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This publication contains the reports presented at the UniDem Seminar organised in Skopje on 4-5 October 2001 by the European Commission for Democracy through law in co-operation with the Constitutional Court of “the Former Yugoslav Republic of Macedonia”.

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

Cet ouvrage contient les rapports présentés lors du Séminaire UniDem organisé à Skopje les 4 et 5 octobre 2001 par la Commission européenne pour la démocratie par le droit en coopération avec la Cour constitutionnelle de « l’Ex-République Yougoslave de Macédoine ».

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

**OFFICIAL OPENING SPEECH: DEMOCRACY, RULE OF LAW AND FOREIGN
POLICY**

Mr Todor DZUNOV
President of the Constitutional Court of
the Republic of Macedonia

Your Excellency,
Distinguished participants and guests,

It is my great pleasure to greet you and wish you a warm welcome to this UniDem seminar of the Venice Commission of the Council of Europe, which, despite the acts of violence that our country and the world have experienced this year, will take place over the next two days in Skopje, Republic of Macedonia, on “Democracy, Rule of Law and Foreign Policy”.

I would like to use this opportunity to express special gratitude for their support in the realisation of this seminar (both for their organisational and financial support, as well as their participation in person) to the President of the Republic of Macedonia, the Assembly of the Republic of Macedonia, the Ministry of Foreign Affairs, the leadership of the European Commission for Democracy Through Law, and especially Mr Buquicchio and Mr Kouznetsov. I would also like to thank the capable management of the Hotel “Holiday Inn” and the Secretariat of the Constitutional Court of the Republic of Macedonia, the interpreters and the media representatives present here with us.

Ladies and gentlemen,

It seems that constitutional law devotes little attention to the manner in which governments conduct their foreign policy. Contemporary political systems have, in practice, entrusted governments with unlimited licence to determine and conduct their foreign policy. Consequently, public participation in matters of foreign policy and the reflection of the public interest in foreign policy options are very limited. A close look at the constitutions of many democratic states reveals that they contain few provisions concerning this domain. Foreign policy still remains an under-regulated area of democracy and of the law.

Today, however, foreign policy can no longer be left solely to governments, and it can no longer remain uncontrolled. Furthermore, it is clear that foreign policy must respect some of the legal rules of both international and domestic law.

As members of the international community, states have assumed a duty to conduct their foreign policy with due diligence and in full conformity with international law – primarily by adhering to legally binding treaties, international customary law, general legal principles and binding decisions of many international organisations. States must comply with the fundamental principles set forth in the United Nations Charter concerning the peaceful resolution of international conflicts, refrain from threats or the use of force in international relations, and work towards the development and fostering of good neighbourly relations.

With respect to the main issue, whether foreign policy is a domain strictly reserved for the government, for a long period of time the judiciary has had no possibility of reviewing foreign policy acts. In many countries, the theory of “*actes de gouvernement*” meant that actions of state authorities in the area of foreign policy should remain outside the scope of judicial

review. According to this theory, when the government undertakes actions in the international context that fall within its sphere of competence, this does not mean that the government is performing administrative functions, and therefore these actions cannot be subject to judicial review but may only be subject to political control by the parliament (for example in France, Greece, Croatia and Slovenia). In other countries, judicial review of these acts is expressly prohibited (as is the case in Finland regarding acts of the President of the Parliament, in the Netherlands regarding review of constitutionality of international agreements, and in Switzerland with respect to federal laws and international treaties).

Nevertheless, today the prohibition on judicial review of foreign policy acts is clearly loosening up. In the first place, a subject of review may be the question whether a state organ, in making foreign policy decisions, has acted beyond its powers as determined by the Constitution (as illustrated in the cases before the Supreme Court of the United States). Some constitutional courts have introduced precedents by examining the merits of the decision in question, not only the constitutional powers of the state organ concerned. The procedure for preventive review of treaties with regard to their conformity with the Constitution is well known, as is the concept of limitations on actions undertaken by the executive branch in cases where fundamental human rights are concerned. Another example is the transfer of national sovereignty to European Union institutions, especially following the ratification of the Maastricht Treaty by some member states of the European Union (Germany and France).

Running parallel to the development of legal rules regarding foreign policy and the control of foreign policy, there is a trend towards a certain democratisation and decentralisation in this domain. The number of legal standards has increased at the level of international organisations and through multilateral negotiations. Foreign policy, more and more, has direct repercussions on the life of ordinary citizens, and therefore cannot be left at the full discretion of its stakeholders. New “players” are appearing on the scene: parliament, even the people directly, non-governmental organisations, and many others.

States are obliged to adhere to and to apply international law *bona fide*, including *jus cogens* rules, treaties, customary law, general legal principles and binding decisions of international organisations. In particular, in conducting foreign policy states must be guided by three basic principles of the international legal order:

1. the prohibition on threats to use force and on the use of force in international relations;
2. the resolution of international conflicts through peaceful means; and
3. compliance with the decisions of the UN Security Council concerning collective security issues.

Moreover, in their relations states should act in accordance with the rules requiring the development of good and friendly neighbourly relations, especially at regional level.

The democratisation of foreign policy also requires states, when undertaking actions related to foreign policy, to observe and comply with the constitution and the law, and to enable the review of such government actions by the relevant constitutional institutions, that is by the

legislative body and the judiciary. Parliaments show interest in the sphere of foreign policy in order to ensure that they are involved in determining its main directions. The judiciary, especially high courts, should consider and take account of foreign policy principles, especially regarding the application of international law in the internal legal order. States are also responsible for informing citizens about their foreign policy, and specifically for informing them about international tribunals or courts for the protection of their rights. States should take further steps towards enabling individuals and relevant local authorities, as well as non-governmental organisations, to be consulted in this field, and where and if necessary, to be directly involved in determining and conducting foreign policy. These are some of the conclusions of the European Commission for Democracy Through Law of the Council of Europe, as stated in its comparative study entitled *Law and Foreign Policy* (“Science and technique of democracy” series, No. 24, 1998).

In March 2001, the Venice Commission entrusted the Constitutional Court of the Republic of Macedonia with the responsibility of hosting the UniDem Seminar “Democracy, Rule of Law and Foreign Policy”, for which occasion we have gathered here today. This two-day seminar will comprise three working sessions. The first will focus on “Contemporary challenges of foreign policy in the European context”, during which the following papers will be presented: “Political ethics and foreign policy”, by Professor Dimitar Mircev, and “Contemporary challenges of foreign policy in the European context”, by Professor Flinterman. The second working session deals with the “Separation of institutional roles in the context of foreign policy – legislation, the executive, and the people”, and during this session we will have the opportunity to hear the views of Professors Denko Maleski and Helene Turard, as well as of Mr Josif Talevski, Judge of the Constitutional Court of the Republic of Macedonia and Mr Simeon Petrovski, advisor to the Court. The third working session, devoted to “Foreign policy within the boundaries of the law”, will include the papers of Professor Georg Nolte, on judicial review of foreign policy in Germany and the United States of America, and Professor Ljubomir Frckovski, on negotiations for the Framework Agreement in Macedonia. We will also have the opportunity to hear Mr Daniel Turp on the issue of compatibility of international treaties and national constitutions and Mr Igor Spirovski on judicial review of foreign policy acts and the role of constitutional courts.

Finally, please allow me to state that we are delighted that the provisional list of participants at this Seminar includes 35 representatives from ten countries from Europe and North America, including university professors, judges of constitutional courts and representatives of governments and international organisations united within the Venice Commission of the Council of Europe. To all of them, we owe special gratitude for the work, knowledge and time they have invested in this Seminar. We hope that the papers and discussions during this UniDem seminar will contribute to throwing light on this delicate topic of paramount importance, and will strengthen our commitment towards democratisation of foreign policy and the rule of law, instead of the use of force in the international relations of states in the modern world.

POLITICAL ETHICS AND FOREIGN POLICY: HOW MACEDONIANS INTERNALISE THE RELATIONSHIP

**Mr Dimitar MIRCEV,
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1. The dilemma and debate surrounding the harmony, autonomy and even antinomy of ethics and politics, including in this context politics in relations between states and in the world in general, have been relevant to political thought since a very long time ago. They have remained of interest and continued to challenge political thinkers from Aristotle and Thucydides through Machiavelli and Grotius, Rousseau and Hegel up to the period of modern thought, and from St Thomas Aquinas through Helvetius, Holbach and Hobbes until nowadays. In particular, as regards what we call today foreign policy, many philosophers, utopists, humanists and pacifists throughout the long development of civilisation have endeavoured to incorporate “wisdom, reason and morality” into an integrated system of ethics within political theory, with this system then being accepted as a norm in international and inter-state relations. In fact, this persistence tended to make political practice and relations among states or nations subordinate to political theory as a norm, with a legal and political system built on that base; and then, as a final layer, came the arrangement of an appropriate institutional and regulatory mechanism.

It was not by chance that many thinkers developed the ideas of “just war” (St Augustine), of “international and inter-state solidarity” (Grotius), of “eternal peace” (Kant) or of humanity as a “legal community” (Puffendorf). Certainly, very few thinkers throughout history believed that individuals may delegate their natural rights to their community or state, which may then transfer their altruistic and moral reasoning to the world as the holder and regulator of that reasoning. Neither Hobbes nor Helvetius, who as philosophers were on the cusp of the classical and modern periods, believed that introducing a certain type of “social contract” between the states of the world, such as the social contract Rousseau and Locke elaborated with respect to the internal order of the state, would suffice to prevent disorder and a lack of ethics prevailing in the world.

Abbot de Saint Pierre, in the early modern period, was one of the rare few to have developed the idea of a “world government” that would implement the principles of peace and morality at the inter-state level, something like the idea of a League of Nations appropriate for that age. But Rousseau and Montesquieu criticised the federalist idea of de Saint Pierre as utopian and Kant problematised their critiques through a proposal generally known in that period as the order of Republica, arguing that this was the only possibility for surpassing the chaotic, inhuman and morally dubious state of relations among states. Nevertheless, in another work, Kant, like de Saint Pierre, developed the federal principle, including the relinquishing by states of part of their sovereignty in favour of a federal government that would prevent wars and advance the peace and well-being of peoples on a moral and ethical basis. Kant also

supported the application of the principles of so-called “universal hospitality” (*l’hospitalité universelle*), from which some consider the later concept of human rights to have sprouted.

Dr Vlado Benko, who has systematised these ideas as a basis for the science of international relations, writes in respect of this fundamental co-relation – but at the same time contrast – between, on the one hand, reason and morality, and, on the other, immorality, lack of reason and destructiveness, that prevail in world politics:

“*Quantula scientis regitur mundus*”. How little wisdom is required to rule the world, our predecessors exclaimed. But the facts offered to us by history belie this. More than 12 000 small and large wars have been waged since the international community came into existence, with internal juntas and revolutions raging, starvation and diseases which not only were not prevented by any wisdom but were far from being overcome, even though at least in some cases there existed subjective possibilities to do so. (Benko, 1997, p.5)

2. Running both parallel and counter to the efforts to organise relations in the world, at least in theory and utopia, on the basis of reason and morality, theories where force, power and monopoly prevail have been even more commonly expressed throughout history. According to these theories, there is a clear prevalence of particularistic interests and violence, of the use of means and even aims that do not rely on ethical criteria understood at the minimum level of general well-being and common reason. This was perhaps a result of the profound understanding of the human being as a “self-supporting, self-sufficient, egoistic and utilitarian individual” that above all wants by nature to govern others, even at the cost of destruction and violence. And if this is so, does it not follow that this human characteristic will be manifested in the state and society, and in relations in the world?

Hans Morgenthau, one of the creators of the *Realpolitik* school in the science of international relations, takes as the starting point in his studies the concept that “ambition to rule over man is the essence of politics” and that international politics is nothing else but the struggle to maintain or to increase power (Morgenthau, 1946, p. 15). Power, however, by itself has no ethical dimension. It is a capacity to execute aims defined on a different basis.

The ancient Greek cities arranged their relations through alliance agreements in which either an interest in common defence or interests in coexistence prevailed. Agreements were broken and numerous wars arose between the cities also because of the imposition of power aimed at extracting material benefits or for the most diverse human reasons – insults to rulers, commands by gods, even simply as matches to see which party was the stronger. The Trojan War, incidentally, was waged for love. The world of Greek cities was not at all an international community; still less was it a community based on higher ethical principles. As for the neighbouring and more distant areas, to the Greeks these were simply “barbarian territory”, to which no principles were applied.

There was no international community in the Roman age or during the large Medieval Empires. The Romans to the very end applied *jus ad bellum* with respect to those countries that they occupied and incorporated in the Empire and *pax romana* for dependent and vassal

states. In essence and form these were reproduced in the Medieval Age, when the large empires such as the Byzantine Empire or that of Charlemagne or the Holy Roman Empire perhaps contained the seed of a “world government” and international community, but were certainly not such a community. Nor were the *pax romana*, *germanica*, *britannica* etc. nor the alliances of the Italian and German cities an effort to create an international community or an international legal system of relations.

However, the state of affairs in the Medieval Ages differed from the Roman international system, which was marked by a supreme and sovereign power supported by a centralised administration and military power implementing one and the same cause and for which all others were *alienis generis*. Feudalism had no such system. Dispersed centers of sovereignty and power prevailed, together with numerous divisions of sovereignty even within one and the same state, with widely different arrangements of the military, political, economic and religious powers. There exists anarchism in a feudal system as well as a lack of international institutions and law, where every holder of power operates according to their own causes and interests in their own ideal mixture of ethics and power. Such an anarchical system provides a context for the war of all against all (*bellum omnium contra omnes*).

In this context, in what might be described as a revolutionary manner, Machiavelli introduced the concept of the interest of the state, of the “state cause” (*raison d’État* or *ragione dello stato*). The Slovenian author I. Simoniti writes with respect to this shift in thought:

the concept of the state cause in ethical respects is contrary to general tendencies and values. It appeared as the antithesis of medieval aspirations for universal moral values; its origin thus means national (local) egoism. Since for Machiavelli “the health of the state” is the highest moral command, it is logical that the state cause requires that for the well-being (survival and progress) of the state the use of any means is possible as long it secures that well-being. (Simoniti, 1998, p. 21).

As at the end of the Middle Ages states became nation-states, the same term came to refer to the identity of the “national cause” – but not, however, in the ethnic sense of the word.

It is well known that in both theory and history Machiavelli was much criticised because he made of the state and of the *raison d’État* a “moral foundation for amoral policy”; but the authors who subscribe to the theory of *Realpolitik* do not refute his concepts. Nevertheless, in the time of Machavelli the structural preconditions for a modern international system began to appear, in which the basic subject or unit is the state, where state sovereignty is absolute and where by adjusting interests, the distribution and balance of powers etc. it is possible to achieve coexistence and agree on some universal moral values.

However, we may speak of the existence of an autonomous system of ethics and morality in international relations and foreign policy – that is of an ethical and moral system that do not depend on and are not derived from the capacity of power of states, of state interests and actual relations – only after the appearance of the first signs of the creation of an authentic international community – a community with its own legal order and political and intervention mechanisms. That creation coincides with the century and a half from the early

civil bourgeois revolutions in the 19th century until the period after the Second World War. During this period, a process of “*géo-étatisation*” of the world began and was almost fully realised, including global colonisation and decolonisation after the Second World War, followed by the full penetration and opening up of capital on the world market and finally the rapid advancement of industrialism, technology and information and communication systems at a global level.

There is also a theory, elaborated by Krippendorff, that the creation of the international system and the international community at global level in some way derives from the reproduction, at global level, of the correlation between labour and capital, where the exploiting class at international level manages to constitute itself not only as a class by itself but also as a class *for* itself, which is not the case with the exploited class (Krippendorff, 1975, p. 79). It is alleged that this influenced the creation, confrontation and balance of the two large blocs after the Second World War, which formed the skeleton of the international system based on the principles and conventions agreed upon between them.

3. It may be argued, however, that only the creation of an international community *sui generis*, a community that is not the mere sum of states connected and bound by agreements with each other, a community that has its own real base in the civil societies of its parts, that has its own legal and political system, its own global and international public, media and information connections – these being the preconditions for its starting to function, and which are to be protected –, can be the basis for advancing and developing values and ethics that may be said to belong commonly to humanity and modern civilisation. Neither Europe nor the world has constituted such a community during the majority of the 20th century.

International law, even codified law such as that relating to diplomacy, the military or navies, was in fact inter-state law. The League of Nations, as the first general international organisation, was voluntary rather than universal, and had, so to speak, no right to impose sanctions. The Permanent Court of International Justice in The Hague was also powerless and uncompulsory while the numerous conventions and pacts (for example the Locarno Pact of 1925, the Briand-Kellogg Pact of 1928 etc.) were completely non-functional and were not equipped to prevent the world cataclysms that were approaching (Pravni Leksikon, 1964, pp. 459-461).

It was only the Atlantic Charter of 1941 that laid down some realistic basis and vision for the future arrangement of the world based on the ideas of freedom, equality and the right to self-determination of nations: in other words a basis, still sprouting, on which universal ethics of humanity could grow.

Leading sociologists and political scientists since the War have problematised at least in general terms the issue of the international community and international society as global social phenomena, as macroentities with their own laws and normative order, with genuine and universal values and ethics – at least in the process of creation. T. Parsons, for example, places as central to debate on the international community the determination of the relation between the order and community in question. He defines order as normative supervision of the activities of the individual or the community when it operates inside some limits of

stability and unification, while the very values and norms of the community are essential parts of this supervision (Parsons, 1969). According to D. Easton, who defines political systems and power as the “authoritarian allocation of values”, part of these values are allocated at international level but it is the stabilisation and legitimate implementation of authority, of the legal system and political mechanism, that would ensure the harmony of obligations with the normative order (Easton, 1965). The United Nations was not at the time of Easton’s writing an authority and mechanism fitting these characterisations but it has since developed and grown in that direction.

The United Nations includes a number of essential features in this respect:

1. In the Charter and the Universal Declaration of Human Rights, followed by a long series of pacts, declarations and resolutions, the UN has developed a legally and ethically based international system including a normative order, executive, arbitration and mediation and even judicial bodies, and finally intervention forces;
2. Based on that order, the rights and freedoms of man and the citizen, the rights and duties of states and nations as well as the absolute sovereignty of nation-states have been established;
3. The UN, however, especially until the 1990s, has based its functioning on the balance of powers in the world, on the bipolar and even multipolar system that operated in the Security Council in spite of the consensus/veto model of decision making. This on the other hand made it impossible to have essentially different and opposed interpretations and activities based on UN documents and the positions taken in them (Czempiel, E. & Rosenau, J., eds. 1989).

Certainly there are many opposing assessments of the real role of the UN, of its efficiency, fairness and ethics in decision making. Some of the largest wars after the Second World War (for example those in Korea and Vietnam) cannot be said to have been fought under the auspices or the silent consent of the UN. In many cases of flagrant breaking of the principles of the Charter and the Declaration (for example South African apartheid, the process of decolonisation, the aggression on the CSSR in 1968 etc.) the UN was either inefficient or did not intervene. R. Aron, one of the “radicals” in the science of international relations, states: “As long as humanity does not attain its unification in a universal state, then essential differences between internal and foreign policy will continue to exist” (Aron, 1962, p. 19).

However, a more sophisticated mechanism has not been created for the time being and the UN does play at least a psychological-political role. To some extent it even plays a pedagogical preventative one in respecting the foundations and universal values of humanity; and it certainly plays a pragmatic role, too.

The second key factor in the development of the international community is the creation of networks of regional inter-state and inter-governmental organisations, of sub-regional political, economic, defence and even civic non-governmental, humanitarian and other organisations, which jointly have an enormous influence as an international ethical factor, i.e. in the behaviour of states in accordance with ethical and moral standards. It may be said to a

certain extent that the power of the UN is being regionalised and that at least part of the power of national states within regions or in the world is being transferred to supranational and regional bodies. The European integrative structures are a typical example of this. Here we witness the phenomenon of the delegation of competences and power (for example: EU to UN, UN to NATO, COE to OSCE) with the aim of preventing more efficiently or eliminating behaviour between or within states that is amoral or undemocratic or that fails to comply with the relevant conventions or standards.

4. Drastic and radical changes in the international system, even in the correlation of political ethics and international politics, appeared in the last decade of the twentieth century, and these changes and their consequences still have a considerable impact on our lives. The fall of the Berlin Wall in 1989 symbolically marked the end of a large ideological inter-state bloc, of a whole universe of lack of freedom, lack of democracy and unnatural social development. In 1992 Francis Fukuyama, based on data from Freedom House, announced that already more than one half of the states and populations in the world lived in conditions of freedom, democracy and respect for the human rights (Fukuyama, 1994). The bipolar system is gone and the world is dominated by the superpower of democracy, prosperity and progress, but also of military and economic might: the USA. In Europe, the member-states of the EU, NATO, the Euro-Atlantic community, are even more intensively integrating and developing, and thus, through the policy of “the carrot and the stick”, attracting other, newly emancipated Central and Eastern European states to join and fully adjust to western standards and requirements (Simoniti, 1998).

However, the essence of the problem of changes and consequences is in the following: in the international system, even within the UN, the bipolar and multipolar system has now been replaced by a monopolar, authoritarian system without competition or challenge. Bipolarism has been replaced by unilateralism and uniregionalism in the interpretation of problems vis-à-vis principles and thus also in the determination of the conduct of all participants (states and others), even resulting in activities and interventions being undertaken to prevent different behaviour.

