

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

European Integration and Constitutional Law

UniDem Seminar
Cyprus, 29-30 September 2000
in co-operation with the Office of the Attorney General of the Republic of Cyprus

TABLE OF CONTENTS

THE EFFECTS OF INTEGRATION ON THE CONSTITUTIONAL LAW OF MEMBER STATES OF THE EUROPEAN UNION	2
EUROPEAN INTEGRATION LAW OF THE CANDIDATE STATES: CYPRUS	8
EUROPEAN INTEGRATION LAW OF THE CANDIDATE STATES: MALTA	16
EUROPEAN INTEGRATION AND CONSTITUTIONAL LAW:THE SITUATION IN ROMANIA.....	20
ESTONIAN CONSTITUTIONAL LAW AND EUROPEAN INTEGRATION	25
EUROPEAN INTEGRATION AND CONSTITUTIONAL LAW: THE SITUATION IN LATVIA.....	35
THE CONSTITUTION OF LITHUANIA AND ACCESSION TO THE EUROPEAN UNION.....	42
EUROPEAN INTEGRATION AND CONSTITUTIONAL LAW: THE SITUATION IN HUNGARY.....	60
THE CONSTITUTION AND ACCESSION OF THE REPUBLIC OF POLAND TO THE EUROPEAN UNION.....	98
THE NECESSITY AND SCOPE OF THE CONSTITUTIONAL AMENDMENT REQUIRED FOR THE ACCESSION OF THE SLOVAK REPUBLIC TO THE EUROPEAN UNION.....	114
EUROPEAN INTEGRATION AND THE CONSTITUTIONAL LAW OF THE REPUBLIC OF SLOVENIA.....	122
THE CONSTITUTION OF THE CZECH REPUBLIC AND ACCESSION TO THE EUROPEAN UNION.....	127
CONCLUDING REPORT	137

THE EFFECTS OF INTEGRATION ON THE CONSTITUTIONAL LAW OF MEMBER STATES OF THE EUROPEAN UNION

Mr Armando TOLEDANO LAREDO
Honorary Director General, European Commission

I. The European Union and the law

The process of European integration is rooted in public international law. The birth in 1951 of the *European Coal and Steel Community* (ECSC), then, in 1957, the *European Atomic Energy Community* “Euratom” and the *European Economic Community* (EEC) took place under international treaty law. This system of law governed the drawing up of the Treaty of Paris in the case of the ECSC and the Treaty of Rome in the case of Euratom and the EEC.

This same international law is present each time the member states sign a new agreement - whatever name it is given¹ - to organise, reorganise or enlarge the powers vested in these three new subjects of public international law. The Court of Justice of the European Communities (CJEC) underlined this link in 1963² when it spoke of a “new ... order of international law”.

Ensuing developments have shown that the implementation of the objectives set out in the treaties created an organisational model that was innovative in many ways and went further than existing ones, being concerned with a group of states pursuing ambitions that were not purely economic and were limited to the one part of the world and, as such, had no universal effect.

The CJEC perfectly expressed this fact in 1964, replacing the previous formula with a new one: “its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply”³. It was on the basis of this legal system that the CJEC was to affirm, in its case law, the supremacy of European Community law over the national law of member states and to emphasise that it was impossible for member states to accord supremacy to a unilateral measure over a legal system they had accepted on a basis of reciprocity; any such measure must be consistent with that legal system. The CJEC pointed out that the obligations accepted under the treaty would be merely contingent on their being called in question by subsequent legislation of the signatories. It was also careful to point out that Community law was not restricted to governing relations among states but was a fully fledged legal system in its own right.

Like any legal system, the Community legal system has three traditional components:

¹ Cf the treaties mentioned, the decision creating a system of Community resources, the decision on election by universal suffrage of Members of the European Parliament, the Single European Act, the Treaty on European Union, the Amsterdam Treaty, and future treaties.

² *Van Gend & Loos* judgment, No. 26/62, of 15 February 1963, European Court Reports 1963, p. 23.

³ *Costa v. ENEL* judgment, No. 6/64, of 15 July 1964, European Court Reports 1964, p. 1158.

- a) a set of rules comprising primary and secondary Community law;
- b) subjects, which are the member states, their citizens and the Community institutions;
- c) legal protection guaranteed by a court whose jurisdiction is permanent and fully defined.

In other words, the comparatively recent system of European Community law, which is developing with the passage of time, is more than just a body of law governing relations between states, like international law, and is more akin to a form of domestic common law in each of the member states.

In 1955 – before even the birth of the EEC and Euratom, and in the context of the ECSC – Advocate General Lagrange said it was worth making the point that the Court was not an international court, but the court of a Community created by six states according to a model which resembled a federal organisation much more than an international organisation, and that the treaty which it was the Court’s function to enforce, though it had been concluded in the form of an international treaty and was indisputably an international treaty, was nonetheless in practice the charter of the Community, and the rules of law which arose from it constituted the “*domestic law of the Community*”⁴. This concept was to be taken up and elaborated upon later by the CJEC⁵. It is therefore clear that these new concepts are more comprehensive than the traditional principle of *pacta sunt servanda*, which confirms the progress of Community law in its sphere of application.

A study of Community case law shows that the CJEC’s judgments are based on an analytical, systematic and teleological interpretation of the system which seeks to establish the point of each provision as well as its meaning. And it is worth noting that this teleological method – which, in the beginning, was essentially inductive in that it tried to identify the legislature’s intention in the legislation it drafted – was subsequently accompanied by a deductive method of enquiry which looked for intentions of the legislature which, over the years, had become Community legal instruments. In doing this, as noted by the commentators, the CJEC developed an approach geared to the realities of a live, active new legal order and which was closer to the methods of national courts than international ones.

The very way the Communities are organised makes them an organisation *sui generis* in which the three traditional powers are identifiable, bearing more resemblance to national bodies than to international organs. Thus the European Commission – a supranational institution – takes decisions by a simple majority; the Council – an intergovernmental institution – is tending away from the traditional system of consensus, using qualified majority voting increasingly often; and the European Parliament, elected by universal direct suffrage every five years since 1979, has gained substantial powers.

⁴ *Fédération Charbonnière de Belgique v. High Authority*, Case No. 8/55, European Court Reports 1955-1956, p. 263.

⁵ *Opinion of the CJEC*, No. 1/91, of 14 December 1991, European Court Reports 1991, p. 6079.

The way the Communities operate corresponds to the three components outlined in the treaties, which are:

- firstly, powers are transferred by the member states to the Communities, treaty by treaty;
- secondly, the establishment of institutions whose task is to fulfil set objectives, generally with no precise schedule; and
- thirdly, the procedures these institutions must adhere to in any action they take are set out in the various treaties.

From this there can be seen to be a dynamic which is inseparable from the pace of the single market and which constantly progresses as the Community evolves, under the watchful eye of the CJEC, which is required to ensure that the treaty law is properly interpreted and implemented.

The treaty law adds the characteristics of primary Community law to those of public international law. It is supplemented by secondary Community law, which is produced by the daily legislative work of the Community institutions and which today amounts to nearly 20,000 pages. Community law, both primary and secondary, takes precedence over all domestic laws, whatever their status in the national legal system to which they belong.

In addition to its permanent jurisdiction, the CJEC has jurisdiction in any dispute between member states which relates to the subject matter of the European treaties if the dispute is submitted to it under a special agreement between the parties (Art. 239 EEC) or pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law (Art. 238 EEC). Moreover, member states undertake not to submit a dispute concerning the interpretation or application of the treaty to any method of settlement other than those the treaty provides for (Art. 292 EEC).

This constant presence of Community law and its precedence over all provisions of domestic law led the first President of the European Commission, Professor Walter Hallstein, to say in an address to the European Parliament that the Community – which had neither binding powers nor an adequate administrative infrastructure, neither armed forces nor police forces – relied on a single instrument, a single weapon: Community law. Professor Hallstein, on the same occasion, described the Community for the first time as a *Community governed by the rule of law*, by analogy with a state governed by the rule of law.

Moreover, the very nature of Community law and the presence of a judicial authority whose jurisdiction and authority are well established can be regarded as a new phenomenon in the history of international organisations.

II. Community law and member states' law

In 1998 the Venice Commission issued an initial questionnaire on constitutional law and European integration as a preliminary to a survey of changes that had taken place in the legal systems of European Union member states in order to adapt to Community construction.

Thirteen members of the Venice Commission⁶ nominated by the European Union member states replied to the questionnaire and their replies were consolidated in document 051/97 CDL-UE (98) 4 of 23 November 1998. Without going into this document, it is useful to note that the nature of the relationship between Community law and the national law of member states differs according to whether the Community law is primary or secondary.

The relationship between the provisions of the European treaties and national law is formalised by the signing of the European instruments, ratification of them by national parliaments and, sometimes, a referendum, if required by the constitution of the state concerned. Secondary Community law and national law are connected through primary Community law, which is incorporated into national legal systems in accordance with the CJEC's case law on the subject.

This case law emphasises in particular that the national legislature must formally repeal provisions that are contrary to the Community legal system in order to guarantee legal certainty⁷. In addition, it states that, in the event of conflict between a provision of national law and a provision of Community law, the latter prevails, whatever the nature of the former⁸. It also states that Community law must be interpreted to that effect by the national courts, which are bound to apply provisions of Community law in all circumstances and without delay⁹. In other words, the Court explains, "a national court which is called upon, within the limits of its jurisdiction, to apply provisions of a Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means"¹⁰, which means in effect that the court, of its own motion, sets aside the provision of national law in question.

It is interesting to note that, in a federal system, only the constitution takes precedence over the law of the federated states, whereas all Community rules take precedence over contrary provisions of national law, whatever their nature. This is because of the need to ensure that the single market functions properly, with the same guarantees for all individuals or legal persons, irrespective of which member state they reside or work in.

Note, too, that *Community regulations* are of general scope – all elements of them are compulsory and they are directly applicable in every member state – whereas *Community*

⁶ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Spain and Sweden.

⁷ *Commission v. French Republic* judgment, No. 167/73, of 4 April 1974, European Court Reports 1974, p. 371.

⁸ *Commission v. Italian Republic* judgment, No. 48/71, of 13 July 1972, European Court Reports 1972, p. 535.

⁹ *Factortame* judgment, No. C-213/89, of 19 June 1990, European Court Reports 1990, p. 2475.

¹⁰ *Simmenthal* judgment, No. 106/77, of 9 March 1978, European Court Reports 1978, p. 645.

directives are binding on the states to which they are addressed, obliging them to achieve a particular result, but leaving it up to the national authorities to decide how and in what form to do so within the prescribed time. Regulations therefore create positive law for the whole Community as soon as they enter into force, whereas directives have to be incorporated into the different legal systems by means of national provisions. For the sake of completeness, it should be added that, if there is a delay in transposing a directive into a national legal system, and if certain conditions are met, the CJEC – in preliminary proceedings – may give one or more provisions direct effect so that beneficiaries can have the national courts apply them.

Fourteen members of the Venice Commission replied to a second questionnaire issued in March 2000¹¹ and containing the following two questions:

1. Has the Amsterdam Treaty led to revision of the constitution in your country? If so, please indicate what form it has taken.
2. More generally, has the Amsterdam Treaty had an effect on legislation or on the basic shape of case law?

Analysis of the replies received revealed the following:

A. As regards the **first question**: in 11 states out of 14, no revision of the constitution had been needed in order to ratify the treaty and incorporate its provisions into the domestic legal system.

Two other states, Austria and France, had amended their respective constitutions. In the case of Austria, the constitution had been amended to take account of measures to be applied and domestic decision procedures in connection with application of Titles V and VI of the Treaty. In the case of France, the amendment firstly reflected “Communitisation” of the right of asylum and immigration and the right to cross internal borders and secondly stipulated that the government had to submit to the National Assembly and the Senate any instruments containing European Union legislation, just as it had previously been obliged to do with European Community instruments.

Ireland had amended its constitution to authorise ratification of the Amsterdam Treaty and make it quite clear that, in the event of conflict between the constitution and Community law, the latter took precedence.

B. **On the second question**, Belgium, Denmark and Italy replied in the negative.

Austria, France, Greece, Luxembourg, the Netherlands and Portugal replied that, though they did not rule out the possibility of repercussions for domestic law, the entry into force of the Amsterdam Treaty was too recent to evaluate the need for new legislation or to predict basic case law tendencies.

The other five states replied in the affirmative. In Germany, a new law allowed any court to seek a preliminary ruling from the CJEC in matters of police and court co-operation in criminal cases. In Spain, reference was made to the treaty in domestic instruments transposing

¹¹ Document CDL-UE (2000) 1 Rainbow and the reply relating to Luxembourg.

Community directives into domestic law. In Finland, the law on election of Members of the European Parliament had been amended to make it impossible to be both a Member of the European Parliament and a member of the Committee of the Regions, in line with the Treaty. In Ireland, the Amsterdam Treaty had been incorporated into the European Communities Act 1972, which meant that the treaty's provisions – along with those of previous European treaties – were binding on the state and had been incorporated into the domestic legal system. In Sweden, too, the treaty had been incorporated into the law on membership of the Union, which contained the basic provisions concerning the relationship between Community law and national law.

III. European integration and constitutional law

The above summary of the replies to the second questionnaire on constitutional law and European integration confirms the information in the replies to the first questionnaire – first of all, the clear relationship between the Community legal system and the legal systems of member states – sovereign legal systems which evolve in a realm of joint transnational enjoyment of rights, to use President La Pergola's words – and the place now occupied by Community law in the lives and daily activities of the European Union's member states and citizens. This was not the case in the past: the process of turning the objectives set by the founding fathers of Europe into reality in the member states encountered a series of obstacles, mainly because of the newness, originality and scale of the project outlined in Robert Schuman's declaration of 9 May 1950. The obstacles have been overcome – though not without difficulty – in the higher interest of the Community - the general interest, that is, of member states and European citizens. The key factor is, of course, the demonstration of political will, which has been taking shape in the new European treaties; but the structure built over the years, which gives the law its place and helps it fulfil its purpose, is crucial.

As has been indicated, the first European treaty, instituting the ECSC, did not entail any constitutional revision in the six founding member states. It was only later, and particularly in the implementation of the EEC treaty, that the relationship between the nascent Community law and the constitutional law of member states posed problems, especially for states belonging to the dualist school. Over the years and with successive CJEC judgments, these problems have been resolved and Community law has found its place and been accorded, in some states, a special position compared with traditional international treaty law.

Once the relationship between primary Community law and national law had been secured, that between secondary Community law and national law was eased. The importance of this should not be underestimated, considering the number of regulations, directives and decisions – to mention only the binding Community legal instruments – adopted every day by the European Union institutions. Article 10 of the EEC Treaty has been a great help in establishing this harmonious relationship, with the three obligations it sets out - two positive and one negative. Article 10 provides, firstly, that member states must take all appropriate measures, whether general or specific, to ensure fulfilment of the obligations arising out of the treaty or resulting from actions taken by the institutions of the Community and, secondly, that they must facilitate the achievement of the Community's tasks. It also provides that the member states must abstain from any measure which could jeopardise the attainment of the objectives of the treaty.

These obligations being understood to apply equally to the legislative, executive and judicial authorities in the member states, at whatever level (central, regional or local), the general

principle of mutual co-operation between national authorities and Community institutions, coupled with mutual assistance among member states, has been interpreted by legal theorists as analogous to the *Bundestreue* of German constitutional law (which, in the context of the Community, is more accurately termed *Gemeinschaftstreue*) - in other words, analogous to the principle of loyalty to the federal or common interest.

The fact that the vast majority of member states have not needed to make constitutional amendments in order to ratify the Amsterdam Treaty demonstrates clearly that the machinery has been put to the test and that it runs smoothly, that each member state has resolved its domestic problems in its own way and that the Community element is a now familiar component or added-value factor.

EUROPEAN INTEGRATION LAW OF THE CANDIDATE STATES: CYPRUS

Mr Alecos MARKIDES
Attorney General of Cyprus

The Challenge of European Community Law

The creation of the European Community, and latterly the European Union, has not only involved the establishment of a new type of legal order operating in the transitional sphere; it has also brought into being a legal order in which a very specific and clear purpose is dominant. This is the promotion of a process of integration, leading towards a 'union' of European states and peoples. This purpose operates at a number of different levels, including economic, monetary and political, but it is ever present.

The Court of Justice never loses sight of the aim of integration when it is interpreting European Community law. In fact, in an exercise of remarkable judicial creativity, the Court of Justice has consistently distanced the EU legal system from 'ordinary' international law, arguing that by acceding to the Union Member States have transferred sovereign powers to the Community, creating an autonomous legal system whose subjects are not just states, but also individuals.

The European Court has given effect to this view by enunciating four key principles:

- Firstly, European Community law penetrates into the national legal systems, and can and must be applied by national courts, subject to authoritative rulings on the interpretation, effect and validity of EC law by the Court of Justice;
- secondly, in this context, individuals may rely on rules of Community law before national courts, as giving rise to rights which national courts are bound to protect. This is the principle of direct effect of Community law;
- thirdly, in order to guarantee the effectiveness of this structure, EC law takes precedence over national conflicting law, including national constitutional provisions. This is the principle of supremacy of Community law;

- fourthly, the organs and constituent bodies of member States, including the legislative, executive and judiciary, are fully responsible for reversing the effects of violations of EC law which affect individuals.

The Constitution as the Supreme Law of the Republic

The Constitution of the Republic of Cyprus, as in other constitutional orders under Article 179(1), is the supreme law of the Republic. According to Article 169(3) of the 1960 Constitution “treaties, conventions and agreements ... shall have ...superior force to any municipal law ...”. This covers any law prior or consequent to an international treaty.¹² Thus, the hierarchy of norms in the Cypriot legal order is (a) the Constitution; (b) international treaties; and (c) ordinary laws.¹³

According to the Supreme Court case law,¹⁴ an international treaty, being inferior to the Constitution by virtue of Article 179(1), is subject to judicial review in the sense that the constitutional provisions prevail in the case of any inconsistency between them and the provisions of the treaty. A treaty does not, *stricto sensu*, repeal municipal law but has only superior force to it taking precedence in its application. Such a treaty retains its nature as part of international law.¹⁵ According to the Supreme Court, a ratified treaty delineates not only the international obligations of the State, as defined therein, but also domestic law until the day that, under its provisions or the Vienna Convention on Treaties, it ceases to be operative.

The Constitutional Structure of the Republic of Cyprus

The foundation for the constitutional structure of the Republic of Cyprus¹⁶ was laid by the Zurich and London Agreements¹⁷. The Treaty of Guarantee¹⁸ and the Treaty of Alliance¹⁹ have been given constitutional force.²⁰

¹² For the definition of the term “law” see Article 186(1) of the 1960 Constitution. See also the *Malachtou* judgment, *infra*.

¹³ See, for example, *Eracleous v. The Municipality of Limassol* (Appeal no 5793), judgment of the Supreme Court of 14 December 1993, which recalled the above hierarchy.

¹⁴ See *Malachtou v. Armefti* (1987)1 C.L.R. 207.

¹⁵ The Vienna Convention on the Law of Treaties was ratified under Article 169 of the 1960 Constitution by Law 62/76.

¹⁶ The Republic of Cyprus was set up by means of the Treaty of Establishment between Cyprus, Britain, Greece and Turkey. The Treaty provides that the Republic “shall comprise the island of Cyprus... with the exception of two areas defined in Annex A of this Treaty, which areas shall remain under the sovereignty of the United Kingdom.” as military bases only. This secured British military bases on the island. In the event, however, that the Government of the United Kingdom, in view of changes in their military requirements, should at any time decide to divest themselves of the aforesaid sovereignty or effective control over the Sovereign Base Areas, or any part thereof, it is understood that such sovereignty or control shall be transferred to the Republic of Cyprus.

The Constitution of the Republic of Cyprus of 1960 is rigid, detailed and complex.

According to paragraph 21 of the Zurich Agreement, several of its provisions had to be included in the Constitution of the Republic of Cyprus as fundamental – basic Articles, not subject to any revision or amendment. These basic Articles, stipulated by the Constitution itself to be unalterable,²¹ include the whole or parts of forty-eight separate Articles out of 199.

On the other hand, according to Article 182(2) and (3) of the 1960 Constitution, any other provision of the Constitution (that is, non-basic provisions) “may be amended, whether by way of variation, addition or repeal” by law passed by a majority vote comprising at least two-thirds of the total number of the Representatives belonging to the Greek Community and at least two-thirds of the total number of the Representatives belonging to the Turkish Community.

As a result of the deliberate withdrawal of Turkish Cypriots and their refusal to participate in the state organs of the Republic since 1964, the Supreme Court of Cyprus in its landmark judgment *Attorney General of the Republic v. Ibrahim*²² applied the doctrine of necessity. This doctrine has been further elaborated by case law as an integral part of the legal and constitutional order of the Republic, so much so, that it is possible to deviate temporarily from strict compliance with constitutional provisions. In other words, the doctrine has been applied in Cyprus to validate public acts facing procedural difficulties which it is impossible to remedy because of political boycott by the Turkish Cypriot leadership and, later, foreign invasion.

¹⁷ *The Zurich (of 11 February 1959) and London (of 19 February 1959) Agreements declared Cyprus an independent Republic, whose independence, constitutional order and territorial integrity were guaranteed by the United Kingdom, Greece and Turkey.*

¹⁸ *The Treaty of Guarantee, between Cyprus, on the one hand, and Britain, Greece and Turkey on the other, aimed at the protection of the constitutional order created by the Zurich and London agreements and the exclusion of political or economic union of the island with any state. The three guarantor powers guaranteed the continuation of existence and maintenance of the constitutional order, as well as, the independence and territorial integrity of Cyprus. By means of Article IV, each of the three guarantor powers reserved "the right to take any action with the sole aim of re-establishing the state of affairs established by the present Treaty" provided that "common or concerted action may not prove possible."*

¹⁹ *The Treaty of Alliance was concluded between Cyprus, Greece and Turkey and provided that military contingents of each state should be stationed in the territory of the Republic. This had the purpose of securing the parties' responsibility to resist any attack or act of aggression directed against the independence or territorial integrity of Cyprus.*

²⁰ *Article 181 of the 1960 Constitution.*

²¹ *Article 182(1) of the 1960 Constitution. A list of these basic Articles of the Constitution is to be found in Annex III thereto.*

²² (1964) CLR 195.

Thus, pending the solution of the political problem, any necessary constitutional amendments comprising non-basic constitutional provisions may be made by a law passed by a majority of at least two-thirds of the members of the House of Representatives,²³ belonging to the Greek Community.

Article 169 of the 1960 Constitution deals with both, the means of ratification of treaties, conventions and international agreements and their effect on domestic law.

According to Article 169 of the Constitution, subject to the provisions of Article 50 and paragraph (3) of Article 57 of the Constitution,²⁴

- every international agreement relating to commercial matters, economic co-operation (including payments and credit) and *modus vivendi* is concluded under a decision of the Council of Ministers;
- Paragraphs 2 and 3 of article 169 provide: any other treaty, convention or international agreement, negotiated and signed under a decision of the Council of Ministers, is concluded and becomes operative when approved by law made by the House of Representatives; and
- every treaty, convention and agreement (concluded as above mentioned) is published in the official Gazette of the Republic and as from its publication has superior force to any municipal law, on condition that such treaty, convention or agreement is applied by the other party thereto.²⁵

The Supreme Court decided that the condition of reciprocity cannot be invoked in conventions the object of which is not to create any subjective or reciprocal rights for the contracting parties themselves but their objective and their intent is to promote certain principles of law, moral and legal values and which a contracting party signs and ratifies only for the realisation of this objective. Examples are: Conventions for the protection of human rights and their improvements and formulation of common rules and the achievement of social justice.

Is constitutional amendment necessary? Problems and Solutions

In the Cypriot constitutional order, the executive power is for the time being ensured by the President of the Republic. The President as well as other designated organs were vested with certain executive powers, carefully enumerated and described in the Constitution.²⁶ The bulk,

²³ *On this basis, there have been, since 1985, a number of amendments on non-basic provisions of the 1960 Constitution such as Article 111.*

²⁴ *Articles 50 and 57(3) of the 1960 Constitution concern the right of veto of the President and the Vice-President of the Republic respectively.*

²⁵ *See the Malachtou judgment, supra, for a clear statement by the Supreme Court as to when such reciprocity cannot be invoked.*

however, of the executive power of the State, namely the residue of the executive power was vested in the Council of Ministers. By virtue of Article 50 of the 1960 Constitution, the President (and the Vice-President) of the Republic have the right of veto on foreign affairs.²⁷ The legislative power of the Republic is exercised by the House of Representatives “in all matters” except those expressly reserved to the Communal Chambers under the Constitution.²⁸ The Supreme Court exercises all the judicial power of the Republic, including constitutional matters, such as the constitutionality of laws, conflict of competence between the organs of the Republic and electoral petitions.²⁹

The Constitution proclaimed itself to be the supreme law of the Republic (See Art. 179(1)). On the other hand, European Community law by its own terms is supreme and takes precedence over all national law, including national constitutions themselves. It should, however, be noted that Article 179 is not a basic provision of the Constitution and may, therefore, be amended under the procedure provided for by Article 182.

Moreover, membership of the European Union involves a partial loss or transfer of sovereignty in favour of the Union. This, *prima facie*, appears to sit uneasily with Article 61 of the 1960 Constitution providing that the House of Representatives exercises the legislative power of the Republic “in all matters”. Article 61 is a basic Article and, therefore, cannot be amended.

A way of overcoming the above difficulties would be by means of an amendment of Article 169 of the 1960 Constitution (a non-basic provision), following the procedure prescribed in Article 182, by adding specific paragraphs reflecting, *mutatis mutandis*, the contents of Articles 29(4)(3), 29(4)(4), 29(4)(5) and 29(7) respectively of the Irish Constitution.

Article 29 of the Irish Constitution provides, *inter alia*, that Ireland may become a member of the European Communities (Article 29(4)(3)), of the European Union (Article 29(4)(4)).

The most interesting provision, for our purposes, though is Article 29(4)(7) 29(5) which provides that:

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

²⁶ See, *inter alia*, Articles 47, 48, 49 and 125 of the Constitution.

²⁷ Except the participation of the Republic in international organisations in which Greece and Turkey are both members; see Article 50(1)(a) of the 1960 Constitution.

²⁸ See Articles 61 and 87 of the 1960 Constitution. The Communal Chambers were designed to serve as legislative, executive and economic authorities in religious, educational, teaching and cultural affairs of the two Cypriot communities as well as issues of personal status.

²⁹ See Articles 133-164 of the 1960 Constitution.

The adoption of such an amendment would cover the actual accession of the Republic to the Union as well as the transfer of national legislative and treaty-making powers to the EU institutions, thus dealing with the potential problems posed by Article 61 of the 1960 Constitution.

Moreover, for reasons of clarity and legal certainty, Article 179(1) of the Constitution (also a non-basic provision) could be amended as follows: “*Subject to the provisions of Article 169 (...) [T]his Constitution shall be the supreme law of the Republic*”.

Such an amendment would ensure that constitutional provisions do not affect in any way the Treaty of Accession and European Community law and would safeguard their supremacy over the Constitution.

Mendelson v. Crawford, Hafner and Pellet

Turning now to the legal/constitutional objections expressed by the Turkish side concerning the Republic’s accession to the EU, the following should be noted.

Both the Turkish Government and the Turkish Cypriot leadership reacted strongly to Cyprus’s application to join the EU. Turkey attempted, using both political and legal arguments, to block Cyprus’s accession course. In the summer of 1997, when, following the publication of *Agenda 2000*, it became obvious that accession negotiations with Cyprus would begin in the next few months, Turkey circulated an opinion signed by Professor Mendelson of the University of London claiming that Cyprus’s application to join the Union as such was unconstitutional.

This Opinion claimed that the 1960 Treaty of Guarantee as well as Articles 50 and 170 of Cyprus’s Constitution precluded Cyprus from joining the European Union.

Cyprus countered this legalistic effort by Turkey by obtaining a joint opinion (24 September 1997) by three well-known international law experts, Professor Crawford of the University of Cambridge, Professor Häfner of the University of Vienna and Professor Pellet of the University of Paris.

Article I(2) of the Treaty of Guarantee provides that the Republic of Cyprus:

“... undertakes not to participate, in whole or in part, in any political or economic union with any State whatsoever...”

However, according to the three experts, this provision does not prohibit Cyprus from becoming a member of a regional organisation such as the European Union. Membership of the Union would not constitute participation, “in any political or economic union with any State whatsoever” within the meaning of Article 1 (2) of the Treaty of Guarantee.

Furthermore, Article 50 of the 1960 Constitution grants the President and Vice-President (a Turkish-Cypriot) a veto over any foreign policy decision, particularly any decision on joining an international organisation or alliance that does not count both Greece and Turkey among its members. However, with regard to the Vice-President's veto, the 1960 Constitution prescribes a specific mechanism based on the assumption of his participation in the administration. In other words, that veto is the prerogative of the Vice-President as an office holder and can only be exercised by him when in office. Thus, under the Constitution of 1960 that veto cannot be

exercised by the Turkish Cypriot community as such but only by the holder of the Vice President's office. In the case of deliberate abstention of the Vice-President from his duties, the intentional refusal to play his constitutional role and in the face of an invasion by foreign forces, one could clearly argue that the vice-presidential veto provided for in Article 50 cannot be exercised.

Finally, Article 170 of the Constitution provides for most-favoured nation treatment to be extended by Cyprus to the three guarantor powers "for all agreements whatever their nature may be". Such treatment has only to be extended "by agreement on appropriate terms". In common with other most-favoured-nation clauses, Article 170 does not prohibit Cyprus from entering into agreements which confer benefits on third states; it envisages that benefits extended to the most favoured nation will also be extended to each of the guarantors. It is significant that in the commercial agreement between the Republic of Cyprus and the Republic of Turkey concluded on 9.11.1963 (see official gazette 21.11.1963) most favoured nation treatment was not accorded to the Republic of Turkey. Thus, Article 170 does not prohibit Cyprus from acceding to any agreement whatever.

In fact, EC membership is not regarded as triggering general most-favoured nation obligations under the GATT or otherwise. Turkey as a GATT contracting party and applicant for EU membership is well aware of this practice. Both Turkey and Greece, **in bilateral treaties concluded with Cyprus after independence**, have recognised that most-favoured nation obligation in respect of trade in products do not apply "to privileges ... preferences or concessions ... granted ... in the future to other countries on account of. participation, entry or association ... [to] a customs union, a free area or an economic community". For these reasons Article 170 would not require Cyprus to extend any additional benefits of EU membership to Turkey.

