their decisions are binding, the treaties establishing them never provide for immediate enforcement of those decisions in national legal systems. There can therefore be no automatic application of those decisions and their enforcement within States necessarily depends on the intervention of the States themselves which are required, in principle, to introduce and apply them in their domestic systems[127]. This is therefore a mediate system which to some extent resembles the one applied to international treaties. Consequently, any binding institutional decision is incorporated and enforced within the State by means of domestic legal instruments adopted by the latter, which may be of a legislative or administrative nature, according to the requirements of its legal system - requirements which usually vary according to the content of the decision. Thus, action is taken on a case-by-case basis (inter alia: Austria, San Marino, Greece, Norway, Sweden, Luxembourg, Denmark).

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[127] *States which apply the Anglo-Saxon system are concerned less with the incorporation of international decisions than with their enforcement within the State by means of domestic statutes.*

However, this approach often presents drawbacks. For one thing, recourse to the legislative process in each particular case causes delays, whereas the enforcement of institutional decisions calls for rapid action, particularly in the case of UN Security Council resolutions adopted under Chapter VII of the Charter. To overcome this handicap, in cases which are fairly exceptional, the solution adopted involves settling the question in advance through authorisations from Parliament to Government. Such authorisations may be contained in the Act approving the treaty under which the organisation was established, and the Act in question then settles the problem of the incorporation and enforcement of decisions by the organisation on an ad hoc basis[128].

In other cases, such authorisation is contained in an ordinary statute of permanent validity which usually takes the form of outline acts applicable to one or more categories of institutional decisions. For example, since 1967 Greece has had a special law for the application of decisions by the United Nations Security Council concerning the imposition of sanctions under chapter VII of the Charter. This is also the case for the United States and Liechtenstein.

5.4 Status in domestic law

As regards the legal standing of institutional decisions, a distinction must be made between those which, under the treaty setting up the organisation, are binding and immediately enforceable in the domestic legal systems of the member States, and those which are binding but not immediately enforceable.

The first category includes decisions of the European Community, which member States usually recognise as superior in standing to their own domestic legislation, including the Constitution. The second category comprises the decisions of traditional international organisations, which have the same standing as the domestic measures (statute or decision of the administrative authority) which incorporate them in domestic law, for the purpose of application.

5.5 Recommendations

a. What was said above, in paragraphs 3.6 a. and 4.9 a., is entirely applicable to this further source of international law represented by the decisions of international organisations. When such decisions are binding on States, they produce legal effects and are elevated to the same status as treaties, customs and general principles. It would therefore be advisable to recommend that national constitutions, particularly those in process of elaboration or revision, should make express provision for the recognition of binding institutional decisions. There is a deficiency in the present situation which should be remedied. Moreover, the legal status to be assigned to such binding decisions in relation to the rules of domestic law should, in principle, be identical to the recognised status of the other sources of international law: treaties, customs and general principles. All these sources have the same legal standing and should be treated in the same way by States.

b. Leaving aside the European Community system which presents no difficulties, mainly because the problem is settled by the actual treaty establishing the Community, it should be

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[128] *In Greece, for example, the Act approving the NATO treaty provides that the obligations assumed under the treaty and the protocol of accession thereto will be enforced by decrees issued on the proposal of the competent ministers.*

noted that, as far as the binding decisions of other international organisations are concerned, States have not yet succeeded in introducing a coherent, effective and practical set of legal rules for their incorporation and rapid enforcement in domestic legal systems. This gives rise to irresolution, improvised action and, more often than not, the adoption of empirical solutions which are not usually characterised by either speed or efficiency. This situation could well hamper the work of the international organisations and undermine the interests of their member States. One possible way out of this difficulty could be afforded by domestic statutes for the approval of treaties establishing international organisations or by other outline Acts which, through appropriate authorisation clauses, could easily provide for ad hoc, detailed solutions, capable of quick and easy application and, above all, adapted to the individual needs of international organisations.

IV. INTERNATIONAL JUDGMENTS AND RULINGS, WHETHER LEGAL OR ARBITRAL

6.1 Introduction

The national constitutions make no provision for the incorporation and enforcement in domestic law of the judgments and rulings of arbitration tribunals and courts[129]. On this question also, the constitutional texts remain silent.