Fukuyama, on the occasion of the recent tragic terrorist attacks on the US, warned that the United States have been carried away during the last few decades by their internal peace and prosperity, which have led them into isolationism, exceptionalism, asking the world and the others to behave according their values and standards and attempting to define the nature of the surrounding world according their taste (Fukuyama, 2001, p. 1). From this standpoint it is not surprising that America has gained the image, according to N. Mailler, of the most hated nation in the world.

Put more simply, the consequences of these global changes are in fact that the international system, even the UN, give priority status to the complex of human rights and civil liberties, while the state and national sovereignty of the members is reduced in its significance but also as a right. The right to intervene has been significantly strengthened compared with the principle of non-intervention on account of absolute sovereignty; furthermore, the right to interpret the fairness of an intervention (as a matter of ethical principle) is now even more closely connected to the complex of power. We are coming back to the position of the realist

theoreticians in the science of international relations that treat power as a necessity and a scarcity, although not necessarily in the negative sense. We are thinking here of Morgenthau, Niebuhr, Kissinger, Brzezinski, Kirkpatrick and others. Kissinger has since 1977 stood for the argument that American national and external values should be expressed more strongly in its foreign policy, that the United States should make even more efforts towards ensuring the respect of these values in the world: "Otherwise," he says, "this nation shall lose its international weight which shall then reflect upon its national interest" (Kissinger, 1977, p. 200). George Kennan, however, had another opinion, which is today becoming very topical: "Our national interest seems to be only in what we are able to see and understand.... We can never contemplate that our moral values necessarily are valid for all people everywhere." (Kennan, 1954, p. 103.)

These dilemmas appear today more topical than ever, when *de facto* the legal system established by the UN is under great pressure for revision and is subject to close scrutiny, while a new order and rules are not yet in place, at least not with international legality and legitimacy. In not a small number of international and foreign interventions, from the Gulf War to the present ones in Afghanistan, the Middle East and on the territory of the former Yugoslavia, the dilemmas of this order and of the great problems of humanity and its parts are resolved pragmatically, militarily and politically, with a visible conflict of interests, of moral principles and power. Small countries are of course the first to lose in this situation.

5. Our concluding proposition is thus that in the last decade we have been experiencing a visible, expressed and profound process of real (re)structuring of the international community and of the world as a whole. If this is so, the main elements in such a process – ranging from economic aspects, production and reproduction, information and communication to spiritual and cultural factors – are working towards the final shaping of this community. These elements can be sublimated in a common qualification: the trend of globalisation. As part of this trend, one can observe an enormous emancipating energy, an awakened interest in treating individuals and social groups as subjects of the international community – from the lowest to the global level. Finally, this community is becoming in any case an interdependent, connected one, progressing every time that it relies upon collective development factors (collective self-reliance).

However, it also appears that the system of international relations and the international legal order, created notably after the Second World War, and the skeleton of which is mainly represented by the UN, the world economic and financial organisations, as well as regional integration mechanisms, is still not functional, lacks sufficient capacity and moreover lacks a well constructed value system that can successfully influence and generate globalising trends. Because of this gap, severe cracks and serious conflicts between universal political ethics, value systems and foreign policy occur. These cracks and conflicts are visible in particular with respect to the fundamental categories of international law and politics and even economics, for example sovereignty, intervention, human rights at the collective level, democratic institutions, justice and the judiciary, the selection of models of economic reproduction and growth and so on.

It is obvious that the construction of the new global and world order depends on the mutual adaptability of the two groups of actors and participating countries: those that are leading, generating and imposing the trend and those that are following or squeezing into it, whether they wish to or not. The latter are mainly small, undeveloped, transitional and geo-politically depressed countries. There is no doubt that unilateralism, the imposition of policies and limitations on politics, the application of old models of power, interests, “global” values, means of blackmailing, pressure, isolation, one-sided sanctions etc. are still present in such relations. Accordingly, it is difficult to say that adaptability exists on both sides and that everyone is renouncing a part of their own interests, power, sovereignty or values, on behalf of universal ones or at least of common benefits, values, moral and humanitarian principles. This is nonetheless the first precondition in the creation of the new international community that is today depicted by the leading British political scientist David Held as a “federal model of democratic autonomy”, in which gradually the legal and political attributes of the old nation-state are disappearing (Held, 2000, pp. 310-335).

6. This extensive introduction may be taken as prolegomena, as some explanation of the clearly manifested unfavourable assessments, attitudes, judgments and opinions of Macedonian citizens and the Macedonian constituency with respect to the relationship between political ethics and foreign policy, i.e. international politics and relations, in the case of their own state and situation. The vast majority of research, interviews, documentary and media evidence here – and this holds true for a period of around 10 years – indicates without doubt that the voting population of Macedonia is unsatisfied with, critical and sceptical of and unreceptive towards the policy that the international community is conducting and implementing with regard to Macedonia. The notion of the international community is here taken broadly, to indicate the whole of the outside world, beginning with neighbouring countries and the region and extending to the continent, the UN, IMF, World Bank etc. However, in concrete form this external factor is mainly concentrated around the European Union together with the Council of Europe, the OSCE and NATO, considering their most direct and most significant role in Macedonia.

I should also mention that Macedonian voters are, as a rule, dissatisfied with national economic, development, social and other policies as well as with the power holders in their own country. However, these attitudes arise internally, and citizens may replace local and national office-holders at any elections. They cannot, however, influence foreign policy towards the country.

A third comment may be made, viz.: the position of the Macedonian public regarding the policy of the international community towards the country does not mean it is unfavourable in principle towards this community, for example Euro- or NATO-sceptical. On the contrary, a number of “Euro-barometer”-type interviews conducted over a sustained time-period have demonstrated a majority inclination towards European integration, association with and full membership of the EU as well as NATO. Accordingly, there is no specifically expressed group or structural difference in the support for European integration and the international community.

Nevertheless, critical attitudes towards European and wider policies towards Macedonia have become in some manner a constant and long-term phenomenon. Let us mention two representative polls, published during the last few months that are indicative in this respect.

The Institute on Democracy, Solidarity and Civil Society, Skopje, towards the end of July 2001, in a wide-ranging survey, tested amongst others the expectations of citizens on the success of NATO Operation Essential Harvest, aimed at collecting the arms of Albanian extremists in Macedonia. As many as 41.4% of those interviewed predicted that the “mission [would] end without success”, 18.1% foresaw “very little success”, 23.2% “partial success” and only 16% predicted “full success”.

“What is your confidence at this moment in NATO?” was the next question. The replies were distributed as follows:

- great confidence 16.7%;
- partial confidence 16.6%;
- very little confidence 18.7%;
- no confidence at all 47.8%.

Asked how they assessed the role of J. Solana and G. Robertson in resolving the current crisis in Macedonia, in the first case, 25.7% of those interviewed replied positively and 71.2% negatively. In the second case, 34.9% gave positive replies and 60.4% replied negatively.

In the survey by the Institute of Sociological and Political-Legal Research, Skopje, on similar topics, conducted at the end of June 2001, over 60% of citizens expressed distrust, scepticism and dissatisfaction with the policy the international community and Europe were conducting with respect to Macedonia. Here the most critical assessments were for the OSCE and NATO, somewhat less for the EU and the least critical for the Council of Europe. This type of data understandably represents an individual reflection and internalisation of the international policy, role and intervention in the events in Macedonia.

The clear and transparent basis – both mental and grounded in actual experience – on which this type of attitude is formed is of course the assessment that the international community is conducting an unfair, ethically unjustified, unreasonable, irrational policy towards Macedonia. Whether this is a realistic assessment is another question. To put it another way, which social and political factors have influenced such an assessment? Who is instrumentalising Macedonian public opinion in this direction, and to what purpose? However, the data remain as a fact.

Similar attitudes could be observed in 1992, when the EU refused to recognise Macedonia under its constitutional name, then in 1992-1995 when Macedonia was subjected to heavy blockades and isolation because of the closing of the border with Greece and the UN embargo on Yugoslavia, and again in 1998-1999 because of the sanctions against Yugoslavia, which affected Macedonia as well.

Macedonian public opinion is equally critical of media coverage of the state and of real life events in the country as presented by the large information sources of the world. Most often the public considers this coverage to be one-sided and unfair. However, from the viewpoint of the global problems and treatment of political ethics and foreign policy, this case is only one episode in our approach to the structural problems that appear in shaping the new features of the international system and community. Small countries' positions are often a typical by-product and a typical collateral outcome of the restructuring movements of the new international order.

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**THE POLITICIAN, THE DIPLOMAT AND THE PEOPLE: MACEDONIAN
FOREIGN POLICY EXPERIENCES**

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The optimism, and even euphoria, with which the peoples of Eastern Europe marked the end of the Cold War and the fall of one-party dictatorships have vanished. It was thought that it would be difficult for communism to fall but very easy to create a democratic society, but it turned out to be the other way around. The international and domestic challenges facing the countries of Eastern Europe and the Balkans were huge. At the level of international society, the tide that sucked Russian power back behind its borders created a vacuum in which some thirty new states, many with no state tradition, could be found. At the level of domestic society, all these states are still undergoing the difficult process of change, guided by the unfamiliar principles of democracy and the market economy. The challenge facing these newly created states was transition to another political and economic system with a foreign policy that would integrate them with Western democracies.

The Republic of Macedonia, one of these states that came into existence after the breakdown of the world power structure and the bloody disintegration of the Yugoslav federation, managed to achieve its independence peacefully. But what only a few understood at that moment of national pride was the fact that independence is not the end of the struggle for freedom, but the very beginning. In other words, an honest view of the internal order of a state and of its position in international politics is an imperative on which the stability if not the survival of the state depends. The Republic of Macedonia has refused for too long to face the realities of its independent existence, which have resulted in the crisis that we are experiencing today. The crisis today forces us to make a re-evaluation of both our democracy and our foreign policy.

The decade-long experience of independence so far is enough to assure us that the one-party system in Macedonia has not been replaced by a system of institutionalised democracy, but with something that resembles *many one party systems*. What, in fact, do we mean by this? We are talking about an order that in political theory has been named *the phenomenon of praetorianism*. Understood in its wider meaning as immature modernity, this system is characterised by elements that can easily be distinguished in Macedonian politics:

- the lack of effective political institutions capable of mediating, refining and moderating the conflicting interests of groups;
- direct forms of confrontation of social forces;
- an absence of political leaders and political institutions recognised or accepted as the legitimate intermediaries to moderate group conflict;
- lack of agreement among groups as to the legitimate and authoritative methods for resolving conflicts.

In institutionalised democracies, as well as in the Communist system that existed in Macedonia, there is an agreement between political actors concerning procedures for resolving political disputes. Praetorianism as a political system, on the other hand, institutionalises chaos. Specifically, in the absence of accepted procedures, the political scene is occupied by different forms of direct action in which political groups use those means that are available to them.

The experience of Third World countries, in relation to which Huntington coined the phrase praetorianism back in 1968, finds its confirmation in Macedonian politics.

It could be summed up as follows:

- the praetorian model of political participation that creates chaos is the result of the institutionalised weakness of the political system;
- at the core of this weakness is the weak party system;
- the weakness of the party system manifests itself in the lack of parties dedicated to the advancement of the interests of ordinary citizens;
- politics takes the form of a scramble for the advancement of narrow interests through control of the state, by the politicising of every single issue.

As an enemy of dictatorship as well as of democracy, praetorianism draws its strength from the weakness of the political system, especially the parliamentary structures, which are easy to manipulate. In addition, the system selects the type of personalities that are capable of coping with the chaos, in which clashes of heads often replace clashes of ideas. These, as the Macedonian praetorian experience shows, are often persons whose loyalty has to be bought; and thus corruption in the form of handing lucrative positions to the participants in the political process and their relatives is regarded as normal. In a way it is normal, since many of the party soldiers are motivated by lucrative aims when joining the party. The leaders, on the other hand, in order to keep them in the field of political battle, have to buy their loyalty.

I am trying to link the foreign policy of the Republic of Macedonia to the domestic drama of transition. Because we are not dealing with a normal democratic state that has a stable

political structure based on widely accepted basic rules of the political game among the political actors and the institutions, but a praetorian system that produces chaos and decay. In the institutions of such a system, normal dialogue on serious issues, including foreign policy ones, is absent. For example, no one has debated the fact that Macedonia as an independent state is in the category of so called quasi-states, whose sovereignty rests exclusively on the protection it gets from international law. No one has debated the question whether Macedonia, together with Moldova, Bosnia and Herzegovina and several states of the former Soviet Union, in Central Asia, for example, could itself go through a process of dissolution or could disappear. No one debates the fact that so long as the advantages of independence are reserved for narrow political, intellectual or economic elites, while the citizen is worse off than prior to independence, Macedonian sovereignty is normative but not empirical. That we, in fact, are a state that has negative sovereignty and must aim its foreign policy towards aid from states with positive sovereignty. Last, but not least, that we are a state with serious problems in interethnic relations, with repercussions in the process of formulation of our foreign policy and the relations of foreigners towards us. In a word, there is an absence of serious debate on serious issues, as is our situation.

The organic tie between the domestic and foreign policy of the Republic of Macedonia is demonstrated in the fact that success in the process of transition legitimises the state in international relations. Thus, it is not an empty phrase to say that domestic policy is our best foreign policy. But, viewed with politicians' eyes, that is the harder road linked to unpopular measures, while foreign policy could be a source of popularity among the people. This contradiction became visible in the first years of independence, as it is today. The foreign policy of a small state, deficient in power, demands patience, caution, and efforts to understand the position of the other side. However, foreign policy, viewed by a politician fighting to survive in the ruthless praetorian system of political outbidding, is a chance for quick and simple victories. In other words, foreign policy can be a compensator for difficult and politically unpopular decisions in the field of the domestic economy, for example. Thus analyses in the process of making foreign policy decisions are replaced with a scramble, at a difficult period when the state is going through the arduous process of international recognition, and when it is more than ever essential that the state speaks with one voice. For the state to speak with one voice is, however, practically impossible in a praetorian system, which is characterised by a cacophony of voices that cannot be tuned through the normal process of democratic decision-making. Even in the most difficult moments of our contemporary history, in the first years after the proclamation of independence, the government and the opposition on the international scene were enemies. In the absence of consensus for the basic rules of the political game, when politics becomes an arena for a merciless fight for power and influence, foreign policy becomes a very attractive political domain. This helps explain the fact that in 1991 there was a lot of pushing on the Macedonian foreign policy scene among the seven centres of foreign policy decision making: the president of the state, the president of parliament, the president of government, the member of the presidency of the SFR of Yugoslavia, the minister of foreign affairs, the opposition and the Albanian parties. Domestic fights for power were transferred to the sphere of foreign policy, resulting in debates that transformed the parliament into a gladiator's arena where those that endured the most won. The transcripts of parliamentary sessions bear witness to foreign policy debates in a parliament of an unconsolidated state, as was and, alas, still is Macedonia.

The difficulties faced were, in part, objective. The weakness of the institutions was due to the fact that the state was in the process of creating its foreign ministry and diplomacy. As a curiosity one could mention that the ministry did not have its own fax machine, while all the correspondence addressed to the ministry, including bills for electricity, water and central heating, landed on the minister's desk. The need to reorganise the executive was imposed by the tempo of events: letters had to be sent, foreign representatives had to be met, international contacts had to be made. The legislative body, on the other hand, was not exposed to such a pressure, so no change occurred in the foreign relations committee, with a staff of one employed. There was also a lack of consciousness among representatives who were members of the committee of the need to work full time on foreign policy issues in order competently to oppose or support foreign policy moves originating from the executive. Thus, practically all debates were conducted in plenary sessions, which were dominated by those with the greatest capacities not of the mind but of the lungs. Sessions became real battlefields where enemy parties searched for problems in the solutions instead of solutions for the problems.

The praetorian state of mind, to a large extent, is characteristic of the powerful creators of public opinion in Macedonia – the intellectuals and the journalists. It is a state of mind that does not view democracy as an open process of political accommodation among numerous conflicting groups, but as a process in which one's own truth has to be imposed. They thus become soldiers for their truth, instead of promoters of political expression and mutual respect of the different political truths that through a democratic procedure of accommodation become state policy. The lack of understanding that, in a society that has proclaimed that there is to be free competition among different groups and their truths, there is no alternative to a policy of accommodation often resulted in the supporting of old schemes of domination with the help of repression and law. This spiritual mixture of totalitarianism and nationalism cannot absorb or affirm the new democratic processes, but in fact helped sharpen conflicts to the point of civil war.

The failure to understand the new domestic realities under the system of pluralist democracy has moved hand in hand with the lack of understanding of foreign policy realities. Macedonian understanding of international politics has not, in many cases, evolved past the positions expressed in the resolutions of the non-aligned in Belgrade (1961) and Cairo (1964), for example, that demanded that the use of political and economic pressure among states be forbidden. This lesson of international politics should have been absorbed in the ten years of independence: that the influence of one state over another through exerting pressure in order to create demanded behaviour simply means the implementation of power, and that is the very essence of inter-national politics. Before speaking of legal equality of states we must have absorbed the lesson that there is no way of eliminating either the differences among members of international society, or the consequences that these differences produce in their relations, while attempts to place everything in the frame of the law amount to attempting to deny reality. Yet again, the failure to recognise the need to accommodate, this time in the realm of international politics (also known as power politics), added to the confusion over Macedonia's position in world politics. This confusion can well be illustrated by the shock among Macedonian intellectuals, journalists and politicians over the fact that a certain state or group of states made their co-operation with and aid to Macedonia conditional upon certain

demanded behaviour of the Macedonian state. From such misunderstanding of world politics to full-blown cynicism is only a short step.

The ethnic gap in Macedonian society, politically manifested through the absence of consensus over the constitutional organisation of the state, introduced additional drama in domestic and international politics these past ten years. After a failed attempt in 1991 to come to an agreement with the Albanians on a mutually acceptable constitution, Macedonian representatives in Parliament voted for the new Constitution. The model of civil society that it contains, based exclusively on the rights of individuals, was not accepted by the largest ethnic minority group, which insisted on certain collective rights. The citizen's concept made Albanians dependent on votes from Macedonians when enacting laws, including those related to their cultural identity. Due to lack of greater understanding on the side of the Macedonians of the needs of the largest minority ethnic group, this model produced conflict instead of consensus. This ten-year continuing conflict has been transferred outside the borders of the state, taking the form of a parallel foreign policy of the Albanians in Macedonia. Aiming at informing the world about their demands, it is manifested in different ways. From not participating in important state delegations or excluding the Albanian position from a joint delegation, to joining delegations of the Republic of Albania; attending political consultations in Tirana or Pristina, or approaching foreign embassies in Skopje; all complete a picture of behaviour that does not happen in normal states.

There is nothing worse for the foreign policy of a state then when it does not speak with one voice and in the name of all the important segments of society. And once again, this negative feature of the foreign policy of Macedonia is the result of flaws in the domestic system of democracy. Thus, this defect in Macedonian foreign policy can be eliminated through the elimination of the domestic sources of misunderstanding. The political agreement reached in Ohrid, for example, introducing consensual elements in the political system, creates preconditions for the creation of mutually accepted internal politics. This is a precondition for Macedonian foreign policy to speak with one voice. But constitutional changes will not by themselves eliminate praetorianism and the defect it produces in the process of decision-making in Macedonia: total dedication of the political actors to the process of mutual discreditation according to the principle of *who will get whom*. This, together with the absence of a sense that different political positions must be accommodated in state policy through an efficient democratic procedure involving compromises, will continue to be a source of conflict. In fact, knowing the dominant state of mind in Macedonia, the introduction of consensual elements will, definitely, lead to new problems: problems stemming from the incapacity of political representatives to yield, which may lead to paralysis of the decision-making process. Democracy, in its deepest sense, is a state of mind of people, while tolerance in the Balkans will be achieved only through a long and slow process of learning.

Conditions in the sphere of foreign policy decision-making are directly linked to the development of democracy in Macedonia. Yet, two examples, one from the beginning of our independence, the other more recent, manifest the inability of institutions to behave in a democratic manner over the past ten years. The first example is Macedonia's membership of the UN and the second is the establishment of diplomatic ties with Taiwan. In both cases, the process of decision-making lacked democratic procedures and transparency, through the co-

operation of the executive and the legislative and with regard to the people. Even though the motives of the politicians in these two cases might be different, the fact remains that important decisions were made behind the backs of numerous participants in the political process, and especially out of view of the people, which undermines democracy. Such praetorian behaviour in the process of decision-making will be abandoned to the extent that the political system becomes more democratic.

Of course, the democratisation of the political system of the Republic of Macedonia is a collective effort, with a role to be played by those in the foreign policy sphere. What is their behaviour? The dominant model in theory of international politics is the *rational actor model*. It is a model that starts from the supposition that political representatives work on the promotion of their countries' national interests. But the politician is always tempted to place his personal interest ahead of the interest of the state. The personal interest-state interests dilemma is also manifested in the foreign policy sphere, in the behaviour of the politician and the diplomat. It can be explained with the help of the *dramatic actor model*, pointing to the dangers that originate from the understanding of the foreign policy sphere as a scene for public performance. The decisions made in that sphere, according to this model, are not made primarily to achieve something, but to improve the image of the actor in front of his audience. This model questions the validity of the concept of the rational actor in foreign policy, understood as an effort for real results in favour of the state. Instead, we have an attempt by the diplomat to pretend usefulness that in the end results in personal gain for the politician or the diplomat. In its diplomatic practice, the Republic of Macedonia, among many small examples of daily greedy behaviour of politicians and diplomats presented as a struggle for the national interests of the state, there is one outstanding example: our candidature for membership of the Security Council of the UN.