Thus, by circulating the opinion of the three Professors, the Government of the Republic has effectively dealt with the Turkish efforts to invent legal arguments against Cyprus' accession to the European Union. This view is reflected by the European Commission's Opinion on Cyprus's application for accession where it is stated, after citing the Turkish arguments mentioned above, that:

"The Community, however, following the logic of its established position, which is consistent with that of the United Nations where the legitimacy of the Government of the Republic of Cyprus and non-recognition of the 'Turkish Republic of Northern Cyprus' are concerned, felt that the application was admissible and initiated the procedures laid down by the Treaties in order to examine it".

Furthermore, the Court of Justice of the EC in the *Anastasiou* case stated that:

" The problems resulting from the *de facto* partition of the island must be resolved exclusively by the Republic of Cyprus, which alone is internationally recognised".

The Role of the National Courts

Upon accession to the European Union, the Republic of Cyprus will transfer its national courts to a distinct supra-national judicial hierarchy, under the authority of a Supreme Court, the Court of Justice of the European Communities. National Cypriot courts would thereby

become European Community courts charged with implementing Community law in the national sphere.

So long as the Republic remains a member of the European Union, and its courts, consequently, part of the European Court system, the power and sovereignty of the State would be fettered in that it would be unable to enact and enforce legislation which would be repugnant or inconsistent with Community law. Furthermore such legislation would not be applied by its own national courts.

Since no man can serve two masters, as the judges of the Court of Justice were keen to emphasise in the first *Opinion on the draft Treaty on the European Economic Area*, it would appear that the more accurate statement of the primary duty of national courts in the Republic, after accession, would be to uphold the goals of the European Union, as declared in the Union Treaties and as interpreted by the Court of Justice of the European Communities.

Conclusion

A study of the constitutional issues relating to Cyprus's accession to the European Union, reveals the complexity of the 1960 Constitution of the Republic of Cyprus.

It is true, that a conflict between the two separate legal orders may arise, especially with the acceptance of the concept of supremacy of Community Law into the Republic's constitutional order following Cyprus' accession to the Union.

Nevertheless, similar problems had arisen with various constitutional orders of other Member States of the Union. These Member States, had in the past found ingenious ways of overcoming constitutional difficulties without any negative effect on Community law. Thus, Cyprus must also find a way to overcome any constitutional problems in the wake of her entry into the Union. Some of the possibilities have been considered above.

It should be noted that as the whole issue involves amendment of basic non amendable in theory Articles of the Constitution, Cyprus can follow only one of two ways: Either to accept the theory, that Community Law regulates matters which are not determined by the Constitution and, therefore, there can be no conflict between the Acquis and the Constitution or, preferably, be bold about it and proceed to amend its Constitution, following the Irish model. In the latter case, the amendment will have to be presented before the people of Cyprus by means of a referendum. The right to vote in such a referendum should be given to all citizens of the Republic, irrespective of community and residence. If the Referendum is in favour of the amendment, I have no doubt that the Supreme Court will respect and recognise the result; after all, one should, always, remember that in the final analysis all power emanates from the people.

In any event, the adoption of an amendment to the Constitution is a matter clearly falling within the sovereign power of the Republic of Cyprus.

In other words, what would be of legitimate concern of the EU and its member States is whether Cyprus has set up the appropriate mechanisms for implementing the Acquis Communautaire. If she does, in accordance to the ECJ decision in the Anastasiou case «the problems resulting from the de facto partition of the island must be resolved exclusively by the Republic of Cyprus, which alone is internationally recognised». The procedure to be followed is an internal matter of the Republic. I may assure you at this solemn meeting that the Republic of Cyprus will take all necessary measures in a legal and democratic way for the harmonisation of its legal order,

including the Constitution, to satisfy all the requirements for accession to the European Union and the recognition of the supremacy of Community law.

EUROPEAN INTEGRATION LAW OF THE CANDIDATE STATES: MALTA

Mr Joseph SAID PULLICINO
Chief Justice of Malta
Member of the Venice Commission

Historical notes:

The independence constitution came into effect in Malta on 21 September 1964. On 4 May 1965, Malta became a member of the Council of Europe.

For the past 35 years, Malta has been an active member of this organisation whose aim “is to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage, and facilitating their economic and social progress” (Article 1 of its Statute). Malta has been party to discussions and decisions of the Council of Europe on various subjects of common concern, mainly social and legal subjects and above all fundamental human rights. Malta has kept this organisation as its guide when enacting its laws and is party to numerous conventions of the Council of Europe.

The culmination of this participation for Malta can perhaps be considered as when Parliament adopted the Act incorporating the European Convention on Human Rights into national legislation in 1987. This Act is living proof of Malta’s commitment towards guaranteeing the fundamental rights and freedoms of the individual. It highlights the respect which Malta has for human rights, the rule of law and the principles of democracy.

More recently, Malta submitted its application for membership to the European Union. This event took place on 16 July 1990 and since then Malta has made great steps forward in its way towards accession. There was, however, a period of time in which this EU application was suspended, when in 1996 the Malta Labour Party was elected to government. After a mere 22 months, however, early elections gave the Nationalist Party a majority of votes and seats in Parliament once more and it was this new government, in September 1998, which reactivated Malta’s application for EU membership.

The Maltese government was asked to prepare answers to an extensive questionnaire, which served as the basis for the formulation of the Commission’s opinion on Malta’s reactivated application. The Commission issued its update report on 17 February 1998 and it recommended to the Council that the screening process with Malta should start as soon as possible with a view to starting negotiations. The General Affairs Council endorsed the Commission’s recommendation on 22 March 1999.

Between late May 1999 and January 2000, Malta carried out the screening process; a process of comparison of Maltese legislation with the *acquis* of the European Union.

In the meantime, a General Affairs Council meeting which was held in June 1999 took the decision that Malta should start participating in the multilateral political dialogue together with the Central and Eastern European countries and Cyprus, also applicant countries.

The European Union's Regular Report on Malta (October 1999) confirmed what was said in the February Report, namely that Malta fulfils the political criteria (the "Copenhagen criteria") of the European Union and that Malta has a functioning market economy able to cope with competitive pressure and market forces within the Union, with some adjustments. Together with this Regular Report, the Commission published a Composite Paper on progress towards accession of each of the candidate countries and recommended to the European Council that accession negotiations could be opened in 2000.

This recommendation materialised, in fact, at the Helsinki European Council of 11 and 12 December 1999 where it was decided to open accession negotiations with, amongst other nations, Malta.

Negotiation update

Malta is currently in the midst of the negotiating process. During the Portuguese Presidency, between January and June 2000, the European Union opened eight chapters with Malta namely:

1. Education and Training
2. Science and Research
3. Common Foreign and Security Policy
4. External Relations
5. Small and Medium Sized Enterprises
6. Industrial Policy
7. Culture and Audiovisual
8. Telecommunications

On 25 May 2000, seven out of these eight chapters were declared to be provisionally closed – the one outstanding element being that of Culture and Audiovisual which is expected to be closed in the near future.

During the current French Presidency, between July and December 2000, another nine chapters are to be opened. These are:

1. The free movement of capital
2. Company law
3. Competition
4. Fisheries
5. Transport
6. Economic and Monetary Union
7. Statistics
8. Social Policy and Employment
9. Consumer and Health Protection

At this point in time, therefore, chapters opened with Malta stand at seventeen, which is the highest number amongst the candidates of the second group.

One cannot fail to mention at this stage the resolution approved unanimously earlier this month by the Foreign Affairs Committee of the European Parliament on the status of Malta's

application for membership of the European Union and the state of negotiations. According to this resolution, Malta's democratic status and respect for human rights show its genuine vocation to be a member of the European Union. It emphasises that Malta meets the political and economic criteria of the European Union and that "*Malta forms an integral part of the European Community of states and cultures and its accession will strengthen the political and security dimension of the European Union, particularly in the Mediterranean.*" It was also observed that "*Malta's constitutional institutions function in an independent, democratic and stable manner*" and considers that there are no problems in Malta regarding the respect for fundamental human rights and freedoms.

The resolution "*notes with regret that the government and the opposition differ in their assessments of the issue of Malta's accession to the EU, and supports all efforts by the various European institutions, particularly the European Parliament, to enter into a constructive dialogue with all constituent corporate bodies and social strata in Malta in order to ensure the continuity of the accession process.*" Accession to the EU will however be the subject of a referendum which will be held once the negotiations have been closed. In this manner, it will be the Maltese people who will take the ultimate decision – which again goes to show the respect for the principles of democracy in Malta.

Constitutional implications

This referendum is not a constitutional requirement in Malta; nor is a special majority required for Malta to be able to accede to the European Union. The Constitution contains no provision to give the power, or alternatively to harness the power, of the Maltese government to accede.

It is only by virtue of the Ratification of Treaties Act (Chapter 304 of the Laws of Malta), and therefore not of the Constitution, that the Agreement of Accession between Malta and the EU would have to be ratified by an Act of Parliament embodying the Agreement.

The Maltese Constitution is based upon what is known as the Westminster model, that is it contains numerous features of the British "constitution" (although unwritten) but goes further. It is in effect the constitution of a parliamentary democracy. It opens with a number of preliminary provisions regarding, *inter alia*, territories, religion, national language, flag and anthem. A declaration of principles which in turn is followed by provisions on the fundamental human rights and freedoms of the individual is also included. The Maltese Constitution also provides for citizenship. In fact it regulates this subject in detail and one finds a whole chapter dealing with citizenship in the Constitution. Furthermore, the Maltese Constitution lays down principles regulating the executive, legislature and the judiciary. Since 1974, when Malta became a republic, executive power resides in the President who is appointed by Parliamentary resolution for a non-renewable period of 5 years and whose salary is charged to the Consolidated Fund. The President's powers, however, are rather limited and perhaps more power lies with the Prime Minister and other Ministers, collectively within the Cabinet. The Constitution does not provide for the legislative process; this is regulated by the Standing Orders of the House of Representatives. The Constitution does however provide for the establishment of the Constitutional Court composed of the Chief Justice and another two judges which is the highest of the superior courts in Malta. The Maltese Constitution provides for the appointment and removal from office of the judges of the superior courts and the magistrates of the inferior courts and lays down other provisions regulating their office, including constitutional safeguards for judicial independence. The office of the Attorney

General and rules applying to the Public Service Commission, the Broadcasting Authority, the Employment Commission and the Electoral Commission are all embodied in the Constitution. As far as these are concerned, the aim is to safeguard the independence of the Attorney General and the Chairmen of the aforementioned entities and this is partly ensured by the fact that their salaries are charged to the Consolidated Fund, as well as by regulating their terms of office and method of removal.

Generally one cannot say that the provisions of the Constitution conflict with any part of the *acquis*. Both the provisions dealing with fundamental human rights as well as those dealing with the internal structure of the State are in line with the political criteria and the *acquis* of the European Union. Nor would accession to the European Union affect basic principles such as the separation of powers - it can only make them stronger.

The Maltese Constitution's opening section declares Malta to be a neutral State on the basis of the principle of non-alignment. This has to be compared to the possibility of the European Union incorporating within its Common Foreign and Security Policy a defence dimension and consequently the effect of such a move on Malta's neutral status. While Malta is aware that adherence to the Common Foreign and Security Policy implies compliance with any joint actions and common positions adopted by the Council in the implementation of common strategies decided upon by the European Council, the evolution of the security dimension in recent months has reaffirmed the principle of Member States participating voluntarily and in a manner consistent with their constitutional obligations. As far as Malta is concerned, both the screening session regarding this chapter held last year and the negotiations held earlier this year have confirmed that Malta's neutrality will be safeguarded, a fact that enabled the provisional closure of this chapter. In any case, Malta's participation in this field must be considered against the backdrop of the precise modalities devised in this respect as well as the situation as it relates to neutral states already members of the European Union. On the basis of the above, it is logical to presume that any developments on common defence will take into consideration the specific status of neutral member countries.

The participation of Maltese representatives within the Union institutions does not raise any constitutional difficulties. It is foreseen that government departments will have the necessary set-up which would enable them to prepare for the implementation of the *acquis* and therefore also for participation in EU institutions. This preparation in the administrative capacity aspect at the national level would ensure the smooth functioning with, and participation in, the structures and institutions of the European Union.

On the other hand, the participation of the executive, the legislature and the judiciary in the implementation of EU law would not differ from that of other Member States. Upon accession, one would expect to find Maltese Ministers participating in the Council of Ministers, Maltese nationals elected to the European Parliament, participation by Maltese judges in the European Court of Justice and Maltese nationals actively involved in all other institutions where their representation is required, including the Commission. In the same manner it is presumed that the Maltese local councils would be able to participate within the Committee of the Regions. Malta does not have a federal government and its local councils have limited functions, mainly of an administrative nature and confined to the locality to which they belong. As a consequence, no constitutional question regarding which powers will remain with the federal government and which will remain with the regional government arise in the context of Malta's accession to the European Union.

An interesting point concerns the relationship between Community law and national law. As far as international treaties and agreements are concerned, Malta has a dualist system whereby an international agreement is not part of Maltese national law unless it is incorporated at a national level. The Ratification of Treaties Act provides that a treaty which affects:

- the status of Malta under international law or the maintenance or support of such status, or
- the security of Malta, its sovereignty, independence, unity or territorial integrity, or
- the relationship of Malta with any multinational organisation, agency, association or similar body

will not enter into force in Malta unless ratified. Furthermore, ratification takes place either by an Act of Parliament or by Resolution of the House of Representatives according to its subject and therefore its effect on national law.

On the other hand, upon accession to the European Union, provision would be made for the automatic application of certain European instruments, namely regulations, and for the mandatory implementation of the other instruments, thus bringing into effect the principle of the supremacy of European Union law.

This principle has to be verified in the context of Article 6 of the Constitution. This states that “subject to the provisions of sub-sections 7 and 9 of Sections 47 and 66 of the Constitution (transitive clauses that do not affect the issue in question) if any other law is inconsistent with the Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void”.

It is clear that, following accession, this provision has to be reconciled with the principle that community law has primacy over national law irrespective of source, status, institution or date of the law concerned. Any provision of the national legal system and any legislative, administrative or judicial practice, that in any way impairs the effectiveness of community law, will be deemed to be incompatible with community law.

It is, therefore, to be expected that issues arising out of a conflict of jurisdictions would be brought to the attention of the judicial organs of the State.

EUROPEAN INTEGRATION AND CONSTITUTIONAL LAW: THE SITUATION IN ROMANIA

Lucian BONDOC
Counsellor, Ministry of Foreign Affairs

In view of the importance and significance of a Constitution for a country's political and legal system, any questioning of its content or amendments to it are usually the subject of wide-ranging and lively national debate in the country concerned. This is true in the majority of states worldwide, and European countries are no exception to the rule.

In Romania's case, it should be noted that debate about revision of the Constitution with a view to the country's accession to the European Union is already under way. For the time being, however, no written drafts have been submitted and no clear options have been identified.

In view of the overall issues and the topics currently under debate in Romania, it is too early to say what will be the final shape and content of the constitutional amendments needed for Romania's accession to the European Union. However, it is already possible to identify the particular aspects of the situation in Romania, the problems raised and the avenues currently being explored.

I. The Romanian Constitution and the political and legal system based on it

The Romanian Constitution was adopted in 1991 by referendum following 18 months of debate. It is essentially modelled on the French, Spanish and Italian constitutional systems.

Under Romanian legal doctrine, the way in which the relationships between the various branches of power are regulated has led to a system that is semi-presidential or shows some semi-presidential traits.

Parliament is bicameral and both Chambers have the same powers. This arrangement is, in fact, the focus of much debate in Romania in connection with the preparations for accession to the EU. Modifications have been proposed several times. Although accession in itself does not require changes here, the acceleration of the process of legislative harmonisation calls for a more effective legislature.

The President is elected by direct universal suffrage for a four-year term, which may be renewed once.

Under Article 2(1) of the Constitution, "*national sovereignty resides with the Romanian people, who shall exercise it through its representative bodies and by referendum*".

The Constitution is the fundamental law, and all other legislation must comply with it. To this end, the Constitutional Court may rule *a priori* on the constitutionality of laws, before promulgation, upon notification by the President of Romania, the Presidents of the two Chambers, or at least 50 Deputies or 25 Senators, and *ex officio* on initiatives to revise the Constitution (Article 144 (1)). Constitutional supervision of decisions after they have been made may only be exercised in rulings on exceptions brought before the courts of law regarding the unconstitutionality of laws and orders (Article 144 (3)).

It should be noted that the procedure for amending the Constitution is relatively cumbersome. Revision of the Constitution may be initiated by the President of Romania on the proposal of the Government, by at least one quarter of the number of Deputies or Senators, as well as by at least 500 000 citizens with the right to vote. The citizens concerned must come from at least half of the counties in the country, and at least 20 000 signatures must be recorded in each of the respective counties (Article 146). The draft or proposed revision must be adopted by each of the Chambers by a majority of at least two-thirds of the members of each Chamber. If no agreement can be reached under the mediation procedure, the decision must be taken in a joint session by a majority of at least three-quarters of the number of Deputies

and Senators (Article 147 (1 and 2)). As stipulated in Article 147 (3), “the revision shall be final [only] after approval by a referendum...”.

It is difficult to tell whether the option chosen by the Constituent Assembly in 1991 was the most appropriate. Nevertheless, if the debate currently taking place in Romania were to lead to a referendum on amendments to the Constitution, it would be most appropriate to take this opportunity to settle the whole range of problems and introduce all the changes needed for accession to the EU. It should be noted here that Parliament recently passed Act No 3/2000 on the organisation of referendums. Under this act, a referendum must be held on the subject of accession to the EU. Taken together with the other provisions of the law, this means that a referendum would have to be held on all changes to the EU treaties to which Romania became a party and which included additional delegation of powers.

II. Problematic aspects of the Romanian Constitution regarding accession to the EU

The discussions in Romania about revision of the Constitution with a view to accession to the European Union have thrown up three main groups of problems:

- the relationship between domestic law and international law (A),
- the question of equal rights for EU citizens and Romanian citizens (B),
- the question of national sovereignty and possible restrictions on it (C).

A) The relationship between Community law, domestic law and the Romanian Constitution

As far as the relationship with international law is concerned, the Romanian Constitution includes two articles that lay down binding principles, viz Articles 11 and 20. Article 11 provides that treaties ratified by Parliament, according to the law, are part of national law. However, there is no specific provision that such treaties take precedence over domestic legislation. Yet Article 11 (1) provides that the Romanian State pledges to fulfil in good faith its obligations deriving from the treaties it has signed up to. The majority of Romanian legal writers are of the opinion that the provisions of Article 11 should be taken to mean that international law takes precedence over domestic law.

Article 20 of the 1991 Constitution, which refers to human rights treaties, is even more explicit. It lays down two fundamental principles in this respect:

- firstly, it provides that constitutional provisions concerning citizens’ rights and liberties must be interpreted and enforced in conformity with the Universal Declaration of Human Rights and with the other conventions and treaties to which Romania is party;
- secondly, it provides that, where any inconsistencies exist between domestic laws and the conventions and treaties on human rights to which Romania is party, the international regulations take precedence.

In this connection, it should be noted that various articles of the Universal Declaration of Human Rights and the European Convention on Human Rights, as well as Convention case-law, have frequently been invoked before the Constitutional Court. Moreover, since 1997, the

Constitutional Court has declared unconstitutional several provisions of legislation in the economic sphere and various articles of the Criminal Procedure Code.

Articles 11 and 20 therefore raise the important and sensitive issue of the provisions of international treaties taking precedence and applying directly under domestic law. Interpretation in the sense of the monist theory as the premise of international law is, in the final analysis, not entirely applicable in connection with accession to the European Union. Indeed, the EU includes both states with a dualist system (Germany) and states with a monist system (France). In all member states of the EU, some categories of Community legislation apply directly and take precedence over domestic legislation. European legal development involves very particular arrangements that have no equivalents among the various types of international co-operation, where clear requirements apply.

As shown by the case-law of the Court of Justice of the European Communities and of domestic courts, the question of Community law taking precedence over domestic law is no longer the subject of much debate. Relationships between Community law and national constitutions raise another issue, however, and the constitutions usually take precedence here (at present, it would seem that only Ireland has come out in favour of Community law taking absolute precedence over domestic law, including the Constitution).

Articles 11 and 20 of the Romanian Constitution show that these issues are not taboo subjects in Romania and open up avenues to be explored in connection with accession. There is now a need to begin looking at the possibilities for extending the scope of these articles accordingly and strengthening them with a view to ensuring that the existing body of Community law that must be adopted takes precedence and applies directly. As shown by the choices made by certain member states, the most appropriate solution might be to lay down this rule, while keeping the wording relatively general so as to maintain the necessary flexibility in these areas.

B) The question of equal rights for EU citizens and Romanian citizens

In the course of the discussions in Romania on the subject of amending the Constitution with a view to accession, three main points have been raised in connection with this principle.

1. The question of land ownership by foreigners

The 1991 Romanian Constitution (like those of other candidate countries such as Bulgaria, etc) explicitly prohibits aliens and stateless persons from owning land in Romania (Article 41 (2)). It should be noted that, in 1997, the Constitutional Court was asked to rule on the constitutionality of legislation enabling firms set up in Romania entirely by foreign nationals to purchase land. The Court took a realistic approach and dismissed the objections. Public opinion in this connection is more relaxed today and debate on the issue is increasingly focusing on the economic aspects.

It should be pointed out that compliance with the European Association Agreement between Romania and the European Communities and their member states also requires revision of Article 41 (2). If the Romanian Constitution were not to be amended, and even if the freedom of establishment provided for in the association agreement could not be implemented in full, it would still have to be in the event of accession.

2. The question of the right to vote and stand for election in local elections

Article 34 (1) of the Romanian Constitution provides that “every *citizen* having attained the age of 18... shall have the right to vote”. With regard to the right to stand for election, Article 35 (1) provides that “eligibility is granted to all citizens having the right to vote, who meet the requirements in Article 16 (3)...”. Lastly, Article 16 (3) provides that “access to a public office or dignity, civil or military, is granted to persons whose *citizenship is only and exclusively Romanian*, and whose domicile is in Romania”. These three articles therefore reserve the respective rights solely to Romanian citizens and will have to be amended either explicitly or implicitly in view of the existing Community legislation on the matter that will have to be adopted in the event of accession.

3. The extradition of Romanian citizens

Article 19 of the Constitution prohibits the extradition or expulsion of Romanian citizens. Given the existing Community justice and home affairs legislation in this area, this point will also have to be reconsidered prior to accession.

C) The question of national sovereignty in relation to accession and the Romanian Constitution

The sovereignty issue is the question at the heart of the debate, and underlies all the discussions about the effects of accession to the European Union. Contrary to what is sometimes said on the matter, accession to the EU does not mean candidate states having to transfer sovereignty. Rather, it is a matter of pooling certain powers with the other member states or delegating certain state powers. Member states are free to withdraw from the European Union at any time. From a legal point of view, they have all the powers and discretion for decision-making associated with the status of sovereign states that are separate entities under international law.

As far as the Romanian Constitution is concerned, it should be noted that it does not include any provisions on the possibility of such delegations of power or on arrangements for them. The Romanian Constitution will no doubt therefore have to be amended here, with the most appropriate solution perhaps being the addition of a general provision, a solution already adopted by several EU member states.

III. The main avenues for discussion regarding practical arrangements for amending the Romanian Constitution with a view to accession

In view of the substance of the constitutional debate in Romania and the various aspects raised, it can be seen that there are issues to be discussed about amendments not actually made necessary by accession itself, such as the reorganisation of Parliament to make it more effective and the procedure for revising the Constitution. At the same time, there are issues for discussion concerning areas where amendments would appear to be necessary before accession to the European Union can take place. These include the questions of the relationship between Community law and domestic law, equal rights for EU citizens and Romanian citizens (the right to vote and stand for election, the right to purchase land) and sovereignty (delegation of the exercise of certain powers). As far as the practical arrangements for the amendments are concerned, Romanian decision-makers are still trying to

find the answers. Although the solutions adopted by the member states are far from uniform, several categories of possible solutions can be identified.

The first solution could be the ad hoc amendment of the provisions in question and the addition of a provision on the possibility of delegating the exercise of certain powers to the Communities. A solution adopted by certain member states (France, Austria) is the inclusion in the Constitution of a separate chapter or section exclusively devoted to framing relations with the European Community.

Obviously, if a constitution included provisions that were totally out of line with the requirements for accession, consideration could also be given to a composite approach. This is perhaps the option that would be most appropriate in Romania's case, which has some similarities with the French situation. However, it is too early to decide one way or the other.

At any rate, from a constitutional point of view and given the rapidly changing and complex situation, the emphasis should be placed on greater flexibility in the rules and regulations so as to enable the European political and legal framework of the enlarged Union to evolve freely at its own pace.

ESTONIAN CONSTITUTIONAL LAW AND EUROPEAN INTEGRATION

Mr Lauri Madise
Advisor, Head of Secretariat,
Constitutional Committee of the Riigikogu

The present report comprises the following:

Firstly, the issue of sovereignty and limitations of sovereignty, which form the basis for Estonia's membership in the European Union, will be examined because the issue of delegating Estonia's sovereignty is of great importance for the implementation of EU law in Estonia.

Secondly, a brief overview will be given of those possible problems relating to constitutional law which may occur in exercising the state powers in Estonia pursuant to the European Union law.

Finally, various procedural and technical considerations of making possible amendments to the Estonian Constitution will be discussed.

1. Estonia's Sovereignty and the Prospects for the Integration of Estonia into the Legal Framework of the European Union.

1.1 Issues related to Sovereignty, Law and the Constitution

When analysing the impact of Estonia's accession to the European Union upon Estonian constitutional law from the viewpoint of the mutual influence of two legal systems, one

should start with the analysis of the notion "the supreme power of state" and the relation thereof to the legal system.

Exercise of sovereignty may be defined as an act planned by an individual with the aim of producing a legal effect, for example, the establishment of a binding legal norm. According to this approach, the sovereign power of state as one of the essential elements of the state, is a tool utilised in the name of the people to create rules and legislation. As a result of this, the embodiment of sovereignty may, through a future legal act, amend or adapt valid legislation to changed circumstances. At the same time, sovereignty is both insurmountable – in the sense that an act of sovereignty cannot be changed by any mere unauthorised individual¹ - and indisputable (in that a sovereign act may not be appealed)². Within a modern democratic governmental system, based on the rule of law and in which the legislative activity of state bodies is contained within a strict framework of a hierarchy of constitutional legal norms, the exercise of sovereignty (expressed by the exercise of *pouvoir constituant*) is subject to such principles. Whilst sovereignty is an initial justification for public power and legislation finding its normative basis in the Constitution, an analysis of the relation between EU and a member state's laws, amounts to the issue of sovereignty and other questions relating not only to the concept of superiority of EU legislation within the legal system of a member state, but also to the constitutional regulation of such through domestic law.

1.2 National Sovereignty and the Constitution of Estonia.

The principles of democracy, rule of law and national sovereignty formed the basis for the elaboration of the Constitution of the Republic of Estonia³, adopted at referendum in 1992. In contrast to numerous other European countries, the Estonian Constitution does not foresee the possibility of delegating the exercise of national sovereignty to international organisations.

The principle of national sovereignty is stipulated by Article 1 of the Constitution:

Article 1.§1.

Estonia is an independent and sovereign democratic Republic wherein the supreme power of state is vested in the people.

The independence and sovereignty of Estonia are timeless and inalienable.

The notions of "independence" and "sovereignty" within the Constitution are defined as follows:

¹ *Within the constitutional model, if the supreme power of state is vested in the people, the constitutional state bodies may amend individual provisions of the Constitution, but they cannot repeal or amend its general principles; this is achieved by the embodiment of the supreme power of state.*

² *The constitution adopted by the embodiment of supreme power of state cannot be disputed by any organ of power.*

³ *Riigi Teataja 1992, No.26, Art. 349. Translation into English (without force of law) – Estonian Legislation in Translation. Legal Acts of Estonia No.1 January 1996.*

- 1) Estonia is an independent state, a subject of international law, and as such, may not form part of another state, for example through the practice of confederation.
- 2) Furthermore, the Estonian state is not subject to the legal power of any superior instances. Such provision therefore stipulates the Republic of Estonia as the embodiment of national sovereignty in the traditional sense of the concept "sovereignty".⁴ The formulation of the Estonian Constitution does not allow a free interpretation of the term "sovereignty" according to one's philosophical convictions, because "independence" is a quality which describes the existence and status of a state and which itself can be determined through legal criteria. In international practice, states may *de facto* fall under the influence of bigger and stronger powers, and *de jure* lose sovereignty, should it render binding the legal acts of another state by signing an agreement. Political scientists may allege that nowadays all states are both politically and economically interdependent. Similarly, states also conclude mutually binding agreements. This does not however mean that the term "sovereignty" is legally inappropriate. Strict observance of the obligations arising from international law, created by international treaties, is an inseparable characteristic of national sovereignty today and forms the basis for legal personality in international law. Similarly, the economic interdependence of states can be described "as a natural course of events". It is, however, quite a different scenario as regards independence, should a state submit itself by consent to the unilateral domination by another subject of international law.

Article 56 of the Constitution defines the Riigikogu elections and referenda as the exercise of the supreme power of state. The wording of Article 1 "wherein the supreme power of state is vested in the people" means that no national or international authority which has been granted authority on either an international level or by the citizens of a foreign state, may have higher power in Estonia than the Estonian people and the Riigikogu (Parliament), the sole authority to whom citizens have delegated their powers.

The second sentence of Article 1 of the Constitution confirms the principle contained in the first and further excludes the transfer of sovereign powers of the state, which would render it impossible for Estonia to resume the referred competence. In this case the state loses its power to decide upon competence.