6.2 Decisions of the Court of the European Communities

Regarding decisions of the Court of the European Communities, as with other binding Community decisions, the question is settled directly by the treaty of the EEC (Articles 187 and 192). The decisions of the Court are directly enforceable in the internal legal systems of member States. From the specifically constitutional standpoint, legal support for the judicial decisions of the Community is provided by either the constitutional provision - where one exists - authorising participation in the EEC or, in all cases, the domestic instrument of approval of the EEC Treaty, which was adopted in accordance with constitutional rules.

6.3 Judgments and rulings of other judicial or arbitral organs

As regards the judgments and rulings of judicial or quasi-judicial organs belonging to other international organisations (for example, the International Court of Justice or the European Court of Human Rights) or of permanent or ad hoc arbitration tribunals, a distinction should be made between, on the one hand, acceptance of the binding nature of decisions by such bodies, and on the other hand, their enforcement in domestic law.

6.3.1 With regard to the acceptance of such decisions, it goes without saying that their binding effect is determined directly and automatically by the treaty establishing the organisation or the treaty setting up the judicial body or the arbitration tribunal[130]. As such treaties have previously been approved in due form by the member States or States Parties, in accordance with their constitutional rules, it follows that the legal coverage of the domestic instruments of approval, in

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[129] *The tribunals and courts in question are of course those set up under public international law.*

[130] *Indeed, there would be no point in asking States to reiterate their acceptance of decisions which are already binding on them.*

terms of internal legislation, extends to binding rulings and judgments given in pursuance of such treaties. This interpretation appears to be generally accepted.

6.3.2 On the other hand, as far as the enforcement of judgments and rulings in domestic law is concerned, it appears that States do not apply any particular system. In some cases, after the arbitral award or judicial decision has been given, an agreement is concluded between the States Parties to the dispute for the enforcement of the judgment and the final settlement of the case. In such cases, the application of the international judgment or ruling is done by means of a treaty, which is usually approved by law in the States Parties[131].

However, the customary procedure for the enforcement of judicial decisions is the following: in each instance, the State adopts the necessary administrative or legislative instruments of enforcement, in the context of its domestic legal system, in order to comply with the judgment or ruling (see inter alia the replies from Denmark, Germany, Greece and Norway).

6.4 Recommendations

6.4.1 States are naturally under an obligation, by virtue of international law, to enforce strictly and in full the decisions of international courts or arbitration tribunals hearing disputes to which they are parties. This obligation takes precedence of their domestic law.

6.4.2 In the case of international judicial decisions which are not automatically enforceable in domestic law, especially those which are taken somewhat frequently, such as the judgments of the European Court of Human Rights, it would be desirable for States to set up in advance a special system capable of ensuring swift and full enforcement.

6.4.3 States should consider the possibility of expressly recognising the primacy of international judgments compared with the judgments of domestic courts, by providing inter alia that the former produce a binding effect in relation to the latter.

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[131] *See the reply from Greece.*

V. OTHER QUESTIONS RELATING TO INTERNATIONAL LAW

7. Apart from the sources of international law, including treaties in particular, national constitutions also contain provisions of direct or indirect relevance to international law. The following are noteworthy examples of such provisions:

7.1 Protection of human rights

Nearly all States give constitutional recognition to the protection of human rights and fundamental freedoms, and this protection is frequently confirmed by legislation and case law. In addition, numerous States are parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the two United Nations Covenants concerning economic, social and cultural rights on the one hand, and civil and political rights on the other (1966), and other international instruments relating to human rights. It is worthy of note that the international instruments mentioned above have in varying degrees influenced certain constitutional texts recently adopted, inter alia by the new European democracies. Moreover, it should be emphasised that some constitutions are found to contain provisions requiring accession to the international human rights conventions (San Marino) or prescribing a method of interpretation in conformity with the 1948 Universal Declaration of Human Rights (Portugal), or again recognising the superiority of human rights conventions over national laws (Russia).

7.2 Protection of aliens and stateless persons

Several constitutions contain general provisions for the benefit of aliens and stateless persons (Italy, Portugal, United States, Russia, Hungary, Romania, Albania, Luxembourg). In other States, aliens enjoy a number of rights and freedoms which are guaranteed by the Constitution (Germany, Sweden, Denmark, Greece). Finally, special provisions in some constitutions expressly recognise the right of asylum (France, Italy, Portugal, Russia, San Marino, Bulgaria, Croatia) and in some cases the principle of non-repatriation (Switzerland, Bulgaria).