A few words in conclusion. After the dramatic months of civil war that cost us unnecessary lives and destruction of property, we have a duty to place under serious scrutiny the institutions that allowed this to happen. Civil war occurs when the normal democratic process has failed to impose order through political accommodation. Macedonian political representatives should stop wasting all their energy proving who is right, but turn to practical aims of political accommodation. In their exaltation with the state as an instrument for imposing law upon individuals, they should not forget that it is also a centre in which a process of accommodation among the participants of the political process occurs. So far as the state's diplomatic activities are concerned it must be remembered that diplomacy is not an art of proving how right one's position is, but of winning the support of the foreign counterpart. It has been said that fanatics and lawyers are the worst diplomats, and we have quite a few of them in Macedonia. Macedonia's domestic and foreign policy needs human beings with common sense, a little sceptical but ready to compromise. Above all, Macedonia needs politicians dedicated to democracy – which, even though it cannot guarantee good policy, is the best of all the decision-making mechanisms that humanity has experienced.

LA REPARTITION DES ROLES ET DES RELATIONS INSTITUTIONNELLES DANS LE CONTEXTE DE LA POLITIQUE ETRANGERE

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Les constitutions ont un double objet : l'aménagement des pouvoirs publics et la détermination des droits fondamentaux de l'individu. Nous laisserons de côté ce deuxième objet, même s'il est le principe fondateur de toute politique menée par les pouvoirs publics, pour nous consacrer à la répartition des rôles entre les branches du gouvernement dans le contexte de la politique étrangère¹. Qu'entendons-nous par politique étrangère ? Il ne s'agit pas simplement de la place occupée par un État sur la scène internationale ni de l'état de ses relations diplomatiques avec les autres nations du monde. En réalité, la politique étrangère d'un État se décompose en différentes parties. Le premier canal d'élaboration de la politique étrangère est la conclusion des traités internationaux, qui représente quantitativement et qualitativement l'essentiel de la politique extérieure d'un État. A cela s'ajoute, avec un poids croissant, la participation de l'État aux organisations internationales. Enfin, bien qu'elle prenne des formes différentes à l'heure actuelle et que l'on ait tendance à parler d'opérations armées extérieures, la guerre demeure une donnée des relations internationales.

La quasi-totalité des constitutions actuelles repose sur le principe de séparation des pouvoirs, ce qui implique une fonction propre à chaque organe de l'État. Comment les rôles sont-ils répartis dans le contexte de la politique étrangère ? La distribution des rôles s'opère essentiellement entre le pouvoir exécutif et le pouvoir législatif. Mais d'autres organes publics peuvent être appelés à intervenir, le plus souvent indirectement, dans la politique étrangère menée par un État. Il s'agit à la fois des collectivités décentralisées ou fédérées, du peuple et du juge constitutionnel.

Toutes les constitutions modernes consacrent la primauté de l'Exécutif en matière de politique étrangère. Le pouvoir exécutif détient un monopole de représentation de l'État sur la scène internationale. La seule éventuelle remise en cause de ce monopole provient d'une volonté des collectivités décentralisées et des différents ministères d'agir en matière de coopération internationale.

Le principe démocratique exige la participation des gouvernés à la prise de décision par les gouvernants. Cependant, dans le contexte de la politique étrangère, le parlement, c'est-à-dire la représentation nationale, joue un rôle secondaire. Les constitutions prévoient une contribution du Législatif à l'expression du consentement de l'État à être lié par un traité

¹ Cette contribution repose en grande partie sur la thèse de doctorat de l'auteur "L'internationalisation des constitutions nationales", Bibliothèque constitutionnelle et de science politique, LGDJ 2000.

international mais le parlement rencontre des difficultés dans sa mission de contrôle du gouvernement.

Le peuple peut être appelé à participer à l'expression du consentement de l'État à être lié par un traité international ; en général cette participation n'est prévue que pour des catégories particulières de traités internationaux.

Enfin, le juge constitutionnel peut intervenir avant la conclusion définitive des traités internationaux pour vérifier leur compatibilité avec la constitution. Dans l'exercice de cette fonction, il est chargé de rappeler au gouvernement et au parlement les principes fondamentaux qu'ils ne peuvent pas remettre en cause par le biais d'accords internationaux.

I. Prépondérance du pouvoir exécutif dans le contexte de la politique étrangère

Née de la tradition monarchique, dans laquelle le monarque menait seul la politique étrangère du pays, la prépondérance du pouvoir exécutif dans la conduite des relations internationales se retrouve dans l'ensemble des constitutions nationales actuelles, qui confèrent au chef de l'État ou au gouvernement la fonction de représentation de l'État sur la scène internationale². Dès lors, ces organes se trouvent habilités à entrer en relation avec les autres sujets du droit international, États et organisations internationales. Ils ont donc reçu la compétence d'engager l'État sur le plan international. Deux facteurs sont à l'origine d'aménagements à cette primauté du pouvoir exécutif : l'apparition de nouvelles formes d'engagement international de l'État et d'autre part la tendance des collectivités décentralisées à agir en matière de coopération internationale.

1. Nouvelles formes d'engagements internationaux de l'État

Il s'agit d'une part de la simplification des procédures de conclusion des traités internationaux et d'autre part du développement des engagements ne prenant pas la forme d'une convention internationale.

Le traité international demeure à l'heure actuelle la source principale du droit international. L'accroissement du nombre des conventions internationales et la diversification de leur domaine d'intervention ont conduit à une simplification des procédures de conclusion des traités internationaux. En France, la pratique des accords internationaux conclus selon une

² *En voici quelques exemples : l'article 36 de la constitution grecque dispose que le Président de la République représente l'Etat sur le plan international ; l'article 123 de la constitution portugaise indique que le Président de la République représente la République portugaise (in Les constitutions de l'Europe des Douze, textes rassemblés et présentés par Henri Oberdorff, La Documentation française 1994.) ; l'article 92 de la constitution bulgare établit que le Président de la République représente la République de Bulgarie dans les relations internationales ; l'article 30a de la constitution hongroise confie la représentation de l'Etat au Président de la République (in Constitutions d'Europe centrale, orientale et balte, textes rassemblés et présentés par Michel Lesage, La Documentation française 1995).*

procédure simplifiée est apparue très tôt, mais c'est seulement en 1958 que les constituants ont décidé de réglementer avec précision les pratiques qui s'étaient développées en marge du texte constitutionnel. L'article 52 de la constitution de 1958 dispose que : « le Président de la République négocie et ratifie les traités. Il est informé de toute négociation tendant à la conclusion d'un accord international non soumis à ratification ». Les accords conclus selon une forme simplifiée et les accords soumis à approbation gouvernementale sont les deux types d'accords compris dans l'expression « accords non soumis à ratification ». Les premiers entrent en vigueur dès leur signature par un membre du gouvernement (avec l'autorisation du ministre des Affaires étrangères), ils ne peuvent donc pas intervenir dans un des domaines énumérés à l'article 53 de la constitution, pour lesquels une autorisation parlementaire est nécessaire à l'entrée en vigueur de l'accord international. Les seconds sont conclus par un ministre soit hors du domaine de l'article 53 soit dans ce domaine mais leur approbation par le gouvernement est subordonnée à l'autorisation du Parlement.

L'intérêt de cette réglementation constitutionnelle est d'autoriser les membres du gouvernement à agir sur le plan international sans le chef de l'État, dans les domaines de compétence privilégiée du gouvernement. Les accords non soumis à ratification dans la pratique conventionnelle française ont donc pour objet de prolonger vers l'extérieur l'autonomie interne du gouvernement par rapport au Président de la République. Mais ils établissent bien un élargissement de l'étendue du pouvoir d'engager l'État au profit du pouvoir exécutif. Que ce soient les membres du gouvernement ou le Président de la République lui-même qui détiennent cette compétence, elle signifie toujours que, par le biais de l'action internationale, l'Exécutif se voit reconnaître un nouveau moyen de créer du droit. Le pouvoir exécutif dans son ensemble profite, aux dépens du Parlement, de l'extension du nombre et des domaines d'intervention des accords internationaux.

D'un autre côté, la multiplication des rencontres internationales ainsi que l'interdépendance croissante entre tous les États de la planète contribuent à augmenter le rôle des représentants de l'État sur la scène internationale. Ces derniers doivent donc prendre de plus en plus souvent position pour leur État sur les sujets les plus variés. L'accord auquel parviennent les représentants de l'État au cours des négociations internationales ne se prête pas toujours à une consécration formelle. Ainsi, se développe la voie non conventionnelle des engagements étatiques sur la scène internationale. Les actes concertés non conventionnels sont des actes collectifs dans la mesure où ils sont le « fruit de la rencontre de volonté des parties »³. Ils interviennent fréquemment en matière de relations internationales économiques, mais ils sont aussi nombreux dans les domaines politiques classiques, notamment en matière de sécurité. Leurs auteurs sont exclusivement des autorités exécutives, le plus souvent habilitées à engager l'État sur le plan international. Ainsi, les signataires de ces instruments sont en règle générale les chefs d'État et les ministres des Affaires étrangères pour des rencontres internationales purement politiques. La question est plus délicate lorsqu'il s'agit de rencontres internationales d'un caractère plus technique, relatives par exemple à des discussions en matière monétaire, dans lesquelles l'auteur de l'acte est le ministre des Finances. Ce dernier

³ P-M. Eisemann : *Le gentlemen's agreement comme source du droit international*, JDI 1979, pp. 326-348, p. 345.

n'est habilité à engager l'État sur le plan international qu'avec la production des pleins pouvoirs. La difficulté est alors de savoir ce que représente pour l'État l'acte signé par le ministre des Finances, par exemple.

Le recours aux procédures informelles d'engagement international se retrouve aussi bien dans la construction européenne avec les réunions régulières des chefs d'État et de gouvernement sous l'appellation de Conseil Européen. En effet, les conclusions de la présidence ainsi que les déclarations adoptées en commun par les membres du Conseil européen établissent, comme les autres actes concertés non conventionnels, un consensus entre États, et non un traité international. D'autre part, les Sommets de l'Alliance atlantique se concluent en général par des déclarations finales qui peuvent avoir une portée majeure pour l'évolution de l'organisation internationale. La Déclaration de Londres sur une Alliance de l'Atlantique Nord renouvelée de 1990 représente assurément une des déclarations les plus importantes de l'OTAN⁴. Les chefs d'État et de gouvernement y proposent une ouverture de l'Alliance vers les membres de l'Organisation du Traité de Varsovie ainsi que l'adoption d'une nouvelle stratégie militaire⁵. Là encore, nous voyons bien que les États s'engagent sur la voie d'une révision du Traité de l'Atlantique Nord par le biais d'un acte informel, qu'on ne peut pas considérer comme un traité mais qui peut être l'oeuvre du seul pouvoir exécutif.

La nécessité pour le pouvoir exécutif d'agir vite ou de donner rapidement un signe diplomatique à ses partenaires internationaux ainsi que le risque d'un refus du Parlement d'autoriser la ratification ou l'approbation de l'engagement international signé, trouvent une solution dans le recours aux accords informels. Or, les constitutions n'abordent traditionnellement la question des relations internationales qu'à travers la notion de traité international, c'est-à-dire qu'elles ne prévoient une répartition des compétences en matière de conclusion des engagements internationaux qu'en ce qui concerne les traités en bonne et due forme. Ainsi, les actes concertés non conventionnels sont absents des dispositions constitutionnelles relatives aux relations internationales. Il en résulte, qu'en vertu de la compétence générale reconnue au pouvoir exécutif de représenter l'État sur la scène internationale et donc d'entretenir des relations avec les autres sujets de droit international, les autorités exécutives obtiennent un surcroît de pouvoir, de marge de manoeuvre pour engager l'État sur le plan international.

La constitution française de 1958 a tenté d'aborder la question des accords internationaux qui ne prennent pas la forme d'un traité en prévoyant la compétence du Conseil constitutionnel pour se prononcer sur la compatibilité d'un *engagement international* avec la constitution⁶.

⁴ Jean de la Guerivière : *Voyage au coeur de l'OTAN*, Seuil 1996, p. 50.

⁵ Déclaration reproduite intégralement dans l'ouvrage de Frédéric Bozo : *La France et l'OTAN. De la guerre froide au nouvel ordre européen*, Masson, 1991, pp. 256-261.

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

Mais la jurisprudence du Conseil constitutionnel a précisé la notion d'engagement international telle qu'entendue par la constitution, et a considéré que les actes concertés non conventionnels n'étaient pas des engagements internationaux au sens de la constitution. Ils échappent alors à toute réglementation constitutionnelle.

2. L'activité internationale des collectivités décentralisées

La coopération internationale touche aujourd'hui des domaines très divers qui se prolongent jusque dans les problèmes de la vie quotidienne locale. Ainsi la coopération transfrontalière s'intensifie à mesure que les États accordent une plus grande autonomie à leurs collectivités décentralisées. Dans un État unitaire fortement centralisé tel que la France, la reconnaissance d'un prolongement externe aux compétences des collectivités locales a été le fruit d'une lente évolution. Le grand changement dans l'organisation administrative du territoire français date de la loi de décentralisation de 1982. Cette loi a réalisé une ouverture timide en faveur des régions uniquement et dans le seul cadre d'une relation transfrontalière directe (donc relations de voisinage exclusivement)⁷. Dans sa démarche d'adaptation du droit français à la réalité des contacts accrus entre les collectivités locales françaises et étrangères, le gouvernement français a pris acte des textes internationaux en la matière. Ainsi, le Parlement a autorisé l'approbation de la Convention-cadre européenne sur la coopération transfrontalière des collectivités ou autorités territoriales par une loi du 23 décembre 1983 et la Convention est entrée en vigueur pour la France le 15 mai 1984. Ensuite, la loi d'orientation relative à l'administration territoriale de la République du 6 février 1992 a fixé un cadre au nouveau développement de la coopération décentralisée et a rappelé la règle selon laquelle la possibilité pour les collectivités territoriales de passer des conventions avec des collectivités locales étrangères est limitée par leurs domaines de compétence et par le respect des engagements internationaux de la France.

La sauvegarde des intérêts nationaux exige qu'un représentant de l'État intervienne à un moment ou à un autre dans la procédure de conclusion d'un arrangement transfrontalier. Or, cette intervention doit se concilier avec la liberté des collectivités territoriales de mener des actions extérieures. La création en 1983 d'un délégué à l'action extérieure des collectivités locales au sein du ministère des Affaires étrangères et la mise en place par la loi du 6 février 1992 d'une commission nationale de la coopération décentralisée permettent de réaliser cette conciliation⁸.

⁷ Olivier Audeoud : *Les collectivités infra-étatiques dans la vie internationale*, SFDI Colloque de Nancy 1994, *l'État souverain à l'aube du XXIe siècle*, Pedone 1994, pp. 139-169, p. 164.

⁸ Christian Autexier : *Licéité de l'action extérieure des collectivités territoriales et préservation des intérêts nationaux*, in *Coopération décentralisée et coopération multilatérale francophone*, *Economica* 1989, pp. 247-263, p. 260. voir aussi Catherine Schneider : *La souveraineté de l'Etat au carrefour du droit international et du droit administratif*, in *Mélanges Peiser*, Presses universitaires de Grenoble, 1995, pp. 423-449, p. 434.

A côté de cette activité internationale des collectivités décentralisées sont apparus des accords infra-étatiques de plus en plus nombreux, conclus par des autorités administratives de pays différents. Les arrangements administratifs sont des « documents signés par les représentants qualifiés des administrations des deux États et destinés à préciser les conditions d'application d'un accord »⁹. L'origine de ces accords entre autorités administratives de pays différents se trouve généralement dans un cadre conventionnel préexistant entre les États concernés. En effet, l'exécution des conventions internationales exige une intervention concrète au niveau des institutions intéressées au premier chef par la convention en question. C'est pourquoi les administrations des différents États concluent entre elles des arrangements déterminant les rôles que chacune doit jouer en vertu du traité international.

En règle générale, les textes constitutionnels ne prévoient pas expressément la catégorie des arrangements administratifs. La constitution française de 1958 interdit à toute autre entité que l'État de conclure des traités internationaux¹⁰. La constitution ne donne pas compétence aux autorités administratives inférieures pour engager l'État vis-à-vis d'un autre État, elle n'attribue cette compétence qu'aux plus hautes autorités exécutives. Deux principes ont été établis pour éviter que l'État français ne se trouve engagé internationalement contre sa volonté¹¹. Sur le plan procédural, toute personne appelée à signer un engagement international doit être munie de pouvoirs : les ministres techniques le sont en général, ce qui ne signifie pas que le ministre des Affaires étrangères contrôle véritablement l'action internationale de tous les ministères. Sur le fond, les accords infra-étatiques ne sont des accords internationaux que dans la mesure où ils s'inscrivent dans le cadre d'un traité international déjà conclu. Il s'agit pour l'État d'apparaître sur la scène internationale avec une volonté unique, tout en permettant, dans la pratique, les relations entre ses autorités administratives inférieures et des autorités étrangères¹².

Même si la répartition des rôles dans le contexte de la politique étrangère semble être largement en faveur du pouvoir exécutif, les constitutions actuelles associent toutes le Parlement de différentes manières à la définition de la politique extérieure.

Participation du parlement en matière de politique étrangère

⁹ *Manuel à l'usage des agents du Ministère des Affaires Etrangères, non publié, cité par Valérie Goesel-Le Bihan, La répartition des compétences en matière de conclusion des accords internationaux sous la V^e République, Pedone 1995 p. 286.*

¹⁰ *Elisabeth Zoller : La conclusion et la mise en oeuvre des traités dans les Etats fédéraux et unitaires, RIDC 1990-1, pp. 737-750, p. 738.*

¹¹ *ibid. p. 742.*

¹² *Valérie Goesel-Le Bihan estime ainsi que cette "fuite hors du droit international [...] trouve sa raison d'être dans la nécessité d'assouplir la répartition constitutionnelle des compétences en matière de conclusion des traités et accords internationaux", in La répartition des compétences en matière de conclusion des accords internationaux sous la V^e République, op.cit. p. 293.*

Dans un régime démocratique, l'action gouvernementale rencontre des limites par le jeu du contrôle démocratique : élections libres et périodiques des gouvernants par les gouvernés, responsabilité du pouvoir exécutif devant le pouvoir législatif ou freins réciproques, respect du droit garanti par le pouvoir judiciaire. Pourtant, il faut bien constater un certain déficit démocratique en matière de politique extérieure. Les parlements nationaux n'occupent pas une place prépondérante dans la définition de cette politique et surtout ils trouvent depuis longtemps que la politique étrangère est un domaine plus difficile à contrôler que la politique intérieure¹³. Il s'est avéré qu'un mécanisme propre au contrôle de l'activité internationale de l'Exécutif était nécessaire. Ce dispositif n'a été prévu que pour une seule forme d'activité internationale : l'élaboration des conventions internationales, et il est bien souvent inadapté aux réalités internationales actuelles. Il en résulte que la fonction de contrôle du pouvoir législatif sur la définition de la politique étrangère n'est appréhendée que partiellement et imparfaitement par le droit constitutionnel.

Dans le domaine de la politique extérieure, la fonction de contrôle doit s'exercer à l'égard des deux moyens principaux de définition de la politique étrangère d'un État, à savoir l'élaboration des normes internationales et la mise en oeuvre de la défense et de la sécurité du pays.

Le Parlement et les engagements internationaux

Il nous faut reprendre la distinction entre les voies conventionnelle et non conventionnelle d'engagement de l'État sur la scène internationale.

a) les traités internationaux

Le Parlement est écarté de la première phase de l'action diplomatique, c'est-à-dire la phase des négociations. En revanche, les constitutions, soit en vertu de la tradition démocratique soit en vertu des principes du régime parlementaire, prévoient l'association du Parlement à l'expression du consentement de l'État à s'engager par un traité international.

Les fondements de l'éviction du Parlement du domaine des négociations internationales se répartissent entre le contexte international et les facteurs internes. En premier lieu, il faut bien dire que l'activité diplomatique impose certaines contraintes de nombre et de discrétion qui s'accommodent assez mal des caractéristiques d'une assemblée parlementaire. Le Parlement ne peut pas participer en tant que tel aux négociations internationales car chaque État agit par représentation. Or, dans un régime parlementaire, c'est le gouvernement qui représente le Parlement. Le manque d'information dont souffrent les Parlements est également une cause importante de leur exclusion. Cette information ne peut venir que du gouvernement qui est libre de la donner et de choisir le moment pour la donner ; ou de la presse, et alors elle n'est que partielle. Dès lors, le contrôle que les Parlements devraient exercer sur la politique étrangère conduite par l'Exécutif ne peut être mené correctement.

¹³ Christopher Hill et William Wallace: *Introduction. Actors and actions*, in *The actors in Europe's foreign policy*, ed. C.HILL, Routledge, 1996, p. 7.