1.3 Requirements arising from EU Law

In international practice, the European Union is the most developed international organisation with respect to its achieved level of integration. It differs considerably from international organisations which are based on a principle of co-operation; the so-called "co-operation organisations". The aim of such is to co-ordinate the member states' policies in certain areas, whereas its own policy is determined by the states themselves, exercising their own sovereign power of state. The main activity of such co-operative organisations remains the gathering and exchange of information, the forwarding of recommendatory guidelines to its members and occasional decision-making of a more binding nature with the prior consent of the parties to the dispute. Organisations based on the principle of integration in contrast develop their own common policy for which implementation competencies already exist. This presumes that the political and legal formation of the organisation – as distinct from its member states –

⁴ *International law often equates the terms "sovereignty" and "independence".*

ensures parallel functions that traditionally have been considered as falling within the competences of a state.

The European Union comprises three distinct organisations that have the status of a legal person which have been established by an agreement, and which through common bodies have developed a legal system, which is itself autonomous and sovereign with respect to international and domestic laws. The relation between this system of laws and national law is characterised by two principles: firstly, *direct applicability of European law within the territories of member states*; and secondly, *the supremacy of such to national rules*.

Direct applicability of European law means that the applicability of legal norms as established by EU organs upon the basis of basic agreements does not depend upon measures for transposition into national law being created by domestic organs. European laws thus create immediate rights and obligations for the organs and member states. Individuals can exercise these rights before the authorities and individuals in courts of a member state. (As a result of such, a new stratum of individuals, different from that of the citizens of other states, is formed.) This quality of EU norms was first stated in the decision of the European Court of Justice of Van Gend en Loos decision, and later expanded upon in the case of Simmenthal in 1978.

The **supremacy** of EU law was first expressed in 1964 in the European Court of Justice decision in the case of Costa v. ENEL, which stated that "integration of a norm proceeding from a Community law source makes it impossible to refer to any subsequent unilateral measure". In the later *Internationale Handelsgesellschaft* decision, the Court clearly states the supremacy of the Community norms also constitutional rules: "reference to restrictions of fundamental rights established by a constitution of a member state or to a constitutional principles of a state cannot prejudice the validity of Community legislation or the effect thereof on the territory of the state".

Proceeding from the above, it would appear that EU membership would considerably interfere with Estonia's independence. Up until the present, the power of state has been restricted by the Constitution, yet in the future the exercise of the Estonian power of state would prove to be essentially limited by foreign legislative, executive and judicial authorities. At international level, national sovereignty is expressed through participation in interstate relations based not only upon the principle of reciprocity and equal rights, but also upon the exercise of rights as a subject of international law (the exercise of rights to enter agreements and undertake obligations as a subject of international law). By becoming a member of the European Union, however, in areas within its competences the Union, rather than a member state, becomes active within the international relations of Estonia with other countries. Furthermore, there would not be relations between member states as based upon the principle of equal rights. In the legislative body of the European Union (the Council), whilst decisions are made in many areas through majority voting, member states do have different numbers of votes, varying from 2 to 10.

Although the German Constitutional Court stated in 1993 that the European Union, in contrast to its member states, does not have "competence over competence", the power to decide upon the extent of state sovereign power is definitely excluded from the competences of a state acceding to the European Union.

In order to ensure an application of EU law throughout the Union, the final instance to assess the lawfulness and effect of European legislation is the Court of Justice which bases its judgments upon the Treaties establishing the Union. The final opportunity to determine the effect of European legislation and thus also the legal limits of European activities, is a body of the European Union itself. According to EU law, it is no longer possible for a member state to unilaterally resume its sovereign power of state by withdrawal from the European Union.

Considering the above, accession to the European Union and subordination to EU law will mean for a member state a transfer of powers of state – the essence of sovereignty – to the bodies of the European Union. According to the Estonian Constitution, such a step would not be possible.

2. Some Other Constitutional Issues

2.1. Application of European Union legislation

In accordance with Article 123 paragraph 2 of the Estonian Constitution, international treaties ratified by the Riigikogu will apply, even if they are in conflict with laws or other legislation of Estonia.⁵ How is it possible to ensure the direct applicability of EU legislation and its supremacy to Estonian legal acts? Pursuant to Article 3 of the Estonian Constitution, the powers of state are exercised solely pursuant to the Constitution and laws which are in conformity therewith. According to Article 152, for example, courts will not apply any law or other legislation which is in conflict with the Constitution. The same article also states that the Supreme Court⁶ must declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution. This is not in conformity with the principle of the supremacy of EU law.

In ensuring the implementation of Community law in Estonia, it is essential to make a clear distinction between a mere delegation of power, which would remain subject to the ultimate control of the delegating authority and a true transfer of sovereignty, which though limited as regards its area of operation, would be absolute within that area. According to the European Court, only the latter fully complies with the requirements of membership. If, pursuant to the introduction to our discussion, the transfer of sovereign powers of state, including legislative power, were established in plain words, the supremacy of EU legislation could be derived from this clause. Such an approach has not however found unanimous approval from member states. Pursuant to the aforementioned German Constitutional Court decision, the Community cannot take for itself greater powers than those granted by Treaty. If so, any resulting legislation would be legally invalid in Germany, and the German Government would be constitutionally prohibited from enforcing it. If the provision of the Estonian Constitution establishing a transfer of the power of state to, and membership of, the European Union, were to include obligations incumbent upon the Union itself⁷, it could be argued that the

⁵ *Article 123 paragraph 1 does not however allow the Republic of Estonia to conclude international treaties which are in conflict with the Constitution.*

⁶ *Estonian constitutional order does not establish a separate constitutional court; the Supreme Court as the highest instance is the court of constitutional review.*

⁷ *E.g. it follows from the section 23 (1) of the German Constitution, that for the transfer of the powers of state the European Union should respect certain principles (the principles of democracy, rule of law and subsidiarity).*

Constitution reserves for the Supreme Court the power of reviewing Community legislation so as to ensure that it remains within the bounds of the powers conferred upon the Community.

2.2. Protection of Fundamental Rights and Freedoms

Article 6 paragraph 2 of the Treaty on European Union stipulates that:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

Fundamental rights and freedoms have a very important place in Estonia – the relevant chapter is the largest in the Constitution. The rights, freedoms and duties set out in this Chapter do not preclude "other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy and the rule of law" (Article 10). The general rule for the restriction of rights and freedoms is set out in Article 11, which stipulates that "Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted". Article 15, paragraph 2 requires that courts observe the Constitution and declare unconstitutional any norm, law or other procedure which violates inherent rights and freedoms or which is otherwise in conflict with the Constitution. Considering not only the principle of supremacy of EU law but also the fact that the exclusive right to decide upon the lawfulness of the legislation of the European Union rests with the European Court of Justice, the Estonian courts have no such rights with respect to the legislation of the European Union. However, presuming that the European Court of Justice assesses the conformity of EU legislation to the European Convention on Human Rights and to the rights proceeding from constitutional traditions of the member states on the basis of the Treaty on European Union, such a fundamental right or freedom proceeding from the Estonian Constitution, which would not conform to the characteristics set out in Article 6.2. of the Treaty on European Union, does not form a part of EU law. Therefore, the specific fundamental rights of the Estonian constitutional law would not be protected against the legislative activity of the European Union in the European Court of Justice.

With respect to provisions ensuring free movement of persons, services and capital as stipulated by EC Treaty, there may exist some problems with certain articles of the Estonian Constitution, which, although protecting some rights important to the European Union, grant the legislative the authority to restrict such rights with respect to persons who are not citizens of Estonia. Articles 28, 29 and 31 of the Constitution permit the restriction of the rights of aliens/foreign citizens to social assistance, to the right to freely choose one's sphere of activity, profession and place of work, as well as to the right to engage in enterprise and to form commercial undertakings and unions. Article 32 paragraphs states the following: "Classes of property which, in the public interest, may be acquired in Estonia only by Estonian citizens, some categories of legal persons, local governments, or the Estonian state may be provided by law". Whilst the above authority to impose restrictions allows interpretation according to which the transfer of sovereign powers of state to the bodies of the European Union also applies to legislation with respect to nationals of the European Union, this leaves the Estonian legislative power the right to exercise this authority only with respect

to third countries. Article 48 of the Constitution may therefore clearly require making additional amendments to the Constitution. Pursuant to Article 48 of the Constitution, for example, only Estonian citizens may belong to political parties. Article 19 of the EC Treaty stipulates that a citizen of the European Union has the right to participate in local elections in the Member State in which he or she resides, under the same conditions as nationals of that state. Article 12 of the same Treaty prohibits discrimination in any form on the basis of citizenship in areas covered by the Treaty.

Should contradictions between the provisions of the Constitution and those of EU law in areas important from the viewpoint of EC Treaty be removed, there will still remain a broader problem: how the Estonian state can ensure the fulfilment of the task set out in the Preamble of the Constitution, guaranteeing the preservation of the Estonian nation and culture under the potential conditions of free movement of goods, persons, services and capital.

2.3. Competence of Constitutional State Authorities in Acts of the European Union

A basic feature of the legislative process of the European Union is that legislative power is vested at the intergovernmental level. The Council, which exercises the legislative power of the European Union consists of the representatives of member states at ministerial level. A member state thus participates in the exercise of legislative powers of the European Union through its executive power. The importance of this from the point of view of constitutional law of member states proceeds firstly from the fact that the infringement of sovereignty of member states is more apparent upon exercising legislative state power. From a domestic point of view, the issue of defining relations between the legislative representative body and the highest body of the executive power is very significant.

From the point of view of the competencies of constitutional powers of state, Estonian democracy is parliamentary in form. In accordance with the principle of legality of administration,⁸ the right of the Government of the Republic and ministers to issue regulations is restricted. Pursuant to Articles 87 paragraph 6 and 94 paragraph 2 of the Constitution, the Government of the Republic or a minister shall issue regulations on the basis of and for the implementation of legislation. This corresponds to the idea, according to which legal regulation of relationships within society is totally covered by laws, that the executive power, without the possibility to regulate certain spheres independently, acts solely in regard to issues determined by the legislator and only imposes rules pertaining to the procedure of implementation of laws, rather than those pertaining to the grounds.

Upon implementation of European Union law we have to bear in mind that with the participation of Estonian executive state power, European Union regulations, which are directly applicable in Estonia, as well as directives, which are binding on a state as to their objectives, shall be passed and that this will affect the balance of relations between the executive and legislative powers and will cause a certain deficit of democracy within the legislative process. The situation in which the legislative state power, when implementing the principal solutions established by the European Union, will find itself does not meet the status of a representative body of Estonian citizens in Estonian constitutional law.

⁸ *This principle is expressed in Article 3 paragraph 1 of the Constitution, pursuant to which the powers of the state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith.*

In order to compensate to some extent for the decreasing importance of citizen representation in the creation of positive law in Estonia, a provision should be added to the Constitution to the effect of increasing the efficiency of the participation of the Riigikogu in the procedure of drafting European Union legislation. This provision would provide for the involvement of the Riigikogu in representing the official views of the state by the Government of the Republic and the ministers, and the provisions should contain an obligation for the Government of the Republic to present to the Riigikogu all drafts of legislation initiated by the European Union Commission, which will create obligations for Estonia, so that the Riigikogu could express its opinion. Certainly, the Government of the Republic should, through a working body of the Riigikogu (a committee), guarantee that the Riigikogu is informed of all important issues and developments in the activities of the European Union institutions as early as possible. The question of whether and to what extent the views of the Riigikogu are binding on Estonia's representative in the European Union Council also has to be answered. The precise procedure for co-operation between the Government of the Republic and the Riigikogu upon exercising the rights and fulfilling obligations deriving from European Union membership should be determined by law.

2.4. Monetary Union and the Bank of Estonia

Article 111 of Estonian Constitution stipulates: "The Bank of Estonia has the sole right to issue Estonian currency. The Bank of Estonia shall regulate currency circulation and shall uphold the stability of the national currency."

Thus, the national bank of emission and its exclusive competence to emit national currency has been established as a constitutional power of state, and the circulation of national currency is guaranteed in the state.

In addition to the European Central Bank, pursuant to Article 107 (consolidated version) of the EC Treaty, a European System of Central Banks shall be set up, which shall, in addition to the European Central Bank, also embrace the central banks of member states. Pursuant to Article 106 of the Treaty, the central banks of states may also produce bank notes, if the European central bank has the exclusive right to issue authorisation of the bank note. Pursuant to Article 14.3 of the European System of Central Banks and the European Central Bank, the central banks of member states are an inseparable part of the European System of Central Banks and they shall act pursuant to the directives and guidelines of the European Central Bank. The legal status of the Bank of Estonia is expressed in Article 112 of the Constitution, which provides that "the Bank of Estonia shall act pursuant to law and shall report to the Riigikogu."

There will therefore be a direct conflict between the provisions of the Treaties concerning the establishment of European Monetary Union and the aforementioned provisions of the Constitution. It seems improper to interpret the "Estonian currency", referred to in Article 111 of the Constitution, as the common currency of the European Union, as the "currency of Estonia" is one of the attributes of independent statehood. Unlike in the case of delegating legislative power, upon which Estonian parliament will retain similar authority⁹, membership

⁹ Under Article 59 of the Constitution the Riigikogu will continue to exercise legislative stete power (Article 59 - "Legislative power is vested in the Riigikogu").

of the European Union, including the monetary union, wholly precludes the application of Article 111 of the Constitution of Estonia.

3. Legal Framework for Interpretation and Possible Constitutional Amendment

3.1. Legal developments in Estonia's integration into the European Union

On 12 June 1995 the association agreement (Europe Agreement) was concluded between the European Communities Member States and the Republic of Estonia. The Riigikogu passed the Act upon its ratification on 1 August 1995. Pursuant to Article 1 of this Agreement, one of the objectives of the established association is to provide an appropriate framework for the gradual integration of Estonia into the European Union.

On 24 November 1995 the Prime Minister of the Republic of Estonia, Tiit Vähi, pursuant to Article O¹⁰ of the Treaty on European Union, submitted an application to Mr Javier Solana, President of the Council of the European Union requesting that Estonia be admitted as a member of the European Union. Since 1996 the Government of the Republic has each year approved a National Plan for the Adoption of the Acquis.¹¹ Although the requirements of Community law may cause some constitutional problems, it has not, up until now, hampered the progress of the harmonisation of the legislation, considering that the enforcement and implementation of several legal acts to be drafted and adopted in the course of the harmonisation process has been scheduled for a period following Estonia's accession to the European Union. At present the Europe Agreement forms the main legal basis for the integration process.

Upon proposal of the constitutional committee of the Riigikogu, on 14 May 1996 the Government of the Republic set up a commission for legal expertise on the Constitution, stressing that one of the tasks of the commission was to achieve the conformity of constitutional provisions with the constitutional norms of the European Union, which are binding on member states. The report, which was prepared as a result of the work of the commission, was submitted to the constitutional committee by Paul Varul, chairman of the commission and the then Minister of Justice, on 1 June 1998. In determining the conformity of the Estonian Constitution to the requirements proceeding from European Union law, foreign experts were of great assistance. On behalf of the Venice Commission of the Council of Europe, expert opinions were presented by Matti Niemivuo and Luis Lopez Guerra, and on the basis of these opinions, the European Commission for Democracy through Law gave its evaluation (CDL (98) 54¹²) of an interim report prepared by the governmental commission, in which possible constitutional amendments resulting from possible accession were proposed. The interim report of the governmental commission was also assessed by SIGMA expert Guy Caarcassone and an expert of German Legal Co-operation Foundation Dr. Hubert Beemelmans. In addition, the analyses of the Estonian Constitution from the point of view of

¹⁰ Presently Article 49.

¹¹ An overview of the fulfilment of the objectives established in the National Plan in the field of the harmonisation of legislation can be found in the Estonian Progress Report for the Commission Review (<http://www.eib.re/english/index.html>).

¹² CDL (98) 54 – Draft Opinion on Constitutional Issues involved in Estonia's Accession to the European Union.

the European Union, were presented by SIGMA expert professor John Pierce Gardner and on behalf of European Union Phare programme by the law office of McKenna & Co. The aforementioned opinions were of great help not only in preparation of the final report of the governmental commission, but also in preparation of this report. In his report, the governmental commission gave the opinion that the constitutional norms of the European Union are not in conformity with Estonian Constitution.

3.2. Legal considerations for the amendment of the Constitution

Pursuant to Article 123 of the Constitution, the Republic of Estonia shall not conclude international treaties that are in conflict with the Constitution. If it is to be considered that joining the European Union would not be in conformity with the Estonian Constitution, the Constitution needs prior amendment.

3.2.1. Considerations Proceeding from Legislative Standards

The above was an overview of the main spheres in which problems may arise in Estonian constitutional law, deriving from the requirements of European Union law.

A more detailed analysis of the Constitution may bring out the numerous provisions which, if taken separately, are in conflict with European Union law. Bearing in mind the element of national culture, which is inseparable from the letter of the Constitution, the form of constitutional amendments is of enormous importance. The face of the Constitution would therefore be affected if the letter of the Constitution were to be overloaded with provisions directly concerning the European Union. Possible amendments to the text of the Constitution in regard to the European Union should constitute but a few additions, which would eliminate the effect of presently valid constitutional provisions in the areas where European law will dictate different rules. The effect of a provision to be added to the constitution establishing, for example, for the possibility to restrict Estonian sovereignty and to delegate some state powers to the organs of the European Union should perhaps do away with the conflict with European Union law in regard to several other constitutional provisions which provide for sovereign authority of Estonian constitutional bodies of state power.

Having regard to constitutional law of different countries, it is possible to conclude that the set of high-ranking norms establishing the basic order in a state, cannot be found in one sole legal act. In Estonia, there is also for example, in addition to the constitution, the Constitution of the Republic of Estonia Implementation Act,¹³ adopted alongside the Constitution and pursuant to identical procedure. Bearing this in mind, it is possible to legalise the accession to the European Union by a separate law, which should be passed pursuant to the procedure required for the adoption of a law amending the Constitution.

3.2.2. How to Arrange the Amendment of Constitution?

Article 163 of the Estonian Constitution provides that the Constitution shall be amended by an Act which has been passed either by a referendum, by two successive memberships of the

¹³ *Riigi Teataja* 1992, No.26, Art. 350. Translation into English (without force of law) – *Estonian Legislation in Translation. Legal Acts of Estonia No.1 January 1996.*

Riigikogu or by the Riigikogu as a matter of urgency. At the same time, under Article 162 of the Constitution, Chapter I "General Provisions" and Chapter XV "Amendment of the Constitution" of the Constitution may only be amended after a referendum.

In order to make constitutional amendments related to European Union, the only possible way seems to be a referendum, irrespective of which Chapter of the Constitution is amended. If ordinary amendments relating to competencies of constitutional bodies and balance of powers do not eliminate the legitimate link between the people and the exercise of the powers of state (they can only amend the forms of legitimising bodies and decisions), then submission of sovereign competencies to international level would substantially restrict the scope of competence of the people as the carrier of supreme state power and, in certain spheres, eliminates the legitimate link of the exercise of state powers to the Estonian people. Although Article 106 of the Constitution states that concerning issues of ratification and denunciation of international treaties, citizens – upon deciding on accession to the European Union at a referendum – would not decide in favour of the adoption of an Act ratifying the accession treaty, but rather vote for a domestic Act amending the Constitution itself.

The time period between the accession to European Union and amending the Constitution by a referendum should be as small as possible. This would better enable conclusions to be drawn as to whether the legal and political character of the European Union to which Estonia is acceding meets the will of the people and the information which served as the basis for the will, as expressed at referendum. This is why prior amendment of the Constitution by a referendum is not expedient; it is inadvisable to obtain the people's consent to join a European Union in a distant future, a Union of which the legal and political character may not remain constant from the time the referendum was held.

As long as the Constitution is not amended, we will continue to be in a situation where the steps taken by the Government of the Estonian Republic in order to prepare for the accession have a highly questionable constitutional ground. The accession negotiations with the European Union and the harmonisation of laws conducted in Estonia demand not only volumes of work but also considerable amount of budgetary resources to form the administrative machinery. At the same time, another approach is also possible, pursuant to which the constitutional reform to enable accession to European Union should be two-phased. In the nearest future, a provision should be added which would legitimise the steps preparatory to accession and aimed towards restricting sovereignty. Nevertheless, the provisions regulating more specifically the participation in the work of European Union and provisions solving specific constitutional issues (for example, co-operation between the government and the parliament and free movement of persons) should still be adopted immediately prior to accession, in order to guarantee Estonia's participation pursuant to the legal order that has developed within the European Union at the time of accession.

EUROPEAN INTEGRATION AND CONSTITUTIONAL LAW: THE SITUATION IN LATVIA

**Mr Aivars Endzins,
President of the Constitutional Court of the Republic of Latvia,
Member of the Venice Commission**

Issues connected with integration of Latvia into Europe are being debated continuously. The term "Europe" is heard at every Parliament session; newspapers, radio and television mention it every day. The absolute majority of politicians and mass media work with the objective that integration into Europe and joining the European Union is a must, not to be discussed and talked over any more. Another issue "how to do it" is the topical one at present. How to do it in each specific sector and in each specific subject.

In my report I shall dwell upon several problems connected with integration of Latvia into Europe and the Constitution of the Republic of Latvia. During the last year the attention of Latvian scientists in the law sector has been intensively turned to the above issue: the topic has been discussed at several seminars, numerous publications were dedicated to it.

As is well known, Latvia, when renewing its independence, also renewed the validity of the Constitution of the Republic of Latvia, adopted in 1922. Thus, if compared with other candidate states in which constitutions, adopted in the last decade are effective, Latvia finds itself in a unique situation.

As I have repeatedly stressed at international seminars, renovation of the validity of the old Constitution had very many advantages, though several shortcomings as well. On the one hand, several norms had to be amended or supplemented, as well as a new Chapter on Fundamental Human Rights incorporated into it. On the other hand, there is a necessity to interpret the enclosed terms in compliance with the demands of up-to-date democracy. Much has been done in both cases, but this was not carried out as quickly as we had initially hoped.

A number of amendments to the Constitution have been elaborated to approximate its norms to those of the standards of European democracy:

- 1) the right to vote, which previously was granted to fully-fledged citizens who were 21 years old, but now reads that Latvian citizens who have attained 18 years of age shall be entitled to vote (Article 8)¹⁴;
- 2) the institution of the Constitutional Court has been fixed in the Constitution (Article 85)¹⁵;
- 3) the period of authority of the President of State and the Parliament has been prolonged from three to four years¹⁶;
- 4) the Constitution has been supplemented with Chapter 8 "Fundamental Human Rights"¹⁷.

¹⁴ *Law Amendment to the Republic of Latvia Constitution adopted 27.01.1994, published in Latvijas Vēstnesis 12.02.1994.*

¹⁵ *Law Amendment to the Republic of Latvia Constitution, adopted 05.06.1996, published in Latvijas Vēstnesis 12.06.1996.*

¹⁶ *Law Amendment to the Republic of Latvia Constitution, adopted 04.12.1997, published in Latvijas Vēstnesis 17.12.1997.*

¹⁷ *Law Amendment to the Republic of Latvia Constitution, adopted 15.10.1998, published in Latvijas Vēstnesis 23.10.1998/*

There is currently much discussion on new amendments to the Constitution, connected with accession to the European Union. Several viewpoints on the elaboration of a new Constitution have been expressed. However, the viewpoints have not received the support of Latvian scientists in the law sector or officials of the state institutions. Thus, at the meeting of representatives of state institutions and university teaching staff on amendments to the Constitution, organised by the State President in June 2000, an agreement was reached that amendments to the existing Constitution shall be minimal.

The discussion had several mutually connected and contradictory dimensions.

The very first such issue is the question whether joining the European Union restricts the independence of Latvia and the sovereign power of the people, fixed in the Constitution.

I shall recall some norms of the Constitution of the Republic of Latvia :

“Article 1: Latvia shall be an independent and democratic Republic”.

“Article 2: The sovereign power of the State of Latvia shall belong to the People of Latvia”.

“Article 77: If the Parliament has amended the first, second... Articles or Article 77 of the Constitution, then such amendments, in order to take legal effect, must be affirmed by a referendum”.

“Article 79 (the first part): Amendments to the Constitution submitted to a referendum, shall be adopted, if at least one-half of those who have the right to vote have declared themselves in their favour”.

During the last year, Latvian lawyers have expressed opposite viewpoints on whether and how much joining the European Union will restrict the independence of Latvia and the sovereign power of the people, fixed in Articles 1 and 2 of the Constitution.

The first viewpoint¹⁸ is that joining the European Union restricts the right of sovereign power of the People of Latvia, as – when becoming a member state – Latvia will delegate part of its sovereignty to the institutions of the European Union. It results from the notion of the sovereign power of the state, which establishes the power of the state as the highest power. When joining the European Union, the People of Latvia and its representatives will not be the only subjects, authorised to issue binding acts in the territory of Latvia – institutions of the European Union shall also possess the above right. Thus, the highest power in Latvia will belong not only to the Latvian people but also to the institutions of the European Union.

The authors of the above viewpoint substantiate it with the practice of the European Court of Justice; namely with the conclusion, established by practice, that “transition of states from the national legal system to the legal system of the Union, which comprises rights and

¹⁸ See A.Buka *“On essential amendments to the Constitution” – Latvijas Vēstnesis, 2000. No. 71/72*

obligations, resulting from the agreements of the European Union, also brings forth constant restriction of sovereign rights of the states.”¹⁹

The theoretic conclusion that joining the European Union restricts the sovereign power of the Latvian people, established in Article 2 of the Constitution, is connected with essential constitutionally legal consequences. Namely, as I have already pointed out, the respective Article may be amended only in a referendum. Besides, in compliance with Article 79 of the Constitution “Amendments to the Constitution, submitted to a referendum, shall be adopted, if at least half of those who have the right to vote have declared themselves to be in their favour.” Thus, in the case of a referendum, the votes of those who have the right to vote but are not taking part in it are automatically considered to be “against”. At the present moment opinion polls show that about one third of respondents would vote “for”, another one third “against”, but the others have no definite viewpoint. Thus, a situation may arise that the greatest part of the nation votes “for” the European Union, but the result depends on people not taking part in a referendum.

To solve the above problem it is offered that the Parliament – as part of an adequate procedure – shall amend the first part of Article 79 of the Constitution, which envisages the qualified majority. The authors of the idea are of the viewpoint that just as is the case with “ordinary” laws, the draft, submitted to referendum, shall be adopted if the number of voters reaches at least half of those who took part at the elections of the last Parliament and if the majority votes for adoption of the draft.

The second²⁰ viewpoint on the issue whether joining the European Union restricts Latvian independence and the power of sovereignty of the people established by Articles 1 and 2 of the Constitution is based upon up-to-date and flexible interpretation of Articles 1 and 2. It envisages that in the case of Latvia becoming a member state, it should only modify the conception of the notion of “independence”, mentioned in Article 1. However, this should not be confused with the concept of “independence-dependence”, but only as a certain quantitative lessening.

In its turn, “sovereignty” within the meaning of Article 2 of the Constitution is not forfeited. In point of fact sovereignty means the right of “having the last word”. When joining the European Union, the member states by an agreement delegate a certain part of their competence – and thus independence – to the institutions of the European Union. The European Union is based upon international agreements and the members of it are separate states. The member states willingly admit being subordinated to the directives of the Union (even in the case that they do not necessarily agree with such), hoping to get some benefit after a certain period of time. However the states retain the right to interrupt the “limited independence” by discontinuing their membership in the European Union. Thus, the “last word” – and that means sovereignty – remains with the member states.

¹⁹ *European Court of Justice. Case 6/64, Costa v. ENEL (1964) ECR 585*

²⁰ *See “The Constitution and the European Union” by Egils Levits, Justice of the European Court of Human Rights, to the Latvijas Vēstnesis. Latvijas Vēstnesis, 2000 No.213/214*

To my mind, the practice of European states is in favour of the second viewpoint. Namely, no member state of the European Union has declared that it has lost “independence” or “sovereignty”. In the modern world, where states have close contact, one need not interpret the notions of “independence” and “sovereignty” as absolutely as a hundred or two hundred years ago.

The theoretic conclusion that joining the European Union does not in point of fact alter Articles 1 and 2, does not bring about the above constitutionally legal consequences with a mandatory referendum on amendments to the Constitution.

However, regardless of what may be the answer to Articles 1 and 2 of the Constitution, the politicians and legal experts in Latvia are convinced that joining the European Union is not possible without a referendum and without amending the Constitution.

The necessity for a referendum follows not only from the practice of the European Union, but also from the situation of Latvian domestic policy. As I have already pointed out, even though the majority of politicians and mass media consider joining the European Union to be a self-evident objective, the community looks on the problem with a certain tension and anxiety. One should not forget that Latvia has had a very negative experience for decades of joining “a union”. Besides, the one and the same Latvian word “union” is used in the phrases the “European Union” and the “Union of the Soviet Socialist Republics”. Thus any attempt of joining a union without ascertaining a clearly expressed will of the people could arouse suspicion about an undemocratic process.

However, the Constitution does not envisage the procedure of holding a referendum about ratification of the law on a certain agreement or to receive an answer to the question such as: “Do you support Latvia joining the European Union?”

The Constitution enumerates the cases when a referendum shall be conducted:

- 1) in the above case when amendments of Articles 1, 2, 3, 4, 6 or 77 shall be submitted to a referendum (Article 77 of the Constitution);
- 2) if the Parliament does not adopt the draft for the amendment of the Constitution, submitted by at least one-tenth of the electors (Article 78 of the Constitution);
- 3) if the President of State has proposed dissolution of the Parliament;
- 4) on a law adopted by the Parliament before its publication, if the President of State on his/her initiative or if not less than one-third of the members of the Parliament have suspended the promulgation of it and if not less than one-tenth of the electors within a period of two months request that the law shall be submitted to a referendum (Article 73 of the Constitution).

Despite this, the last condition may not be applicable to confirmation of an international agreement, as Article 73 of the Constitution envisages that “foreign agreements... shall not be submitted to a referendum”.

Thus, none of the above conditions is suitable to reach a decision on whether Latvian citizens support Latvia joining the European Union and a viewpoint has been expressed that the situation shall be changed²¹.

Two theoretic solutions are possible in this connection:

- 1) The above Law on amendments to the Constitution, permitting the adoption of amendments in a referendum without the qualified majority of the electors.
- 2) The Law on amendments to the Constitution adopted by Parliament and envisaging a specific referendum on joining supranational organisations or indeed the European Union.