7.3 Protection of national minorities

Members of minority groups enjoy the same rights and are subject to the same obligations as all other citizens. In addition, however, a number of constitutions contain general provisions for their protection (Denmark, Portugal, Romania, Czechoslovakia, Albania, Croatia, Lithuania), and more especially for the protection of linguistic minorities (Italy, Switzerland, Russia, Bulgaria). The Hungarian Constitution contains detailed provisions for the protection of minorities. Other constitutions provide direct protection for specific minorities (Finland, Norway, Slovenia). It should be noted that the constitutions of the new democracies of Central and Eastern Europe are the ones most likely to contain provisions concerning minorities, this being an issue which acquired major topical importance after the recent events which radically changed the face of Europe and the world.

7.4 Provisions prohibiting the use of force

Not only war but any recourse to the threat or use of force in international relations are outlawed (Article 2 para. 4 of the United Nations Charter). Some constitutional texts, particularly the most recent ones, repeat this preemptory rule word for word (Hungary, Slovenia, Czechoslovakia), while others, following the same general line, expressly prohibit

aggression or explicitly provide that force will only be used for defence (Portugal, Denmark, Norway, Turkey, Albania). It goes without saying, however, that even long-established constitutions which contain general provisions on the declaration of war have to be interpreted, on the basis of international law, as authorising recourse to war only for defensive purposes.

Depending on the country concerned, the authority to use force may be vested in the Head of State without restriction, in the Head of State subject to parliamentary authorisation or in the Parliament. Lastly, some constitutional texts expressly rule out war as a means of settling disputes (Italy, Hungary, San Marino), while the German Constitution provides that the Federation shall accede to agreements concerning arbitration of a general and compulsory nature.

7.5 Recommendations

a. States are obliged to provide permanent protection, both in their constitutions and at all other levels of State activity, for human rights and fundamental freedoms, including the rights and freedoms of the members of national minorities and those of aliens and stateless persons. Such protection must also be as extensive and effective as possible. This is a task which has to be pursued tirelessly, unremittingly and unfailingly.

b. States which have not yet done so should, in particular, accede to all the international conventions on human rights, whether of universal or European scope.

c. States should incorporate in their constitutions, in the most forceful manner possible, the two cardinal obligations of international law, viz the settlement of international disputes by exclusively peaceful means and non-recourse to force or the threat of force in their international relations.

d. It would also be worthwhile for constitutions to contain an ever greater number of general provisions favouring international peace and security, respect for international law and justice, co-operation and development of friendly relations between peoples and States[132]. Such provisions may in particular have a salutary effect from the standpoint of interpretation.

e. Lastly, and speaking generally, more encouragement should be given to the incorporation of international law in domestic constitutional systems, and conversely to the incorporation of the principles of democracy, human rights and the rule of law in the international legal system. This interaction can only benefit the society of nations.

b.Summary of the discussions on "The elaboration of model clauses on the relationship between international and domestic law"

1. Hierarchy of norms

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[132] *See, for example, Article 2 para. 2 of the Greek Constitution.*

Some participants considered that the rank of the norms of international law vis-à-vis the norms of domestic law can only be dictated by the Constitution of the country concerned, and no particular rank can be inferred from the intrinsic nature of the norms of international law alone.

To this it was objected that a State based on the rule of law must ensure observance of any binding legal norms, including those of international law; for this to happen the most obvious method would seem to be to recognise to the norms of international law a higher rank than to the norms of domestic law, without of course detracting from the free political choice of constitutional legislators.

It was however admitted that certain treaties could pragmatically be recognised as having a lower rank than domestic law, in view of their subject matter being of a lesser importance.

2. Possible conflict between high jurisdictions

In certain countries the Constitutional Court was competent to assess the constitutionality of a treaty, while the Supreme Court remained competent to interpret the law, including the law receiving or transforming that treaty; there is therefore a danger of conflicting decisions of the two high jurisdictions in particular on the issue of the rank of the norms of international law in their relation with the norms of domestic law.

A wise way to prevent this kind of conflict appeared to be the procedure of control by the Constitutional Court of the constitutionality of a treaty prior to its ratification; should however a conflict arise, the Parliament would only be competent to settle it.

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