Les facteurs internes de l'exclusion des Parlements sont de deux ordres, ceux qui ne dépendent pas des Parlements eux-mêmes et ceux qui sont directement liés à la volonté des parlementaires. L'amplitude de l'intervention du pouvoir législatif dans les négociations internationales, de même que pour toute autre activité de contrôle d'ailleurs, est fonction de différentes variables¹⁴. Tout d'abord, dans les régimes parlementaires contemporains, la place occupée par le Parlement au sein du système constitutionnel de l'État est souvent faible par rapport à celle de l'Exécutif. Ensuite intervient le fait que la sanction qui est à la disposition du Parlement en régime parlementaire pour désapprouver l'action gouvernementale est la censure du gouvernement. Or il est rare que les parlementaires soient prêts à aller jusqu'à cette extrémité pour une question de politique étrangère. Finalement, se pose le problème de savoir si les parlementaires ont véritablement le désir d'exercer un contrôle effectif de la politique étrangère menée par le gouvernement. En effet, la volonté d'associer la démocratie et la paix est une constante de la pensée politique depuis le Projet de Paix Perpétuelle d'Emmanuel Kant¹⁵. Dans la lignée de cette pensée, on estime que la seule idée intéressant la démocratie serait la paix, tandis que l'ensemble des autres problèmes de politique étrangère serait indifférent à la démocratie¹⁶. La vision de J-J. Rousseau selon laquelle la démocratie ne doit pas s'occuper de politique étrangère semble encore pouvoir s'appliquer de nos jours¹⁷. On continue de constater que les progrès démocratiques sont lents pour tout ce qui concerne l'action de l'État tournée vers l'extérieur. Si on entend bien les plaintes des parlementaires à propos de la dépossession du pouvoir normatif du législateur, on ne voit encore aucun effort réel pour forcer le gouvernement à associer la représentation nationale aux discussions internationales.

Si le Parlement n'intervient pas dans la phase des négociations internationales, en revanche il participe à l'expression du consentement de l'État à être lié par des obligations internationales. Le principe de la participation du Parlement à la conclusion des traités internationaux est étroitement lié à la tradition démocratique qui implique que les représentants de la Nation soient associés à toutes les grandes décisions de politique étrangère¹⁸. A cela s'ajoute la

¹⁴ *Simon Cohen : Le contrôle parlementaire de la politique de défense, RDP 1977, pp. 377-446, p. 379.*

¹⁵ *Emmanuel Kant : Pour la paix perpétuelle. Projet philosophique, présenté par Joël Lefèbvre, Presses Universitaires de Lyon, 1985.*

¹⁶ *Joseph Barthélémy : La conduite de la politique extérieure dans les démocraties, op.cit. p. 25.*

¹⁷ *"Ce qui importe essentiellement à chaque citoyen, c'est l'observation des lois au-dedans, la propriété des biens, la sûreté des particuliers. Tant que tout ira bien sur ces trois points, laissez les Conseils négocier et traiter avec l'étranger ; ce n'est pas de là que viendront vos dangers les plus à craindre." : Lettres écrites de la montagne (VII), Ecrits politiques, Bibliothèque de la Pléiade, Gallimard, p. 826.*

¹⁸ *B. Mirkine-Guetzevitch : Droit International et Droit Constitutionnel, RCADI 1931-IV, p. 360 : "toute la politique extérieure est l'affaire intime de chaque citoyen, [...] un traité n'est pas moins important qu'une loi, et c'est pourquoi la Révolution française exige que la*

tradition parlementaire qui prévoit la participation du Parlement à l'élaboration des seuls traités mettant en cause une compétence législative et qui a donc une signification différente. Le système d'association du Parlement à la conclusion des traités internationaux est le plus généralement un système mixte, dans le sens où l'autorisation du Parlement devra être obtenue pour la ratification de certains traités uniquement. A l'origine, l'intervention du Parlement était nécessaire lorsque le traité portait sur une matière de compétence législative puisqu'il s'agissait d'éviter que le gouvernement ne puisse faire la loi par le biais des traités internationaux. Par la suite, la participation du Parlement à la confection des traités s'est justifiée non seulement pour les traités intervenant dans un domaine de compétence législative mais également pour tous les traités importants pour la nation¹⁹. Cette tradition parlementaire s'est retrouvée dans la plupart des constitutions des États européens.

En général, la constitution énumère le domaine d'intervention du Parlement. L'énumération de l'article 53 de la constitution française constitue un bon « échantillon » des matières dans lesquelles le Parlement est appelé à intervenir. Elle est assez semblable dans quelques autres États européens tels que l'Espagne²⁰, l'Italie²¹ ou encore le Portugal²². Conformément à la tradition, les traités de paix, de commerce, ceux qui engagent les finances de l'État, ceux qui modifient des dispositions législatives, ceux qui concernent le statut des personnes ou qui sont relatifs à la cession d'un territoire, voient leur entrée en vigueur subordonnée à l'autorisation du Parlement. S'y ajoutent les traités ou accords relatifs à l'organisation internationale, expression qui est interprétée strictement car une interprétation large conduirait à y inclure tous les traités internationaux puisque l'on peut aisément dire qu'ils concernent tous d'une manière ou d'une autre l'organisation des relations entre États. En France, les gouvernements successifs ont restreint cette expression à la seule catégorie des traités relatifs à des

politique extérieure soit elle aussi conduite et contrôlée par le peuple, c'est-à-dire par l'Assemblée".

¹⁹ E.Zoller : *Droit des relations extérieures, op.cit. p. 191.*

²⁰ *L'article 94 de la constitution espagnole énumère les traités à caractère politique, à caractère militaire, qui affectent l'intégrité territoriale de l'Etat ou les droits et devoirs fondamentaux, qui impliquent des obligations financières, qui entraînent la modification ou l'abrogation d'une loi ou exigent l'adoption de mesures législatives pour leur exécution, in Les constitutions de l'Europe des Douze, textes rassemblés et présentés par Henri Oberdorff, op.cit. p. 123.*

²¹ *L'article 80 parle des traités de nature politique, qui prévoient des arbitrages ou des règlements judiciaires, ou encore qui entraînent des modifications du territoire, des charges pour les finances publiques ou des changements dans les lois, in Les constitutions de l'Europe des Douze, op.cit. p. 256.*

²² *L'article 164 donne compétence à l'Assemblée pour approuver la ratification des conventions internationales portant sur des matières de sa compétence réservée, des traités d'amitié, de paix, de défense, de rectification des frontières, ceux concernant des questions militaires et tous ceux que le gouvernement jugera bon de lui soumettre, in Les constitutions de l'Europe des Douze, op.cit. p. 340.*

organisations internationales permanentes et à celle des traités impliquant des limitations de souveraineté. La lacune qui caractérise l'article 53 de la constitution française, et qui est comblée dans un certain nombre d'autres pays, est celle des traités d'ordre purement politique. La pratique qui existait sous les III^e et IV^e Républiques de soumettre tous les traités importants au Parlement a été reprise sous la V^e République, mais le fait que cette catégorie de traités ne soit pas mentionnée dans la constitution laisse une importante marge de manoeuvre au gouvernement qui insiste sur le caractère facultatif et exceptionnel de l'intervention du Parlement hors des cas de l'article 53²³.

La procédure de participation du Parlement français à la conclusion des traités internationaux prévue par la constitution est marquée par le temps, dans le sens où elle ne correspond pas aux conditions actuelles des relations internationales conventionnelles. En effet, les accords internationaux par lesquels la France s'engage sont très nombreux, ils exigent parfois une rapidité incompatible avec la durée du processus de vote d'une loi d'autorisation. Il s'agirait de trouver une méthode permettant au Parlement de se prononcer sur les conventions internationales les plus importantes, c'est-à-dire aussi bien les traités politiques que les conventions multilatérales réglant une matière de la compétence du Parlement, sans que cela gêne l'activité internationale de l'État.

Une des difficultés majeures que rencontrent les Parlements dans l'examen des traités résulte du jeu des réserves au traité. Celles-ci sont décidées par le gouvernement seul et ce dernier n'a pas l'obligation d'en informer le Parlement²⁴. Dans la pratique, soit le gouvernement tient le Parlement informé des réserves qu'il émet à un traité, en insistant cependant sur le fait qu'il n'y est pas obligé, comme c'est le cas en France, soit il ne l'informe pas des conditions qu'il a attachées au traité pendant les négociations, c'est ainsi que procède le gouvernement britannique²⁵. Cependant, la liberté d'action d'un gouvernement qui accepte d'informer le Parlement des réserves à un traité, n'est pas menacée car la dénonciation d'un traité ne nécessite en général pas l'autorisation du Parlement²⁶. La situation n'est donc pas satisfaisante car le Parlement ne peut pas se prononcer sur la réalité de l'engagement international qui va lier l'État. D'autre part, l'absence du droit d'amendement des parlementaires lors du débat d'une loi d'autorisation de ratification d'une convention internationale contribue largement à réduire le pouvoir de contrôle du Parlement. En effet, le Parlement peut uniquement empêcher ou au contraire donner son accord à l'engagement international de l'État lorsque la procédure

²³ Alain Pellet : *Commentaire de l'article 53, op.cit. p. 680.*

²⁴ *ibid. p. 701.*

²⁵ Lord Templeman: *Treaty-making and the British Parliament, in Parliamentary participation in the making and operation of treaties: a comparative study, Martinus Nijhoff Publishers 1995, p. 153-176, p. 172.*

²⁶ P. Rambaud : *Le Parlement et les engagements internationaux de la France sous la V^e République, RGDIP 1977-II, pp. 617-665, p. 654. La constitution bulgare semble faire exception sur ce point puisqu'elle attribue compétence à l'Assemblée Nationale à la fois pour la ratification et la dénonciation d'un certain nombre d'accords internationaux (article 85-1 de la constitution).*

internationale de conclusion se déroule en plusieurs étapes. Ce n'est finalement associer le Parlement que d'une façon très minime à la confection des traités internationaux, qui pourtant prennent de plus en plus la place de la réglementation nationale. L'intérêt d'une intervention du Parlement résiderait justement plutôt dans la possibilité pour ce dernier de discuter des dispositions conventionnelles et de leur insertion dans l'ordre juridique interne. Il apparaît alors nécessaire d'adapter la constitution, pour permettre une meilleure collaboration du Parlement à l'élaboration « normative » des traités internationaux, c'est-à-dire à l'élaboration des règles de fond posées par ceux-ci.

b) les actes internationaux non conventionnels

Le contrôle parlementaire sur les actes non conventionnels correspond au contrôle de toutes les activités de l'Exécutif en matière de politique étrangère, qui ne prennent pas la forme d'un traité international (actes concertés non conventionnels tels que les déclarations finales d'une conférence internationale par exemple). Les mécanismes dont dispose le Parlement peuvent avoir pour objectif l'information du Parlement et la surveillance de l'Exécutif : ils prennent alors la forme soit de commissions parlementaires spécialisées soit du contrôle général en matière budgétaire. Jusqu'à présent le Parlement français était peu enclin à utiliser ces mécanismes pour exercer son contrôle sur la politique menée par le gouvernement. L'année 2000 semble marquer un changement de perspective. En effet, plusieurs missions parlementaires ont été créées pour faire la lumière sur l'attitude des autorités françaises dans un certain nombre d'opérations extérieures : une mission d'information sur la prise de l'enclave musulmane de Srebrenica par les forces serbes en juillet 1995 et une mission d'information sur les risques sanitaires encourus par les soldats français dans la guerre du Golfe en 1991, une mission d'information sur la vente d'armes au Rwanda ayant été créée la première. D'autre part, la commission de la défense de l'Assemblée nationale a demandé que soient systématiquement communiqués au Parlement les accords de coopération militaire signés par la France avec des États étrangers. Il semblerait pour le moment que ces missions ne soient pas un très grand succès car les personnalités politiques et militaires appelées à témoigner devant elles n'ont pas fait de révélations. Elles ont tout de même le mérite d'exister et peut-être d'ouvrir la voie à un contrôle plus strict du Parlement sur l'utilisation des forces armées dans des opérations extérieures.

Il faut bien constater que la plupart des actes unilatéraux de politique étrangère font partie de la compétence exclusive du gouvernement, ainsi de la reconnaissance, des blocus ou embargo, du vote dans les organisations internationales ou des mesures de rétorsion ou de représailles²⁷. De même, restent en dehors de tout contrôle parlementaire les déclarations des ministres et des porte-parole du gouvernement, les prises de position, les interviews, toutes les communications et informations données ou reçues par le gouvernement²⁸.

En France, sous la V^e République, la réalité du contrôle sur une politique décidée par le Président de la République, qui n'est pas responsable devant le Parlement, peut être mise en

²⁷ Rudolf Geiger : *Grundgesetz und Völkerrecht*, Verlag C.H.Beck, München 1994, p. 132.

²⁸ H.D.Treviranus : *Aussenpolitik im demokratischen Rechtsstaat*, op.cit. p. 69.

doute et montre qu'il existe un réel problème dans les rapports entre les pouvoirs établis par la constitution de 1958²⁹. Le retrait de la France des structures de l'OTAN en 1966 illustre ce propos. En effet, la décision, prise par le Président de la République et non par le gouvernement, a donné lieu au dépôt d'une motion de censure contre le gouvernement et à une discussion mêlant politique intérieure et extérieure, empêchant ainsi une réelle confrontation des arguments sur l'opportunité de la décision de retrait de la France de l'OTAN³⁰.

Le Parlement dispose en réalité de peu de poids institutionnel pour contrôler efficacement la politique étrangère menée par le pouvoir exécutif. La participation réelle du Parlement à la conduite de la politique étrangère dépend du rapport de force entre les organes étatiques dans la réalité de la constitution appliquée. Si le gouvernement a une majorité politique au sein du Parlement, il aura les mains plus ou moins libres. En revanche, quand le gouvernement est dépendant politiquement du Parlement, il doit faire plus attention à la volonté de la majorité³¹.

Le contrôle de la politique communautaire présente une particularité, puisque tous les Parlements européens ont mis en place l'une ou l'autre procédure afin de peser d'une certaine manière sur les décisions prises par les gouvernements au sein de la Communauté européenne. Le but poursuivi est de permettre au Parlement de s'exprimer, de prendre position sur les projets d'actes communautaires et sur la politique européenne en général. Il s'agit donc pour le Parlement de retrouver son rôle classique de définition d'une politique d'ensemble que le gouvernement est chargé d'exécuter. Pour atteindre ce but, la plupart des Parlements européens ont créé une commission spécialisée dans les affaires communautaires chargée d'examiner les projets d'actes communautaires et de transmettre les projets les plus importants à la Chambre pour un débat en séance publique. En France, l'article 88-4 de la constitution prévoit que le gouvernement doit informer le Parlement des propositions d'actes communautaires comportant des dispositions de nature législative³².

Même si la procédure de l'article 88-4 de la constitution française, ainsi que l'ensemble des solutions développées par les Parlements européens, apparaissent comme une nouveauté intéressante, elles semblent insusceptibles de toute extension aux négociations internationales générales. En effet, les propositions d'actes communautaires qui sont soumises au Parlement émanent toutes de la Commission des Communautés européennes. Un tel monopole de l'initiative n'existe pas au niveau international car il peut y avoir autant de propositions qu'il y a de parties. C'est donc le particularisme de la procédure communautaire qui rend possible la participation du Parlement. Si une extension de la consultation des Parlements, prévue pour

²⁹ Yves Cottrel : *Note sur le contrôle du Parlement sur la politique étrangère de la France sous la V^e République. Importance du rôle des commissions des Affaires Etrangères*, RDP 1983, pp. 965-982, p. 977.

³⁰ *Intervention de M. Fontanet, J.O. Débats parlementaires à l'Assemblée Nationale du 19.04.1966*, p. 780.

³¹ *ibid.* p. 59.

³² *Thibaut de Berranger : Constitutions nationales et construction communautaire*, LGDJ 1995, p. 447.

les projets communautaires, était possible, ce serait éventuellement pour les traités multilatéraux pouvant faire l'objet de réserves. On pourrait en effet envisager que le Parlement prenne part à l'élaboration de certaines réserves après avoir eu connaissance du texte négocié et définitif. Mais un tel élargissement des procédures de contrôle de la politique européenne du gouvernement à l'ensemble de la politique étrangère n'est à l'ordre du jour dans aucun État européen.

II. Le Parlement et l'envoi de troupes armées à l'étranger

La question de la répartition du pouvoir de faire la guerre est fondamentale pour toute démocratie. Le peuple souverain doit décider lui-même de l'avenir de la nation et donc prendre la décision d'entrer en guerre. Aujourd'hui, il s'agit d'adapter aux nouvelles conditions de la société internationale et du droit international la nécessaire participation du Parlement à la décision d'utiliser les forces armées nationales. La question des pouvoirs en matière de guerre combine deux principes fondamentaux du droit constitutionnel : le principe démocratique selon lequel le peuple reste maître de son destin et le principe républicain selon lequel les décisions doivent être prises à plusieurs, par opposition au régime monarchique où le Roi décide seul. La prédominance du pouvoir exécutif dans le domaine de la politique étrangère conduit à la reconnaissance de sa compétence pour déclencher et mener les hostilités, généralement avec le consentement du Parlement donné sous forme d'autorisation préalable³³. Dans des cas plus rares, le Parlement est seulement informé, dès que les conditions le permettent, de l'état de guerre³⁴.

Dans la constitution française de 1958, le Président de la République s'est vu attribué des pouvoirs importants, lui donnant une place prépondérante dans l'engagement et la conduite de la guerre. En effet, l'article 16 lui accorde des pouvoirs exceptionnels qui conduisent à ce que

³³ Article 19 de la constitution danoise : "le Roi ne peut sans le consentement du Folketing employer la force militaire contre aucun Etat étranger" ; article 63-3 de la constitution espagnole : "il incombe au Roi, sur autorisation préalable des Cortes Generales, de déclarer la guerre et de conclure la paix" ; article 35 de la constitution française : "la déclaration de guerre est autorisée par le Parlement" ; article 78 de la constitution italienne : "les Chambres autorisent la déclaration de guerre et confèrent au gouvernement les pouvoirs nécessaires" ; article 37 alinéa 6 de la constitution luxembourgeoise : "le Grand-Duc ... déclare la guerre et la cessation de la guerre après y avoir été autorisé par un vote de la Chambre émis dans les conditions de l'article 114 alinéa 5 de la constitution " (majorité des deux-tiers) ; article 96 §1 de la constitution des Pays-Bas : "le Royaume n'est déclaré en état de guerre qu'avec l'autorisation préalable des Etats généraux" ; article 138 c) de la constitution portugaise : "il appartient au Président de la République de déclarer la guerre... et de faire la paix... sur autorisation de l'Assemblée de la République ou, si elle n'est pas réunie et que sa réunion immédiate s'avérait impossible, de sa commission permanente", in *Les constitutions de l'Europe des Douze, textes rassemblés et présentés par Henri Oberdorff, op.cit.*

³⁴ Article 36 de la constitution grecque : "le Président de la République représente l'Etat sur le plan international et déclare la guerre ; il conclut les traités de paix, d'alliance... et il en donne connaissance à la Chambre des députés, avec les éclaircissements nécessaires, aussitôt que l'intérêt et la sûreté de l'Etat le permettent", *ibid.* p. 190.

la décision soit prise par lui seul, lorsqu'il existe une menace à l'intégrité du territoire. En ce qui concerne l'envoi de troupes armées à l'extérieur, le Président de la République est l'autorité délégataire de l'autorisation de déclaration de guerre, celle-ci devant être votée par le Parlement. Le Président de la République décide et le Premier ministre exécute : telle est la répartition des pouvoirs qui découle des décrets du 18 juillet 1962 relatif à l'organisation de la défense nationale et du 14 janvier 1964 relatif aux forces aériennes stratégiques³⁵. En réalité, l'assentiment parlementaire ne peut jouer qu'un faible rôle de contrôle en raison de la liberté qui est laissée au gouvernement dans l'ensemble des actions préalables à l'engagement d'hostilités armées.

L'intervention des forces armées à l'extérieur du territoire prend deux formes différentes à l'heure actuelle, selon le cadre dans lequel elle est décidée. L'État peut agir à la demande d'un autre État ou bien prendre place au sein d'un dispositif collectif de sécurité. On parle alors soit d'opérations unilatérales soit d'opérations internationalisées. Dans le cas des opérations armées unilatérales, il y a prépondérance de l'Exécutif sans véritable contrôle du Législatif sur les actions entreprises. Le recours aux compétences propres du pouvoir exécutif en matière militaire permet de justifier le déclenchement et la conduite d'une guerre sans autorisation préalable des Assemblées. Des exemples significatifs sont donnés par l'assistance militaire accordée par la France à la demande d'un État étranger. En général, les opérations sont menées sur la base d'accords de défense ou d'assistance militaire approuvés par le Parlement par application de l'article 53 de la constitution³⁶. La procédure de décision est alors en général « souple et informelle »³⁷ car la décision appartient au Président de la République, sans consultation du Parlement. Ainsi, les accords de coopération ou d'assistance militaire confèrent en fait au Parlement un rôle réduit à une « approbation pour le futur » car l'intervention du Parlement n'est pas requise lors de l'application de l'accord. Or il existe bien un intérêt pour l'Assemblée de se prononcer : vérifier la conformité de l'opération menée par les forces armées françaises aux stipulations de l'accord.

Les opérations armées internationalisées sont celles dont peut décider le Conseil de Sécurité de l'ONU dans le cadre du maintien de la paix et de la sécurité internationales. Les gouvernements estiment que les parlements n'ont pas à intervenir puisqu'ils ont donné leur accord lors de la ratification de la Charte des Nations Unies. On estime que les opérations menées dans le cadre de l'ONU sont des opérations de police ne nécessitant pas une déclaration de guerre, c'est-à-dire l'autorisation du Parlement après un débat confrontant tous les avis et permettant de prendre la meilleure décision possible, en toute connaissance de cause. La situation actuelle d'exclusion du pouvoir législatif dans le domaine de la guerre a pour conséquence de réduire les Parlements à une fonction de légitimation du pouvoir

³⁵ M-T. Viel : « La répartition des compétences en matière militaire », *RDP* 1993, pp. 141-195, p. 178. Voir aussi Yves Daudet, Général Morillon, M-C. Smouts : « La vision française des opérations de maintien de la paix », *Cedin-Paris I, Montchrestien* 1997, p. 49.