However, the procedure of voting itself does not exhaust all problems connected with the functioning of Latvia in the European Union. "The existing text of the Constitution does not solve the potential conflicts of hierarchy between the Constitution, laws and government regulations on the one hand and legal documents of the European Union on the other."²². In this sense, therefore, one has to pay particular attention to other norms of the Constitution:

"Article 64: The right of legislation shall belong to the Parliament and to the People, within the procedure and extent provided for in this Constitution".

"Article 68: The ratification of the Parliament shall be indispensable to all international agreements dealing with issues to be settled by legislation."

In its turn, Chapter 6 of the Constitution presents a thorough enumeration of all juridical institutions passing judgement. The Chapter lags even now behind commitments of Latvia as concerns integration in European processes: the European Court of Human Rights, whose jurisdiction Latvia acknowledged as binding when ratifying the European Convention for Protection of Human Rights and Fundamental Freedoms, is not mentioned. Nevertheless, Latvia is slowly but noticeably turning towards a direct application of norms of the European Convention for Protection of Human Rights and Fundamental Freedoms. Such application of interpretation of the norms of the Convention by the European Court of Human Rights can indeed be felt in practice of Latvian Courts.

"Article 58: The State administration institutions shall be subordinated to the Cabinet of Ministers".

To avoid conflict between the Constitution of Latvia and direct impact and priority of the European Union law, it would be necessary to incorporate into the Constitution one or several norms either on any supranational organisations or just the European Union in a proper legal form.

²¹ See Gunārs Kusiņš "How to better approximate Latvian and European laws", *Latvijas Vēstnesis* 1999. No.390/391

²² See the above article

At the moment no definite drafts have been elaborated, but several proposals on variants of the amendments have been expressed:

- 1) To incorporate into the Constitution a new Article (structurally Article 2 (a) will be the best choice), determining that “Latvia is a member state of the European Union”²³. The author of the proposal is of the viewpoint that “precisely and in a compressed way, everything that is needed would be said at once and all adjustments, resulting from membership (even priority of the rights of the European Union over the national ones) would be “covered”.”
- 2) To amend only Article 68 of the Constitution. As already mentioned, the wording in effect determines that “the ratification of Parliament shall be indispensable to all international agreements dealing with issues to be settled by legislation”. For example, the Commission of Experts, headed by Walter van Dam and working under the PHARE programme states in its conclusion: “Furthering of effective constitutional and administrative approximation of rights and membership in the European Union”²⁴ offers the following optimal wording of Article 68 of the Constitution:

“(1) Latvia may participate in agreements, which delegate realisation of competences, envisaged in the Constitution, to international organisations or institutions.

(2) The ratification of Parliament shall be indispensable to all international agreements dealing with issues to be settled by legislation. In cases when legislation establishes that international agreements (as well as present and future acts of international institutions) have the force of law, the Parliament may determine that the above laws are of higher force than those adopted by the Parliament later, unless the Parliament in its later acts expresses its will to recede from the international liabilities.”

The authors hold: “that the above wording delegates the right of adoption of decisions to the European Union and other international institutions. At the same time it leaves the possibility of variations on a national level, as the direct application shall be based on the Parliament law. Further- as the amendment allows delegating only competences of the Constitution, the Constitutional Court still remains authorised to avert violation (by the Union law) of fundamental rights or other rights envisaged by the Constitution. In the same way the Parliament may exclude specific sectors as fundamental freedoms or human rights from the sphere of influence of the European Union.” In turn, the second part of the wording of the Article “guarantees the role of the Parliament in the ratification of agreements and ensures approximation of rights and obligations, following from the agreements. In the same way it ensures superiority of the Parliament law, guaranteeing priority of the present and future international rights over later Parliament decisions.”

²³ “*The Constitution and the European Union*”. Egils Levits, *the justice of the European Court of Human Rights, to Latvijas Vēstnesis*. *Latvijas Vēstnesis*, 2000., No. 213/214

²⁴ *On foreign country experience in solving constitutional problems*. *Latvijas Vēstnesis*, 2000. No. 213/218

- 3) Consideration has been expressed about more detailed amendments in a new Chapter²⁵ of the Constitution, which with a precise wording characteristic of the Constitution would determine the procedure of adopting decisions at the time when Latvia joins the European Union. The most important issue is what competences will be delegated to the institutions of the European Union. A convincing argument in support of the suggestion is the fact that there are traditionally strong traditions of normative regulation.
- 4) Another variant is to amend all the Articles, which could turn out to be incompatible with membership of Latvia in the European Union, at the same time supplementing the wording of the Articles with pretexts. However, this variant could be very fragmented and not sufficiently clear.
- 5) A combination of all the above is of course also a valid possibility.

I would like to note that a possibility of adopting a special constitutional law has deliberately been avoided, as the Constitution does not envisage passing constitutional laws.

The most probable variants of the procedure could be the following:

The first variant: adoption of amendments to the Constitution as regards supranational institutions in general, but following the invitation to join the European Union- a referendum on it, as a vote for a specific amendment of the Constitution or in any other form.

The second variant: adoption (by the Parliament) of the amendments to the Constitution solely concerning the European Union and submitting it to a referendum.

Many other variants are also possible.

When analysing the Constitutions of all the countries of the European Union, it can be seen how differently one may ascertain membership of the European Union in the Constitution. And this experience is an inexhaustible source of ideas for the Latvian legal experts, when considering the issues of amendments to the Constitution and the procedure of joining the Union. In its turn exchanges of viewpoints at seminars such as this is of tremendous help in testing ideas and finding the optimal solution.

Latvia has to make a trustworthy choice and to accomplish much work in improving the Constitution. It is too early to state what particular model will be chosen. In all the above I have outlined many problems and only some, not yet elaborated suggestions to solve them. However, I do hope we shall succeed.

THE CONSTITUTION OF LITHUANIA AND ACCESSION TO THE EUROPEAN UNION

²⁵ *Gunārs Kusiņš "How to better approximate Latvian and European laws". Latvijas Vēstnesis, 1999, No.390/391*

Mr Vilenas Vadapalas*
Professor, University of Vilnius

Introduction

The Lithuanian Constitution currently in force was adopted by a referendum on 25 October 1992.²⁶ The Constitution is based upon the principles of civil society (Preamble of the Constitution), Rule of Law (Preamble), democracy (Article 1), respect for human and minority rights (Articles 18-37 and 45), market economy (Article 46) and other principles inherent to modern constitutions of democratic states. In this respect, when speaking about constitutional questions of any future accession of Lithuania to the European Union, it should be pointed out that Article 6 of the Treaty on European Union declares that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. However, it goes without saying that the 1992 Constitution was constructed without any consideration of the possible accession of Lithuania to the European Communities. It should be noted that the Constitution of Lithuania does not establish the so-called “Community clauses”: (1) the principle of transfer of sovereignty, (2) the principle of direct effect of the EU law, and (3) the principle of supremacy of the EU law over domestic legislation. At the same time, the Constitution emphasises the principles of independence and state sovereignty (Articles 1-5, 135 and 136, see below).

Constitutional reform relating to any future accession to the EU has not yet begun in Lithuania. Nevertheless, some preparatory work has already been done. On 7 January 1998, the Chancellery of the Seimas (Lithuanian Parliament) established a working group, which was asked to draft the legislation necessary for the accession of Lithuania to the European Union. On 15 September 1998, this working group submitted to the Chancellery the first draft, consisting of draft amendments to articles 135 and 138 of the Constitution of the Republic of Lithuania. The scope of the draft was limited to so-called “Community clauses”, which, in the opinion of the working group, should be introduced into the Constitution of Lithuania, i.e. the partial transfer of state sovereignty to a supranational international organisation, internal procedures concerning proposed Community measures, and the principles of direct effect and supremacy of the Community law, etc.²⁷ This draft did not concern itself with certain special provisions of the Constitution, which could give rise to questions of their compatibility with the *acquis communautaire*, i.e. acquisition of real property (Article 47 of the Constitution) and local elections (Article 119). The draft of 15 September 1998 was discussed in the Committee of European Affairs of the Seimas.

* *Director General of the European Law Department, Government of Lithuania and Chair of International and EU Law at the Faculty of Law, Vilnius University. The opinions expressed are personal.*

²⁶ *For the English text of the Constitution of the Republic of Lithuania see at: Parliamentary Record/Seimas of the Republic of Lithuania. 1992, Nr.11, p. 2-30.*

²⁷ *See: Stojimas į Europos Sąjungą ir Konstitucija. Seminaro medžiaga 1999 06 29-30. Vilnius: Eugrimas, 200, pp. 125-161; Vilenas Vadapalas. Independence and Intergration – Constitutional Reform in Lithuania Preparing its Accession to the European Union. In: Verfassungrechtliche Reformen zur Erweiterung der Europäischen Union. Forum Constitutionis Europae – Band 2. Baden-Baden: Nomos Verl., 2000. S.9-22.*

The issue of the conformity of the Constitution with community law was further discussed during a seminar-workshop on the “Constitution of the Republic of Lithuania and Accession to the European Union” organized by the European Law Department of the Government of Lithuania together with the SEIL/PHARE Project in Vilnius on 28 July 2000. The participants of the seminar-workshop discussed draft proposals prepared by the author of this paper.²⁸

The drafting of proposed constitutional amendments relating to the future accession of Lithuania was also included into the Action Plan for the Implementation of the Programme of the Government of the Republic of Lithuania (1999/2000). Under the Action Plan, the European Law Department of the Lithuanian Government shall submit to the Government a new draft.

1. Constitution of Lithuania and international treaties

1. The Lithuanian Constitution is based on a monistic approach to international treaties and incorporates ratified international treaties into the Lithuanian legal system (Article 138 of the Constitution). This monistic approach facilitates the national implementation of future obligations deriving from the EC, the EU and other Community treaties. However, a question arises as to whether the monistic legal system *per se* creates a legal basis, which would be sufficiently effective for ensuring direct effect and supremacy of EC law over Lithuanian law.

The EC Treaty and EU Treaty, as with all other primary and secondary legal acts of the European Union, have supremacy over legal norms of domestic law of the Member States.²⁹ As regards the future accession of the Republic of Lithuania, it should be pointed out that, according to the Constitution, these treaties should be ratified. Thereafter, these treaties would become a constituent part of the Lithuanian legal system on the basis of the provision of Article 138 of the Constitution of the Lithuania, which stipulates:

“International agreements which are ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania.”³⁰

This constitutional provision makes international treaties ratified by the Republic of Lithuania a constituent part of the Lithuanian legal system. It means that these treaties are directly

²⁸ See: Vilenas Vadapalas. *Questions concerning National Level in Lithuania: The Constitutional Impact of Enlargement at the EU and National Level. Reader: Provisional reports and documents. Colloquium on European Law. Millenium Session XXX. The Hague, 20-23 September 2000, pp. 139-140.*

²⁹ *In Simmenthal (1978) the Court of Justice of the European Communities referred to this requirement as “supremacy of Community law” which invalidates the norm of domestic law contrary to Community law and precludes adoption of national legislation contrary to it. - Common market Law Reports 11978, 3, p.263.*

³⁰ *A provision analogous to the provision of Article 138 of the Constitution of the Republic of Lithuania is established by the 1978 Constitution of Spain laying down that validly concluded international treaties shall constitute part of the internal legal order. However it does not say anything about the relationship between such treaties and legislative and constitutional norms.*

applicable in the Lithuanian legal system, provided, of course, that these treaties contain self-executing provisions, i.e. provisions which could be effected in domestic law. All State institutions - the legislature, the judiciary, administrative and other institutions - must apply them and comply with them.

On 22 June 1999 the Seimas enacted a new Law on International Treaties which establishes the supremacy of ratified treaties over domestic law. Article 11 of the Law stipulates:

“Article 11. Binding force of international treaties to which the Republic of Lithuania is a party

1. International treaties to which the Republic of Lithuania is a party shall be effected in the Republic of Lithuania.
2. If a ratified international treaty stipulates provisions other than the laws or other legal acts of the Republic of Lithuania, irrespective of whether they are in force at the moment of the conclusion of the treaty or enter into force following the conclusion of the treaty, the provisions of the international treaty shall apply.
3. If the execution of an international treaty requires that a law or other legal act should be enacted, the Government of the Republic of Lithuania shall submit a draft law to the Seimas following established procedures, or issue a directive; either method ensures that the particular law or other legal act is adopted.”

The monistic rules of Lithuanian law, i.e. the incorporation of international treaties into the national legal system (Article 138 of the Constitution and Article 11 (1) of the Law on International Treaties), as well as the supremacy of ratified international treaties over ordinary laws and other (i.e. inferior) legal instruments (Article 11 (1) of the Law on International Treaties) facilitate domestic transposition of international treaties in Lithuania. As a matter of principle, this model does not require international treaties to be transposed, through the enactment of internal legal instruments, into internal law. It is important, in particular, with regard to the Europe (association) Agreement with Lithuania of 12 June 1995. This monistic model creates possibilities for the direct enforcement of self-executing provisions of the Europe Agreement in Lithuanian law, i.e. the provisions creating the rights and obligations to natural and legal persons. These are, for example, the provisions concerning the abolishment of quantitative restrictions on exports in Lithuania and any other measures having equivalent effect (Article 14(2), establishment (Article 44)), etc.

With respect to Lithuania, the Europe Agreement is a treaty of public international law, whereas with regard to the Member States of the European Union the Europe Agreement is, first and foremost, a part of EU law. Thus, with regard to the Member States, the Europe Agreement has direct effect and supremacy under EU law itself notwithstanding the monistic or dualistic system of a particular Member State. A distinction should be made between the direct effect and supremacy of international treaties under national law, on the one hand, and the direct effect and supremacy of the Community law under the EU law, on the other. In this respect, the monistic system and the supremacy of ratified international treaties over national laws and secondary legislation *per se* are not sufficient to give full effect to EC law in the national legal system. First of all, the supremacy of ratified international treaties in Lithuania does not mean they are superior to the national Constitution, whereas this would be the case under Community law. Consequently, the problem of conflict of laws could arise especially with regard to Lithuanian constitutional provisions which are problematic from the point of

view of the EU law: Article 47 (right to acquire real property) and Article 119 (right to take part in municipal elections). Secondly, the monistic model and the supremacy of international treaties under Lithuanian law, even with respect to the EC and the EU Treaties, do not necessarily imply direct effect and supremacy of secondary Community law.

Politically, it would be difficult to expect that the Lithuanian Constitution would be amended to include provisions which *expressis verbis* would establish the supremacy of Community law over the Constitution. Instead, it seems necessary to amend the Constitution in order to adjust its particular provisions (Articles 47 and 119(2)) to the needs of future accession to the EU, as well to provide for amendments introducing into the Constitution so called "Community clauses" (the principles of the transfer of sovereignty, the direct effect of the EU law, and general clause the supremacy of the EU law over Lithuanian laws and other legal acts).

2. Procedures for constitutional amendment

The procedures to amend the Constitution are established in its Chapter 14,

"Amendments to the Constitution", which reads as follows:

Article 147

In order to amend the Constitution of the Republic of Lithuania, a proposal must be submitted to the Seimas by either no less than one-quarter of the members of the Seimas, or by at least 300,000 voters.

During a state of emergency or martial law, amendments to the Constitution may not be made.

Article 148

The provision of Article 1 of the Constitution that the State of Lithuania is an independent democratic republic may only be amended by a referendum in which at least three-quarters of the electorate of Lithuania vote in favour thereof.

The provisions of Chapter 1 ("The State of Lithuania") and Chapter 14 ("Amending the Constitution") may be amended only by referendum.

Amendments to other chapters of the Constitution must be considered and voted upon in the Seimas twice. There must be a lapse of at least three months between each vote. Bills for constitutional amendments shall be deemed adopted by the Seimas if, in each of the votes, at least two-thirds of all the members of the Seimas vote in favour of the enactment.

An amendment to the Constitution which is rejected by the Seimas may not be submitted to the Seimas for reconsideration for the period of one year.

Article 149

The adopted law on an amendment to the Constitution shall be signed by the President of the Republic of Lithuania and officially promulgated within 5 days.

If the President of the Republic of Lithuania does not sign and promulgate such a law in due time, this law shall become effective when the Chairperson of the Seimas signs and promulgates it.

The law on an amendment to the Constitution shall become effective no earlier than one month after the adoption thereof.”

2. There are no specific practical problems regarding the procedure of amendment of the Constitution in case of accession. However, one problem could arise in the case where the question of accession is the subject of a referendum. In this regard, Article 9 of the Constitution stipulates:

“The most significant issues concerning the life of the State and the People shall be decided by referendum.

In cases established by law, referendums shall be announced by the Seimas. Referendums shall also be announced if no less than 300,000 of the electorate so request.

The procedure for the announcement and execution of a referendum shall be established by law.”

The first paragraph of the Article (“the most significant issues (...) shall be decided by referendum”) does not necessarily mean that a referendum on this matter should be held. However, if this is the case, the 1989 Law on Referendums is applicable. The provisions of this law could give rise to the most difficult problem, namely, the provision establishing the excessive requirement of an absolute majority of the citizens of Lithuania voting “for”. Article 32, paragraph 6, of the Law on Referendums stipulates:

“The provisions of a law of the Republic of Lithuania or other issue raised by the referendum is considered as adopted, provided that during the referendum more than half of all listed citizens have approved it.”

Today, at least, it would be difficult to expect that such a majority of Lithuanian citizens will vote in a referendum for the accession of Lithuania to the European Union. According to opinion polls in October 2000, 47 percent of Lithuanians are for the accession, and 21 percent are against it.³¹

3. Constitutional problems of the future accession of Lithuania to the European Union

The Constitution of Lithuania does not contain so-called “Community clauses” providing for the transfer of sovereignty to the European Union, direct effect and supremacy of the EU law over national law, etc.

Membership of the European Union calls for transfer by a Member State to the Union of a certain portion of the jurisdiction of its State institutions in the areas defined by the constitutive treaties of the EC and the EU. Article 249 (formerly Art. 189) of the EC Treaty stipulates:

³¹ Tests made by “Vilmorus”. See <http://rope.euro.lt/indexeng.html>.

“In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.”

The case-law of the European Court of Justice is unequivocal about the meaning of above provisions: Member States transfer to the EU a part of their sovereignty, agreeing to limit their sovereign rights to pass binding legal acts in some areas defined by the EC and the EU Treaties. Already, in *Costa v. ENEL (1964)* the Court held:

“ By (...) a transfer of powers from the States to the Community, the Member States have limited their sovereign rights (...).”³²

Transfer of sovereignty to the European Union implies also the exercise of pooled sovereignty as regards the Member States of the European Union. This is clearly reflected, for example, in Article 88-1 of the Constitution of France:

“Article 88-1

La République participe aux Communautés européennes et à l'Union européenne, constituées d'Etats qui ont choisi librement, en vertu des traités qui les ont instituées, *d'exercer en commun certaines de leurs compétences.*“(our emphasis added)³³

In this connection it is necessary to determine whether or not the Constitution of the Republic of Lithuania prohibits the transfer of a part of the jurisdiction of State institutions to international organisations.

Article 1 of the Constitution declares:

“The State of Lithuania shall be an independent and democratic republic.”

³² *Common Market Law Reports 1964, p.425.*

³³ *English translation:*

“Article 88-1

The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common.“(our emphasis added)

Accession to the European Union and transfer to its bodies of a portion of State sovereignty does not at all mean that the State loses its independence or any features of its democratic system. It has been universally recognised and is beyond doubt that Member States of the European Union are fully-fledged members of international associations and organisations. On the contrary, under the Treaty on European Union, through the implementation of its common foreign and security policy, the Union might ensure the common defence of its members (Articles 2 (ex Art. B) and 24 (ex Art. J.4) and in this way protect the independence of its members; “the Union shall respect the national identities of its member States, whose systems of government are founded on the principles of democracy” (Article 6 (ex Art. F), paragraph 2.

Accession to the European Union does not mean loss of independence or its limitation; it means a partial delegation of State sovereignty to the EU bodies along with the consent to transfer the sovereign rights of the State in certain areas defined in the treaties establishing the Communities and the Union. Reference to Articles 2 and 3 of the Constitution is relevant at this point:

“Article 2

The State of Lithuania shall be created by the People. Sovereignty shall be vested in the People.

Article 3

No one may limit or restrict the sovereignty of the People or make claims on the sovereign powers of the People.

The People and each citizen shall have the right to oppose anyone who encroaches on the independence, territorial integrity, or constitutional order of the State of Lithuania by force.”

Similar provisions were established in the constitutions of France, Italy, Spain, Portugal and some other States but they have not prevented those countries from becoming members of the European Communities, subsequently the European Union.³⁴

The above-mentioned and similar constitutional provisions do not mean prohibition of transfer of certain issues of state competence to international organisations; they point out the source of sovereignty - the people - and prohibit the usurpation of sovereignty by individuals or groups. The above provisions were not an obstacle for Lithuania when in 1991 it became a member of the United Nations; one of the bodies of the UN, the Security Council, is empowered to adopt resolutions for the maintenance of international peace and security which are binding on the UN Member States (Article 24 of the United Nations Charter); nor were those provisions an obstacle when in 1995 Lithuania ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides that judgments of the European Court of Human Rights are binding on the High Contracting Parties and that the Committee of Ministers of the Council of Europe shall supervise their execution (Article 46 of the Convention). Of course, the essential distinction should be made between the “traditional” international organisations, such as the United Nations, its specialised agencies

³⁴ See: D. Kriaučiūnas. *Konstitucinės Lietuvos narystės Europos Sąjungoje problemos. - Lietuvos integracija į Europos Sąjungą: būklės, perspektyvų ir pasekmių studija. Vilnius: Europos integracijos studijų centras, 1997, p. 167-168.*

(ILO, ICAO, etc.), and the Council of Europe, etc., of which Lithuania is a member State, on the one hand, and the European Union, on the other hand. Membership of the UN does not require the transfer of sovereign powers to the organs of the United Nations, even to Security Council, whereas membership of the European Union means membership of a supranational organisation, since the legislative powers in large areas are transferred by the States to the institutions of the Union. The same distinction applies to the competence and jurisdiction of the International Court of Justice, on the one hand, and that of the Court of Justice of the European Communities, on the other. The competence of the ICJ is to adjudicate, on the basis of public international law, disputes between States; States need not submit to its jurisdiction. The ECJ is competent to adjudicate cases which, from traditional point of view of public international law, would be within the exclusive jurisdiction of States.

Nevertheless, membership of the European Union is membership of an international organisation, albeit supranational. In this respect it should be noted that the Constitution of the Republic of Lithuania contains a special provision dealing with the accession of Lithuania to international organisations. Article 136 stipulates:

“The Republic of Lithuania shall participate in international organisations provided that they do not contradict the interests and independence of the State.”

As for the interests of Lithuania, it was showed above that the constitutional principles and objectives of the Community and the Union do not contradict the principles and objectives of the Lithuanian constitutional system. In most cases they could be regarded as corresponding and complementary. With regard to independence, an additional argument could be found in favour of making the conclusion that, after the accession to the EU, Lithuania would not lose its independence according to public international law. It seems that the Member States of the EU still possess the traditional customary international law qualifications of states, which have been previously codified in Article 1 of the 1933 Montevideo Convention on the Rights and Duties of States:

“The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States”.

The transfer of sovereignty to the Union in the areas defined by the EC and the EU Treaties does not deprive the Member States of such traditional elements of statehood in international relations. This is a matter of the transfer of certain sovereign powers, rather than the loss of control by the Government over population and territory. Free movement of persons in the Community has nothing to do with the existence of “a permanent population” of a State Member. The same concerns the citizenship of the Union: by introduction of the citizenship of the Union there was no intention to replace national citizenship of a nation-State. Citizenship of the Union is limited only to those who have the nationality of one or other of the Member States; Member States retain the full powers to define conditions of their nationality. The Union does not possess its own territory or power to change “a defined territory” of the Member States. As for “government”, the institutions of the Union, such as the Council and the Commission, acting within the powers conferred them by the EC and the EU Treaty, do not substitute the governments of the Member States. Here, in addition, the principle of sovereignty is applicable. Finally, the “capacity to enter into relations with other States” could be linked to the question of the external relations of the European Community, where, according to and within the limits of the EC treaty, the Communities have exclusive competence (common commercial policy,

common fisheries policy and, to some extent, competition) or share competence (transport, education, culture, public health, research and technological development, environment, development and assistance policy, protection of intellectual property) with the Member States. There is authority for the view that shared competence is the general rule, and exclusive Community competence the exception; besides, certain provisions of the treaties *expressis verbis* provide that the existence of Community competence does not prejudice the competence of the Member States to negotiate in international bodies and to conclude international agreements (Articles 111 (5), 174 (4), 181, etc.).³⁵ Membership of the Union does not deprive a State of its general capacity to enter into relations with other States. Such capacity is an element of its international legal personality, including its power to conclude international treaties, to be admitted into international organisations and to bring international claims.³⁶

The above analysis shows that the Constitution of the Republic of Lithuania does not prohibit the accession of Lithuania to the European Union and does not create obstacles in respect of the obligations which Lithuania would assume in connection with its membership of the European Union. It may also be presumed that under the provisions of Article 138 of the Constitution and Article 11 of the 1999 Law on International Treaties, such legal acts of direct application as regulations and decisions passed by the bodies of the EU would become a part of the legal system of the Republic of Lithuania because this would stem from the treaties ratified by the Seimas (Art. 138 of the Constitution) and would even have supremacy over Lithuanian laws and other legal instruments (Art. 11 of the 1999 Law). However, this legal presumption is hardly a sufficient ground for solving this fundamental issue. The problem of the transfer of sovereignty could arise with regard to interpretation of Articles 4 and 5 of the Constitution:

“Article 4

The People shall exercise the supreme sovereign power vested in them either directly or through their democratically elected representatives.

Article 5

In Lithuania, the powers of the State shall be exercised by the Seimas, the President of the Republic and Government, and the Judiciary.

The scope of powers shall be defined by the Constitution. (...)”

First of all, since Articles 4 and 5 are speaking about the exercise of the supreme sovereign power and the powers of the State directly, through democratically elected representatives, by the Seimas, the President, the Government and the Judiciary, then the exercise even of a part of these powers by the EU institutions could raise questions about the constitutionality of such transfer. It would necessitate the amendment of the Constitution with a provision devoted to the transfer of sovereignty or State competence to the European Union.

³⁵ I. MacLeod, I.D. Hendry, S. Hyett. *The external relations of the European Communities*. Oxford: Clarendon Press, 1996, p. 64, 235, etc.

³⁶ As the International Court of Justice stated in its advisory opinion in the *Reparation for Injuries (1949)* case: “What it does mean is that it is a subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims”. – *ICJ Reports 1949*, p. 179.

In preparing for EU membership, the Republic of Lithuania also has to establish a constitutional provision which would stipulate that the binding legal acts adopted by the institutions of the European Union are directly applicable in the legal system of the Republic of Lithuania and have precedence in case where the laws and other legal acts of the Republic of Lithuania contradict them.

On the contrary, in Lithuania the amendments to the Constitution dealing with the relations between the Seimas (Parliament) and the Government in respect of proposed Community measures (regulations, directives, etc.) seem to be unnecessary because this issue could be resolved through amendments of ordinary legislation (e.g. the Statute of the Seimas, Law on the Government, Rules of Procedure of the Government, etc.). Of course, membership of the European Union gives every Member State a right to take a part in adopting acts of the EU bodies and at the same time the possibility of protecting its national interests. This applies, in particular, to the participation of the Member States in the adoption by the Council of such binding legal acts as regulations. In connection with this, the legislative bodies of the Member States must be informed about drafts, the new regulations and directives etc. in order to allow their national parliaments to express their position on the adoption of such acts and whether they will content to them, especially when these acts concern the national interests. Because the interests of a Member State in the European Council are represented by the representatives of the government of that State, the Government is able to inform the Parliament about draft new binding acts. One of the most modern legal solutions to this problem is Article 88-4 of the Constitution of the French Republic adopted on the basis of the Constitutional Law of June 25, 1992 (as amended after Amsterdam Treaty), which amended the Constitution of the French Republic with Title XV "On the European Communities and the European Union" in connection with the ratification of the 1992 Maastricht Treaty on the European Union. Article 88-4 of the Constitution of France States:

«Le Gouvernement soumet à l'Assemblée Nationale et au Sénat, dès leur transmission au Conseil de l'Union européenne, les projets ou propositions d'actes des Communautés européennes et de l'Union européenne comportant des dispositions de nature législative. Il peut également leur soumettre les autres projets ou propositions d'actes ainsi que tout document émanant d'une institution de l'Union européenne.

Selon les modalités fixées par le règlement de chaque assemblée, des résolutions peuvent être votées, le cas échéant en dehors des sessions, sur les projets, propositions ou documents mentionnés à l'alinéa précédent. »³⁷

³⁷ *English translation:*

The Government shall lay before the National Assembly and the Senate any drafts of or proposals for instruments of the European Communities or the European Union containing provisions which are matters for statute as soon as they have been transmitted to the Council of the European Union. It may also lay before them other drafts of or proposals for instruments or any document issuing from a European Union institution.

In the manner laid down by the rules of procedure of each assembly, resolutions may be passed, even if Parliament is not in session, on the drafts, proposals or documents referred to in the preceding paragraph."

Similar provisions are established in Article 23 (European Union), paragraph 3, of the German Constitution (Grundgesetz):

„Die Bundesregierung gibt dem Bundestag Gelegenheit zur Stellungnahme vor ihrer Mitwirkung an Rechtsetzungsakten der Europäischen Union. Die Bundesregierung berücksichtigt die Stellungnahmen des Bundestages bei den Verhandlungen. Das Nähere regelt ein Gesetz.“³⁸

In addition to the issues of “the Community clauses”, it should be noted that there are two provisions of the Lithuanian Constitution which could raise difficult questions of their inconsistency with the *acquis communautaires*, i.e. Article 47, paragraphs 1 and 2 (right to acquire land property) and Article 119, paragraph 2 (right to take part in municipal elections). In addition, Article 125, paragraph 2 (exclusive right of the Bank of Lithuania to issue bank notes) could give rise to a restrictive interpretation of its provisions with regard to the possibility of introduction of the European single currency in Lithuania.