³⁶ A. Manin : « L'intervention française au Shaba. 19 mai/14 juin 1978 », *AFDI* 1978, pp. 159-188, p. 184.

³⁷ R. Hadas-Lebel : « La V^e République et la guerre », *op.cit.* p. 16.

exécutif, c'est-à-dire simplement de soutenir l'action entreprise par le gouvernement. L'attitude du Président français lors de la guerre du Golfe illustre cette proposition puisque le débat parlementaire qu'il a suscité avait pour seul objectif d'assurer l'unité de la majorité parlementaire derrière sa politique. De même, le Parlement a été tenu à l'écart de la décision d'engager une opération militaire au Kosovo. Le Premier ministre et le ministre de la Défense se sont exprimés devant l'Assemblée nationale mais c'est aux Français directement que le Président de la République a annoncé le début des combats. Dernièrement, c'est l'éventuel soutien militaire aux États-Unis dans leur lutte contre le terrorisme qui relance le débat. Ainsi, le Premier ministre a assuré qu'il n'y aurait pas d'engagement de la France sans consultation du Parlement³⁸. Le fossé entre « autorisation » et « consultation » n'est-il pas flagrant ?

En France, l'article 35 de la constitution prévoyant l'autorisation du parlement pour déclarer la guerre est tombé en désuétude du point de vue formel, puisqu'il n'existe plus de déclaration de guerre comme au début du siècle. Cependant, on peut difficilement en tirer la conclusion que l'autorisation du Parlement pour l'envoi de troupes armées à l'étranger serait, elle aussi, devenue caduque. Une révision de l'article 35 semblerait dès lors indispensable. Il pourrait s'agir d'établir l'obligation pour le gouvernement de faire une déclaration devant le Parlement lors de toute intervention des forces armées françaises à l'extérieur du territoire de la République, dans les huit jours de son déclenchement³⁹. Un débat devrait suivre cette déclaration. A l'heure actuelle, il apparaît de moins en moins acceptable de soutenir l'idée que les Parlements ne soient pas associés à l'envoi des troupes à l'étranger pour des opérations armées. Finalement, les corps législatifs se retrouvent avec une marge de manoeuvre réduite qui se traduit par une information limitée et une sanction de l'Exécutif plutôt inefficace.

En revanche sur cette question, la situation des pays d'Europe centrale et orientale (PECO) présente une particularité dans la mesure où les constitutions des nouvelles démocraties européennes ont intégré les principes du constitutionnalisme, de l'État de droit et du respect des droits de l'individu mais elles ont également tenu compte des développements du droit international ayant affecté les anciennes constitutions occidentales⁴⁰. Ainsi, on peut classer les constitutions des nouvelles démocraties en deux groupes selon l'attitude qu'elles ont adoptée par rapport aux questions de défense et d'utilisation des troupes armées. Dans le premier groupe, les dispositions constitutionnelles relatives à la guerre et la paix ne diffèrent pas de celles existant dans les anciennes démocraties. Ainsi, l'article 62 de la constitution roumaine prévoit la réunion des deux chambres du Parlement pour déclarer la guerre et l'article 92 décrit les attributions du Président dans le domaine de la défense. De même, l'article 100 de la constitution croate attribue au Président la compétence de déclarer la guerre et de conclure la paix avec l'autorisation préalable du Parlement. Ce dernier intervient également pour autoriser

³⁸ *Le Monde* du 20.09.2001, p. 5.

³⁹ *Propositions pour une révision de la constitution*, 15.02.1993, *Collection des rapports officiels, Rapport au Président, Annexe 1* p. 94.

⁴⁰ Voir H. Tourard : *La contribution du Conseil de l'Europe à l'élaboration de la démocratie dans les pays d'Europe centrale et orientale*, Mémoire de DEA de droit international, Strasbourg 1994.

la ratification des accords internationaux à caractère militaire. Enfin, l'article 43 de la constitution lettone correspond au modèle le plus ancien d'engagement des forces armées : « le Président de l'État déclare la guerre sur la base d'une décision de la Diète ». Dans ces trois États, le texte constitutionnel n'a pas été adapté aux nouvelles conditions de l'utilisation des forces armées. Il en résulte que les problèmes rencontrés par les Parlements des anciennes démocraties dans ce domaine se retrouveront devant les Parlements de ces États.

Dans la deuxième catégorie, les constitutions ont maintenu le schéma traditionnel de la compétence du chef de l'État pour déclarer la guerre après autorisation du Parlement mais elles ont également tenu compte en partie de l'évolution de la société internationale. En effet, la constitution a prévu, en plus de la déclaration de guerre, la participation du Parlement à la décision d'envoi de troupes armées à l'étranger. La constitution prévoit explicitement la compétence du Parlement pour autoriser un tel engagement des troupes armées, et ce quelle que soit la nature des opérations en cause (accord de défense ou décision de l'ONU). Ainsi, l'article 128 de la constitution estonienne, l'article 86 de la constitution slovaque et l'article 40-b de la constitution hongroise ont considéré l'ensemble des cas de figure dans lesquels des troupes armées pourraient être appelées à agir à l'extérieur du territoire de l'État. La constitution russe du 12 décembre 1993 a également adapté la notion d'autorisation parlementaire de déclaration de guerre à l'évolution du droit international. L'article 102 attribue ainsi au Conseil de la Fédération, c'est-à-dire le représentant des États membres de la Fédération de Russie, le pouvoir de décider de l'utilisation des forces armées de la Fédération hors des limites du territoire⁴¹. Le Parlement ne se trouve donc pas dépossédé de ses compétences lorsque l'Exécutif engage des forces armées dans des opérations militaires, soit en vertu d'accords de défense bilatéraux conclus avec d'autres États soit dans le cadre d'une organisation de sécurité collective régionale ou dans le cadre des opérations de maintien de la paix de l'ONU. Seule la Hongrie a prévu une exception à la nécessité d'une autorisation parlementaire pour l'envoi de troupes à l'étranger dans le cas des opérations de maintien de la paix accomplies sur demande de l'Organisation des Nations Unies (article 40-b).

A côté des pouvoirs politiques, on trouve des intervenants secondaires dans le contexte de la politique étrangère.

Intervenants “subsidiaires” : peuple et juge constitutionnel

Les constitutions contiennent peu de dispositions relatives au rôle que le peuple peut être amené à jouer en matière de politique étrangère. D'un autre côté, elles accordent une place de plus en plus importante au juge de la constitutionnalité des normes.

⁴¹ *Michel Lesage cite un arrêté du Conseil de la Fédération du 21 juin 1994 "sur l'utilisation des Forces Armées de la Fédération de Russie pour la conduite des opérations de soutien de la paix dans la zone du conflit géorgien-abkhaïze", in La constitution russe du 12 décembre 1993 et les six premiers mois du système politique, RDP 1994, pp. 1735-1767, p. 1749.*

1. le rôle du peuple

Le contrôle direct des gouvernés sur la politique étrangère demeure à l'état embryonnaire même si le référendum a fait son entrée dans la politique internationale par deux mécanismes : celui de la participation du peuple à la ratification d'engagements internationaux et celui du consentement aux mutations territoriales⁴².

Le peuple peut intervenir directement dans le processus d'engagement international de l'État par le biais de l'autorisation de ratification de certains traités internationaux. Cette intervention se fait à la place de celle du Parlement. Les engagements internationaux susceptibles d'être soumis à l'approbation du peuple sont ceux comportant des aspects que l'on peut appeler constitutionnels. En effet, certains traités, notamment ceux relatifs aux organisations internationales, emportent des conséquences sur le fonctionnement des pouvoirs publics tel qu'il est prévu dans la constitution. Dès lors, puisqu'en démocratie, c'est le peuple qui choisit son mode de gouvernement, il est naturel qu'il intervienne dans le processus d'acceptation de tels engagements internationaux. La constitution française prévoit que les traités internationaux ayant des implications sur le fonctionnement des pouvoirs publics peuvent être soumis à une autorisation référendaire de ratification. D'une manière concrète, c'est essentiellement la construction communautaire qui donne lieu à une intervention directe du peuple en matière de politique étrangère. Ainsi, le traité d'élargissement de la Communauté européenne à la Grande-Bretagne, le Danemark et l'Irlande dans les années 70 a été soumis à l'autorisation de ratification par le peuple français. De même, la ratification du Traité de Maastricht créant une union économique et monétaire ainsi qu'une citoyenneté européenne a été autorisée (à une faible majorité) par référendum. Cependant, le type de traités susceptibles d'être soumis au référendum implique en général une révision de la constitution. Or, celle-ci doit précéder la ratification du traité d'après la constitution de 1958. Le peuple qui n'intervient pas dans la procédure de révision de la constitution mais intervient seulement au stade de l'autorisation de ratification se trouve alors dépossédé de la véritable possibilité de peser sur les choix politiques faits au travers du traité. C'est d'ailleurs pourquoi en Irlande le peuple s'est prononcé sur la révision de la constitution nécessitée par le Traité de Maastricht mais ensuite n'est plus intervenu dans la procédure de ratification du traité⁴³.

La participation du peuple aux engagements internationaux de l'État demeure insatisfaisante. Les thèmes abordés dans les traités internationaux touchent de plus en plus aux choix fondamentaux d'un État et sont susceptibles à ce titre d'être proposés à la discussion devant le peuple. Là encore l'idée selon laquelle la politique étrangère doit demeurer l'affaire de quelques-uns trouve une confirmation.

D'autre part, la tradition française exige le consentement des populations intéressées pour toute cession ou adjonction de territoires (article 53 al 3 de la constitution). Cette disposition n'a pas trouvé application dans ce cadre précis mais dans celui de la décolonisation, c'est-à-

⁴² Elisabeth Zoller : *Droit des relations extérieures*, PUF 1989, p. 321.

⁴³ Joël Rideau : *Les procédures de ratification du Traité de l'Union européenne*, RFDC 1992, pp. 611-624, p. 619.

dire de l'accession de territoires à l'indépendance (affaire des Comores). Pour cela il a fallu étendre les hypothèses de cession aux hypothèses de sécession⁴⁴, avec la limite que cela ne valait que pour les peuples d'outre-mer et non pour une partie du peuple français (décision du Conseil constitutionnel du 2 juin 1987).

En dehors de ces rares hypothèses, on est dans l'obligation de constater que le contexte de la politique étrangère demeure « étranger » aux mécanismes de démocratie semi-directe.

2. le rôle du juge constitutionnel

A l'heure actuelle, on constate une généralisation du contrôle de constitutionnalité des traités internationaux dans l'ensemble des États européens. Il s'agit pour l'État de garantir le bon ordonnancement des normes dans l'ordre juridique interne. La mise en place d'une juridiction constitutionnelle dans les États ayant construit un nouvel ordre juridique rompant entièrement avec le précédent, tels que les PECO ou l'Afrique du Sud, montre la diffusion de la théorie du constitutionnalisme. Le principe de la suprématie de la constitution auquel ces États adhèrent dorénavant implique le recours à une garantie juridictionnelle du respect par les pouvoirs publics de la hiérarchie des normes au sommet de laquelle se trouve la constitution. L'avènement du contrôle de constitutionnalité des traités internationaux dans ces États signifie, au-delà du constitutionnalisme, la prise en compte par les nouvelles constitutions de l'importance des traités internationaux dans la société internationale actuelle et de leurs implications pour l'ordre juridique étatique. La volonté des nouveaux constituants de se prononcer expressément sur le processus d'harmonisation des normes internationales avec les normes constitutionnelles correspond à la nécessaire adaptation de la constitution aux conditions actuelles des relations internationales. Ces dernières impliquent une multiplication des cas où l'État devra conclure des traités internationaux contraires à la constitution (il en va ainsi de l'adhésion à des organisations internationales d'intégration par exemple).

La volonté de l'État de s'engager dans un traité international comportant des dispositions contraires à certains principes constitutionnels conduit à la révision de la constitution pour « éliminer » les dispositions constitutionnelles s'opposant à la ratification. Cependant, il s'agit de savoir si la constitution peut être révisée sans limite de manière à aboutir à une constitution totalement différente de celle choisie par le peuple à l'origine. Dès lors, le juge constitutionnel en tant que gardien de l'ordre constitutionnel établi se trouve mêlé au conflit entre la volonté populaire telle qu'exprimée dans la constitution et la nécessaire intégration de l'État au sein de la société internationale. Si le pouvoir exécutif et le pouvoir législatif se mettent d'accord pour s'engager sur le plan international, ce qui implique toujours un contrôle de constitutionnalité extrinsèque du traité, on peut se demander pourquoi le juge constitutionnel s'opposerait aux limitations de souveraineté volontairement consenties. Mais le rôle du juge constitutionnel est de sauvegarder l'ordre constitutionnel interne établi par la constitution. Il est clair que « le

⁴⁴ Elisabeth Zoller : *Droit des relations extérieures*, PUF 1989, p. 326.

contrôle exercé par les juridictions constitutionnelles sur les traités internationaux vise à préserver le noyau constitutionnel »⁴⁵.

Le contrôle de constitutionnalité des traités internationaux renforce en réalité les garanties nationales de ratification des traités, puisqu'il complique la procédure de ratification de l'engagement international; il comprend donc des possibilités de blocage à l'encontre de l'évolution de la société internationale. Le juge constitutionnel en tant que gardien de la constitution va s'attacher à faire respecter par les pouvoirs politiques les limites posées par la constitution à la participation de l'État à des organisations internationales d'intégration. Dès lors subsiste le problème des réserves de constitutionnalité que l'on oppose aux normes internationales et qui mettent en avant la souveraineté des États. Si ces réserves sont trop souvent invoquées par le juge constitutionnel, la ratification de tout engagement international substantiel nécessitera une révision préalable du texte constitutionnel. Cette situation existe déjà en ce qui concerne l'intégration européenne⁴⁶. On risque alors d'aboutir à une dévalorisation de la norme fondamentale.

Il existe d'autre part le risque d'une réminiscence d'une société internationale non organisée, dans laquelle les États invoquent leurs intérêts nationaux pour ne pas se soumettre à des règles internationales. Or, l'existence d'un nombre croissant de règles de droit qui s'imposent aux États et non que certains États imposent aux autres ou auxquelles ils se soumettent à leur guise contribue à la soumission de l'État au droit tant à l'intérieur des frontières que sur la scène internationale. Cela implique obligatoirement des conséquences importantes pour la souveraineté étatique. Le contrôle de constitutionnalité des engagements internationaux ne devrait pas être utilisé pour freiner l'évolution de l'ordre juridique international.

En réalité, le problème du contrôle de constitutionnalité des traités internationaux est une question politique qui met le juge constitutionnel dans l'embarras quelle que soit l'attitude qu'il adopte. Il est, en effet, toujours difficile d'appliquer des principes juridiques à des matières purement politiques. On demande au juge constitutionnel d'adopter une interprétation évolutive de la constitution en fonction de ce que les pouvoirs politiques estiment être l'évolution de la société internationale. C'est la clause constitutionnelle permettant le transfert de droits de souveraineté vers une organisation internationale qui devrait donc être interprétée de manière adaptée à la progression de l'intégration internationale des États. Il n'est pas certain que le juge constitutionnel ait les moyens d'opérer une telle interprétation et on peut se demander si cette mission doit bien lui revenir, ou si elle ne doit pas plutôt être l'affaire des pouvoirs politiques, responsables devant le peuple.

⁴⁵ Constance Grewe et Albrecht Weber : *Le Traité sur l'Union devant les juridictions constitutionnelles*, *Annuaire International de Justice constitutionnelle* 1993, pp. 11-30, p. 12.

⁴⁶ "Il est alors tentant pour les juges constitutionnels d'opposer à un droit communautaire lui-même chaque jour plus envahissant un droit constitutionnel national chaque jour plus exigeant", Michel Fromont : *Le droit constitutionnel national et l'intégration européenne*, *Revue des Affaires européennes* 1997/2, pp. 191-208, p. 203.

La répartition des rôles dans le contexte de la politique étrangère demeure inégale. L'emprise croissante des normes juridiques en droit international n'a pas encore abouti à une modification de cette répartition des rôles. En effet, le Parlement en tant que producteur des normes nationales, le peuple en tant que destinataire de ces normes, ne participent pas encore suffisamment à la détermination de la politique extérieure de l'État. Cela nécessite une adaptation des textes constitutionnels mais également un changement dans les mentalités de la classe politique aussi bien que des peuples.

**CONSTITUTIONAL COMPETENCES OF STATE ORGANS IN THE
CONCLUSION, RATIFICATION AND EXECUTION OF INTERNATIONAL
AGREEMENTS**

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It is well known that after the fall of the socialist regimes and the breakdown of federal states the new democratic systems in the countries of South Eastern Europe abandoned the constitutional principle of unity of power. In this process, the principle of separation of powers appeared as one of the features of the new democracies, as a system of state power divided among the legislature, the executive and the judiciary. Furthermore, recognition of the importance of the attainment of human rights and freedoms, as well as the rule of law, became common characteristics of this part of Europe, often stressed as fundamental values of the constitutional order in these states, which was certainly a result of the need to confirm their acceptance of constitutionalism and the values of traditional democracies. Today, however, considering the fact that the classical theory of separation of powers, adapted and applied in contemporary conditions of parliamentary life, has gone through certain modifications, it seems more appropriate to speak of a division of functions among the fundamental branches of power, i.e. the parliament, the executive and the judiciary. Thus, taking account of the institutional system of distribution of competencies between particular branches of power, their mutual interaction and joint responsibility and competencies, as well as security questions, domestic political conditions, but also often the role of individual political leaders and party elites and structures, it is perhaps not surprising that certain differences between particular systems – especially in their political functioning – can be distinguished. It may freely be noted that although broadly speaking the parliamentary system has been accepted as the basis for the organisation of state governments in South Eastern Europe, this does not of itself indicate a uniformity or identity of systems. Elements of the so-called German model of

parliamentary rule prevail in some countries, while in others characteristics of the constitutional order of state government with a strengthened executive, especially a strong head of state, may be noted.

Such is the case with the Republic of Macedonia, too. After the dissolution of the former Yugoslavia and the adoption of the Constitution in 1991, Macedonia joined the large family of Central and South Eastern European countries that proclaim the principle of division of state powers as one of the crucial preconditions for establishing a modern democratic society. If we accept the idea that “only power can control power” than it becomes clear that the most efficient way to achieve this aim is to ensure there is a division of powers.

Considering the grave consequences that may arise when a single branch of power has unlimited power, it is clear that it is only through the separation of powers that a political climate conducive to attaining and effectively protecting human rights and freedoms can be created. The desire and need to achieve these aims, but at the same time an absence of democratic tradition, combined with underlying historical conditions, political culture and sociological features, are at the root of the clear emphasis placed in the Constitution on the division of state powers into legislative, executive and judicial branches as one of the fundamental values of the constitutional order of the state. Such a phenomenon is of course accentuated where the political sensitivity of the relevant actors is not immediately sufficient for the proper functioning of the system, especially in the case of new democracies building their tradition and democratic culture. Precise constitutional norms containing proper instruments for the efficient functioning of the system of divided, but balanced and accountable state government are required. This has meant that the separation of powers is particularly stressed in the Constitution, as an act safeguarding the democratic structure and functioning of the state.

It is not by chance that we devote a considerable part of our presentation to the constitutional features of the division of powers in the Republic of Macedonia as leading criteria in determining the position and competencies of certain power-holders. This is because it is this very principle that underlies the distribution of powers, the interaction of the branches of power and the checks and balances put in place, and this applies also when the power-holders exercise their competencies in the process of implementing the foreign policy and international relations of the state. International agreements certainly belong under this umbrella also.

Keeping in mind the relevant principles enshrined in the Constitution, the state administration is conceived and organised as a structure of independent, more or less parallel powers, the status, competencies and relations of which are determined and guaranteed by the Constitution. The notion of higher and lower powers cannot appear, as these are different powers, subject first and foremost to the Constitution and to the mechanism for the review of the constitutionality and legality of their work that is set up via the Constitutional Court of Macedonia. The division of powers among the Parliament, the Government and the President established by the Constitution rests primarily on the foundations of the parliamentary system, but includes certain elements of a presidential or semi-presidential system. In terms of the functional division of competencies between distinct power-holders, the concept of a

dominant legislator accompanied by institutional elements of mutual checks and balances clearly emerges.

Thus, the Constitution defines the Assembly as a unicameral, representative body of the citizens, having the sole right to adopt laws (an exclusion of this rule is the existence of a state of war or emergency). The Assembly is the body that adopts the most significant decisions in the state and at the same time exercises political control over the Government. Thus, the Government emanates from the parliamentary majority that elects it and that may pass a vote of no confidence in it or hold any of the members of the Cabinet individually responsible through the institution of interpellation. The executive is characterised by a dual structure, with power vested in the Government, which is the holder of the executive power as such, and the President of the Republic, who represents the state abroad. Here the Constitution sets forth a clear and precise distinction in their competencies and responsibilities, which often have points of contact of their own that are manifested as checks or as instruments of mutual collaboration in a number of fields of their activities. Such is the case with the appointment of representatives of the state abroad, where it is the Government that proposes the Ambassadors and overseas envoys of the Republic of Macedonia, but the President appoints or recalls these individuals by decree. In contrast with the Government, the head of state is not politically responsible to the Assembly, nor does the latter elect it. What gives the Macedonian regime elements of a presidential system is its "dual legitimacy": that is to say, the fact that the legitimacy of the Assembly and of the President are subject to equal democratic requirements. Just as the composition of the Assembly is decided at general, direct and free elections by secret ballot, so the President obtains his legitimacy directly from the citizens at general and direct elections. Nonetheless the Assembly retains the possibility of impeaching the President, by initiating a procedure to determine his responsibility where, in the implementation of the presidential rights and duties, questions arise as to a breach of the Constitution and laws; the final decision on impeachment is adopted by the Constitutional Court.

The system of division of powers functions in such way that the power-holders cannot be seen as operating absolutely in parallel to (or in other words, never touching) each other. A system of checks and balances is provided for through various institutionalised instruments for mutual collaboration or even control; in this system, however, priority is given to the legislature. Thus, the Assembly has the exclusive right to adopt laws, while it is the executive that influences their destiny. This system operates in practice either through the constitutional competence of the Government to propose laws and to determine the policy relating to their implementation or through the right of the President to impose a suspensive veto before promulgating the laws. It is in fact the President's right to veto that strengthens his position, granting him a significant position in the legislative process not only as a check, but also as an element of balance. Although the Macedonian President's right to the so-called corrective veto is a limited one and does not have the scope of the veto of the American President, it may nonetheless play a significant role as a means of suggestion and instrument of influence on the Assembly to reconsider its decision. Furthermore, the right of the President to inform the Assembly on issues within his competence has been assessed as a means of exerting influence on the representatives, on the public but also indirectly over the Government, suggesting certain solutions in a given direction. The Assembly may also request such reporting from the President.

These are only some of the features of the Macedonian parliamentary system seen in the light of the division of powers. There exist a number of other elements that illustrate the tendency of the Constitution to provide for limited, but balanced powers distributed among the separate power-holders, who implement their rights and responsibilities alone, operate on independent bases and act within the framework of the Constitution and the law. Although this structure cannot be characterised as forming a system of checks and counter-checks in the classical sense of the phrase, enabling each branch to influence the others to the extent of dismissing or even abolishing one another, the Macedonian parliamentary system, through its mechanisms of mutual collaboration and relations, aims to create the optimum conditions for the functioning of government and to provide constitutional guarantees of the rule of law and protection of human rights and freedoms.

It is precisely within this framework that the question of the constitutional competencies of the various power-holders with respect to foreign policy and international agreements should be considered. The principle of the division of power and of checks and balances is reflected in the procedure through which international agreements become an integral part of domestic law. This may be fully understood if we consider the fact that the principles and aims pursued in foreign policy (and in international relations more generally) are the expression and consequence of internal factors – and in particular, of the fundamental social relations that determine the shape and character of the basic political institutions and policies pursued within a state.

It is well known that international agreements represent a form of international relations and a means of communication among states, an instrument through which they express their will and thus subscribe to certain corresponding rights and obligations arising from the agreement. International agreements represent the most significant legal acts institutionalising collaboration among the signatory states, on the one hand, and, on the other, make possible the amendment of the international legal order. As the basic subjects of international law, states have the sovereign capacity to negotiate, such that by taking on rights and obligations through agreements they limit their sovereignty reciprocally. Since, by entering into force, international agreements become an integral part of domestic law, producing rights and obligations for the citizens of a given state, the mechanism of their incorporation into the domestic legal system takes on the utmost importance.

We will now turn to look at the constitutional position of certain organs of power in the Republic of Macedonia as regards the process of implementing international agreements in the domestic legal system.

On the subject of international agreements, the Constitution of the Republic of Macedonia is relatively silent. That is to say, it only determines the legitimate holders of the right to conclude international agreements on behalf of the State. It does not go any further: it does not determine the manner in which such agreements may be concluded, nor does it specify the character or categories of international agreements that may be concluded by some of the relevant bodies. Thus, the Constitution of the Republic of Macedonia provides that international agreements on behalf of the state are concluded by the President of the Republic

of Macedonia. This rule is stated without exception; however some flexibility nevertheless exists in this respect, as the Constitution also empowers the Government to conclude international agreements if such a possibility is provided for by law. Only the President and the Government of the Republic of Macedonia, as leaders of the executive, are authorised to conclude international agreements. Although in some other states the Constitution vests the Parliament with the right to conclude international agreements of a certain character (for example the Parliament of Hungary concludes international agreements that are of exceptional importance for the foreign relations of the state), in the Republic of Macedonia this right is exclusively reserved for the executive and in no case may it be delegated to the Assembly. However, it is the Assembly that has the last word in the process of introducing the international agreement into the domestic legal system by way of ratification – a point to which we shall return later.

Such provisions take into account the constitutional position of the executive and its dual structure. In any case the conclusion of international agreements by the executive is a logical and efficient policy supported and accepted by Western democracies. The justification of this approach, which has proven its positive value in practice, is based, amongst other considerations, on the principle of efficiency of action by the state in the international arena. This is because the executive is the branch of power responsible for managing the affairs of the state, and thus is also responsible for the management of its external activities and international relations, far more than the Parliament or especially the judiciary.

In particular, the President represents the state at home and abroad and as such has a general authorisation to represent the state, to carry on negotiations and to conclude international agreements. In the majority of countries, irrespective of whether the regime is presidential or parliamentary, it is the head of state that concludes agreements and thus at international level gives the consent of his state to be bound by such an agreement. This is the case with France, the USA, Spain, Germany, Belgium, Italy, Poland, Albania, Turkey, etc. So, for example, according to Article 167 § 2 of the Constitution of Belgium the “King concludes treaties”. According to Article 63(1)(b) of the Constitution of the Czech Republic the “President of the Republic... negotiates and ratifies international agreements”. In contrast with other states, where the constitution itself provides for the type of international agreement that the head of state may conclude on behalf of the state (for example: the Greek Constitution in Article 36 provides that the President of the Republic shall “conclude treaties of peace, alliance, economic co-operation and participation in international organisations or unions”), the Constitution of the Republic of Macedonia does not make such distinctions. The Constitution confines itself to laying down as a norm that the President is the primary holder of the right to conclude international agreements on behalf of the state. However, some conclusions as to what type of international agreements the President is authorised to conclude may be drawn in the light of international practice. We should certainly bear in mind here the weight of the President’s legitimacy, derived directly from the citizens, as well as the fact that he represents the unity of the state, its sovereignty and independence. The President does not conclude all agreements, but only the most important ones, which have general political implications for the whole country or include issues related to the international political identity of the state and its external security. (The latter criterion is based on the President’s position as Commander-in-Chief of the armed forces of Macedonia and at the same time President of the

Security Council). Thus, the Law on the Conclusion, Ratification and Implementation of International Agreements lists as falling to be concluded by the President agreements with respect to the borders of the Republic of Macedonia, entry into an alliance or community with other states or exiting such alliances and communities, as well as other international agreements which according to international law are concluded by heads of states. In any case, according to the Constitution of the Republic of Macedonia the President of the Republic is one of the authorities that may propose the Republic's admission to or exit from an alliance or community with other states, as well as its admission to or exit from membership in an international organisation. Furthermore, the principle according to which the President is the authorised signatory of international agreements of prime importance for the state finds its practical application in the normative solution contained in the above-mentioned Law, according to which the President initiates the procedure for entering into negotiations for the conclusion of international agreements based on a decision adopted by way of referendum. (Note that according to the Constitution, such decisions concern issues of the utmost importance for the state.) In addition, the President may set in motion the procedure for carrying on negotiations at his own initiative, on the basis of an act of the Assembly of the Republic of Macedonia or on a proposal by the Government.

Besides the power to conclude international agreements, the President has another instrument at his disposal through which to manifest the autonomy, independence and legitimacy of his institution, an instrument that reflects the practical implementation of the principle of division of powers in the field of international relations (international agreements). This is the right to refrain from promulgating laws (including laws on the ratification of international agreements), which allows the President to prevent his competencies from being manipulated or reduced to mere formalities, and thereby protect his authority and constitutional position. We shall return to this later, when we examine the role of the legislature in concluding international agreements.

As mentioned earlier, besides the President, the Government may also conclude international agreements, in certain cases laid down by law. The Constitution provides that executive power is vested in the Government, the independence and authority of which is confirmed by its autonomy in defining policies regarding the implementation of laws and other regulations and general acts of the Assembly, as well as in itself adopting regulations and general acts regarding their implementation. The Government is also one of the bodies authorised to propose the adoption of legislation (and furthermore, in cases where another authorised body has introduced a proposal, the Government may provide its opinion). In terms of international agreements this means the Government has competence with respect to agreements regulating concrete issues in the field of the country's political and economic activities and its interactions with other states. Thus the Law on the Conclusion, Ratification and Implementation of International Agreements provides that the Government of the Republic of Macedonia may conclude international agreements regulating issues in the field of the economy, finance, science, culture, education, protection of the environment, transport and communications, health, justice, energy, human rights, diplomatic and consular issues, etc. Considering the wide scope of operative activities of the Government in the field of foreign policy, it is easy to understand the wide range of agreements that may be concluded by the

Government, irrespective of whether this is done by the Prime Minister or the relevant minister (member of the Government).

The relations of the President of the Republic and the Government in the process of concluding international agreements may be characterised as close relations, involving mutual collaboration and co-ordination. Thus, while exercising its rights and duties, the Government informs the President of the Republic and may ask him to inform it on certain issues resulting from his competencies in enforcing the executive power. Since foreign policy and international agreements, the latter being the instruments by which the former is operationalised, belong to the group of competencies shared by the Government and the President, the positions of these two institutions of executive power can easily be seen to be a relation of mutual collaboration and flexible positioning and not as one of subordination. This is in conformity with the provision according to which the two bodies co-ordinate with each other with respect to issues on which their competencies overlap in implementing the executive power – a relation that was accepted by the Constitutional Court in its finding that a provision of the Law on the Government of the Republic of Macedonia regulating this issue was compatible with the Constitution. We should have a similar understanding of the position of the President: that is, the Government is authorised to propose commencing the procedure for carrying out negotiations and concluding international agreements that fall within the field of competence of the President. The latter may have a certain advantage in these relations of co-operation and mutual information as the Government is required to inform the President of its proposals to carry out negotiations and of draft agreements that fall within its own sphere of competence. However, although there is no such obligation imposed on the President, this does not place the President in a position of superiority or put the Government in a subordinate position, but only serves to ensure that information is provided to the head of state on the carrying out of negotiations and the aims that the Government seeks to achieve through the conclusion of such an agreement.

As the Government drafts laws and other regulations, is responsible for policies regarding their implementation and is one of the bodies competent to propose laws, so it appears as a unifying factor in the part of the procedure preceding the final stage of validity of an international agreement. Specifically, it is the Government that tables before the Assembly the draft law on the ratification of an international agreement, irrespective of whether the latter was concluded by the President of the Republic or the Government itself (or an authorised member thereof). Considering that in certain situations the political, legal and personal stands of the President may differ from those of the Government with respect to the issues covered by the international agreement, in cases where the agreement was concluded by the President he may inform the Assembly of his positions and views in respect of the agreement – that is, present the justifications for the conclusion of the agreement. In order to maintain a balance between the positions of the President and the Government in this respect and to protect the Government from the possible domination of the President's opinions and the possibilities available to him to influence or pressure the Members of Parliament towards the adoption of a proposed Law on Ratification, the Government may also provide its opinion on the international agreement.

Under the Macedonian Constitution, a concluded international agreement becomes an integral part of the internal legal order where it is ratified in accordance with the Constitution. This means that a signed, but not yet ratified international agreement does not create legal obligations, but only moral and political ones, for the state. In contrast with systems that recognise the competence of the parliament to provide the executive with prior authorisation to conclude an international agreement, the Republic of Macedonia has adopted a system of *ex post facto* approval of concluded agreements by way of ratification by the legislature. This means that for an international agreement to be legally concluded (i.e. to have passed through the generally accepted stages of negotiations, signing and ratification) it must be ratified by law. Here lies the essential role of the Macedonian Assembly with respect to international agreements. While the Assembly has no role or influence during the course of negotiations and conclusion of the agreement itself, ratification is the instrument available to the Assembly through which proper observance of the principle of division of powers and balance of mutual relations is guaranteed. At this stage the Assembly assesses whether the concluded agreement is in compliance with the Constitution. The question is whether in this process of checking and confirmation of the agreement the Assembly carries out or may carry out a type of political control. Considering the importance of the act of concluding an agreement in the international arena it would seem to be too great a luxury for the state if the Assembly refused to ratify an agreement for purely political reasons. However, this is unlikely to occur in practice since the Government most often emanates from the parliamentary majority, which understandably supports and approves its policy.

The fact that only international agreements ratified in accordance with the Constitution are an integral part of the internal legal order of the state implies that ratification is not a purely formal and declarative act, but has a constitutional significance in the creation of a binding international agreement. Ratification as a measure of domestic law has great significance with respect to the validity of the agreement for the state and its citizens. In particular, the international agreement produces legal effects (i.e. establishes rights and duties for the state and its citizens) and binds the state internationally from the moment of its ratification. Approval by the Macedonian Parliament is a basic precondition for the full validity of the agreement in the framework of domestic law and without it the agreement cannot produce legal effects in the internal legal order. Through the adoption (by regular procedure and simple majority) of a law of ratification the international agreement is incorporated into the domestic legal system and becomes a constituent part of the Macedonian legislation. The Assembly cannot ratify the agreement partially or conditionally, but it may make reservations. However, although ratification remains the discretionary right of the Assembly and the means through which it reconsiders the content of an agreement from a constitutional aspect, it is open to question whether the Assembly can refuse to ratify an agreement and within what timeframe it must be ratified. Given that the Constitution provides for express ratification, the possibility for silent or assumed legal approval is excluded. In this case, generally accepted norms of international law and international customs should be applied.

The next element with constitutional significance for the validity of international agreements, following ratification as a control mechanism implemented by the Assembly over international agreements and thus over the executive, is the promulgation of the law of ratification. The right of the President not to sign the decree promulgating the law comes into

play at this stage. It can be expected that the President could use this possibility with respect to agreements concluded by the Government. Although the President's right to impose a suspensive veto is soft by nature and aimed primarily at prompting closer examination of a previously adopted decision, its role should not be minimised. The refusal to sign the decree promulgating the law on the ratification of an international agreement may be an expression of doubts as to its constitutionality or a means of stressing the need to reconsider some of its aspects which may have a negative impact on the domestic legal system. Again, the question of the timeframe within which the President has to sign decrees promulgating laws (including laws of ratification) remains open to interpretation. The Constitution does not define the time-limit within which the President is required to sign the decree or return the law for further deliberation, which leaves open the possibility of different interpretations: does a failure to sign the decree within a certain "reasonable" time mean refusal or implicit approval (equivalent to signing) of the decree?

Once an agreement has been concluded and ratified and the law on its ratification promulgated by a decree, the law in question may not enter into force before it is published in the Official Gazette of the Republic of Macedonia. The publication of the international agreement has a double role: it is of constitutional significance for the full validity and implementation of the agreement and at the same time enables the public to be informed as to its contents and the rights and duties deriving from its implementation. The rule is that laws enter into force at earliest on the eighth day from their publication (*vacatio legis*), but in exceptional cases determined by the Assembly, a law may enter into force on the day of its publication. It is essential to stress in this context that international agreements cannot have retroactive effect except in cases where this is more favourable for citizens. This means that the provisions of an international agreement "do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party" (Article 28 of the Vienna Convention on the Law of Treaties).

As an expression of a state's free will to make agreements in its international relations, which is certainly limited by the *jus cogens* of international law, international agreements produce certain legal effects on the state party from the moment when they become legally binding on it (in this instance, from the moment of publication of the law on the ratification of the international agreement). The relevant aspect for the practical entry into force of the international agreement is its execution and implementation within the framework of the legal system of the state party. According to the Constitution of the Republic of Macedonia, international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be modified by law. Such a definition raises a number of questions, for example: how are international agreements implemented, and what is the place and legal position of international agreements under domestic legislation?

One of the basic principles of international law and custom (accepted also by the United Nations in the framework of the 1969 Vienna Convention on the Law of Treaties, a Convention that has itself been incorporated by the Republic of Macedonia) in respect of the implementation of international agreements is the principle of *pacta sunt servanda*.

According to Article 26 of the Vienna Convention, “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. This means that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (Article 27 of the Vienna Convention). This rule has the aim of ensuring that the obligations agreed to are respected and implemented in “good faith”. Failure to do so would incur the international liability of the state and would discredit it in the international context.

The institutional mechanisms for implementing international agreements take into account the organisation of the branches of state power and their respective constitutional positions. Thus, the Government and the President are responsible for the implementation of international agreements of the Republic of Macedonia (in accordance with Article 23 of the Law on the Conclusion, Ratification and Implementation of International Agreements). This ranking of the responsibility of the bearers of executive power with respect to the implementation of international agreements is not accidental. It results from the fact that according to the Constitution the primary holder of executive power of the Republic of Macedonia is the Government. Within the framework of its constitutional competencies, the Government determines the policy of implementation of legislative acts independently and is responsible for their implementation. Thus, it adopts a number of subordinate legal acts that aim to create the necessary legal preconditions for the proper implementation of the obligations undertaken by the agreement.

The significance of international agreements within domestic legislation is paramount. Indeed, a number of states provide for the supremacy of international law (international agreements) over domestic legislation, including even the highest constitutional acts of the state (the Benelux countries). Others recognise the priority of international agreements with respect to domestic laws (France, Spain, Croatia, Slovenia, Bulgaria, etc.).

The position of international agreements in the legal system of the Republic of Macedonia is not precisely defined, although some conclusions in this respect may be extrapolated indirectly. First of all, international agreements must be in accordance with the Constitution, which means they do not have supremacy over the Constitution. They may be part of the internal system only if they are in accordance with the Constitution. This compliance is monitored throughout the procedure of creating an agreement and is an obligation for all the participants in the procedure: the Government, the President and the Assembly. Thus, before accepting obligations under an international agreement, the state must be sure that it is compatible with the Constitution. The process of incorporating international agreements into the domestic legal system therefore involves all the branches of power, which are responsible for avoiding and preventing all possible conflicts between domestic and international law. In any case, the principle of the rule of law, as a fundamental value of the constitutional order, applies equally to all the participants in the creation (direct or indirect) and implementation of the legal system. The various authorities may implement their rights and duties only within the framework of the Constitution and the law.

The second feature of relations between the international agreements and domestic legislation is that the former, incorporated as such, cannot be modified by law. This constitutional principle is a fully acceptable and logical consequence of the need to provide in certain

respects for the superiority of international law over domestic law. The fact that the law cannot modify an international agreement that has been ratified is a means of guaranteeing legal certainty and reciprocity between states grounded on international legal principles.

It remains open to question, however, whether the internal relations between the authorities with respect to international agreements are sufficient to ensure that the principle of the rule of law is strictly observed. Is it possible that in such a constellation of relations an international agreement may be concluded and ratified that deviates in certain respects from the principles determined by the Constitution of the Republic of Macedonia? Is an element missing, in this chain, that would safeguard legal certainty and the rule of law in the domestic and thus international framework too? A measure existing in some countries that aims to ensure constitutionality and overcome any conflicts that may arise between domestic and international law is judicial review, which most often is carried out by the Constitutional Court. This control appears in two forms: as *ex ante* review, before the entry into force of the agreement, and *a posteriori*, once the agreement has entered into force. Having in mind the constitutional competencies of the Constitutional Court of the Republic of Macedonia it seems at first sight that this issue falls within the scope of its competencies. However, Article 110 of the Constitution, which enumerates the competencies of the Constitutional Court, does not provide any indication that it is competent to assess the constitutionality of international agreements. Wherever this competency does belong to the Constitutional Court it is expressly provided for in the Constitutions of the relevant states. However, the Constitution defines the Constitutional Court as a body of the Republic that protects constitutionality and legality (Article 108 of the Constitution) and amongst others it decides upon the compliance of laws with the Constitution (Article 110). Thus, one may ask whether it may be acceptable to interpret this as meaning that this may include the so-called implicit competency of the Constitutional Court to assess the constitutionality of international agreements through the laws on ratification. The answer would depend on the treatment of the law on ratification of international agreements and on the response to the question: are international agreements an integral part of these laws or is the law on ratification only a formal instrument through which international agreements are incorporated in the domestic legislation, and not organically connected to the agreement?

Based on the above considerations, it may be concluded that the principle of the division of powers, competencies and responsibilities of the authorities is reflected in the procedures for incorporating international agreements into the internal legal order. The intention of ensuring that each of the branches of power plays an adequate role within the framework of their constitutional competencies may be noted. This also aims to provide a balance between the powers, with nonetheless a certain, understandable predominance of the executive. The control mechanisms in place aim to prevent conflicts arising between national and international law and to safeguard the constitutionality of international agreements.

REVIEW OF ACTS OF FOREIGN POLICY: THE ROLE OF CONSTITUTIONAL COURTS

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The ideology of constitutionalism undoubtedly embarks on undertakings that are visionary in their nature, and in all probability, that is the reason why they are encumbered by resistance and controversies that require decades of hard work and confirmation by experience to be overcome and resolved. The establishment of the principle of the rule of law as a foundation of a contemporary society of free individuals who enjoy the full exercise and protection of their inalienable rights vis-à-vis the state is such an undertaking, which is slowly, but certainly, harvesting the fruit of its successes.