1) Article 47 (paragraphs 1 and 2) in the context of the right of acquisition of real property, raises questions of its conformity with the principle of non-discrimination in relation to three of the four fundamental freedoms of the European Community: free movement of persons (including the right of establishment), services and capital (Articles 39, 43, 54, 58 (3)). These provisions establish very strict limits on the rights of foreign nationals and legal persons, including those of citizens and legal persons of the European Union, to acquire property in Lithuania. Article 47, paragraph 1, stipulates that “land, internal waters, forests, and parks may only belong to the citizens and the State of the Republic of Lithuania through the right of ownership.” This provision does not apply even to Lithuanian legal (corporate) persons. Paragraph 2 allows certain categories of foreign nationals and corporate persons to acquire non-agricultural land but only for certain economic activities.³⁹ Lithuanian legal persons are only allowed to acquire property for these same purposes.

These restrictions should be examined, first of all, from the perspective of Articles 43-48 of the EC Treaty, which provide for a general framework for the right of establishment. In

³⁸ *English translation:*

(3) The Federal Government shall give the Bundestag the opportunity to state its opinion before it takes part in drafting the European Union laws. The Federal Government shall take account of the opinion of the Bundestag in the negotiations. Details shall be the subject of a law.”

³⁹ *More detailed rules are set out in the 1996 Constitutional Law on the implementation of provisions of Article 47, paragraph 2, of the Constitution. Article 4 of the Constitutional Law allows only citizens or corporate persons of the EU, of the associated countries, NATO and the OECD to acquire non-agricultural land in Lithuania for the purposes of economic activities. Under Article 3, para. 5, the term “economic activities” means “unlimited and permanent activities of an industrial, commercial and professional character and the activities of craftsmen or other activities in Lithuania, which have been established and registered in accordance with the procedure established by law whereby profit is sought in compliance with the procedure and conditions established by the laws of the Republic of Lithuania.”*

particular, Article 43 prohibits any restrictions on the right of establishment based on nationality of a Member State. Article 44, which is devoted to the means of implementation of the right of establishment, stipulates that the Council and the Commission shall carry out their duties in this field by enabling a national of one Member State to acquire and use land and buildings situated in the territory of another Member State.

Article 56 of the EC Treaty prohibits all restrictions on the movement of capital and payments between Member States, and between Member States and non-EC countries. Although Article 57 (1) of the EC Treaty contains stand-still clause allowing Member States to maintain restrictions which existed before December 31, 1993 in respect of the free movement of capital (including direct investment in real estate), this provision is valid only in respect to non-EC states – restrictions between Member States shall be unconditionally abolished. Additionally, Directive 88/361 further liberalizes free movement of capital between Member States. Its scope is narrower than the scope of Article 56 of the EC Treaty in that it does not cover non-EC states. Under its Article 1, all restrictions on capital movements between persons resident in Member States shall be abolished. Appendix I of the Directive sets out a list of capital movements and refers to direct investments (including investments in land and buildings) by non-residents. Nevertheless, under Article 6 (4) of this Directive, Member States may maintain existing national legislation regulating purchase of secondary residences until a separate decision of the Council is taken.

Article 39 of the EC Treaty provides for the free movement of workers within the Community. Regulation 1612/68 on freedom of movement of workers (Article 9, paragraph 1) provides that a worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.

At the same time, it should be emphasized that according to the ECJ case law Member States may establish certain restrictions for the above mentioned freedoms and rights, but these restrictions should fulfil the following conditions:

- a) they should not discriminate on grounds of nationality;
- b) restrictions should be necessary for the public interest;
- c) the principle of proportionality should be observed.

In the case *Commission v. Greece* (C-305/87) the ECJ found that the provisions of a decree of the President of Greece prohibiting foreigners (including nationals of Member States) to acquire land in border areas of Greece was incompatible with Articles 39 (free movement of workers), 43 (right of establishment) and 49 (free movement of services) of the EC Treaty.⁴⁰ In the case *Klaus Konle v. Republic of Austria* (C-302/97) the ECJ pointed out that the system of prior authorisations for acquisition of land might be justified only in exceptional circumstances for the public interest – for example, town and country planning.⁴¹ In both cases the Court applied the principles of the proportionality and the public interest.

⁴⁰ ECR 1989, p. 1461.

⁴¹ ECR 1999, p. 1

Furthermore, it should be mentioned that Protocol 16 to the EC Treaty provides for an exemption for Denmark, which allows some restrictions on the right of foreigners to purchase secondary residences in Denmark. This also covers the right to acquire land. As for the experience of accession negotiations of other Member States, it should be noted that it is common to negotiate certain transitional periods in this field – for example, Austria, Finland and Sweden negotiated 5 year transitional periods concerning the acquisition of secondary residences; and Portugal negotiated 5 year period concerning the acquisition of agricultural land.

Finally, it should be pointed out that only in Slovenia and Lithuania is or was acquisition of land by foreigners still a matter of a constitutional legislation, whereas in all other countries this kind of question is governed by ordinary laws. Nevertheless, Lithuania remains the only country still retaining constitutional restrictions in this area, because Slovenia has already amended its Constitution in 1997 prior to the ratification of the Europe Agreement.

As far as the situation in Lithuania is concerned, it should be underlined that the constitutional and negotiation options of Lithuania in this field is still not clearly defined. In principle, there are two options: firstly, to allow all foreign natural and legal persons to acquire property in Lithuania, and secondly, to negotiate the possibility of some derogations (transitional periods rather than exemptions) and refer to these restrictions in a possible new Constitutional Law on the Implementation of Article 47 of the Constitution (for both options of the constitutional amendments, see the Annex to this paper).

In any case, Lithuanian legislation shall follow the above mentioned rules of *acquis communautaire* concerning the right to acquire property.

2) Article 119, paragraph 2, allows only citizens of the Republic of Lithuania to participate in municipal elections:

“Article 119

(...)

Members of local government councils shall be elected for a two-year term on the basis of universal, equal and direct suffrage by secret ballot by the residents of their administrative unit *who are the citizens of the Republic of Lithuania* (our emphasis added).

(...)”

This provision could be regarded as being inconsistent with the provisions of Article 19 of the EC Treaty, which, *inter alia*, stipulates that “every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.”⁴² At the same time, Article 19 of the EC Treaty does not aim at

⁴² Article 19 (ex Article 8b)

1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament these

harmonisation of national electoral systems; all it requires is the abolition of any requirement of nationality. It should be added that this right was also included in Article 40 (right to vote and to stand as a candidate at municipal elections) of the Draft Charter of Fundamental Rights of the European Union⁴³. In general, this right is a constituent part of the citizenship of the Union.⁴⁴

Directive 94/80 established more detailed provisions on the exercise of this right. Firstly, it establishes 3 general requirements concerning the exercise of the right: citizenship of the Union; residence in that Member State; and other conditions of eligibility also required from nationals of the host State, e.g. certain age limits (Art. 3). Secondly, it gives definitions: “municipal elections” are defined as being elections by direct universal suffrage of members of the representative council and, where appropriate, the head and members of executive of “a basic local government unit”. The “basic local government units” are those specified in the Appendix to the Directive and are empowered to administer, at the basic level of political and administrative organisation, certain local affairs (Art. 2). Thirdly, it establishes residence requirements: - if national law provides for minimum periods of residence in electoral territory, this condition must be fulfilled (Art. 4). Fourthly, it contains provisions related to candidates including grounds for disqualification (Art. 5 (1) and sets out rules on non-discrimination, on civil and criminal law grounds. Art. 5 (3) Member States may provide that only their nationals may hold the office of elected head of the executive of a basic local government unit. Finally, the directive provides for the possibility of derogations (Art. 12) (currently only Luxembourg qualifies): if the proportion of citizens of the Union who are not nationals of that Member State exceeds 20 per cent of the total number of voters, that Member State may: (1) restrict the right to vote; (2) restrict the right to stand as a candidate; and (3) take appropriate measures with regard to the composition of the list of candidates.

arrangements may provide for derogations where warranted by problems specific to a Member State.

2. *Without prejudice to Article 190(4) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament these arrangements may provide for derogations where warranted by problems specific to a Member State.*

⁴³ Article 40

Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides, under the same conditions as nationals of that State.

⁴⁴ *Part II of the EC Treaty spells out the following rights for every citizen of the Union: a) rights of free movement and residence; b) rights to vote and to stand in municipal elections in the Member State of residence; c) rights to vote and to stand in elections to the European Parliament in the Member State of residence; d) rights of diplomatic and consular protection; e) rights to petition the European Parliament and to apply to the Ombudsman.*

Lithuanian legislation shall follow the above mentioned rules of *acquis communautaires* concerning the right to vote and to stand in municipal elections.

3) The analysis of the constitutional questions of the future accession of Lithuania to the EU would be incomplete without making a short examination of Article 125, paragraph 2, of the Constitution, which deals with the monetary issues and, therefore, is relevant to the Economic and Monetary Union. Of course, the introduction of the Euro is a separate matter from the EMU, which should also be separated from the general question of the accession to the EU. Nevertheless, it should be mentioned that the provision of Article 125, paragraph 2, of the Constitution could be interpreted in such a way that it does not allow the introduction of single European currency in Lithuania.

“Article 125 (*extract*)

The Bank of Lithuania shall have the exclusive right to issue bank notes.”

This constitutional provision shall be examined with regard to the third stage of EMU, which started on 1 January 1999, after the European Central Bank was established on 1 June 1998 and the independent European System of Central Banks (ESCB), comprising with the European Central Bank and the national central banks, was created. The Euro was introduced on 1 January 1999. Euro denominated banknotes and coins will be brought into circulation by 1 January 2002.

Under Art. 105 of the EC Treaty, the ESCB has the following tasks: to define and implement the monetary policy of the Community (according to the Statute of the ESCB, whose main element is maintaining price stability within the Community); to conduct foreign exchange operations; to hold and manage the official foreign reserves of the Member States; and to promote the smooth operation of payments systems. A Member State may participate in the third stage of EMU only if it satisfies certain macro-economic requirements. Once a Member State begins to participate, it acquires the right to participate in the decision-making process on monetary issues (both in the ECB and the Council). However, according to the Protocol 10 of the EC Treaty, understanding was reached that participation in the third stage of the EMU is compulsory, once a Member State fulfils the necessary requirements.⁴⁵ At the same time, if a Member State does not comply with the established macro-economic requirements (e.g., it has excessive budget deficits) it may have sanctions imposed on it by the Council or the ECB. At the same time, even if a Member State is not participating in the third stage of EMU, it has to avoid excessive budget deficits.

Going back to Article 125 of the Constitution of Lithuania, it should be pointed out that the term “to issue bank notes” is subject to interpretation. It could mean only national currency (Litas) and, therefore, would not be in contradiction with the powers of the European Central Bank to issue the single European currency. In any case, the accession of Lithuania to the European

⁴⁵ *The decision concerning Greece has already been taken in Lisbon this year. Denmark and the United Kingdom are covered by special Protocols – these Member States have the right to choose whether to participate or not. For the time being, Sweden does not qualify for the third stage of the EMU.*

Union does not mean that Lithuania would automatically participate in the third stage of EMU. Therefore, the aforementioned provision of Article 125 of the Constitution *per se* could not be regarded as incompatible with the *acquis communautaires*, and, thus, could be an obstacle to the accession of Lithuania to the EU.

4. Possible applicability of Community law in the Lithuanian legal system

Courts in Lithuania accept the principle of direct effect and the supremacy of treaty obligations on the basis of the provisions of Article 138 of the Constitution (ratified international treaties are incorporated into the Lithuanian legal system), as well as Article 11, paragraph 2, of the Law on International Treaties (ratified international treaties have supremacy over laws and secondary legal acts). Nevertheless, it would be premature to speculate whether it is also applicable to secondary community law, notwithstanding the fact that there are no legal obstacles to extend these dispositions to secondary law.

There are no case-law proving that Lithuanian Courts recognize a rule of interpretation, whereby national law must be interpreted in conformity with international obligations (the principle of direct effect). However, there is a constitutional ground to assume that this recognition would be given in future in relevant case-law. First, Article 135, paragraph 1, of the Constitution provides for “universally recognized principles and norms of international law” having binding force. It states:

“In conducting foreign policy, the Republic of Lithuania shall pursue the universally recognized principles and norms of international law, shall strive to safeguard national security and independence as well as the basic rights, freedoms and welfare of its citizens, and shall take part in the creation of sound international order based on law and justice.”

With respect to the applicability of international legal instruments in the Lithuanian legal system, it is important to consider the case-law of the Constitutional Court of Lithuania. In its Opinion of January 24, 1995 on the Conformity of Articles 4, 5, 9, and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of Article 2 of Protocol No. 4 of the Convention to the Constitution of the Republic of Lithuania, the Constitutional Court gave the following conclusion with regard to the legal force of the Convention in the Lithuanian legal system:

“This constitutional provision with regard to the Convention means that a ratified and effective Convention will become a constituent part of the legal system of the Republic of Lithuania and will have to be applied in the same way as legislation of the Republic of Lithuania.”⁴⁶

Such legal force of ratified international treaties (i.e. that they have the force of law) has been endorsed by the Constitutional Court in its Decision of October 17, 1995 on the Conformity of Paragraph 4 of Article 7 and Article 12 of the Law of the Republic of Lithuania on International Treaties to the Constitution of the Republic of Lithuania.⁴⁷

⁴⁶ *Valstybės Žinios*, 1995.01.27, No.9 -199.

⁴⁷ *Valstybės Žinios* 1995.10.20, No.8 -1949.

The Supreme Court of Lithuania, on many occasions, confirmed these principles and gave priority to international treaties of Lithuania in cases where the law allows such priority (for ex. Article 606 of the Civil Code of Lithuania).

An example of the case where the Supreme Court has based its decision on the direct effect of international treaties, was civil case Nr. 3K-3-337, 1999 concerning trade marks, where the Court applied the 1967 Convention establishing the World Intellectual Property Organization (WIPO) and the 1957 Nice Agreement concerning the International Classification of Goods and Services for the Purposes of Registration of Marks.⁴⁸

It should be noted that this case law concerns the period before 22 June 1999, when a new Law on International Treaties was adopted and, therefore, the principle of supremacy of ratified international treaties was established (Article 11, para.2).

5. Role of national courts

4. Courts in Lithuania accept the principle of direct effect and the supremacy of international obligations, and this is based on the provisions of Article 138 of the Constitution (ratified international treaties are incorporated into Lithuanian legal system), as well as Article 11, paragraph 2, of the Law on international treaties (ratified international treaties have supremacy over laws and secondary legal acts). It would be premature to speculate whether it is also applicable to secondary Community law notwithstanding the fact that there are no legal obstacles to extend these dispositions to secondary law, provided that the Constitution would be amended with the provision establishing the principle of direct effect of the EC law.

5. There is no case-law proving that Lithuanian courts recognise a rule of interpretation, whereby national law must be interpreted in conformity with international obligations. However, there is a constitutional ground to assume that this recognition would be given in future by relevant case-law. We have already seen that Article 135, paragraph 1, of the Constitution provides for binding force of “universally recognised principles and norms of international law”.

Notwithstanding the fact that this constitutional provision is devoted to foreign policy, it seems that the conclusion could be drawn that Lithuanian law should be interpreted in conformity with “universally recognized principles and norms of international law” including the principle *pacta sunt servanda*. Of course, it is not directly related with the EU law. However, this rule of interpretation will be applicable to future obligations of Lithuania, which will derive from the EC and EU treaties.

It seems that the new Law on International Treaties of 1999, which incorporates international treaties into the Lithuanian legal system and establishes the principle of the supremacy of international treaties, will lead you new case-law concerning the national implementation of treaties.

6. If a Community measure is inconsistent with prior international commitments of Lithuania, do Lithuanian courts give priority to those prior international commitments? First of all, Lithuanian legislation does not contain provisions concerning this matter. In fact, Community measures are of course, not yet directly applicable in Lithuania. Secondly, there

⁴⁸ *Teismų praktika, Nr. 12 (1999), p. 74.*

is no comparable Lithuanian case-law on this matter. Finally, the answer, even if it can only by definition be theoretical, could be very complex. For example, one specific answer could be drawn from the provisions of the 1995 Europe Agreement concluded by Lithuania. Article 64 paragraph 5 of the Europe Agreement (anti-competitive agreements between undertakings) refers to a concrete Community measure: Council Regulation No. 26/1962, and, in fact, makes this measure directly applicable. One may suppose that this measure, as a part of the provisions of the Europe Agreement, shall prevail over prior international commitments (treaty commitments). In practical terms, the question of point 7 may also be relevant with regard to the accession negotiations: Lithuanian free trade agreements with Latvia and Estonia, as well as with Ukraine may be regarded as incompatible with this Community measures. The only way to resolve this contradiction would be to repeal these treaties before Lithuania's accession to the EU or, possibly, to ask for a transitional period. This last solution seems unrealistic.

EUROPEAN INTEGRATION AND CONSTITUTIONAL LAW: THE SITUATION IN HUNGARY

Mr Barna BERKE
Professor, University of Budapest

This paper was completed and structured for the purposes of the Unidem seminar on the basis of the author's previous writings. Part I and part III deal with the Hungarian experience and the possible Hungarian theoretical approach; in part II developments in the legal systems that would certainly be the most influential on Hungarian law are overviewed. In the oral presentation at the seminar the author intends to give a summary of the argumentation and conclusions drawn by scholars who submitted a preparatory document to the Ministry of Justice on the subject of constitutional amendments necessitated by EU-accession.

I. An experience and a basis for prospective thinking: the decision of the Hungarian Constitutional Court on the Europe Agreement

A special competition enforcement and co-operation regime was established in the EC-Hungary Association agreement (called the "Europe Agreement", referred to below as EA). According to Article 62 EA⁴⁹ and its Implementing Rules (IR)⁵⁰ in the case of anti-competitive practices that may affect trade between the parties, the parties' competition

⁴⁹ Article 62 EA: "(1) The following are incompatible with the proper functioning of the Agreement, in so far as they may affect trade between the Community and Hungary:

(i) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

(ii) abuse by one or more undertakings of a dominant position in the territories of the Community or of Hungary as a whole or in a substantial part thereof;

(2) Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85 and 86 of the Treaty establishing the EEC.

⁵⁰ The relevant IR provisions

authorities (i.e., the Hungarian Office of Economic Competition (OEC) and the European Commission) are bound to proceed upon their own competence under the EA competition regime applying the criteria and principles of the application of Articles 85 and 86 EC. This is the provision whereby the Hungarian legal system had its first encounter with Community law, in need of elaborating its approach towards supranational Community law in the course of meeting its complex competition law obligations under the Europe Agreement. Consequently, the approach of Hungarian law might serve as a model for other fields of Hungarian law, for the entire Hungarian legal system and possibly for other associated countries having the same model provisions in their respective agreements with the EC.

In a submission⁵¹ in 1996 the constitutionality of certain provisions of this competition enforcement and co-operation regime established by Article 62 EA and especially by its Implementing Rules was contested, based on the argument that within the context of Article 62 (2) EA, as implemented, the fundamental problem is that a Hungarian legislative act is not a precondition for the application, according to the state of the art at any time in the future, of EC law (the criteria of application of Articles 85, 86 EC) by national authorities. 'Criteria' of a foreign law (EC law) must directly (immediately) be given effect in the normal practice of a Hungarian law enforcement organ, in the area of public law (since the prohibitive rules of restraint of competition, with an ex post enforcement and repressive sanctions for illegal behaviour represent public law). The submission⁵² raised the important preliminary issue, whether the Court is authorised to control the constitutionality of a Hungarian law promulgating an international treaty in the domestic legal system in accordance with the traditionally dualist nature of Hungarian law (in other terms, the posterior control of international treaties concluded and entered into force was at stake).

In a dualistic system (Italy, Germany, Ireland, Denmark, the Nordic countries, United Kingdom and Hungary) it is the promulgation law that incorporates the treaty into the national legal system with the effect of becoming binding to everyone (providing for generally mandatory rules of conduct, in the wording of the Act on the adoption of laws). The status, the ground of validity, the hierarchy of a particular treaty within the internal legal system is determined by the national promulgation (incorporation) law. Treaty law becomes law in Hungary on the face of the internal legislation incorporating it. Acquiring the status of national law, the content of a treaty should be exposed to constitutional review as any other laws of the Hungarian legal system.

⁵¹ For the substance and argumentation of the submission, see B. Berke, 'Implementation of the Association Agreement, Approximation of Laws, Eventual Accession - Some Constitutional Implications', in F. Mádl (ed.), *On the State of the EU Integration Process - Enlargement and Institutional Reforms (Studies on European Law - 3rd International ECSA Conference in Budapest, 6-10 November 1996)*, 1997, EU Centre for Research and Documentation/ELTE University, Budapest.

⁵² For the argumentation of that part of the submission, Berke, *Justifications for the ex-post constitutional review of international treaties*, *Magyar Jog*, 1997/8, pp. 449-461. (in Hungarian)

The preliminary question was decided by decision 4/1997 of the Constitutional Court⁵³. It was held that national law promulgating and thereby incorporating a treaty into the internal legal system may subsequently be subject to constitutional review which may extend to the treaty part of the internal incorporation legislation. Should the Constitutional Court find a treaty or a provision thereof unconstitutional, it declares the unconstitutionality of the national law incorporating the treaty. The obligation in international law undertaken by the Republic of Hungary thereby remains unaffected. It falls on the legislator to establish the conformity of the international law obligation with national law, if need be with the amendment of the Constitution. The argumentation invoked the doctrine and jurisprudence in various dualistic countries to demonstrate that the inherent logic of dualism necessitates that the national incorporation law be constitutionally reviewable after its promulgation and entry into force⁵⁴. The so-called abstract norm-control extends to the national incorporation law, as it applies to any domestic rule of law. The Hungarian Constitutional Court followed the experience of other dualistic countries and declared its competence with the limitation of ruling exclusively about the internal consequence of the eventual unconstitutionality of a treaty⁵⁵. Thereby the national incorporation law could be annulled but the obligation of Hungary undertaken in international law would remain unaffected. It would be the duty of the government and the legislator in this specific instance to establish the conformity of Hungary's international law obligation with the substance of national law, this could be achieved in various ways (eg. renegotiation of the treaty, amendment of the Constitution).

The Europe Agreement Judgment represents the first ex post constitutional control of an international treaty. The Constitutional Court (CC) declared that in the context of the implementation of Article 62 (1) and (2) in Section 2 of Act I of 1994, it is a constitutional requirement that the Hungarian law enforcement authorities cannot directly apply the application criteria referred to by Article 62 (2) EA. The CC identified the core issues of the case as follows: the Court had to assess how - in the field of prohibition of anti-competitive restraints - the legal criteria and principles of Community law may become effective in the Hungarian legal system on the basis of Article 62 EA and the Implementing Rules. Accordingly, the constitutional issue is whether the norms of the domestic law of another subject of international law, another independent system of public power and autonomous legal order [...] can be applied directly by the Hungarian competition authority without these foreign norms of public law having previously become part of Hungarian law.

⁵³ For a summary of the Preliminary Issues Judgment, see *Bulletin on Constitutional Case Law*, Edition 1/1997, Secretariat of the Venice Commission, Council of Europe, Strasbourg, 49-50.

⁵⁴ *Jacobs-Roberts* (eds, *UK National Committee of Comparative Law*), *The effect of treaties in domestic law*, 1987., *Eisemann* (ed), *L'intégration du droit international et communautaire dans l'ordre juridique national*, 1996. (See the respective country reports). *Rideau*, *Constitutions et droit international dans les Etats membres des Communautés européennes*, RFDC 1990 p.427.

⁵⁵ For the consequences as conceived in the international law of treaties in respect of dualistic countries see for example: *Elias*, *The modern law of treaties*, 1974, p.146 et seq. For the German approach see *Professor Frowein's paper in: Jacobs-Roberts, op. cit. supra*, p.67., for the Italian doctrine see for example the case analysis in: *68 Rivista di Dir Int* 888, 900 (1985).

Some basic terms were clarified at the outset. Direct applicability was understood as distinguishing the appearance of the Community law of the member States from the way in which international treaties may become part of domestic law. This is a matter of relationship between two legal systems in the dualistic concept. On the other hand, direct effect, or judicial effect, or judicial enforceability is an issue of law enforcement, of the nature of the rule in question, that is to say this is a matter of relationship between the legal norm and the individual. Direct or immediate enforceability (a mechanism) is therefore to be distinguished from direct judicial enforceability (which relates to the precision of the norm). The first was asserted by the CC to the provisions examined, the second was denied. Although Article 62. (1) and (2) EA itself did not create directly enforceable prohibitions and legal consequences for private law subjects but it was to be enforced indirectly, through the automatism of direct/immediate applicability of these criteria and principles by the Hungarian competition law enforcement organ. In practical terms, indirect effect plays a role when the substantive rules of Hungarian competition law were to be interpreted for a concrete case and filled up with EC law substance in the cases falling under the EA and dealt with by the Hungarian authority. The problem with the mechanism of direct/immediate applicability would materialise this way.

Another element of this mechanism is its openness to the future criteria and principles of EC law. The consequence of the examined rules is that the relevant Community law criteria, as soon as they appear in EC Commission decisions or in ECJ judgments or in EC Regulations, have automatically and directly/immediately (i.e. without prior Hungarian incorporation action) to be taken into consideration and be given an interpretative guidance effect by the Hungarian competition law enforcement authority. This mechanism is characteristic of the EC legal system and is called self-penetration of Community law into the member state sphere of law enforcement (i.e. EC rules appear *eo ipso* as norms directly/immediately applicable in their quality of EC law by the member states' law enforcement organs). This self-penetration mechanism of public law does not fit into any of the accepted ways in which foreign law (i.e. internal law of another jurisdiction, such as EC law as the internal law of the Community which is a distinct system of law) could enter into the Hungarian dualist legal system, it is different from the operational model of international treaty law; of the generally accepted rules of international law; and of private international law.

In the constitutional analysis the sovereignty principle, the requirement and the source of democratic legitimacy for the exercise of public power vis-a-vis the individuals, the exclusion of implicit modification of the Constitution were the main points of the decision.

The main pillars of the CC's conclusions are as follow. According to Article 2 (2) of the Constitution, the Parliament is the depositary of the sovereignty of the people; the generally applicable form of the exercise of power is the exercise of power by the Parliament. However, the Parliament may not breach Article 2 (1) and (2) of the Constitution even by the conclusion and proclamation of international treaties. According to the Constitution, the Parliament has the competence to adopt and amend the Constitution. But also in this regard, the Parliament may only proceed constitutionally, in compliance with the procedural and decision-making requirements governing the amendment of the Constitution and on the basis of the provision on the direct and express power to amend the Constitution. The Parliament is not entitled to

carry out the covert amendment of the Constitution by means of the conclusion and promulgation of an international treaty⁵⁶.

Regarding future questions and developments one of the influential statements of the decision is that international treaty obligations undertaken outside the scope of international *ius cogens* cannot become effective in their content contrary to the Constitution. The principle of *favor conventionis* applies until the Constitution is violated as a result of the interpretation of Hungarian law in conformity with the international treaty. If the appropriate interpretation of the undertaken international obligation leads to the violation of Article 2 of the Constitution, the harmony required by Article 7 (1) of the Constitution has not been established. This statement could obviously be relevant in the context of a possible constitutional review of EC law as applicable within the national legal system (providing the hard issue of the availability of constitutional review of secondary EC law is answered in the affirmative). In the CC proceedings about the Europe Agreement, the executive took the following position in a submission: It is known from scholarly works and from the jurisprudence of EU Member States that the rules on the limitation of sovereignty or the joint exercise thereof with other states, either if such rules are explicit as in the case of a number of Member States or if they are implicitly applicable as in the case of the current Hungarian Constitution, are not independent of the other constitutional provisions and they cannot be used to circumvent other constitutional provisions or to deprive them of their content. It is on this basis that the process of concluding treaties involving the limitation of sovereignty and the authorisation of institutions concluding such treaties are subject to constitutional control. Moreover, such an agreement may not affect the essential elements of sovereignty, and cannot directly contradict constitutional principles. The principle of democracy based on the representation of the people cannot be violated and the level of protection of fundamental rights cannot diminish. Even where the latter criteria are fulfilled, the limitation of sovereignty can only take place in specific limited fields and such limitation cannot be irrevocable or irreversible.

The Europe Agreement Judgment is also an important milestone in the development of Hungarian constitutional jurisprudence. Whereas in its earlier judgments the Court only developed its approach towards international treaty rules, generally accepted rules and principles of international law and international *ius cogens*, for the first time in the Europe Agreement decision it enunciated its hints on the features of Community law. In addition, although it adopted its judgment by interpreting Hungarian laws concerning international law, it expressly took into account the fact that Community law has special characteristics compared to international treaty law. Accordingly the Court stressed that the referenced 'EC

⁵⁶ *Decision 30/1998 of the Hungarian Constitutional Court may be read in German on its homepage: www.mkab.hu. For a descriptive analysis with some debatable statements of evaluation by a PhD student, see: Volkai, *The application of the Europe Agreement and European Law in Hungary...*, accessible via the internet at Harvard Law School, Jean Monnet Chair, Working papers, 1999. See also: Tatham, *Constitutional judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court*, ICLQ 1999, 913. As a background analysis to the case, see (in Hungarian): Berke, *Some legal questions of free trade agreements: for the analysis of the EC-Hungary association agreement*, *Jogtudományi Közlöny*, 1998, pp. 81-93. Berke, *The legal construction of the European Economic Area and the adoption of EC law - lessons for the analysis of the EC-Hungary association agreement and for the approximation of laws*, *Magyar Jog*, 1998 pp. 142-159.*

law criteria' are to be understood as norms of domestic law, because EC law is the domestic law of the Community, which on the other hand qualifies as foreign law from the point of view of Hungarian law enforcement, since Hungary is not a Member State of the European Union. The approach that the Hungarian Constitutional Court would adopt once Hungary becomes a Member State of the European Union would be modelled along the lines established by the German Federal Constitutional Court ('Bundesverfassungsgericht') and shared in the core issues by another influential constitutional court of a dualistic country, the Italian Constitutional Court. Let us give a brief overview⁵⁷ of the concepts and evolution characterising these two legal systems, serving as an inevitable model for the Hungarian constitutional thinking about Community law.