The battle of principle between will and reason, between the popular will and constitutional constraints, or if one prefers, between democracy and the rule of law, has lasted for more than 200 years. Nowadays, although there still might be a rationale in maintaining this tension at a theoretical level, it is hardly necessary to prove that the outcome of this battle is what we call *a constitutional democracy*, where these two principles coexist with each other. Furthermore, we all know that the decisive role in ensuring the success of this undertaking belongs to the judiciary, especially to constitutional courts, without which the *idea of a higher law* and the rule of law seem to be impossible.

In the light of this, the relationship between democracy and rule of law could be considered a non-issue to a large extent. The topic of this seminar, however, contains two additional but similarly important relationships: the relationships between democracy and foreign policy and between the rule of law and foreign policy. These two relationships enshrine principles that traditionally do not go well together. The relations established between states have always been a secrete domain wherein diplomacy works, far away from the eyes of the public and the sword of blind justice. Even today, there is an obvious reluctance to allow the parliament and the citizens' access to the foreign policy domain, which remains under the control of the executive, even though some constitutions prescribe that major decisions cannot be reached without the involvement of the parliament. But if we take into account the fact that contemporary international relations, and particularly European integration processes, have resulted in legally binding rules directly affecting the citizens, it seems difficult to accept that their validity and application could be established without due respect for democratic principles. The consequences of foreign policy today are such that an interesting inverse analysis could be made: instead of speaking about a *State governed by the rule of law* perhaps we should speak about *the rule of law governed by the State's foreign policy*. Although this might sound frightening, it is a true and accurate picture in view of the current trend of superiority of international over domestic law, particularly of European Union law over the national legislation of its member states, which also proves that foreign policy should not be

excluded from the requirement that there be democratic foundations in its creation. Therefore, we ought to take seriously the message of Antonio La Pergola that “the need to ensure better transparency in the creation and implementation of foreign policy shall be one of the main challenges of constitutional theory in the 21st century”.¹

It will be no less a challenge, in my opinion, to examine the boundaries of the principle of the rule of law within which foreign policy should fall i.e. whether it should be subject to review by the judiciary, particularly judicial review by constitutional courts. Bearing in mind the character and repercussions of foreign policy decisions mentioned above, it is clear that the theory of *actes de gouvernement* (not being subject to judicial review) cannot be upheld in its broadest meaning. However, the opposite theory, that courts should have full access in reviewing all foreign policy acts, is equally untenable, particularly as regards those acts founded on political discretion, and those of importance solely in the area of international relations. To this, one should add the problem imposed by the specific legal framework within which the judiciary functions, and which in a complex manner encompasses both international and domestic law, as a complementary source of law in the systems of some states in which foreign policy decisions are incorporated. Finally, the courts, especially constitutional courts, can hardly avoid or refuse to protect certain constitutional principles, such as the separation of powers and fundamental human rights, even in cases when it is foreign policy acts by which they are endangered. It seems that the judiciary is under permanent pressure to distinguish what is an act of law, by which it is bound, on the one hand, and what appears to be an act of policy on the other. Perhaps in this context, the future perspective of the judiciary may be found in striking a balance between the two extremes of this relationship, with no chance of one overruling the other; however, such a balance could not be kept alive unless certain principles and criteria are adhered to. The relationship between international and domestic (internal) law is certainly crucial; so too is the interpretation of rules, relations and issues covered by foreign policy acts. These questions are therefore subject to analysis in this article, which starts with a brief comparative overview and concludes with elaboration on the position and role of the Constitutional Court of the Republic of Macedonia.

A. Legal framework concerning the position and the role of constitutional courts

The basic framework for assessing the position and role not only of constitutional courts, but of ordinary courts as well, can be found in the age-old question concerning the relationship between international and domestic law as defined in the constitution of a given state. The incorporation of international law (the ultimate result of foreign policy) into the internal legal order is fettered with problems relevant to the courts, which cannot simply be reduced to a question of hierarchy of legal norms, although that is the most important issue to be resolved. From the outset, the form of incorporation of international law into the internal legal order raises two main issues. First of all, there is the question of the basis on which the norm is applied as a part of international law as such or as a part of the internal legal order. In this

¹ *Legal foundations of foreign policy” in “Law and foreign policy” in Science and techniques of democracy No. 24, Venice Commission, Council of Europe Publishing, 1998.*

context, it is not only important when and how an international act becomes a source of law for the courts, but the question whether the courts may decide upon its applicability and legal effects is of equal importance. The solution pursuant to Article 102, paragraph 2 of the Basic Law of Germany, according to which the Federal Constitutional Court has the power to decide whether a rule of international law is an integral part of the law of the Federation, is just one example of possible solutions to this problem. However, even without such a clear provision, national courts are often confronted with situations where they are asked to resolve the issue of the applicability of a rule contained in international law, irrespective of the government's attitude towards this question.² Second, there are direct consequences flowing from the principle of separation of powers: constitutional competencies in the sphere of foreign policy, and the manner of incorporation of international law into the internal legal order, inevitably involve judicial review, even if such review is conducted only from a formal or procedural point of view.

Furthermore, the scope of jurisdiction of a state's judiciary is determined and expanded in consequence of the rank awarded to international law within the hierarchy of the internal legal order. Notwithstanding the prevailing trend of superiority of international law over national laws,³ some states have maintained the supremacy of the constitution over international treaties that are part of their internal legal order, although elsewhere the interpretation of some constitutional provisions may suggest that international treaties are given a rank equal to that of the Constitution.⁴ The superiority of international law over the national law of a given state should leave relatively small space for dilemmas on the part of ordinary courts as to which legal rule to apply, although it is well known that several doctrines have been developed with the aim of protecting national authorities from undertaking actions that might have implications on the application of international law.⁵ On the other hand, subordinating international treaties to national constitutions puts constitutional courts or courts with similar

² For more information, see: Conforti, Benedetto and Labella, Angelo "Invalidity and Termination of Treaties: The Role of National Courts", *European Journal of International Law*.

³ Albania, Armenia, Azerbaijan, Bulgaria, Croatia, Czech Republic (only those related to human rights); Estonia, France, Georgia, Germany, Greece, Hungary (according to their Constitutional Courts' case law), Spain, Switzerland, Portugal, Slovenia, etc. Also, see: Economides, Constatntin "The relationship between international and domestic law", *Science and technique of democracy*, No. 6, Venice Commission, 1993.

⁴ For example, Article 91 of the Constitution of Netherlands, which stipulates that the Parliament may approve (ratify) a treaty in conflict with the Constitution by two-thirds majority vote. Practically speaking, such a treaty becomes a norm of constitutional rank. According to the Constitution of Turkey (Article 90), although international treaties have equal rank with domestic laws, it is explicitly prohibited to challenge them before the Constitutional Court, which implies their superiority over the over the entire legal order, including the Constitution itself.

⁵ Benvenisti, Eyal. "Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts" *EJIL*, Vol.4, No. 2.

jurisdiction between the hammer of international law and the anvil of the national constitution. Some constitutions, following the example of the French Constitutional Council, have introduced preventive review of the constitutionality of international treaties by constitutional courts⁶, which has proven to be a theoretically good concept that ensures the protection of constitutionality, and at the same time does not compromise the state in its international relations. This solution corresponds perfectly to the provisions contained in those constitutions where the ratification of a treaty that is found to be in conflict with the constitution is conditional upon changes being made to the constitution in consequence, thereby giving full meaning to the preventive review of constitutionality. Other constitutions, however, fully adhere to the principle of constitutionality in respect of international agreements (treaties) by prescribing *a posteriori* judicial review of treaties by constitutional courts.⁷ In this context, an important interpretation of the Constitutional Court of Hungary is worth mentioning, according to which once an international treaty becomes part of the internal legal order, its constitutionality may still be subject to review, even though no such competency of the Constitutional Court is expressly provided for. However, the consequences of the Court's repealing decision would have relevance only in respect of the applicability of the treaty within domestic law, but not in respect of the international duties assumed by Hungary under that treaty.⁸ On the other hand, along with Turkey, the Constitution of Slovakia does not provide for the review of constitutionality of international treaties by the Constitutional Court.⁹

Another issue faced by constitutional courts and related to the hierarchy of legal norms is the treatment of the so-called "generally accepted norms of international law", which are often referred to by constitutions as fundamental values of the constitutional order. There is an issue, on the one hand, as to the clear identification of this notion and of the criteria for its acceptance by the state (through the courts), and on the other hand, there is the question whether constitutional courts may review the conformity of domestic laws with generally accepted rules of international law and ratified treaties as being superior to national laws. The consistent application of the principle of superiority in the latter case does not leave any room for dilemmas, at least with regard to ratified international agreements, and is accepted as common practice in some constitutions (Albania, Bosnia and Herzegovina, Poland, Slovakia, Slovenia). Generally accepted principles of international law, including but not limited to customary law, are commonly used as instruments of interpretation, although, for example,

⁶ *Albania, Andorra, Armenia, Azerbaijan, Portugal, Russia, Slovenia.*

⁷ *Austria, Germany, Czech Republic, Poland, Georgia, Hungary.*

⁸ *Decision No. 4/1997 of 22 January 1997; published in the Bulletin on Constitutional Case-Law, Venice Commission, [HUN-1997-1-001].*

⁹ *Klucka, Jan "The establishment of a Constitutional Court in a Period of Transition - The example of Slovakia, in "Contemporary problems of Constitutional Justice", Tbilissi 1996, Proceedings, Venice Commission, CDL-INF (97) 7.*

the Israeli Supreme Court acknowledges the mere relevance of this particular source of law, and not of international treaty law.¹⁰

It is clear that in those countries where constitutional courts have been vested with the power to review the constitutionality of international acts whether in *a priori* or *a posteriori* proceedings, control over foreign policy, at least in the area of treaties incorporated into the domestic law, can be exercised based on any criterion deriving from the constitution. Taking into account the sublimation of complementary values both in international and domestic law, which are treated as forming a common European constitutional heritage, one should expect that constitutional courts will concentrate on fundamental issues embraced in any constitutional system, such as sovereignty and the transfer of powers, the principle of the separation of powers, human rights and democracy considered as values and principles that ought to be supported and protected by the law. Indeed, even in cases where constitutional courts explicitly lean towards the doctrine of self-restraint with regard to foreign policy issues, they rarely miss any opportunity to indicate that the aforementioned principles ought to be observed and should serve as the main direction and limit even for decisions made by state authorities with a significant degree of discretion.

B. Constitutional courts between law and foreign policy

A close insight into the jurisprudence of constitutional courts shows that their actions and activities fluctuate within the boundaries of the above-mentioned problems, but understandably with differing levels of intensity and degrees of complexity. Below, we shall consider decisions pertaining to foreign policy, taken by state competent authorities and resulting in the conclusion of international treaties or other acts of relevance for international relations, and which have been or could be subject to judicial review in the light of the principle of the separation of powers and other fundamental principles enshrined in the constitution. The issue of the courts' ensuring the superiority of international over domestic law will not be discussed, because the application of international law by the courts is a different complex, related to the fulfilment of international duties assumed by the state as well as to the principle of legality within the internal legal order, which is distinct from the creation of foreign policy and judicial review undertaken by constitutional courts in this context.

The broadest scope for action, albeit restricted through limitative procedural requirements for the referral of cases for the review of the constitutionality of an international treaty, belongs to those constitutional courts that are charged with and can carry out preventive review. The jurisdiction of these courts is clear: an international treaty not yet ratified may be subject to review in the light of the competency of state organs to conclude such a treaty, as well as in the light of the conformity of its content with the constitution. The Constitutional Council of France, for example, has been given the opportunity on many occasions to review the

¹⁰ For more information about these issues, see: Georgiveski, Saso "Application of international law in the constitutional order of the Republic of Macedonia" Yearbook in tribute of Evgeni Dimitrov, Faculty of Law, Skopje 1999, page 48, Benvenisti, *Supra* 5

compatibility of international acts with the French Constitution, thus exercising control over foreign policy and resolving discrepancies between French foreign policy and constitutional principles. Hence, in 1999 the Council barred the anticipated ratification of the European Charter on Regional and Minority Languages because the Charter called into question the status of the French language¹¹. According to Article 54 of the French Constitution, the ratification of such an international convention must be preceded by changes to the Constitution, which did not happen in France. In contrast with this case, a finding by the Council of nonconformity of the Rome Statute of the International Criminal Court as of 1998 led to changes to the French Constitution as prerequisites for its ratification¹², which circumvented the problem of immunity of the President of the Republic and other state officials guaranteed by the French Constitution. The particular impact of the Constitutional Council's control over foreign policy and questions of sovereignty and its transfer is clearly demonstrated in the Council's decisions concerning France's membership in the European Union. Thus, the Constitutional Council held that provisions concerning monetary policy, freedom of movement and residence of aliens, asylum and visa requirements set forth in the Maastricht and Amsterdam Treaties were in conflict with the French Constitution because they concerned vital conditions for the exercise of national sovereignty. The ratification of these treaties became feasible upon intervention i.e. changes made to Article 88-2 of the Constitution.¹³ The Constitutional Court of Slovenia, similarly, instigated changes to the Slovenian Constitution for the purposes of ratification of the European Agreement concluded with the European Union, because it found the treaty provisions concerning the property rights of foreigners to be unconstitutional.¹⁴ The Constitutional Court of Bulgaria held the Framework Convention for Protection of National Minorities to be compatible with the Bulgarian Constitution, thus refusing petitioners' arguments that Bulgaria has never had nor currently has national minorities, as a relevant factor in reviewing the compatibility of the Convention with constitutional principles.¹⁵

These examples show that constitutional courts, in carrying out preventive control of foreign policy acts, have practically no restraints in protecting the supremacy of the national constitution and its principles and values. Consequently, the pressure imposed on the bodies that are competent with respect to foreign policy is not just evident, but effective too. Under these circumstances, the doctrine of *actes de gouvernement* or other grounds for self-restraint of the court are inoperational. On the contrary, when foreign policy acts generate consequences, court opinions are delivered with much more attention and frequently undisguised attempts to interpret disputable issues in favour of their conformity with the constitution. Foreign policy in the area of military co-operation, which ordinarily involves issues of sovereignty and individual rights, illustrates this observation profoundly. The

¹¹ *Decision No. 99-412 DC of 15 June 1999; Bulletin, [FRA-1999-2-005].*

¹² *Decision No. 98-408 DC of 22 January 1999; ibid., [FRA-1999-1-002].*

¹³ *Decision No. 97-394 DC of 31 December 1997; ibid., [FRA-1997-3-007].*

¹⁴ *Decision No. Rm 1-97 of 5 June 1997; ibid., [SLO-1997-2-008].*

¹⁵ *Decision No. 2/98 of 18 February 1998; ibid., [BUL-1998-1-001].*

Constitutional Court of Germany, ruling on the different position of German nationals in service in NATO troops on the territory of Germany and those in service in the German Armed Forces, found that such an unequal position of its citizens was justified by the strategic goal of German foreign policy towards the integration of Germany into the western alliance, which required the acceptance of constraints due to external factors in the international relations of Germany.¹⁶ A similar interpretation as to the significance of the German membership in NATO and the Western European Union can be found in the decision concerning the act of the German Government to deploy military forces in Yugoslavia. In this case, the Court held that such measures undertaken by the Government might derive from prior agreements with NATO and Western European Union, although the constitutional tradition required the consent of the Parliament for such action.¹⁷ Outside of the military context, the Supreme Court of Argentina ruled that when one general or basic international treaty contains the framework for future agreements, the latter could be concluded under simpler procedures without the prior consent of the parliament.¹⁸ The constitutional courts of Bulgaria and Slovenia have reviewed the constitutionality of acts of their parliaments or governments to permit foreign air forces to fly over their territory. In the Bulgarian case, the permission issued by the parliament was solely based on the constitution, whereas in the Slovenian case, it was evident that the Government had acted *ultra vires*; however the case was dismissed on the grounds of lack of standing of the petitioner. The Constitutional Court of Slovenia nonetheless used the opportunity in the reasoning of its decision to convey an important position of principle. First, answering the question whether such a decision by the Government fell purely within the scope of Slovenian foreign policy, the Court held that it concerned the relationship between the Parliament and the Government and the issue at stake fell within the sphere of competency of both. As to the issue whether flights of foreign military airforces should be permitted or not, the Court held that this issue could not be the subject of judicial review by the Court because it was a political question. Nevertheless, legislation governing this issue is required as a precondition for legality of the act. The issue of competency and grounds for conclusion of international treaties was also reviewed by the constitutional courts of Bosnia and Herzegovina and of Portugal.¹⁹

The cautiousness of constitutional courts can be witnessed in other spheres of foreign policy, where the self-restraint doctrine becomes rather apparent. The Constitutional Court of Germany, in many instances, has acknowledged the need for flexibility and discretion in concluding foreign policy acts, but at the same time has not missed the opportunity to give important interpretations of the basic principles of the German constitutional order, which must be taken into account. Of particular interest is the case of the Basic Agreement between the Federal Republic of Germany and the Democratic Republic of Germany, which

¹⁶ Decision No. 1 BvL 15/91 of 8 October 1996; *ibid.*, [GER-1996-3-022].

¹⁷ Decision No. 2 BvE 3/92, 2 BvE 5/93, 2 BvE 7/93, 2 BvE 8/93 of 12 July 1994; *ibid.*, [GER-1994-2-021].

¹⁸ Decision No. D.224.XXXIII of 7 May 1998; *ibid.*, [ARG-1998-2-007].

¹⁹ Decision No. U 12/98 of 7 June 1999; *ibid.*, [BIH 1999-2-002]; Decision No. 494/99 of 5 September 1999; *ibid.*, [POR-1999-2-005].

acknowledges the right to self-determination of both parties, and was contested by Bavaria as a violation of the preamble of the Basic Law, from which emanate the aspirations for the reunification of Germany. In this case, the Court reaffirmed the need for discretion in foreign policy, but at the same time underlined that the preamble has a binding legal effect for all constitutional authorities, and in principle, prohibits the undertaking of any measure or act of foreign policy aimed at preventing reunification of Germany.²⁰

The balance between fundamental constitutional principles and foreign policy acts can be further examined as a concern of other constitutional courts in a different context. The Constitutional Court of Italy indirectly found the extradition agreement between Italy and the United States to be unconstitutional by reviewing the Criminal Procedure Law, and by invoking the protection of right to life that might be violated due to the existence of death penalty in the United States. On the very same grounds, the Court found a similar agreement concluded with France in 1870 to be unconstitutional, too.²¹ The Constitutional Court of Georgia reached an interesting decision in a case where although a domestic law was reviewed, the law called for international treaties to be concluded in future to ensure monetary donations were obtained, as a precondition for the exercise of social rights granted by that law. The Court repealed part of the law, on the grounds that the state was obliged to ensure the exercise of constitutional rights to social welfare of its citizens, and these rights could not be made conditional on foreign policy acts.²² Also, the Court of Arbitration of Belgium held that the court had jurisdiction to review the constitutionality of domestic acts for accession to international treaties, and in such cases a review of the substance of provisions contained in the international instrument is needed. This is in consequence of the fact that no provision of international law, even Article 27 of the Vienna Convention on Law of Treaties, empowers states to enter into agreements that contradict their constitution.²³

A particularly interesting field of judicial review by constitutional courts is the relationship between the national constitutional order and European Union law. In this context, in addition to the experiences of the French Constitutional Council, of equal importance are the experiences of the Federal Constitutional Court of Germany, which has attempted to review the compatibility of German foreign policy within the framework of the European Union and possible constitutional constraints thereto. In the Maastricht case (1993), the German Constitutional Court expressed its considered opinion on the compatibility of the European treaties with the German constitutional order, at the same time emphasising that the German Government should strive towards the reflection of the basic principles of the German constitutional system in European Union law, and primarily the principles of human rights

²⁰ For this and other examples, see: *Kommers, Donald, "Constitutional jurisprudence of the Federal Republic of Germany", Duke University Press, Durham and London, 1997, page 148-165.*

²¹ *Decision No. 223/1996 of 27 June 1996; Bulletin, [ITA-1996-2-005].*

²² *Decision No. 2/35 of 29 December 1997; ibid., [GEO-1997-3-004].*

²³ *Decision No. 12/94 of 3 February 1994; ibid., [BEL-1994-1-004].*

protection and democracy.²⁴ The critical point of view expressed by the Court was that it has the right to review acts adopted by the organs of the European Union in respect of their competencies. Because these acts can affect fundamental rights guaranteed in Germany, they fall within the jurisdiction of the Court. However, when undertaking such review (at the level of secondary legislation), the Court does so in a relationship of co-operation with the European Court of Justice.²⁵ On the other hand, the Court was very protective of federalism as a fundamental principle, finding that the Federal Government had violated constitutional rights granted to the member states of the Federation by adopting Council Directives that concerned their interests without prior consultation with them.²⁶

This brief overview of the opinions and positions developed by some of the more active courts in this area demonstrates that constitutional courts can play a significant role in the protection of the constitutional order and constitutional values, without hindering the creative and progressive role of foreign policy. Sovereignty (even relativised in the context of European integration), the separation of powers, human rights and democracy are the foundations of the contemporary constitutional culture of Europe and its nations, and cannot be left open to uncontrolled political decisions, including decisions brought in the area of foreign policy. If a value-based judgment may be advanced here, than one could argue that the current role of constitutional courts has had, at very least, a positive impact on the harmonisation between international and national laws as well as on the respect for the constitutional will of nations to live up to the principles and values they have chosen. If it is legitimate to constrain the government with these principles and values, than this should apply to foreign policy as well. The constitutional courts have shown that the ability to balance between what is known as an immanent characteristic of foreign policy and the essential requirement of any legal order, is not distant and alien to them.