II. The model legal systems – how to deal with our future problems learning from the past

1. The Italian legal system is characterised by its traditional dualism towards the internal application and effect of treaties. As regards general (customary) international law, its reception is ensured in Article 10 of the Constitution which provides that Italy's legal system conforms with the generally recognised principles of international law⁵⁸. This provision is understood as permanently transforming customary international rules into domestic law, the required conformity may only be adjudicated upon by the Constitutional Court: once it has pronounced, no legislative intervention is needed to introduce the accepted principle in the Italian legal order. As a matter of principle customary international law is superior to and in case of conflict entails the unconstitutionality of domestic law⁵⁹. The Italian Corte di cassazione relied on Article 10 to recognise primacy of Community law, regarded as an ordinary instrument of international law, invoking the formula "*pacta sunt servanda*" and concluding that observance of treaty obligations is constitutionally guaranteed in Italy⁶⁰. This approach remained isolated primarily because of the existence of more appropriate constitutional foundation and the specific principles as regards internal application of Community law.

The Constitutional Court regarded Article 10 an insufficient basis since the performance of specific treaty obligations may not be equated to the endorsement of general international law.

⁵⁷ *The basis of this concise overview is essays published in Hungarian: Berke, European Union, Community law and national constitutional jurisprudence, Jogállam, 1996/1, pp. 9-40. Berke, Constitutional limits to European Community law, in: Studies in European law - II., ed. F. Mádl, 1996, Budapest, pp. 9-49.*

⁵⁸ *Constitutions of the countries of the world, eds. Blaustein and Flanz, binder VIII. by G.H. Flanz, Oceana, 1987.*

⁵⁹ *In according a constitutional status to general international law Italy departed from the meaning of similar principles included in earlier Constitutions of other countries, such as Article 4 of the Weimar Constitution (1919), Article 9 of the Austrian Constitution (1920), Article 7 of the Spanish Constitution (1931), the first ones adopting generally recognised international law as part of national law.*

⁶⁰ *Parallel to the elaboration of its differing doctrine by the Constitutional Court this attitude has continuously been weakened and by the end of the seventies it may be considered overcome.*

The constitutional foundation for introducing treaty obligations into internal positive law is Article 11 of the Constitution which provides that Italy agrees, on condition of equality with other states, to the limitation of sovereignty as may be necessary for a system calculated to ensure peace and justice between Nations: it promotes and encourages international organisations having such aims. No specific article is devoted to the expression of supremacy of treaties over national law, it is governed by the consequences of the dualism.

From the viewpoint of their effects within the national legal system treaties are regarded as bearing the same rank as ordinary domestic laws, they operate as part of national law without superiority in hierarchy. The theoretical consequences of this equal ranking are that treaties are subject to later legislative modification and that judges of the judiciary may apply them in cases of conflict with national rules adopted prior to the incorporation of the treaty (being part of the same legal system the *lex posterior derogat legi priori* formula applies). The exceptions, as regards superiority of treaties, from the general constitutional regime are the Lateran Pacts and the European Community Treaties⁶¹.

The relationship between the Italian legal system and Community law may be seen as a history of conflicts that involves fundamental issues, the adjudication of which resulted in the pronouncement by the ECJ some of the most determinative judgments in the construction of the Community. The substance of the principle "*lex posterior derogat priori*", an important basis of the dualistic theory, was at stake in the application of Community law in the *Costa v. ENEL* case. The centralised constitutional review on the conformity of national laws with treaty obligations was challenged in the *Simmenthal* case. These landmark Community law cases, their origin and influence and the counteraction taken by the Italian Constitutional Court reveal the basics of interaction in the early phase.

In *Costa v. ENEL*⁶² a customer and shareholder of a nationalised power company challenged before a Milan court the Italian nationalising law as being contrary to the Constitution and certain provisions of the EEC Treaty⁶³. The court referred these allegations to the Constitutional Court and requested at the same time a preliminary ruling under Article 177 EEC from the ECJ. Ostensibly the primary issue was about jurisdiction: in the dualistic concept the nationalisation law, being subsequent to the law that approved the EEC Treaty, must prevail and therefore there was no basis for the judge to turn to the Community Court. The Constitutional Court held that domestic courts must give effect to the latest will of the national parliament and cannot sidestep domestic law in availing themselves of Article 177. Its decision did not allow any exceptions to the principle of equal ranking of treaties and domestic laws: a later internal law would take precedence over the treaty and over any rules issued thereunder prior to the national law⁶⁴. For the Constitutional Court the case was resolved when the question of jurisdiction had been decided.

⁶¹ *La Pergola-Del Duca, Community law, international law and the Italian Constitution, AJIL 1985 p.607.*

⁶² *Before the Italian Constitutional Court: decision no.14 of 7 March 1964. CMLRev 1964 p.225 and p.435.*

⁶³ *Namely, Articles 37, 52, 53, 92, 93 and 102 EEC.*

⁶⁴ *La Pergola-Del Duca, op.cit. AJIL 1985 p.610.*

Approximately four months later the European Court of Justice adopted a landmark decision⁶⁵. The judgment was not limited to the questions of jurisdiction and interpretation of the Treaty articles invoked but was formulated with concern on the future of Community law as a whole. The Court held that national law, whether adopted before or after the effective date of the EEC Treaty, cannot take precedence over Community law. Having regard to the characteristics that distinguish the Treaty from ordinary international treaties and to the real powers transferred to the Community with the limitation of sovereignty of the member states the Court pronounced that the integration of the Community's own legal system into that of each member state and "more generally the terms and the spirit of the Treaty make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity". Because of its independent origin and special nature the law stemming from the Treaty cannot be overridden by domestic legal provisions "without being deprived of its character as Community law and without the legal basis of the Community itself being called into question". The overall foundation of this status of Community law lies in the permanent limitation by the member states of their sovereign rights, "against which a subsequent unilateral act incompatible with the concept of Community law cannot prevail".

The above formula should not be seen only as a reaction to the dualism of the Italian legal system; the primacy of Treaty law over subsequent internal legislation was also not admitted in some monist states (the French doctrine will be described below). Beside direct effect, supremacy was found to be the second cornerstone of the Community legal system which was declared to be a *sui generis* one, different from regimes established by ordinary international treaty law. The European Court considered that the supremacy rule had become part of the national legal systems on the entry into force of the Treaty, the completion of the internal ratification procedure was the only requirement for the application of the supremacy principle by member state courts and authorities.⁶⁶ The ECJ has taken in this respect a "definite monistic" view.⁶⁷

Leaving aside the discussion on the teleological foundations of this judgment (built around integrity and uniform application of Community law)⁶⁸ and the opinions about the originality of the supremacy principle in Community law, as opposed to international law,⁶⁹ we focus on

⁶⁵ *Case 6/64 Costa v. ENEL (1964) ECR 585.*

⁶⁶ *According to the advocate general the dualist member states may have to amend their constitutions to give effect to the supremacy principle. The Court emphasised, against this proposition, that the supremacy rule has already penetrated the national legal system with the entry into force of the Treaty.*

⁶⁷ *Stein, Lawyers, judges and the making of a transnational constitution, AJIL 1981 p.12.*

⁶⁸ *Stein, Toward supremacy of Treaty-constitution by judicial fiat, Michigan Law Review 1964-65 p.491.*

⁶⁹ *De Witte, Retour à "Costa", la primauté du droit communautaire à la lumière du droit international, RTDE 1984 p.425. Wyatt, op.cit. ELRev 1982 p.147. The "new Community legal order" was distinguished from international law in cases 90 and 91/63, Commission v. Belgium and Luxembourg (1964) ECR 625 where the Court denied the applicability of an international law principle in Community law context between parties bound by the compulsory jurisdiction of the European Court of Justice.*

the next stage of the relationship between the Italian legal system and Community law. Direct effect and supremacy had to be accepted as fundamental substantive rules of Community law but not without any counteraction. The Community legal system, although accepted as a distinct one considered neither foreign nor international law for the Italian courts, had been regarded as separate from the Italian legal order. Between these two independent legal orders the necessary co-ordination is ensured by Article 11 of the Constitution which provides the basis for internal application of Community law.

As opposed to the automatic integration approach taken by the ECJ the reference to the constitutional provision governing generally the internal reception of treaties may be understood as the first line of defence against an unforeseeable and uncontrollable power in the name of Community law (triggering a fundamental conceptual difference which seems to remain important as long as the community of states is not transformed into a unified state).

According to Article 134 of the Constitution the Constitutional Court decides on controversies concerning the constitutional legitimacy of laws. Since Community law received its legitimacy in Italy on the basis of Article 11 of the Constitution the alleged conflicts between national law and Community law involved the violation of Article 11 and so raised the issue of constitutionality of the particular Italian law. Accordingly, it was for the Constitutional Court alone to pronounce on the compatibility of domestic and Community law, the courts of the judiciary were obliged to refer these kind of conflicts to the Constitutional Court. On that adjudicative basis the Constitutional Court defined in the San Michele case⁷⁰ a “hard core of constitutionality” composed of the protection of inalienable rights of human beings which would have rendered unconstitutional national legislation derogating therefrom. This case concerned one of the Community Treaties and the judgment was made about a year after the ECJ ruling in *Costa v. ENEL*, obviously as a counteraction.

The reference to a constitutional hard core (*noyau dur constitutionnel*) had been the foundation of the second line of defence and a control device accessible for the member state over the development of Community law. As the Community Treaties (like international treaties in general) are inferior in hierarchy to the Constitution and constitutional values, the laws of the Community remain subject to verification as against the constitutional requirements and values stemming from the Italian Constitution.⁷¹

The constitutionality of the law approving the EEC Treaty was discussed in the *Frontini* case⁷² where it was alleged that the direct applicability of EEC regulations violated the constitutional regime concerning the enactment of laws in Italy because the Constitution did not authorise an external body (the Community) to create law applicable in Italy. The Constitutional Court has accommodated the supremacy principle holding that it had no power to review the compatibility of individual Community regulations with the Italian Constitution

⁷⁰ *Judgment no.98 of 27 December 1965. Rideau, Constitution et droit international dans les Etats membres des Communautés européennes, RFDC 1990 p.441.*

⁷¹ *Olmi, Les hautes juridictions nationales, juges du droit communautaire, in: Du droit international au droit de l'intégration, Liber Amicorum Pierre Pescatore, 1987, p.499.*

⁷² *No.183 of 27 December 1973. (1974) 2 CMLR 386. CMLRev 1974 p.373.*

because they were given effect as acts of an autonomous legal system⁷³ and do not fall under Article 134 of the Constitution relating solely to the review of constitutionality of the laws of the State and of the regions. However, limitations of sovereignty are allowed only for the purposes indicated in the EEC Treaty and it should be excluded that such limitations give the organs of the EEC an unacceptable power to violate the fundamental principles of the Italian constitutional order or the inalienable rights of man. It will always be assured, according to the Constitutional Court, that a control on the continuing compatibility of the Treaty with the above fundamental principles is exercised within the context of transfer of sovereignty. The power attributed to the Community is therefore limited by national constitutional considerations and the final say in such a possible conflict is for the Constitutional Court to pronounce which could entail the disapplication of Community acts in Italy. That was the meaning of this first-generation constitutional reserve.

The other element of the Frontini case concerned the reproduction in national laws of the content of EEC regulations, thereby transforming the Community rules into domestic sources of law. The European Court of Justice laid down the principle that the forms and the process necessary in national law to give full effect to a Community regulation may not alter the content and effectiveness of EEC law.⁷⁴ More specifically, in Variola⁷⁵ the ECJ affirmed that the entry into force and application of Community regulations are independent of any measure of reception into national law, their direct application is “an indispensable condition of simultaneous and uniform application” throughout the Community. The Italian practice of reproducing regulations in domestic laws concealed the Community law nature of EEC regulations which affected their interpretation and the enforcement of obligations thereunder.

The Corte Costituzionale followed in the Frontini judgment the ECJ, emphasising the requirements of legal certainty and equality and accepted the direct application of regulations “as acts having the force and value of statute in every member state, to the extent of entering into force everywhere simultaneously and receiving equal and uniform application to all their addressees”, concluding that Community law should not be “the subject of state-issued provisions which reproduce them”.⁷⁶ National laws which merely reproduce the content of Community regulations had consistently been declared unconstitutional. From a substantive law viewpoint the coexistence of Community and national laws has been conceived in Italy by the mid-seventies along the supremacy principle which was declared, without a proper Treaty basis, by the European Court as a powerful innovation governing the entire Community legal order. However, Article 11 of the Constitution was the only accepted basis of internal application of Community law (the doctrinal ground for supremacy) and the formulation of constitutional reservations revealed the possibility of permanent control by the Constitutional Court over the development of Community law.

⁷³ *In particular, Article 189 of the EEC Treaty (direct application of Community regulations in the member states) was held a lawful delegation of law making power to the Community, since it formed part of the transfer of sovereignty authorised under Article 11 of the Constitution, and taking into account the guarantees of due process and the participation of the Italian State in the Community lawmaking process.*

⁷⁴ *Case 39/70 Nord Deutsches Vieh und Fleischkontor (1972) ECR 491.*

⁷⁵ *Case 34/73 Variola v. Amministrazione delle Finanze (1973) ECR 981, decided about ten weeks prior to the Italian Constitutional Court’s ruling in Frontini.*

⁷⁶ *Mastellone, The judicial application of Community law in Italy, CMLRev 1982 p.153.*

In *Frontini* the Constitutional Court did not expressly pronounce on the competence of the courts of the judiciary to set aside national legal rules contrary to Community regulations. In the *ICIC* case⁷⁷ it was specified that declaration of the unconstitutionality of subsequent national laws contrary to Community law fell within the exclusive competence of the Constitutional Court. Therefore ordinary courts could not apply the consequences of the priority of EEC law, they were obliged to refer the matter to the Constitutional Court. To give full operation of the supremacy principle a new judgment was necessary from the European Court of Justice. In the *Simmenthal* case⁷⁸ an Italian judge questioned, in Article 177 proceeding, this adjudicative monopoly of the Constitutional Court invoking direct applicability and supremacy of Community law. The reference was a convenient ground for the ECJ to complement the judgment rendered in *Costa v. ENEL* in order to secure the practical implications of the supremacy principle. In *Simmenthal* it was ruled that a national court which is called to apply Community law is under a duty to give full effect thereto, if necessary by refusing its own motion to apply any conflicting provision of national law (both prior and subsequent) and it is not necessary for the courts to request the prior setting aside of conflicting domestic rules “by legislative or other constitutional means”.⁷⁹

The practice prevailing in Italy was held incompatible with those essential requirements of Community law which concern its integration, direct effect and direct application within the national legal system and grant it equal status with national law as regards enforcement and judicial application. The effectiveness of EEC law would be impaired if the resolution of the conflict were deferred to a court other than the one having initial jurisdiction (the national trial court) “even if such an impediment to the full effectiveness of Community law were only temporary” (involving the delay caused by the intervention of the Constitutional Court). Member state courts have become the courts of Community law upon the entry of the Treaties into the national legal order.⁸⁰

It took six years for the Italian Constitutional Court to endorse the meaning of the *Simmenthal* judgment that threatened one of its important prerogatives to centrally review alleged conflicts between national and Community law.⁸¹ In the *Granital* case⁸² the Constitutional

⁷⁷ *Societa industrie chimiche Italia Centrale v. Ministero commercio con l'estero*, no.232 of October 30, 1975. *CMLRev* 1976 p.630. *RTDE* 1976 p.396, *Plouvier*, *L'arret de la Cour constitutionnelle d'Italie dans l'affaire ICIC*, *RTDE* 1976 p.271.

⁷⁸ *Case 106/72 Amministrazione delle Finanze v. Simmenthal* (1978) *ECR* 629. *CMLRev* 1974 p.372.

⁷⁹ *This judgment has also specified that Community law, insofar as it is an integral part of and takes precedence in the national legal order, precludes the valid adoption of new national legislative measures incompatible with it (consideration no. 17).*

⁸⁰ *Barav, Observations. Les effets du droit communautaire directement applicable, Cah.Dr.Eur.* 1978 p.265. *Carreau, Droit communautaire et droits nationaux: concurrence ou primauté?*, *RTDE* 1978 p.381.

⁸¹ *Barav, Cour constitutionnelle italienne et droit communautaire: le fantom de Simmenthal*, *RTDE* 1985 p.313.

⁸² *No.170 of 8 June 1984, Spa Granital v. Amministrazione delle Finanze*, *CMLRev* 1984 p.756. *CDE* 1986 p.185.

Court was requested to decide on the constitutionality of a decree allegedly violating the rule that an interpretation given by the ECJ is to govern legal relationships arising and established even before the judgment⁸³. It argued that conflicting national provisions cannot constitute an obstacle to the recognition of the binding force conferred by the Treaty on Community law as a source of directly applicable rules. Domestic statutes apply “to a legal system that does not seek to interfere with rules produced in the Community’s system, which is a separate and independent one, although municipal law does guarantee compliance with those rules in Italy”⁸⁴.

After this statement of delimiting again the two legal systems, the Constitutional Court pronounced its new position invoking that Community regulations are always to be applied (even over later conflicting national statutes) and holding that national courts entrusted with the task of applying Community regulations may refer a question of interpretation under Article 177 EEC to the European Court. The judiciary could henceforth disapply, simply ignore conflicting national rules as a normal part of the judicial work (the validity or abrogation of the conflicting national rule is a different question). The Constitutional Court did not forget to emphasise that its new formula applies only insofar as powers transferred to the Community are duly exercised in producing legal rules which are complete and immediately applicable in municipal courts. The theoretical importance of the Granital judgment was that it carried the autonomy approach already dominating in the Frontini case to its logical conclusion, previous decisions did not wholly accept the supremacy of Community law.⁸⁵

The Italian Constitutional Court has not, however, remained powerless in the surveillance of the application of Community law. The sphere of its possible intervention has in fact been extended. In addition to the already established grounds to guarantee respect for certain constitutional values (fundamental human rights) and the protection of fundamental principles of the constitutional order a new category has been introduced. According to this reservation the Constitutional Court has not lost the power to decide on the constitutionality of Italian laws intended to impede or prejudice the “continuing observance of the Treaty” when the Community system or its basic principles are affected. The aspect that makes this eventuality a matter of constitutionality is the assessment whether the legislator intentionally and “unjustifiably” neglected the obligations approved by the law adopting the Community Treaties, in a manner that removed some of the restrictions voluntarily imposed on State sovereignty. It must be underlined that this reservation defined an important and unlimited power of assessment since one of the essential elements of its formulation spoke about “unjustifiable action” of the Italian legislator which means that justifiable measures contrary to Community law or against actions of Community institutions may be upheld by the Constitutional Court. This concept indirectly assures the competence for the Constitutional Court to guarantee that the powers attributed (*pouvoir attribué*) to the Community are not

⁸³ *Cases 66, 127-128/79 Salumi (1980) ECR 1237.*

⁸⁴ *English translation in: Leading cases on the law of the European Communities, eds. Curtin-van Empel-Völker-Winter, 1994 p.319.*

⁸⁵ *Cartabia, The Italian Constitutional Court and the relationship between the Italian legal system and the European Community, Michigan JIL 1990 p.173.*

exceeded, or in more proper terms, Community measures and laws adopted transgressing the limits of this attributed power would not be recognised and applied in Italy.⁸⁶

The Granital decision reaffirmed the conceptual difference concerning supremacy of Community law: Italy applies Community law (which is non-Italian law in its origin and interpretation) because the Constitutional Court interpreted the constitutional principles as indications that the domestic legal order should not impede its internal application, and not because Italian law is subordinate to Community law as the ECJ would like to see it. In other words, supremacy of Community law has not been accepted in Italy recognising the “supreme sovereignty of the Community”.⁸⁷ Or as it was also regarded, the direct application of EEC regulations did not come from an unqualified supremacy, instead from the fact that they cover the fields transferred by the Treaty into Community competence: therefore the Granital decision may also be understood as only drawing the consequences of this division of law-making competence.⁸⁸ Though the practical result of these views is the same in most cases the theoretical difference is of relevance when the legal nature of the Community, the respective powers of member states and the Community, the delimitation of the attributed power and the possible blocking of the internal application of Community measures are at issue.

The development opened by the Granital judgment resulted in the recognition by the Italian Constitutional Court of the supremacy and direct applicability principles as regards Treaty provisions producing direct effect.⁸⁹ In the BECA case it was held that the general principles emanating from the jurisprudence of the European Court of Justice satisfy the same requirements of direct applicability as Community regulations, therefore it is for ordinary courts to set aside the conflicting national law without recourse to the constitutional control procedure.⁹⁰ In the case Provincia di Bolzano the explication was more precise: the Treaty provisions were considered directly applicable, with the meaning as they had been interpreted by the ECJ.⁹¹ The Granital-formula has also received application to Community directives. In the case known as “referendum against pesticides” the Constitutional Court held that even a successful referendum would not have the effect of precluding the application in Italy of a directive provision which satisfied the conditions (as determined by the ECJ) of direct effect.⁹² Primacy and direct applicability of appropriate rules of directives conferring rights

⁸⁶ Gaja, *CMLRev* 1984 p.648.

⁸⁷ La Pergola-Del Duca *op.cit.* *AJIL* 1985 p.615. It may be recalled that the Italian theory is a dualistic one based on Article 11 of the Constitution, the ECJ’s notion of permanent cessation of sovereignty lays the grounds for a monistic view.

⁸⁸ Petriccione, *Italy: supremacy of Community law over national law*, *ELRev* 1986 p.321.

⁸⁹ Daniele, *Après l’arret Granital: Droit communautaire et droit national dans la jurisprudence récente de la Cour constitutionnelle italienne*, *CDE* 1992 p.6.

⁹⁰ Judgment 113/85 of 8 May 1985. Rideau, *op.cit.* *RFDC* 1990 p.443. Olmi, *op.cit.* p.528.

⁹¹ Judgment 389/89, see: Daniele, *op.cit.* *CDE* 1992 p.7.

⁹² Judgment 64/90, see Note by Traversa in *RTDE* 1991 p.296. The conclusions of this decision was confirmed in Giampaoli, judgment 168/91.

upon individuals as against state organs have been ensured in line with the relevant leading cases decided by the European Court.⁹³

Concerning the ranking of Community law within the Italian legal order the dualistic separation of the two legal systems has been maintained. However, the formulation of the reasoning in some cases revealed the difficulties inherent in the dualistic approach when the immediate internal application or direct effect of Community law was to be explained. Community rules have been described as provisions which, within the limits of competence and appropriate objectives of the Community lawmaking organs, have prior ranking (rang primaire) to national law, or in similar terms, which supersede national provisions even of legislative origin.⁹⁴ Similarly, the Constitutional Court qualified Community law as entering into and remaining in force in the Italian legal order without its effectiveness being influenced by national law.⁹⁵ But the traditional dualistic conception has never been abandoned.

The other side of the post-Granital development can demonstrate how the Constitutional Court qualified in its jurisprudence the reservations formulated in *Frontini* and in *Granital*. In the *FRAGD* case⁹⁶ it was explicitly stated that a rule of Community law cannot be applied in Italy if it infringes a fundamental principle of the Italian Constitution concerning the protection of human rights, notwithstanding the fact that the Court of Justice had accepted the legality of the rule in question.⁹⁷ This case concerned the ECJ's power of limiting or excluding the retroactivity of its preliminary rulings declaring the invalidity of a Community regulation. The Venice court, referring the matter to the Constitutional Court, was of the opinion that the exercise of this power by the ECJ violates the constitutional principle that guarantees for everyone the right to institute legal proceedings for the protection of his own rights and legitimate interests (Article 24 of the Constitution). The Constitutional Court upheld its competence and discussed the reference on its merits. A balanced decision has been reached: though the ECJ may declare that the previous effects of an invalid regulation remain unaffected, it must accept that the invalidity is applicable in the proceeding before the national court which made the reference under Article 177 EEC and also in all other proceedings initiated in national courts before the invalidity had been declared.

The category of reservation that was introduced in *Granital* has been qualified in more recent cases. An illustration may be the *BECA* decision where the Constitutional Court restricted its scope to the protection of "the system of fundamental principles of the Community legal order which is to be seen in its totality or in its essential core". The constitutional control of national laws would therefore be conducted as against this basis. It transpires from this judgment that

⁹³ *Case 41/74 Van Duyn (1974)ECR 1337, case 148/78 Ratti (1979)ECR 1629, case 8/81 Becker 1982(ECR) 53, case 286/85 McDermott 1987(ECR) 1953, case 103/88 Fratelli Costanzo (1989)ECR 1839.*

⁹⁴ *Reasoning expressed in Provincia di Bolzano. See: Gaja, New developments in a continuing story: the relationship between EEC law and Italian law, CMLRev 1990 p.85, who denotes this wording as "the simpler concept of supremacy".*

⁹⁵ *Judgment 144/89 Buitoni Perugia, see: Daniele op.cit. CDE 1992 p.13.*

⁹⁶ *Judgment 232/89, see: Schermers, The scales in balance: national Constitutional court v. Court of Justice, CMLRev 1990 p.97.*

⁹⁷ *Schermers-Waelbroek, Judicial protection in the European Community, 1992, p.135.*

the Constitutional Court would not apply *ex officio* this ground of constitutional control, it suggested that ordinary courts are expected to expressly invoke this “exception of unconstitutionality”.⁹⁸ Other cases confirmed the restrictive attitude as regards the grounds of challenge of internal laws, though sometimes the Constitutional Court made that approach plain only in the decision taken on the merits of alleged violations of Community law principles (instead of refusing admissibility of the reference).⁹⁹

Finally, it should be mentioned that the amendments to the Community Treaties brought forward by the Maastricht Treaty have so far been considered in Italy as being covered by Article 11 of the Constitution which permits their implicit modification without a further constitutional amendment. However, should the Treaty adversely affect the fundamental principles of the Constitution and the basic values protected thereunder even a constitutional revision could not protect a treaty from constitutional challenge. It would remain unconstitutional, together with the act of revision, because the principles giving the Italian Constitution its “specific identity” are “absolutely intangible”.¹⁰⁰

2. In Germany, Article 24(1) of the Grundgesetz (GG) provided that the Federation may by legislation transfer sovereign powers to inter-governmental institutions, Article 25 assures supremacy and automatic adaptation to general international law.¹⁰¹ Treaty law is treated in a mitigated dualistic way: the parliamentary approbation of a treaty, besides authorising definitively its conclusion, transforms the treaty attributing to it the force of law within the national legal order capable to bind the State organs and individuals alike (the approbation not only permits the making of the treaty obligatory by a later law but transforms itself into internal binding law the treaty content).¹⁰² Treaties take the rank of the approbation law, their interpretation and the enforcement of their directly applicable provisions form part of the judicial functions.

In the internal reception and application of Community law the necessary conformity had been achieved by the early seventies. The German Constitutional Court (Bundesverfassungsgericht, BVerfG) developed a case-law, deliberating on the scope of Article 24(1) GG, towards the recognition of the specific nature of Community law and of its fundamental principles. It was held in 1967 that constitutional control under Article 100 GG may not be applied to Community regulations since the acts of the Community, for the benefit of which Germany transferred sovereign powers, do not qualify as actions of the German authorities.¹⁰³ The Community was qualified as an interstate institution, a Community of a

⁹⁸ *Daniele, op.cit. CDE 1992 p.18.*

⁹⁹ *An example may be the Poulos case (286/86), see: Rideau, op.cit. RFDC 1990 p.444, Daniele, op.cit. CDE 1992 p.19.*

¹⁰⁰ *Luciani, La Constitution italienne et les obstacle à l'intégration européenne, RFDC 1992 p.669.*

¹⁰¹ *Constitutions of the countries of the world, op.cit. supra 4, binder VI. Articles 24(1) and 25 are essentially identical to Articles 10 and 11 of the Italian Constitution.*

¹⁰² *The Zustimmungsgesetz or Vertragsgesetz give the treaty provisions a new legal foundation (Geltungsrund) with its transmutation into domestic law. Pescatore, op.cit. supra 48 p.358.*

¹⁰³ *Decision of 18 October 1967, CMLRev 1968 p.484, RTDE 1968 p.203.*

special kind in a process of developing integration, empowered with certain sovereignty transferred by the member states. An autonomous and independent new authority had so been created whose acts need not be confirmed or ratified by the member states and may not be annulled by them. Being *sui generis* legal acts (neither international law nor municipal law) taken outside of the German public authority the constitutional review provided for by the GG could not normally be extended to Community regulations (the reasoning is similar to that of the Italian Constitutional Court).

Supremacy of Community law over subsequent national laws had been declared implicitly in the above decision which was so generally formulated that it had been understood to cover subsequent legislation as well when the impossibility to repeal a Community regulation was stated.¹⁰⁴ In a later case the BVerfG was filed with a constitutional complaint attacking the refusal by a court to request a preliminary ruling in a question which had already been discussed and ruled on in a previous judgment of the ECJ.¹⁰⁵ It was expressly declared that directly effective Treaty provisions superpose and supersede contrary national laws: German courts must apply those rules which, though attributable to an independent supranational sovereign power, nevertheless produce direct effect in the domestic sphere and overrule and set aside incompatible national laws. It is for the ordinary courts to verify the rules applicable to cases before them and to disapply those contradicting to superior laws. The Constitutional Court argued that Article 24(1)GG when correctly interpreted lays down that the sovereign acts of Community organs, including the judgments of the European Court of Justice, are to be recognised by the originally exclusive holder of sovereignty.¹⁰⁶ After this ruling German courts had generally endorsed the requirements of the supremacy principle in the application of Community law. The reasoning followed by the courts referred to uniformity of Community law which cannot be modifiable by member states, to the existing competence of the Community which assure at the same time supremacy of its laws, to the principle of equal treatment of subjects under EC law.¹⁰⁷

The most remarkable contribution of German law to the history of Community law has intervened in the protection of fundamental human rights. We cannot discuss in detail the evolution of Community law in this field, as a starting point we refer to the initial position of the European Court that it had no authority to ensure respect for rules of internal law in force in the member states even if they involved principles of constitutional law: Community law did not contain any general principle guaranteeing the maintenance of vested rights, including fundamental rights.¹⁰⁸ General considerations about the status of Community law, the meaning and consequences of the constitutional authorisation to be party to the Community

¹⁰⁴ *Bebr, How supreme is Community law in the national courts, CMLRev 1974 p.31.*

¹⁰⁵ *The German Lütticke case, decision of 9 June 1971. The complaint argued that the applicant was denied of a legitimate judge (ie. the European Court). The ECJ held previously that Article 95 EEC was directly effective and took priority over subsequent national legislation, as a matter of Community law the question had therefore been settled.*

¹⁰⁶ *Schermers-Waelbroek, Judicial protection in the European Community, 1992 p.131. Olmi, op.cit. p.526.*

¹⁰⁷ *Bebr, op.cit. CMLRev 1974 pp.31-34.*

¹⁰⁸ *Case 1/58 Stork v. High Authority (1959)ECR 17, cases 36-38/59 and 40/59 Präsident etc. v. High Authority (1960)ECR 423.*

will be discussed. From the viewpoint of national law the fundamental question is whether the transfer of powers under Article 24(1)GG may allow for any derogation from the fundamental constitutional principles and rights guaranteed therein.

The 1968 decision seemed to immunise Community acts of constitutional review. It was the supreme finance court (Bundesfinanzhof) which condensed the views of German courts that have been expressed after the *Costa v. ENEL* judgment to observe the fundamental constitutional provisions ignoring or contesting the absolute supremacy of Community rules.¹⁰⁹ While accepting the *Costa v. ENEL* ruling as to the nature and autonomous character of Community law it refuted the rulings concerning the relation of Community law to German law and its effects therein: supremacy over constitutional provisions was excluded arguing that direct application of regulations may produce legal effects only insofar as the Community rule does not conflict with “higher norms of a different quality”. The Bundesfinanzhof stated that constitutional provisions prevail over Community law and may preclude its application in Germany.¹¹⁰ In a similarly overt reasoning it was stated that the supremacy of Community law broke down on the Grundgesetz if it is contrary to the principles governing the State since these principles were imposed on every law either of German or Community origin.

The opening battle between the German Constitutional Court and the European Court was the *Internationale Handelsgesellschaft* litigation. The administrative court of Frankfurt referred the case to the ECJ to rule on the validity of a system of export deposits alleged to be contrary to fundamental rights, to the principle of proportionality (a doctrine of German constitutional law under which public authorities may impose on the citizens only those obligations which are necessary for attaining a particular objective). The European Court stated,¹¹¹ as a matter of delimitation of Community law and its possible judicial review, that the validity of Community measures cannot be judged according to the rules or concepts of national law. Even a violation of the fundamental human rights provisions of a member state’s constitution could not impair the validity of a Community rule because only Community criteria may be applied and the assessment must be made by the Community Court. Should there be analogous guarantees inherent in Community law the fundamental rights would be protected by Community law itself. The ECJ declared that “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice” and “the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community”.

The referring administrative court challenged the preliminary ruling maintaining that there was no legal ground for the supremacy of Community law in the given case. It argued that the

¹⁰⁹ *Decision of 10 July 1968, taken after the European Court gave judgment on the preliminary reference in case 17/67 Neumann (1967)ECR 441. Zuleeg, Fundamental rights and the law of the European Communities, CMLRev 1971 p.446.*

¹¹⁰ *The resemblance to the approach taken by the Italian Constitutional Court in its Costa decision is striking, even if we consider that the Bundesfinanzhof made light of the ECJ’s Costa v. ENEL judgment as representing authority only on the jurisdictional relation between the European Court and national courts.*

¹¹¹ *Case 11/70 Internationale Handelsgesellschaft (1970)ECR 1125. CMLRev 1971 p.250.*

effect of Article 24(1)GG cannot be equated with a constitutional amendment the ratification of the Treaty did not disclaim the observance of the fundamental rights but the legislator could merely assign to the Community lawmaking powers attributed to it in the Grundgesetz as restricted by its articles. If Community law could prevail over constitutional provisions and if it could be exempt from respecting the requirements for the protection of fundamental rights a “constitutional and legal vacuum” would result with the possible erosion of constitutional law as the highest authority of national control.¹¹²

The Bundeiverfassungsgericht has pronounced the following fundamental statements.¹¹³ The European Court cannot give a binding decision whether the rule of Community law is compatible with the German Constitution, the independent side-by-side existence of the two legal systems involves the separation of competences of the ECJ and the BVerfG. As a matter of substantive assessment, precedence of Community law does not allow for the conclusion that it prevails over constitutional law: the foundations of Community law is not put into question by this approach,¹¹⁴ nevertheless Community law should seek a system which is compatible with an entrenched (*zwingende*) perception of German constitutional law. The transfer of sovereign powers to the inter-state institution did not open the way to amending the basic structure of the Grundgesetz by the lawmaking of the Community institutions. Article 24GG did not actually give authority to transfer sovereign rights but opened up the national system, within the constitutional limitation, reducing the fields for national legislation by taking back the sovereign’s exclusive claim to rule and gave room to the direct effect and applicability of law from another source.

The part of the Grundgesetz dealing with fundamental rights was an inalienable essential component of its structure, protected by Article 79(3) ensuring its integrity and inalterability. In the absence of a democratically elected parliament and a codified catalogue of fundamental rights the substance of which is reliably and unambiguously fixed for the future the Community law standard of fundamental rights may develop without any guarantee as to its adequacy with the requirements of the Grundgesetz. The reservation derived from Article 24GG towards supremacy of Community law remains applicable as long as legal certainty is not achieved to exclude any transgressing of the limitation constitutionally imposed on recognition and application of Community law. In the case of conflict involving fundamental rights not sufficiently protected in the Community’s legal order the internal application of secondary Community law can be precluded (but the BVerfG can never rule on the validity of Community law).

Although the European Court considered that it protected fundamental rights within Community law, the mistrust in the standard of protection and the unpredictable results of its judicial monopoly made it appropriate to underline that only the German Constitutional Court

¹¹² *Bebr, op.cit. CMLRev 1974 p.30.*

¹¹³ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Decision of 29 May 1974, 2BvL 52/71, The First Solange case. CMLR 1974 p.540. RTDE 1975 p.333. CDE 1975 p.161.*

¹¹⁴ *Just as international law is not put into question by Article 25GG when it provides that general international law takes precedence “only” over ordinary federal law and not over the Constitution and as foreign law, in the operation of private international law, is not questioned when set aside by national public policy considerations.*

is entitled to protect fundamental rights guaranteed in the German Constitution, no other court can deprive it of this duty imposed by constitutional law. Therefore the Constitutional Court had to examine Community rules and rule on possible infringements of fundamental rights in order to ensure that the protection offered in the Grundgesetz was not impaired as a result of direct effect and application of Community law. The practical consequence of this ruling was that parties could challenge the constitutionality of Community law before German courts causing delay to the full application, violating unity and indivisibility of Community law and detracting it from its supranational authority.¹¹⁵

As a result of the political declarations¹¹⁶ and the extensive jurisprudence of the European Court considering the Community bound by the provisions of the European Human Rights Convention¹¹⁷ the German Constitutional Court reversed in 1986, after some previous indications in this direction,¹¹⁸ the conclusion reached in 1974. In the Second Solange case¹¹⁹ it was held that the Community's protection of fundamental rights had developed into a system providing substantially equal protection to that guaranteed by the German Constitution. It had already been specified in a prior decision that the system of protection in an international organisation could not be required to be identical to that prevailing within the national sphere, however the protection offered must guarantee a minimum standard sufficient to meet the needs of the German Constitution.¹²⁰

So long as the Communities and the case-law of the European Court generally ensure an effective protection of fundamental rights as against the sovereign powers of the Community and insofar as they generally safeguard the essential content of fundamental rights, the German Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community law by national courts or other authorities and will no longer review laws of Community institutions by the national standard of fundamental rights. The BVerfG anticipated as justification for the above conclusion that the European Court is not obliged to determine the general principles of Community law according to the lowest common denominator derived from the comparison of national constitutions, instead it should ensure the best possible development of particular principles of fundamental rights with regard to, apart from national solutions, the practice of the ECHR organs.

¹¹⁵ *Edison-Wooldridge, European Community law and fundamental human rights: some recent decisions of the European Court and of national courts, LIEI 1976 p.1.*

¹¹⁶ *The Joint Declaration of the European Parliament, the Council and the Commission, OJ 1977 C 103/1, ELRev 1977 p.210, The Declaration on Democracy by the European Council of 1978, Bulletin EC 3-1978 p.5, and the Preamble to the Single European Act 1986.*

¹¹⁷ *For a survey of this jurisprudence and the substantive position taken by the ECJ see: Schermers-Waelbroek, Judicial Protection in the European Communities, 1992, pp.37 et seq., Hartley, Foundations of European Community law, 1994, pp.139 et seq.*

¹¹⁸ *Hahn, La Cour constitutionnelle fédérale d'Allemagne et le Traité de Maastricht, Rev.Gén.Dr.Int.Public 1994 p.122.*

¹¹⁹ *Wünsche Handelsgesellschaft, decision of 22 October 1986, 2BvR 197/83. (1987) 3 CMLR 225. CMLRev 1988 p.201, RTDE 1987 p.87 and p.537.*

¹²⁰ *Rideau, op.cit. RFDC 1990 p.427.*

Article 24(1)GG has further been qualified: it does not itself provide for the direct validity and application of the law established by an international institution, nor does it directly regulate the relationship (priority of their respective application) between such law and domestic law. The possible internal priority as regards validity or application of international treaties, including the Community Treaties, do not follow directly from general international law.¹²¹ As a matter of doctrine it was stated that the internal priority of validity or application only arises by virtue of an application-of-law instruction to that effect given by national law. This applies also in the case of treaties, like the Community Treaties, the content of which obliges the parties to provide for internal primacy in their validity and application.

To put it in a straightforward way, the immediate validity of the Community regulations for Germany and the precedence of their application over internal law arises from the application-of-law instruction of the Act of Accession which extends to Article 189 EEC as well. The constitutional authorisation for that accession is in Article 24(1)GG allowing for the transfer of sovereign rights to international institutions whose laws are accorded priority by the appropriate internal application-of-law instruction.¹²² The duties under the EEC Treaty have been considered international law obligations, without any qualification or mention of the specific nature of Community law, in order to make firm the constitutional foundation of the internal existence and application of Community law and the limits set forth in the German Constitution as to the fields of competence transferred and the substantive fundamental rights requirements imposed on Community laws emerging from the lawfully transferred competence.

Following the reservation pronounced in the Second Solange judgment the Constitutional Court restated that it is and will be competent to ensure respect for fundamental rights as against Community acts should the intervention of the European Court be inefficient to guarantee the level that is imperatively prescribed by the Grundgesetz.¹²³ It was upon the intervention of the Constitutional Court in the Kloppenburg case, as late as in 1987, that the “Cohn Bendit” type rebellion of the Bundesfinanzhof against direct effect of directives was brought to an end.¹²⁴ The demonstrative violation of Community law was overruled in Germany, unlike in France, with the initiation of proceedings by the parties affected against the ruling of a high court which could be subject to constitutional review.

¹²¹ *Under international law states are not obliged to incorporate their treaties into their national law and to accord them priority as against domestic law. Ratification, incorporation or transformation are the terms to describe the monistic and dualistic models, neither of which ensures the superior ranking of international treaty law.*

¹²² *Olmi, op.cit. p.526, CMLR 1987 p.257. Darmon, Juridictions constitutionnelles et droit communautaire, RTDE 1988 p.217. Roth, The application of Community law in West Germany: 1980-1990, CMLRev 1991 pp.138. and 142.*

¹²³ *Decision of 12 May 1989, in: Chronique générale de jurisprudence communautaire, RMC 1990 p.49. Roth, op.cit. CMLRev 1991 p.144.*

¹²⁴ *German Kloppenburg case, decision of 8 April 1987, (1988) 3 CMLR 1. Roth, op.cit. CMLRev 1991 p.140. Crossland, Three major decisions by the Bundesverfassungsgericht, ELRev 1994 p.204.*

The judgment rendered on the constitutionality of the Treaty on European Union¹²⁵ has become one of the cornerstones in the development of the Union and, more specifically, in the conception of the relationship between the national legal order and that in action at Community level. We cannot discuss the entirety of this authoritative decision nor the background considerations and motivations condensed in a carefully structured argumentation of some eighty pages. Leaving aside the questions about the admissibility of the complaints we dwell on the fundamental issues relating to the nature of the Union and the delimitation of its progression that the Constitutional Court considered and pronounced on. The structure and content of the Maastricht Treaty, though being the basis of the decision, will not separately be described here. The scope of the decision was primarily centred around the question whether the legislative assent to the TEU and the necessary constitutional amendment entail the erosion of national sovereignty and the powers of the German parliament. Under the “eternity clause” of the Constitution (Article 79(3)GG) the principle of democracy, as expressed in Article 20(1) and (2), is an unassailable requirement not open for any modification. It is part of that principle that the exercise of state powers is derived from the people of the state and the persons acting thereunder must be fundamentally answerable to the people, there must prevail a sufficiently effective content of democratic legitimacy. Sovereign rights being transferred to international institutions the German Bundestag and the citizens who elected it necessarily lose some influence on political will-formation and decision-making. Whereas it was not intended by the wording and sense of the Constitution that unanimity as a universal requirement be imposed on the integration, the majority principle, on the other hand, finds its limits in the constitutional principles and basic interests of the member states.¹²⁶

It is, however, a pre-condition for membership in an international institution envisaged by the Maastricht Treaty that a legitimacy and an influence proceeding from the people is secured inside its structure. At present that democratic legitimacy emanates primarily from the national parliaments representing the people of the individual member states, the European Parliament represents currently only an additional factor.¹²⁷ The initial requirement therefore is that national parliaments preserve powers and functions of substantial importance: by virtue of the democracy principle the extension of the Community’s functions and powers must thereby be limited. The material exigency of the approach is that the competences of the Bundestag may not be emptied for the benefit of the Council of ministers because it is composed of representatives of the national governments and falls beyond the reach of the citizens.¹²⁸

As a result of its exclusive democratic legitimacy, in the meaning of constitutional principles, the Bundestag must decide not only on German membership in the EU but also on its

¹²⁵ *Brunner et al. v. The European Union Treaty, cases 2BvR 2134/92 and 2159/92, decision of 12 October 1993. (1994) 1 CMLR 57. For a background see: Autexier, Le traité de Maastricht et l’ordre constitutionnel allemand, RFDC 1992 p.625.*

¹²⁶ *Hahn, op.cit. RGDIP 1994 p.112.*

¹²⁷ *Hanf, Le jugement de la Cour constitutionnelle fédérale allemande sur la constitutionnalité du Traité de Maastricht, un nouveau chapitre des relations entre le droit communautaire et le droit national, RTDE 1994 p.402.*

¹²⁸ *Gerkrath, Le Traité sur l’Union européenne devant la Cour constitutionnelle fédérale allemande, Europe 1993 novembre p.5.*

continuation and development. The opening up of the German legal system to the direct validity and application of supranational law of the Community without establishing with sufficient certainty the powers that are transferred and the intended programme of integration would constitute an unconstitutional surrender of powers. The extent and degree of transfer of the exercise of sovereignty assented by the legislature must be clear to avoid granting general enablement and to preclude the Community claiming powers or functions that were not specified. Predictability and sufficient certainty of rights and duties flowing from the membership are decisive because subsequent important alterations to the integration programme set up in the Maastricht Treaty and to the Union's powers are no longer covered by the law of accession to the present Treaty. Consequently, resultant Community laws would not be binding within the sphere of German sovereignty. Beside the explanation of the above conclusion the BVerfG made the statement that within a supranational organisation the democratic legitimation need not necessarily have the form prevailing in a constitutional system of a state, an unqualified declaration sent to the future.¹²⁹

The characterisation of the European Union and the Community laid accent again on the derivative nature of Community competences and invoked that the Maastricht Treaty equipped the Union and the Communities only with specific competences and powers in accordance with the principle of limited individual competences.¹³⁰ Germany has remained one of the "Masters of the Treaties", concluded and adhered to for an unlimited period (Article Q TEU), which includes the capability of ultimately revoking its adherence by a contrary act.¹³¹ In the understanding of the BVerfG, in the system set up by the Maastricht Treaty sovereignty still exists at member state level. The European Union is not a federal state based on the people of one European nation but a close association of independent sovereign states exercising jointly certain competences (Staatenverbund), therefore the question of membership in a European State did not arise. Resort to an unqualified concept of national sovereignty and to the vague notion of "Staatenverbund" triggered criticism for equating the institution created for European integration to a simple international law organisation, for ignoring the status of individuals in the enforcement of Community law and for promoting overstepped argumentation.¹³²

The second and third pillars (Articles J and K TEU) do not confer powers on the Union to take measures that have direct effect within the member states. It is the extension of the Communities and the "communautarisation" of the intergovernmental pillars that have to be

¹²⁹ Schwarze, *La ratification du Traité de Maastricht en Allemagne, l'arrêt de la Cour constitutionnelle de Karlsruhe*, RMC 1994 p.301.

¹³⁰ Article F(1) TEU takes account of the independence and sovereignty of member states, confirmed by the Final Conclusions of the European Council in Birmingham (16 October 1992). See Article E TEU and Article 3b(1) EC.

¹³¹ The majority of views support the conclusion that unilateral withdrawal from the Community (Union) would legally be impossible. Another doctrine even contests the member states' collective power to dissolve the Community. Herdegen, *Maastricht and the German Constitutional Court: constitutional restraints for an ever closer union*, CMLRev 1994 pp.243 et seq.

¹³² Schwarze, *op.cit.* RMC 1994 p.300. Advocate general Lenz in NJW 1993 pp.3038 et seq. Gerkrath, *op.cit.* Europe 1993 novembre p.6.

subject to constitutional scrutiny. The introduction of matters falling at present under Article J or K into the supranational Community pillar necessitates an amendment to the Treaty and a further assenting national act of ratification, which will also be subject to review by the German Constitutional Court.¹³³ Also the delimitation of these areas from Community competence may become a justiciable issue both before the European Court and national constitutional courts. The Union itself has no separate legal personality either in relation to the Communities or to the member states, it is a designation for the member states acting jointly in intergovernmental co-operation.¹³⁴

No Kompetenz-Kompetenz could have been granted to the Union under Article F(3) TEU which, according to the BVerfG, merely makes a statement of intent in the context of policies and programmes that the member states wish to provide the Union with adequate resources “under whichever particular procedure is necessary for that purpose”. The Union may not have been empowered to provide itself by its own authority with the sources necessary to fulfil its obligations. Any action based on different interpretation would not be covered by the assent given to the Treaty and would not be legally binding in Germany. As regards the new competences provided for in Articles 126 to 129 EC,¹³⁵ it has been specified that the harmonisation measures for the purposes of their specific objectives may not be based on Article 235 EC. The BVerfG imposed the constitutional obligation on the federal government to assert its influence in favour of a strict treatment of the subsidiary principle to avoid the erosion of national competences¹³⁶ and anticipated that the European Court will scrutinise the adherence thereto.¹³⁷ Limited individual empowerment, strict subsidiarity and a principle of proportionality with general application constitute foundations of the Community constitution, as the BVerfG has put it in the interest of the national legal system.

In the protection of fundamental rights the Constitutional Court reaffirmed its position explained in the Second Solange decision, stating that it exercises its jurisdiction on the applicability of secondary Community legislation in Germany in a “relationship of co-operation” with the European Court. As a matter of policy that co-operation would restrict its intervention to preserve a general guarantee of the constitutional standards that cannot be dispensed with. At the same time that intervention applies also in the fields of

¹³³ *The Bundesverfassungsgericht did not omit to specify that the existing protection of basic rights available as against state powers cannot in any event be diminished: insofar as the implementation of a traditional international convention (ie. pillars two and three of TEU) would infringe constitutional rights it is prohibited by constitutional law. Therefore no legal lacuna was created by Article L TEU.*

¹³⁴ *The perception of the EU as having no legal personality is doubtful, see: Everling, Reflections on the structure of the European Union, CMLRev 1992 p.1053.*

¹³⁵ *Lane, New Community competences under the Maastricht Treaty, CMLRev 1993 p.939.*

¹³⁶ *Article 3b(2) EC, also included in the general part, Article B(2), of the Treaty on European Union. On the importance of the general part of TEU see: Curtin, The constitutional structure of the Union: a Europe of bits and pieces, CMLRev 1993 p. 17. and Müller-Graf, The legal basis of the third pillar and its position in the framework of the Union Treaty, CMLRev 1994 p.493.*

¹³⁷ *Toth, Is subsidiarity justiciable?, ELRev 1994 p.268.*

intergovernmental co-operation to the extent that their national implementation may constitutionally be challenged like other instruments of international law. The jurisprudence has been extended to direct challenges of Community acts interfering with fundamental rights and the concept of co-operation does not seem to withdraw the substantive force of the previously established doctrine. Instead, it amounts again to a denial of absolute supremacy of Community law and its Court of Justice.¹³⁸

The Constitutional Court clearly vindicated competence to control actions of Community organs. Discussing the predictability of certainty of obligations flowing from the Maastricht Treaty it held that subsequent important alterations to the integration programme and to the Union's powers of action would no longer be covered by the present act of accession. In order to keep that restriction alive it will review "legal instruments of European institutions and agencies" to examine whether they remain within the limits of the powers conferred on them or whether they transgress the attributed sovereign rights. This formula expressed the intent of interfering in the political areas of Community legislation which may result in reviewing an amalgamation of laws and politics created at Community level on the basis of a constitutional argumentation plainly "fertilized" with politics. Here comes the criticism attacking the judgment for not distinguishing between legal and political problems.¹³⁹

The implications that the limited nature of competences transferred have for the dynamic application of Community powers has been made clear in a forceful manner. Invoking the dynamic extension of the existing treaties on the basis of an "open-handed treatment" of Article 235 EEC, on the judicial legitimacy of implied powers and on an interpretation allowing maximum exploitation of Community powers under the "*effet utile*" theory the Constitutional Court intended to reduce the effect of these instruments in the future. The fundamental distinction is to be observed carefully by the organs of the Community, especially by the Court of Justice, which is torn between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty. The admonition addressed to Luxembourg expected that due regard is paid to the limits between judicial development of Community law still covered by the Treaties and a judicial activism amounting to an extension thereof¹⁴⁰. Excessively broad interpretation of enabling rules included in the Treaties to claim non-specified competences would not produce any binding effects for Germany. The warning could not have been more straightforward: the European Court should cautiously consider the limits of Community empowerment and the consequences of its judgments to avoid their being disregarded in Germany. This eventuality would put into question one of the basic structural pillars of the Community system.¹⁴¹

As a general evaluation it may be said that the main contribution of this judgment to the relationship of Community (Union) law and national law was the reaffirmation of the

¹³⁸ Herdegen, *op.cit.* CMLRev 1994 p.239.

¹³⁹ Schwarze, *op.cit.* RMC 1994. p.301.

¹⁴⁰ Herdegen, *op.cit.* CMLRev 1994 p.248.

¹⁴¹ It should be noted that the power of the European Court will probably be on the agenda of the revision conference, at least high German officials, the Chancellor included, hinted that the standing of lower courts under Article 177 EC should be reconsidered. See: Mancini-Keeling, *Democracy and the European Court of Justice*, Modern LR 1994 p188.

principles which has become doubtful as a result of the political development. In this sense, it represents the orthodoxy of approaches protecting national sovereignty, emphasising the internal constitutional ground as the authority to make Community law applicable, resorting to constitutional reservations, vindicating certain control over legislative and judicial actions of Community institutions, ensuring influence on the development of the Community and the Union.¹⁴²

III. Attempted theoretisation of issues to emerge, focusing on some selected crucial questions

The Hungarian Constitutional Court adopted in the Europe Agreement decision the majority approach of the Member States to Community law in that it recognised its special nature not by virtue of the inherent nature of Community law, but under the authority of own national legal order. In order to identify the appropriate course of action in terms of constitutional requirements for a prospective accession some statements of principle may be made. Most of the questions raised in the experience of the legal systems discussed above may be expected to emerge in the Hungarian legal system as well. Being a dualist country, from the Hungarian viewpoint the Italian and the German development could be the most instructive.

As was demonstrated above, it is of little importance whether the monistic or the dualistic theory prevails in a country when the doctrinal basis of the application, superiority and direct effect of Community law is at stake. The basic consequences of dualism are completely obsolete in the context of Community law. In ranking Community Treaty law has practically been placed over ordinary legislation, the application of Community law as against a national law adopted subsequently has also been established. The Constitution, however, is regarded (by the member states but not by the European Court) superior to the Community Treaties. In this context the status of “legislation of constitutional force” may be problematic. Much depends on the internal structure of the Constitution: for instance if the specific clause on the necessary transfer of sovereignty requires a majority higher than the adoption of legislation, but not lower than the amendment of the Constitution, the levels of legitimation could produce a satisfactory outcome.

The dualistic theory may affect the Treaties but can hardly govern the internal application of secondary Community law. Once the powers have been transferred to the Community the status of secondary legislation will be governed by the principles of the Community legal system. There were attempts to give secondary Community law the status of international treaties (implicit ratification) but for the purpose of exposing it to the unfavourable consequences already applied to genuine treaties (see at the Conseil d’Etat). The challenge for a possible disapplication of secondary rules is not exercised along the logic of dualism (succession of laws in time, ranking) but on grounds of constitutionality which is reserved exclusively to constitutional courts. The necessity of constitutional amendments about the transfer of sovereignty (political, jurisdictional, economic-monetary), voting rights of non-nationals can be identified from the text of the Constitution. I would submit the argument that no other textual modification would be required in order to achieve the status satisfactory

¹⁴² *Mention about the possible withdrawal of Germany from the Community, without being specified whether unilaterally or by a collective act of the member states, seems to be a newly introduced conceptual element. The other rulings fit well within the line of approach previously taken and now reaffirmed or strengthened. See: Hahn, op.cit. RGDIP 1994 p.125.*

from the viewpoint of current Community law. It would be for the Constitutional Court to pronounce on any further requirements. (At the material time both Community law and the national constitutions will probably be different to justify the reconsideration of the above submission.) It must be underlined that there are other constitutional models different from the Italian or German ones. The Dutch Constitution especially deserves attention for its position concerning the direct effect of treaty law (provisions of treaties that are capable of binding everyone produce direct effect and become judicially applicable on their own). This paper does not seek to produce a comparative overview.

The decisive element for the internal reception and application of Community law is the doctrinal basis accorded to the supremacy thereof. As was shown above, national constitutional courts have been anxious to emphasise that the authority of application was given to Community law in the member state constitution. The constitutional provision governing domestic effects of international treaties (Article 55 of the French Constitution) was invoked by the Conseil Constitutionnel, however the Cour de cassation could “afford” to base superiority and application of Community law on its specificity, as claimed by the European Court. More instructive is for the dualistic thinking the argumentation applied by the German Constitutional Court: the application-of-law instructions of the parliamentary legislation (the Act of Accession) constituted the ground of application of Community law. So long as the “*pouvoir constituant*” (the people of the country, acting in referendum or through the parliament) does not confer absolute supremacy on the Community rules, their internal application could only be based on the Constitution. The constitutional ground, as understood in the above context, is not possible to surrender other than by the will which expressed assent to the accession and with a further constitutional amendment. Any other attempt to this effect is subject to the scrutiny of and refusal by the Constitutional Court.

As to the issue of fundamental constitutional values the requirements of Article 8 of the Hungarian Constitution may be extended to the activity of a supranational sovereign along the reasoning adopted by the Bundesverfassungsgericht in the Solange and Brunner cases. The democracy principle and the decisive role of the parliament in the integration process should and could be ensured on the basis of the present Constitution. In order to avoid unfavorable political connotations the highest national political organ normally could leave it for the Constitutional Court to determine a constitutional core to be protected as long as the country is organised upon a national Constitution. Constitutional Courts have not and will not draw a list of matters falling under the fundamental structure or the basic principles of the Constitution. The Constitutional Court must have authority to pronounce rulings on constitutionality of important steps taken by Community organs or agreed by the member states collectively. For the Hungarian Constitutional Court the substantive and procedural powers have been accorded and should be maintained to effectively carry out the functions connected to the European legal development.

Finally, the question may be raised whether the review of constitutionality of an international commitment is to be examined in view of previous international obligation already binding on the state. An affirmative answer is supported by Article 7 of the Constitution which ensures automatic adoption of general international law (of which the principle *pacta sunt servanda* forms undoubtedly part). In this case international treaties already concluded by and binding on Hungary, whether or not incorporated or transferred, should be included in the set of reference norms against which a constitutional review is assessed.

Community law would qualify as non-foreign law from the viewpoint of Hungarian law enforcement following accession to the European Union, but it is an open question whether the CC at the time of accession would take an international law oriented approach towards EC law or would base itself on the special *sui generis* characteristics doctrine in the assessment of the relationship of Community law and the national constitution. The core issue which shows the difference in these approaches is the evaluation of the autonomy principle of EC law and the absolute nature of its supremacy. Answering these core matters necessitates a careful and honest legal analysis combined with the acceptable proceeds of political science about the source of democratic legitimacy and the theories of legitimacy-creating factors.

1. Basic conception of the EU/EC legal model

This report concentrates on the European Community (EC) which is to be regarded as a legal structure and a legal machinery independent from the member states but functioning in a co-ordinated co-existence with the legal systems of the individual member states. The operational principles and techniques of this co-existence are determined by the EC: the constitutive treaty, the laws adopted by the Brussels institutions and the decisions of the European Court of Justice (ECJ). Structural issues (competence attribution and control, supremacy of EC law vis-a-vis member state constitutions) have however come to the forefront of discussions for the clarification of the constitutional foundations of the EC/member state co-existence and interaction. The understanding – which has by now become traditionally cited – describing the EC as an autonomous and independent legal order should not be questioned since most of its substance and consequences have been approved by the member states, by their political organs as well as by their courts. Nevertheless, in the post-Maastricht times an ever growing need to examine the EU/EC from a constitutional approach and expose it to traditional concepts like the source and frames of legitimacy for exercising public power and to some fundamental structural issues of the EU/EC model such as the extent and final control of competence attributed to the Community had emerged. At the level of member states internal arrangements were urged to ensure effective parliamentary intervention and control in the EU/EC decision making, especially in the areas falling within the necessary powers clause of the founding treaty and in the verification whether the EU/EC action remained within the objectives and activities defined in the founding treaty.