C. Jurisprudence of the Constitutional Court of the Republic of Macedonia

The main feature of the position of the Constitutional Court of the Republic of Macedonia as to review of foreign policy acts is a reflection of the insufficiently clear, ambiguous and relatively restraining constitutional ground for the existence of such a competence of the Court. If one seeks the answer to the question whether the Constitutional Court can review foreign policy acts by looking directly at the constitutional provisions which set forth the Court's jurisdiction, it is certain no grounds will be found there. First, the review of the conformity of international agreements (treaties) with the Constitution is not expressly stated to fall within the competence of the Court; nor is the review of the conformity of laws or other

²⁴ *Kommers, op.cit. supra n. 20, page 109.*

²⁵ *Decision No. 2 BvR 2134/92, 2 BvR 2159/92 of 12 October 1993; Bulletin, [GER-1993-3-004].*

²⁶ *Decision No. 2 BvG 1/89; ibid. [GER-1995-1-015].*

regulations with ratified international agreements (Article 110 of the Constitution).²⁷ Bearing in mind that the main and predominant competence of the Constitutional Court is *a posteriori*, abstract and normative review of constitutionality, this issue is of immense importance. Furthermore, the limited scope of constitutional complaints, which can be lodged to challenge only individual acts by which freedom of thought and public expression of thought, freedom of political activity and association or the prohibition of discrimination are violated, substantially reduces the scope of individual acts, including acts in the sphere of foreign policy, that could be subject to judicial review by the Constitutional Court. The only certain terrain where the Constitutional Court may take actions in this sphere is where disputes emanate from conflicts of competence between the legislative and executive branches of the government. However, the referral of this type of cases to the Court is conditioned by *locus standi*²⁸, which, in contrast with the abstract review available via *actio popularis*, has resulted in only two cases of conflicts of competencies referred to the Court by authorised petitioners – but these were not related to foreign policy.

Such restricted jurisdiction of the Court in the sphere of foreign policy could be relativised by interpretation of the constitutional provisions pertaining to the status of international law in the constitutional order of the Republic of Macedonia. The Constitution of the Republic of Macedonia, like many European constitutions, devotes few provisions to these issues; however, these are sufficient to enable one to identify the monist concept in the application of international law, the latter's primacy over domestic laws, and the self-executing character of international treaties on one hand, and the subordination of international treaties to the Constitution on the other. According to Article 8 of the Constitution, adherence to generally

²⁷ Pursuant to Article 110 of the Constitution, the Constitutional Court is competent to decide on the conformity of laws with the Constitution, and on the conformity of collective bargaining agreements and other regulations with the Constitution and laws; to protect the freedoms and rights of the individual and citizen relating to freedom of conviction, conscience, thought and public expression of thought, to political association and activity as well as to the prohibition of discrimination among citizens on the grounds of sex, race, religion, or national, social or political affiliation; to decide on conflicts of competencies among holders of legislative, executive and judicial offices, and on conflicts of competencies among organs of the Republic and units of local self-governemnt; to decide on the accountability of the President of the Republic; and to decide on the constitutionality of the programmes and statutes of political parties and associations of citizens.

²⁸ According to Article 62 of the Rules of Procedure of the Constitutional Court (published in the "Official Gazette of the Republic of Macedonia" No. 70/92) the petition (proposal) to resolve conflicts of competencies among holders of legislative and executive office can be lodged by any of the state organs directly affected by the conflict. Any person who due to acceptance or refusal of the competency by the organs concerned cannot exercise his/her rights may also submit such a petition. According to Article 63 of the Court's Rules of Procedure, the petition to resolve a conflict of competencies may be referred to the Court provided that one of the organs concerned has accepted or refused the competency to handle the same case by a final and enforceable act, or both organs concerned have accepted or refused the competency by a final and enforceable act.

accepted norms of international law is established as a fundamental value of the constitutional order of the Republic of Macedonia. Pursuant to Article 118, as discussed earlier, international agreements ratified in accordance with the Constitution are an integral part of the internal legal order and cannot be changed by law. In accordance with Article 98, paragraph 2, as seen above, the courts adjudicate based on the Constitution, laws and ratified international agreements. Ratification of international agreements falls within the competence of the Assembly of the Republic of Macedonia (Article 68); recognition of states and governments and the establishment of diplomatic relations is a competence of the Government (Article 91); and membership of the Republic in international organisations, as well as association in and disassociation from a union or community with other states, fall within the competence of the Parliament, although in the latter case confirmation on a referendum is required for the validity of the decision (Articles 120 and 121, mentioned above). The Constitution does not contain provisions directly regulating whom and under what conditions can decide about the use of Macedonian armed forces abroad, or about the use of the territory of the Republic of Macedonia by foreign military forces.

As shown above, the Constitution provides sufficient “material” for the Constitutional Court when the principle of separation of powers and foreign policy procedures are concerned. Although the Court has not dealt with a large number of cases, it is clear that it could not encounter serious problems in this terrain. Whenever a conflict of competencies or procedures arises, the Constitutional Court will be guided by clear provisions concerning the scope and grounds of its intervention and the criteria on which its decisions should be based. In contrast, problems that need to be resolved by interpretation of the Constitution in respect of the position of the Constitutional Court towards international law can easily be foreseen. This applies equally to “generally accepted norms” of international law and to international treaties. But as indicated above, only the so-called upper line – the creation of international law as an act of foreign policy and its judicial review – are the focus of our interest, not the application of international law within the domestic legal order, which involves different issues and relations. The doctrine of “political questions” and acts of foreign policy in the military sphere will be tackled as well.

In 1992, the Court faced the first referrals of cases for review of constitutionality of acts made in the foreign policy context, and this was the moment when the Court started to develop positions of principle, primarily with regard to its own competence, and later on with regard to the limits of foreign policy decisions and their place in the values of the constitutional order. It is difficult to say that the Court’s jurisprudence in this area is characterised by the adoption of consistent positions, despite the fact that a purely quantitative examination may suggest that. It should also be noted that sometimes the Court has gone beyond the boundaries it established in prior cases, and later on has returned to its original position, which indicates that the Court, due to the short period of time in which it has dealt with such questions, is still in search of its real role.

In the jurisprudence of the Court, decisions refusing initiatives for the review of the constitutionality of international agreements or other foreign policy acts are predominant, either because the Court has declared itself incompetent to handle such cases or because the petitioner did not meet *locus standi* requirements, irrespective of the importance of the issues

at stake for the “health” of the constitutional order. For example, in the initiative submitted by one member of Parliament appealing to the Court to review which branch of power (the Parliament or the President) is competent to ask the United Nations to deploy international peace-keeping forces in Macedonia²⁹, the Court refused to consider the initiative, on the grounds that the case was about conflicts of competencies, which can be referred to the Court only by authorised entities and not by individuals, even if it is an individual member of the parliament who has no direct legal interest in the conflict. Contrary to the Slovenian Constitutional Court, which in a similar case used the opportunity in the reasoning of the decision to state clearly its position on the merits of the case, the Constitutional Court of the Republic of Macedonia did not give any leads as to what could have been the Court’s decision on the merits of the case if procedural preconditions had been met. The lack of active procedural capacity in cases of conflicts of competencies is considered an absolute procedural obstacle against the Court’s intervention, and not only in the area of foreign policy.

Very close to the aforementioned position, in its firmness, is the Court’s position regarding its competence to review the constitutionality of ratified international agreements (agreements not yet ratified are not part of the domestic legal order, and therefore generate consequences only in the international relations and duties of the state). In one of the very first decisions handed down by the Court on the review of ratified international agreements³⁰, one could easily sense that the Court’s position towards international agreements would remain an open issue for a while. The Court in that case drew a problematic line distinguishing the law on ratification, which contained only two articles: one article indicating that it was a law on the ratification of an international agreement, and the second article prescribing the time when the law would enter into force, from the international agreement subject to ratification. The main issue raised before the Court was the unconstitutionality of the provisional reference “former Yugoslav Republic of Macedonia” that appeared in two international agreements concluded with the International Monetary Fund and the World Bank, and which were ratified by the challenged laws. In the first articles of these laws, of course, the constitutional name of the country appeared. The petitioner in this case argued that the acceptance and ratification of these two international agreements, where the provisional reference appeared, was in violation of the Constitution. The Court declared itself competent to hear this case because review of constitutionality of the text of domestic laws was at stake (i.e. the first article of the laws), and consequently reasoned as follows:

...F(f)rom the provisions subject to review, it is conclusive that the Republic of Macedonia is the name of the state in whose legal order the Constitution has the highest rank in the hierarchy of legal acts. Therefore, the Constitution substantively binds all other legal acts within the legal order to use the name Republic of Macedonia. Moreover, the provisions concerned prescribe that international agreements can be concluded by the Government as well, and there is a constitutional duty on the part of the Assembly to ratify such agreements as a precondition to their becoming part of the internal legal order. As to the relationship between the law

²⁹ *Decision No. U. 252/92 of 16 December 1992.*

³⁰ *Decision No. U. 46/96 of 2 September 1994.*

(including laws on ratification), as an act of the internal legal order, and the international agreement, as an act of the international law, the Constitution sets forth the principle according to which international agreements cannot be changed by law.

The Court ascertains that the challenged laws, both in their title and contents, use the name Republic of Macedonia as determined by the Constitution, whereas the reference to the “former Yugoslav Republic of Macedonia” appears in the international agreements subject to ratification as a provisional reference used only by the International Bank for Reconstruction and Development and by the International Development Association in the context of their relations with the Republic of Macedonia.

Therefore, the Court finds that the contested laws use the constitutional name of the country. The provisional reference used by the foreign entities is an issue of their concern, and not an element which, in conjunction with the international agreement, enters into the internal legal order. This finding is supported by the explicit expression contained in the agreement that such reference shall be used only by that entity and provisionally, and therefore the issue of conformity of the challenged laws with the Constitution of the Republic of Macedonia cannot be raised.

It is obvious that the Court in this case refrained from treating a ratified international agreement as fully a part of the internal law of the country, and relativised the meaning of its expressed position that “the Constitution substantively binds all legal acts within the legal order to use the name Republic of Macedonia”.

Later on, the position of the Court inclined towards excluding any competence to review ratified international agreements, on the grounds of the lack of explicit authorisation in this respect in the Constitution. In the case referred to the Court for review of the Law on the Ratification of the Interim Accord Between the Republic of Macedonia and the Republic of Greece concluded in New York on 13 September 1995, the Court unambiguously separated the review of the law on ratification (its two articles) from the text of the Accord. Specifically, the Court declared that it was competent to review the law in the light of the issue of competency to conclude and ratify the Interim Accord, and in view of the conformity of the procedure followed with the Constitution³¹; however, it refused to review the constitutionality of the Interim Accord and stated that:

...Departing from the provision contained in Article 118 of the Constitution, pursuant to which international agreements ratified in accordance with the Constitution are part of the internal legal order and cannot be changed by law, and in line with Article 110 of the Constitution, according to which the Constitutional Court of the Republic of Macedonia decides on the conformity of laws with the Constitution but not of international agreements, the Court finds that review of the conformity of an international agreement with the Constitution ought to be undertaken by the Assembly

³¹ *Resolution No. U. 341/95 of 24 January 1996.*

of the Republic of Macedonia in the course of the procedure for its ratification. Upon ratification, the international agreement becomes part of the internal legal order, and is directly enforceable.

The Court reaffirmed its restrictive approach in the case where the Law on the Ratification of the Agreement between Member States of NATO and Other Member States of the Partnership for Peace was challenged in respect of the status of NATO forces in Macedonia. The petitioner, whose husband lost his life in a car accident caused by a vehicle controlled by a member of the NATO troops in Macedonia, who remained immune with respect to the Macedonian judicial authorities, argued that the status of NATO troops, as determined in the agreement, violated the human dignity of Macedonian citizens and the dignity of the state. The Court refused to hear the case, on the grounds that the Constitution does not explicitly provide for the Court to review the content of international agreements. However, this case deserves special attention because it was the first case where a foreign policy act was referred to the Court in connection with a violation of the human rights guaranteed by the Constitution. This restrictive approach of the Court, different from the interpretation given by the Hungarian Constitutional Court in a similar constitutional situation, undoubtedly led to the exclusion of judicial review by the Court of international agreements, even when basic constitutional values are concerned. This position was repeated in a few other cases; however the debate about its credibility continues in the Court.

The doctrine of political questions is another type of restrictive approach used by the Court in the review of foreign policy acts. In 1993, the then members of the Court had also refused to decide on the issue of the admission of the Republic of Macedonia to the United Nations under the provisional reference instead of its constitutional name, taking the position that:

“...C(ertain political and diplomatic actions and activities of the Government, undertaken in the process of international recognition of the Republic of Macedonia, where the Government acts in the capacity of the executive branch in the area of international relations, are not and cannot be subject to judicial review.”³² And again in 2000, the Court invoked the political questions doctrine in the case of recognition and establishment of diplomatic relations with the Republic of China (Taiwan). In its decision, the Court delivered rather complicated reasoning as to the constitutional preconditions of foreign policy and the place of foreign policy acts within the internal legal order, which are of immense importance for the Court’s competence. In this case, the act of the Government was contested for several reasons, based on the understanding that former acts of the President of the Republic in the area of international relations, and laws on ratification of international agreements containing clauses for the recognition of certain states (like the People’s Republic of China), being already part of the domestic legal order, are binding on the Government in deciding on the establishment of diplomatic relations with other states. The Constitutional Court refused to decide on the merits of this case due to the individual character of the contested decision on one hand, and its character as an act pertaining

³² *Decision No. U. 111/93 of 10 November 1993.*

to a political question on the other, which from a constitutional point of view is of greater relevance. Following are excerpts from the Court's reasoning:

It is clear that according to Article 91, paragraphs 8 and 9 of the Constitution, the Government of the Republic of Macedonia has direct constitutional authorisation to recognise states and governments and to establish diplomatic and consular relations with other states. In the Court's view, acts by which the Government exercises such powers have the character of acts by which a certain foreign policy is being conducted within a given period of time, and are political in nature, irrespective of their form. The consequences of these acts in the context of international relations of the state, undoubtedly, are of a legal nature pursuant to the Vienna Convention on Diplomatic Relations, but they are not part of the internal legal order either as sources of law or as acts whose content is restricted by law, except in respect of the competency for their adoption.

The decision challenged in this case, together with the Joint Communiqué for the establishment of diplomatic relations between the Republic of Macedonia and the Republic of China (Taiwan), therefore fall within the political powers of the Government set forth in Article 91, paragraphs 8 and 9 of the Constitution.

On the other hand, Articles 118 and 119...regulate a different context of international relations connected to international agreements, which, under the circumstances specified in the Constitution, may become part of the internal legal order, *and consequently be subject to judicial review by the Constitutional Court*. In this latter case the Government has a completely different position from the one determined in Article 91, paragraphs 8 and 9, which in addition to the Constitution is further elaborated by law in accordance with the Constitution. As regards the review of the challenged decision and Joint Communiqué in the light of the aforementioned constitutional provisions, the Court finds that these acts cannot be subsumed under the regime set forth in Articles 118 and 119 of the Constitution, due to both formal and substantial reasons.

Primarily, the challenged decision and the Joint Communiqué cannot be considered as "ratified international agreements", which is a prerequisite for their application as legal norms in the internal legal order, and furthermore, these acts do not contain provisions concerning concrete rights and duties of the state that may have implications on the internal legal order.

Based on the above, the Court believes that the nature of the Government's powers set forth in Article 91, paragraphs 8 and 9 of the Constitution reflects on and determines the very nature of the challenged decision and the Joint Communiqué as acts of pure expression of political will by the state i.e. authorities of the state competent to establish diplomatic relations with another state, and thereby do not attain the status of

regulations within the internal legal order. The review of such acts is possible via mechanisms of political control available in a parliamentary democracy.³³

Does this not logically mean that the review of other acts before the Constitutional Court is possible?

It is evident from the above that the Constitutional Court of the Republic of Macedonia, at least for the time being, has chosen the path of self-restraint in the review of foreign policy acts. The core pillar of such practice can be found in the interpretation of the place awarded to international agreements within the internal legal order of the Republic, as well as in the formal lack of explicit provisions stipulating that the Court is competent to review and decide on their constitutionality. It is highly likely that this interpretation may change and evolve over time, and the Constitution does not lack grounds for such a development. The current position seems satisfactory for those who advocate the superiority of international law and its ranking equal to the Constitution, because if a ratified international agreement is part of the domestic law, but the Constitutional Court, where one exists, cannot subsume it within a review of constitutionality, no other conclusion could be drawn as to its rank. On the other hand, the Constitutional Court has explicitly refused to review the conformity of laws and other internal acts with ratified international agreements. Practically speaking, this means that international agreements stand outside the internal legal order as a separate entity, which cannot be subject to review by legal instruments nor can it be used as a criterion for the review of domestic legislation. Either way, the exclusion of international agreements from the scope of judicial review leads to a real danger of infringement of certain fundamental values of the constitutional order, such as human rights and freedoms that by definition cannot be exercised without judicial protection. On the other hand, the political question doctrine can always be invoked and used as a corrective factor that removes the Court far away from politics, thus leaving politics to resolve its own problems in the system of democracy. The rule of law, however, is a value of such enormous importance that this cannot be left exclusively to the will of conjunctive political needs.

D. Conclusion

Although traditionally the sphere of foreign policy is a relatively closed and inaccessible area for both parliaments and constitutional courts, contemporary international relations, the development of integration processes and the role of international law have an influence on the determination of foreign policy objectives inherent to the promotion of democracy and the values of common constitutional heritage, especially in Europe. The consequences of foreign policy are increasingly extending beyond simple relationships between states, and have a direct impact on the day-to-day life of people and their rights and freedoms. Decision-making process about individual rights and freedoms cannot take place without the participation of citizens; likewise their protection cannot be ensured without allowing for a proper role to be played by the judiciary.

³³ *Decision No. U. 140/1999 of 14 June 2000.*

The complementarity between international and domestic law and their hierarchical relationship raise many problems for both ordinary and constitutional courts. Whereas the role of ordinary courts mainly focuses on the implementation of international law into the internal legal order, constitutional courts, and other courts in a diffuse system of judicial review of constitutionality, are confronted with the problem of review of acts of foreign policy, including international agreements (treaties), which are the most tangible results of foreign policy. Contrary to diffuse systems of judicial review of constitutionality, the centralised type of constitutional courts are strictly bound by formal constitutional provisions stipulating competency of the court to review this type of acts. However, these provisions have proven to be either restrictive or ambiguous.

The judicial review of foreign policy acts has shown itself to be effective in the systems of preventive control where, on the one hand, the superiority of international law has no effect in a given case, and on the other the constitutional courts are free to invoke any constitutional principles as a criterion in their review of constitutionality. In the systems of repressive (*ex post facto*) control, however, not only is the competence of the court to the review constitutionality of foreign policy acts rarely prescribed, but also the court has to take into account circumstances specific to the nature of foreign policy, and in doing so to establish criteria of self-restraint. In any case, the protection of the prerogatives of the political branches of the government in the area of foreign policy is a sovereign domain reserved for the constitutional courts. The protection of other important principles and values embraced in the constitution ultimately depends on the balance between them and the discretionary domains of foreign policy, which is the most important task of constitutional courts.

The Constitutional Court of the Republic of Macedonia is also confronted with these problems and issues in its jurisprudence. It seems that the formal “silence” of the Constitution as to the competence of the Court to review the constitutionality of ratified international agreements on the one hand, and the Court’s practice of refraining from interpreting the Constitution in favour of complete submission of international agreements to the authority of the Constitution on the other, is the main reason for the position of self-restraint of the Court in this area. But as the Court has developed the political questions doctrine, future developments should not exclude the likelihood of accepting the opposite position as a precondition for striking a rational balance between foreign policy and the rule of law.

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The Venice Commission has been working for several years on the question of law and foreign policy. In 1998 it carried out a detailed study of this issue, which was published in the series Science and technique of democracy.

Foreign policy unquestionably serves the national interest in the broadest sense. However, nowadays it is no longer left entirely to the discretion of governments. It has ceased to be uncontrollable. On the contrary, it obeys certain legal rules which are, in a sense, its foundations and which act as curbs on States' freedom of action, in the interests of the international community and of all the countries belonging thereto. The legal foundations of foreign policy are therefore made up of both rules of international law and rules of domestic law.

The seminar in Skopje was a very useful initiative aimed at having an exchange of views of representatives of different countries.

La Commission de Venise travaille sur la question du droit et de la politique étrangère depuis plusieurs années. En 1998, elle a préparé une étude détaillée sur ce sujet qui a été publiée dans la série Science et technique de la démocratie.

La politique étrangère est, sans aucun doute, au service de l'intérêt national, au sens large du terme. Cette politique, cependant, n'est plus aujourd'hui à la discrétion totale des Gouvernements. Elle a cessé d'être incontrôlable. Elle obéit, au contraire, à certaines règles juridiques qui sont, en quelque sorte, ses fondements et qui constituent autant de limitations à l'action des Etats, et ceci dans l'intérêt de la société internationale et dans celui de l'ensemble des pays qui la composent. Les règles qui composent les fondements juridiques de la politique étrangère sont donc aussi bien des règles du droit international que des règles des droits internes des Etats.

Le séminaire à Skopje a été une initiative très utile, dont l'objectif était d'avoir un échange de vues avec des représentants des différents Etats sur le sujet susmentionné.