Apart from these primordial structural matters certain operational principles have also been raised in the recent constitutional law oriented discourse, focusing primarily on the national implementation of EC law, the autonomy of member states laws (procedural and remedial), the co-operation of the national judiciaries and constitutional courts with the two Community courts (especially with the highest EC court, the European Court of Justice). The issue of fundamental rights protection represents an evergreen area of discussion, not because of the substantial differences or conflicts between EC law and national laws but as a result of the fact that EC law, the member state laws and the European Convention on Human Rights constitutes a troublesome triangle that could produce unfortunate conflicts between member states and the EC. The Convention and the Strasbourg practice bind the member states (as individually parties to the Convention) but not the Community (which is an international person but not party to the ECHR), therefore it is a conventional obligation for member states (courts and government organs alike) to uphold a Strasbourg decision taken upon individual petition against a national law implementing EC law. At the same time member states have to obey the interpretation of the ECJ as regards the appropriateness of EC norms from the fundamental rights protection viewpoint, since the ECJ vindicates that it falls within its exclusive and compulsory jurisdiction to assess EC law, according to the fundamental rights

standards of EC law (which is elaborated by the same ECJ). Should there be diverging standards before the ECJ and the Strasbourg organs the member states would have to breach either their obligations under the Convention or their duties under Community law.

Another of the key operational questions is the principle of subsidiarity. Although it is very much connected to the extent and nature of the EC competence fields, subsidiarity as it was set out in the Maastricht Treaty, incorporates some criteria concerning the exercise of the attributed EC competence (with the US terminology: executive subsidiarity). This has a consequence not only for member state actions within the EC decision-making process but also for arrangements within the member states themselves, since the political message of subsidiarity, flowing from the EU treaty (as a non justiciable political provision), is to implement it as a matter of EU principle which is applicable in domestic affairs as well (democratic subsidiarity, term of the preference for lowest level decision making). As to the EC practice with the subsidiarity principle it turned out to be a justification of comfort for the European Commission bureaucracy when it engaged in soft-law making, using informal instruments for rulemaking or to interpret normative acts, instead of focusing on the need to demonstrate the legitimacy of its actions and to indicate the dimension of a given EC policy. Just as the European Parliament exerted vigilance because of this "*détournement*" of subsidiarity which risks the EC's institutional balance, the member states should also be critical about this practice.

As an inventory for a candidate country a number of constitutional matters need reflection and a number of technical, legislative undertakings of constitutional relevance should be fulfilled before accession. Accession to the European Monetary Union would certainly necessitate additional constitutional modifications as regards the national central bank and the formulation of monetary policy. Participation in the supranational legal machinery would require the theoretical foundation of all the matters related to the legal genesis and structural principles of the EU/EC system and as a result of this work the elaboration of an appropriate post-Maastricht kind empowering clause to be incorporated into the text of the Constitution. As a next step the method of incorporation into national law of the EC supremacy principle should be considered. This is a delicate matter leading right into the core of the structural question about the grounds and constitutional foundation of EC law.

Accession to the EC legal system the supremacy principle would be applicable to Hungarian law enforcement organs as a matter of EC law that they would be bound to uphold, nevertheless some introduction of this supremacy principle seems to be necessary to give it express grounding within Hungarian law. It is an interesting theoretical question whether any domestic expression of this kind is needed or not for the EC law originated supremacy principle to prevail. After the Hungarian legal system is introduced in the EC system on the basis of the proper constitutional empowering clause the requirements of EC law, including supremacy, could prevail for Hungary as a matter of EC law (as in a member state this obligation is similar to a treaty obligation under international law) and would bind all organs of the state.

However, the supremacy principle should also be applied in legal relationships as between individuals. Theoretically speaking, as a consequence of accession based on the constitutional empowering clause, the existing EC law becomes part of the law applicable in Hungary, including the supremacy principle. The legislation promulgating the accession treaty incorporates and transforms this treaty into Hungarian law, at the time of accession for the Hungarian legal subjects (individuals) any obligation deriving from EC law may only emerge

from the promulgation legislation (and from its annexes). The laws adopted by the Brussels organs in the future may be applicable in Hungary as EC norms, but the "window" for this future applicability is to be opened by Hungarian law, therefore they should be considered from the viewpoint of their domestic application as basically emerged from the authorisation of and based on the empowering clause and the above mentioned promulgation law. The founding treaty or any other EC legislation does not include the supremacy principle, it came from the jurisprudence of the ECJ (the texts of its decisions would certainly not be made part of the annexes). These are the reasons why the supremacy principle should appear in Hungarian legislation, since it determines the law to be enforced when deciding about a legal duty (thereby the substance of the obligation itself) falling on an individual.

The level of expression of the supremacy principle should not be the Constitution but its proper place is in the legislation promulgating the accession treaty, so that it could be made clear that EC law does not enjoy absolute supremacy and it is not superior in ranking to the Constitution. The above short argumentation implies as answers to the basic structural questions that the ground of existence and applicability of EC law within the national legal system is the Constitution (with the empowering clause) and the legislation promulgating the treaty of accession. The opposing thesis stands for the *sui generis* existence of EC law and its self-penetration into national laws, this idea intentionally departs from and neglects the national constitutional grounding to explain the self-determined evolutionary capacity of EC law, its absolute supremacy, and the incapability of member states to exercise final control over the competence attributed by them to the Community. Putting these structural questions on the edge would risk a constitutional collision in the EU, therefore the intellectual and legal challenge is to define a "communitarian model" for the existing practice which may answer (and not neglect or deny) some fundamental questions. As long as it is not worked out and generally approved for the EU - member state relationship the sincere legal conclusion could only stand for the national constitution as the ground and supreme authority in the establishment and national enforcement of EC law.

Other elements of the inventory include the capacity to give effect to basic operational principles like the loyalty obligation and the particular duties defined therefrom by the ECJ, the direct enforcement of justiciable EC laws by national institutions (public administration, courts), the clarification of the status and role of the courts in the enforcement of EC law (the confusing constitutional provision should certainly be repealed under which the Supreme Court of Hungary is the superior judicial organ of the country). In the following parts of this report we discuss some theoretical issues relating to the constitutional understanding of the EU/EC, and give a summary of a Constitutional Court case in Hungary in the implementation of the association agreement paving the way for harmonisation of laws.

2. On sovereignty, federalism and legitimacy

The nature of sovereignty in the architecture of Europe in the federal view is based on historical reconsideration of political legitimacy, collective self-determination and their separation from the idea of unitary states. There is a version of federalism, other than the conventional one centred on a federal state, that sees federalism in terms of a set of legal principles taking us beyond notions of the state. Traditional attributes and functions of the state are not denied and the traditional state sovereignty is not abolished, but for pragmatic reasons it is exercised (transferred, pooled) on a different level to assure more efficiency. This co-operative federalism and the underlying functionalist ideas governed the establishment of the Communities in the fifties. (Co-operative federalism was an old idea, which appeared

several times in more or less realistic concrete projects in European history and forms part of US constitutional concepts.)

The institutional structure put in place for the European Communities were set out in a "*traité cadre*", with the creation of Community institutions capable of substantiating it. The Community was designed and intended as an inherently dynamic system, whose constitution must mirror and promote the launched process of continuous change, adaptation and integration. This functionalist concept of co-operative federalism involved a technocratic participation of the states as a kind of enterprise association. The founding fathers spoke about supranational institutions as being merely of technical value without affecting the functions of nation state sovereignty, and their political objectives were clearly nation-state oriented, obviously with state constitutions as a static instrumental shield for domestic and international affairs. European integration is far beyond this idea now. The way of mutation and the present state of the Community (now called European Union, which at best is only in the making) was built on a political and on an equally important legal process. The importance of law (and especially of the jurisprudence of the Court of the Communities and its endorsement by national courts) in this change has until recently been largely ignored by political scientists and constitutional lawyers. In Hungary political scientists launched their effort (a quite modest one with some confusing first-approach argumentation), constitutional lawyers have unfortunately not yet made their voices heard even when multi-disciplinary analysis of subsidiarity formed the subject of discussions (international lawyers are active in promoting their views, quite rightly from their angle, about the relative nature and lacking substance of sovereignty). The subject still calls for a proper examination from constitutional lawyers in the Hungarian professional community.

As regards the nature of sovereignty and the state in the present model of the Community (or EU) an ever more influential explanation is gaining ground as "cosmopolitan federalism". This concept provides for fundamental changes in the assessment, understanding and projection of a federal-like integration. Cosmopolitan federalism understands federalism not as a form of state but mainly in juridical terms as law without a state. This version equates federalism with a radical criticism of state sovereignty, with the underlying focus on the dignity and liberties of the individual and on the universality of fundamental rights. A dispersion of sovereignty beyond the traditional unit of the (nation) state is desired in this approach. As regards the principle of democracy and the legitimacy issue, this version challenges the idea that democracy is in essence "people rule", pointing out that popular (democratic) sovereignty can not be the absolute basis, but democracy must stand on self-standing proposals which need constitutional entrenchment in order to be protected from democratic majorities.

This is obviously about questioning the legitimating role of the *Demos* as both the constituent power and the basic unit on which the democratic community rests (traditionally in a state structure). Sovereignty of the law takes a prominent place in this theory instead of the concept of popular sovereignty and the multitude of peoples (as civil multitude of individuals) instead of the collectivist *Demos*. In this theory informal institutions comprising the public sphere (the media) and the judicial power assume the function of making political and administrative decisions legitimate. Cosmopolitan federalism therefore offers no relevant role for national sovereignty in the political-legal architecture of the European Union. The opposing nation-based ideas for the construction of the EU consider classical state federalism unrealistic and without proper constitutional foundation since there is no such unit as European *Demos*, and

reject cosmopolitan federalism because of its anti-democratic character since it would undermine the traditionally required and still relevant democratic legitimacy of public power.

Political (and legal) integration of constitutional states requires a constitutional basis. The constitution is the supreme affirmation of the primordial power of a people over themselves (as a collectivity), and over the space they occupy. The constitution organises various branches of government, establishes the balance between them, and sets the limits of power by guaranteeing a set of fundamental rights against (public or private) trespass. From this source derive the legitimacy of power and the validity of the law it enacts.

One of the starting thesis should be that sovereignty is a legal-normative concept, not primarily a sociological one. Sovereignty relates to the legitimacy of power and the validity of law. It is not an artifact of the magnitude of the former or the effectiveness of the latter, but rather sovereignty is an attribute of the power of the state. In addition, sovereignty is the power of a people over the state and over themselves as a politically organised society. Defined according to these terms, sovereignty is a postulate of legitimacy and is rightfully included among classic democratic principles. In addition, sovereignty is a normative concept that could properly be presented in constitutional law understanding as opposed to an international law based conception whereby mainly the relative nature of its substance is emphasised (quite rightly, taking into account the requirements from, the practice of and the consequences for individual states of our world of increasing interdependence). Nevertheless, sovereignty as a normative-legal concept does have a substance and it should be identified and assessed in relation to the institutional-legal construction of the integration process taking place in the EU system. The EU itself, viewed in its *sui generis* supranational structure as an autonomous legal unit independent from member states and on the other hand as defined in the legal interactions with the member states' legal orders, has to be described in constitutional law thinking instead of an international law approach. Neglecting the legitimacy centred issue of the system of public power in the EU/EC and sticking exclusively to an international relations based explanation of sovereignty would totally hinder the core constitutional matters and obstruct a much-needed discussion.

Integration involves a reduction in state sovereignty. The extent of this reduction may (although not indefinitely) be increased either through reform of the founding Treaties, or, more informally, by the ever widening interpretation of the Treaties' clauses establishing the jurisdiction of Community bodies over member states (implied powers, pre-emption, the necessary powers clause). This latter scenario triggered bitter constitutional criticism, most remarkably (but with precedents in the sixties and seventies) in the post-Maastricht area (see the German, Spanish constitutional court cases, the French Conseil constitutionnel's decisions, the Italian constitutional jurisprudence and doctrine, the recent judgement of the Danish Supreme Court).

Integration changes the very structure of national legal systems. Logically, the submission of the State to the Community requires that Community law prevail over national law in the sphere of Community responsibilities. In each of the member states, the Community is the source of a new law whose provisions prevail over domestic norms at any level. The supremacy of this new body of law liberates the national judges who must apply it from their duty of absolute submission to nation law, including national constitutional law, and, in effect, transforms them into Community judges. The main implication of this release is to allow national judges to escape in some measure the binding force of fundamental rights as defined in their respective national constitutions. The above standard description needs however to be

qualified: member state constitutional law is not recognised by national high judiciaries as being subordinated to Community law. Member state constitutions are doctrinally supreme when the following fundamental issues are at stake:

1. competence division, the extent of competence transferred (attributed) and the final control thereof;
2. ground of validity of EC law within a member state legal order (self-penetration versus acceptance on the basis of the constitution);
3. constitutional control to assure fundamental rights protection in the application of the EC rules.

Supremacy of Community law substantially modifies the formal subordination of governments to their respective Parliaments. The supremacy of "derived" or secondary Community law, made by the representatives of national governments in the Council of Ministers, turns this relationship upside down. It is a delicate matter from the legitimacy viewpoint which was emphasised by member state courts leading to a specific constitutional amendment in Germany to assure participation of the parliament in the EC decision-making which is dominated by member state governments. This is why the argument, shared by the author, that preliminary approval of the national parliaments is needed when the government delegate votes in the Council of Ministers upon a question falling within the "necessary powers clause" (Article 235, old numbering), since an underlying assessment of the objectives and activities of the EC is at stake (the member state government should not be able to modify the extent of attribution to be decided by the parliament).

Providing an adequate constitutional basis for a transformation of this magnitude is necessary for the states involved, since their own legitimacy would fall into doubt if changes were carried out in opposition to their respective constitutions. The Community is also in vital need of an articulated constitutional basis, given that it has only the power granted to it by its member states and its law exists only to the extent that national judges, whose decisions cannot be reviewed by the European Court of Justice, respect it. Upon the traditional and still relevant doctrine, judges would not be able to respect Community law if its validity and its asserted primacy have no basis of support in the constitutions they are bound to. In spite of its indispensability, the constitutional grounding of the integration process is still inadequate. Moreover, little attention has been paid in the past to this phenomenon, which may be termed as "constitutional deficit". The European Court of Justice has also ignored the problem for a long time, up to the developments in national constitutional fora with the Maastricht Treaty. Theoreticians of European law have tended to scorn the issue and to dismiss thoughts on it as manifestations of "anti-European" nationalism. This attitude may have been somewhat justified in the past insofar as the constitutional deficit was seen as a result of the very methods used to bring about integration (functionalist, nation state based, technocratic process, with ever increasing co-operation). That the label of anti-European nationalism should not be attached – out of ignorance or manipulation – to anyone raising these core issues in the process of the pre-accession preparations.

3. The problematic autonomy of EC law and the co-operation leeway

The core of the standard doctrine on the relationship between Community law and national law, as developed by the immensely activist, integration promoter jurisprudence of the

Community Court, is the idea of "two-co-ordinated but distinct legal systems" which at least since the mid-seventies have been the cornerstone of European integration. The European Court of Justice sometimes speaks of distinct but co-ordinated legal orders, not of independent ones. However, the ECJ's formal denial that national judiciaries actually control the validity and co-ordination of Community rules (which is a correct position on the basis of the founding treaty), coupled with its failure to scrutinise the form and the terms by which national constitutions should articulate their compliance (again, correctly though implicitly approving the superiority of member state constitutions), raises serious doubts about the substantive value of this co-ordination. These independent but co-ordinated legal systems are applied simultaneously to the defendant by a single judge operating inside a single national jurisdiction. Indeed, the proclaimed co-ordination is not horizontal, but vertical and hierarchical. The doctrine establishes that Community treaties and Community law have both direct effect in the territory of the member state, and supremacy over domestic law. The effects of the doctrine are truly momentous when it is applied to "secondary law" (law created by Community bodies) to which no reference is made in most of the member states' constitutions. Although theoretically derived from domestic law by means of authorisation clauses, the supremacy, direct effect, and the validity of secondary law are based, as regards their operational force, exclusively on the treaties and cannot be questioned by a national judge (some national courts have opposing views on this matter, for example a German administrative court disagreed with the interpretation the ECJ gave to an EC law and instead of giving effect to the EC norm – as defined by the ECJ which is only competent to interpret it – turned to the Federal Constitutional Court).

The non-existent or weak basis of the standard doctrine, itself a product of legal activism, places national judges in a difficult and paradoxical position. It obliges them to act according to rules which, by definition, form no part of the ordinances granting their authority to judge, and to which, at least with respect to secondary law, the national legal order does not expressly refer. The application of European law raises a relatively minor problem in countries without a system of constitutional jurisdiction, where judges are precluded absolutely from questioning the constitutionality of prevailing norms. Problems in applying European law arise in such systems only when statutes are promulgated which conflict with existing Community regulations. If the European norm belongs to Community primary law, its application depends upon the provisions of corresponding domestic systems with regard to international treaties.

With respect to secondary law, since most domestic legal orders contain no provisions, whereby a national judge can base his or her decisions, he has to do it either on the standard doctrine itself, or on the application, by analogy, of treaty dispositions, which is an approach that is, in any case, not easily reconcilable with a legal culture based upon the principle of judicial subjugation to the law. Thus, it comes as no great surprise that judicial attitudes toward Community law, especially with respect to its supremacy over subsequent national law, have varied among the member states. Further variations of note are brought about by the differing degrees of attention actually paid to European law by national judiciaries (Article 177 procedures, theory of "*acte clair*"), and the effectiveness of means available to rectify lack of observance through appeal to the corresponding supreme court (ECJ as "*gesetzlich Richter*").

The most serious problem is how to bind judges to European law on terms set by the European Court in those countries that have a system of judicial review of legislation, particularly in cases, common in Europe, where judicial review is organised according to the

centralised model with a Constitutional Court. This is the case also in Hungary (similarly to Germany, Italy). In such contexts, the problem posed by the potential conflict of secondary European law and domestic statutory norms, which a procedure for constitutional challenge places on a different grounding, is compounded by the need to prevent open discord between European law and the national constitution and all the problems that would entail (see the problems with the EC banana regulation in Germany, the administrative court referred the case to the federal constitutional court upon disagreement with the interpretation received from the ECJ).

Conflict between Community law and national statutes passed later in time could be treated merely as a flaw in the constitutionality of the statutes in question given that, from a domestic point of view, the primacy of Community law derives from the "opening clauses" of the constitution. Such was the reasoning of the Italian Constitutional Court in the *Granital* case. The European Court of Justice rebutted this view in the *Simmenthal* sentence, which "de-constitutionalises" certain procedural aspects of the relationship between Community and national law (held that it is not for the national constitutional court to draw the consequence of unconstitutionality when a domestic law is in conflict with EC law, but it is directly for the normal court to give effect to the supremacy principle by setting aside the conflicting national rule). This ECJ ruling has the advantage of clarity but the disadvantage of depriving effective action before the constitutional court if a national judge either fails to apply, or misapplies, Community law. For this reason, "de-constitutionalisation" in another aspect has not been taken to its logical extreme in Germany (quite rightly), where the constitutional court regards a national judge's refusal to refer questions to the Court of Justice in circumstances specified in Article 177 of the Treaty of the European Community as a violation of Article 101 of the German constitution guaranteeing the right to procedural justice akin to the Common Law notion of due process (the problem here was a substantive principle not the procedural question of giving effect to supremacy). It is apparent from the French practice that the problem of later national laws could emerge also in countries where constitutionality of adopted laws are not examined, the anti-communitarian jurisprudence of the *Conseil d'État* has terminated in this respect only in 1989.

Another type of problem stems from uncertainties posed by the real or imagined discord between European law and national constitutions. Until recently, this problem emerged only with regard to the fundamental rights guaranteed by these constitutions. In all European countries that have constitutional courts, the main task of these courts is to ensure respect for fundamental rights by invalidating all legal provisions found to be in violation. Because giving direct effect to European law requires its application by national judges, constitutional courts have also attempted to secure control over domestic applications of European law. From the outset, the European Court strongly rejected granting such control and instead emphasised the primacy of community law over national at no matter what level. The result of this rejection was the rise of a complex doctrine, particularly in Germany and Italy, whereby the respective national courts, without abdicating their authority to exercise control over domestic applications of European law, tacitly refrain from exercising it in practice. As long as the Community maintains protections of constitutional rights equivalent to those provided in the national system, the national courts will not interfere. A detailed account of the doctrine's evolution and its strengthening by the "opening" of the Community to basic rights, first by means of the ECJ, and subsequently through the Treaties, is hardly required in order to demonstrate its purely pragmatic nature and the inherent instability it introduces. The absence of a solid theoretical basis to solve this type of problem may have even more momentous consequences after the national implementations of community law.

Reality makes European and national politics moving beyond obsolete sovereignty and statist notions. The dual character of the EC's supranationalism as revealed by the sovereignty and management paradigms sheds some light onto the classic inquiry of what sort of governance the EC has been and is. The supranational trait of the EC having a virtually general competence, however, gives enormous relevance to the other supranational traits that sustain the sovereignty and management paradigms, i.e. majority voting in the Council (extended further in Amsterdam), a quasi-federal legal sphere (with the so-called normative supranationalism and strong EC law originated enforcement devices) and the increasingly independent expertise of EC policy-makers. One of the most problematic federal-like development was the *kompetenz-kompetenz* question: to what extent does the ECJ have competence to define its own competence, which in more practical terms is about the definition of the extent of EC spheres of action. Member state constitutional courts dealing with this question have denied the *kompetenz-kompetenz* from the ECJ and held that member states are "masters" of the founding treaty which is to define the competence attributed and the objectives to pursue. It may be seen as a consequence that the Treaty of Amsterdam intended to give clearer definitions of the possible EC actions and of the policy fields affected by new or recently attributed competence.

A sovereignty reading of the growth of EC jurisdiction does not answer the question how could it happen without a constitutional crisis (extension of the powers of the EC delegated in limited fields by the member states). The final control over all EC action by each government at the Council level was enough to prevent such a crisis from happening. Recently a sort of "mixed commonwealth" approach was advocated by an eminent political scientist to avoid constitutional collision in Europe. This political control replaced for a while the implicit constitutional guarantee of the EC Treaties that the Community would have limited powers. The story of the growth of EC competence (jurisdiction) is incomplete without taking into account the development of the EC management phenomenon. The breakdown of the principle of enumerated powers (which in fact was never part of any written EC law texts) allowed management realities to take over. In the seventies, management became the dominant culture. Ever since, management explains the further breakdown of limits to EC jurisdiction and the weakening of the constitutionally protected EC – member state tension. The constitutional ethos of the EC had been firmly established by the Court in the sixties. Had it remained very important in the following decade, the Court would not have allowed final political control in the Council by governments to become a good enough substitute for the constitutional guarantee of the EC having limited powers. But the Court understood that by backing the Council broad readings of EC jurisdiction it fulfilled its pro-integrationist role.

Today a closed list of EC powers in the face of the changing needs of the broadly defined project of merging national markets and to handle the ever extending common policies (either exclusively by Community organs or in co-operation with member states with joint actions), sounds either too restrictive or too ambitious. It would in any case be impractical. Most national rules with economic significance or related to the spheres of activity of the EC may potentially need co-ordination from the EC or could call for EC harmonisation. This cannot be done if EC powers are based on the specific delegation of power and control of its exercise from each member state. But without the final political control of sovereign representatives, the EC institutions teleological and expansive reading of its own powers is only sustained by the notion that economic and market integration has its own expert logic that determines when centralisation and decentralisation in a policy area is needed. The integration process seems to demand this regulatory discretion. Without the EC having the capacity of progressively

determining the scope and reach of its own powers, according to its successful management by objectives, there would not be in the functionalist explanation an integration process. In this regard, integration is a dynamic process and it cannot be said *a priori* when it will reach its end.

Thus, after the breakdown of limited jurisdiction and of final political control by national sovereigns, the question of what powers the EC has is not in itself the most important problem, except for those engaged in a reconstruction of sovereign actors at the EC level or outside it. With the breakdown of the Council unanimity rule, which has proved to be a weak political guarantee of the EC having limited powers, the faded constitutional guarantee of EC enumerated powers seems more precious and irreplaceable. As the debate about the adjudication of the new principle of subsidiarity shows, it is impossible to resurrect from the Court a strict legal check on the gradual reading of EC jurisdiction by the EC political process.

The principle of subsidiarity has been introduced in the normative part of the Treaties (Article 3b EC), evoking the existence of some legal limits to EC action. This principle has not been developed to allow better control by each national government of Council decisions. The final word has been left to the ECJ, and some pressure has been exerted from a national constitutional court to force the ECJ into using subsidiarity to reconstruct legal limits of EC jurisdiction. However, it seems unlikely that the European Court at this stage of integration will come up with a creative and acceptable way for all to clearly draw the line over the legal limits of EC powers, in spite of the rhetorical willingness of the German constitutional court to check the scope of the national delegation of powers to the EC. (There are examples for a more cautious attitude in the ECJ recent jurisprudence as regards definition and extension of EC competence: Keck and its aftermath, also the WTO cases, ECHR accession case).

4. Some preparatory considerations

The constitutional foundation is relevant not only in the explanation of a federal-like legal machinery (in the EC context called normative federalism), not only in the understanding of the relationship of EC and member state legal systems, but also in the determination of the meaning in law of the association relationship based on the "Europe Agreement" (EA). Provisions and implementation of the association agreement should constantly be tested along constitutional considerations, with a view to searching for an "Association of Law" phenomenon, on top of the political process (as the EC was described "Community of Law"). The starting point of reflection is the law of international treaties, as the basic legal regime applicable to the association agreement and to its implementation at national level (the status of treaties in domestic law, the constitutional review of treaty provisions as transformed or incorporated into national law). Another question to be raised refers to the possible endorsement in the law of association of certain principles or components prevailing in the unique legal mechanism of the EC-member state relationship, for instance the issues of similarity in substance and judicial applicability of EA provision worded identically to the EC Treaty: the standstill articles, the basic prohibitions, taking into account also the time factor: i.e. the expiration of the relevant transition period included in the EA for a particular prohibition to take eventual judicial effect.

The candidate countries' approximation of laws venture should be placed in its appropriate context: in terms of constitutional limitation of giving effect to EC law and also with regard to the policy grounds and the "*finalité*" of the approximation (harmonisation, co-ordination) of

laws process as had been developed in the EEC (now EC). Identification of the underlying motives, objectives and analysing the purposive orientation, the functionality of the approximation process, chapter by chapter according to the subject matters involved, should be a must in the contemporary efforts of the associated countries. It is common place that catching up rapidly with the EU on the regulatory surface without participating in the interrelated set of policies, without being part of the coherent institutional-regulatory-enforcement regime could easily result in a distortion of the objective pursued: the successful preparation and accession to the European Union.

There are some basic matters that have never been seriously examined, for example: the place of harmonisation of laws in the transition period leading only to the establishment of a free trade zone (the association agreement represents from this viewpoint the transition period of the EEC: a negative integration phase), the well-foundedness of approximation of market access related rules if even free trade has not yet been achieved in many areas, regulatory alignment to certain EC policies disregarding its interrelation with others, introduction of harmonised EC rules without participating in the mutual recognition mechanism, creation of an EC-conform regulatory and institutional environment without the extension of the home country control principle, overseeing the benefits of regulatory competition. To overcome a spreading misunderstanding in Hungary about the need of introducing monism for the integration to be possible, the irrelevance of monism or dualism should be emphasised tangible when the legal ground for internal application of Community rules is at issue.

On the EC side the self integrationist character of Community law is emphasised: in the new legal order created by the constitutive treaties, whose subjects are the member states and individuals alike, the rules adopted by the Community organs (secondary EC law) are to have binding force and straightforward effect for/within member states, the force and status of EC law in national legal systems does not depend on any incorporation, transformation or introduction. This mechanism is most appropriately called "*applicabilité immédiate*", immediate application which is to be distinguished from direct application used specifically with regard to Regulations and direct effect which refers to judicial enforceability of rights flowing for individuals from EC law.

In our preparation the experience of member states having a legal system similar to the Hungarian one offers the most benefit, therefore Germany and Italy should be the first line of sources (because of their dualism in the relationship of domestic and international law) to find conclusions about how EC law has departed from the regime of domestic adoption and application of international treaties. In the dualistic German system the Bundesverfassungsgericht held (in 1986, confirmed in 1993) that the empowering Article 24(1) GG does not provide on its own for the direct validity and application of EC law in Germany, nor does it directly regulate the relationship (priority of their respective application) between Community and domestic law. The possible internal priority as regards validity or application of international treaties, including the Community Treaties, neither follows directly from general international law: *pacta sunt servanda* was denied the effect of elevating treaty law to the status of hierarchy accorded to generally accepted rules of international law (i.e. treaty law may not be supreme to the Grundgesetz through the medium of *pacta sunt servanda*). As a matter of doctrine it was stated that the internal priority of validity or application only arises by virtue of an application-of-law instruction given to that effect by national law. This applies also in the case of the Community Treaties, the content of which (as interpreted by the ECJ) obliges the parties to provide for primacy in their internal validity and application.

The immediate validity of Community law for Germany and the priority of their application over domestic law are based on the application-of-law instruction set forth in national law. The constitutional authorisation for accession is in Article 24(1) GG allowing for the transfer of sovereign rights to international institutions, on the other hand the laws of that international organisation are accorded internal validity and priority of application by the application-of-law instruction included in the legislation introducing the accession treaty into the German legal system. The consequence (and the motivation) of preserving the constitutional foundation of the internal existence and application of Community law was that absolute supremacy of EC law could be refused, ongoing influence could be ensured concerning reviewing the constitutional limits of competence transferred, observance in EC law of the German level of fundamental rights could constantly be examined.

A catalogue of foreseeable problems and an inventory of possible solutions may be seen from the constitutional jurisprudence in the member states, the dualistic Italy and Germany are certainly the most relevant for Hungarian legal thinking. On the other hand the constitutional process at Community level deserves much attention as well: first the constitutionalisation of the Community system and its governing principles, the importance of a strong general loyalty clause (Article 10 EC, former Article 5), the practice of subsidiarity, the development of national remedies and sanctions for the breach of EC law obligations, the narrowing economic management competence of member states in the sectors under liberalisation. The topic of the day for now is whether Europe needs a constitution, whether the present EC system represents a "politeia" on its way towards statehood (federalism), whether an "*assemblée européenne constituante*", a constitution giving assembly should be convened and a basic constitutional chart of the European Union be completed.

Selected literature consulted for Part III:

Eisemann (ed.), The integration of international and European law into the national legal order, A study on the practice in Europe, Kluwer 1996.

Berranger, Constitutions nationales et construction communautaire, LGDJ 1995.

O'Neill, Decisions of the European Court of Justice and their constitutional significance, Butterworth 1994.

O'Keeffe - Twomey (eds.), Legal issues of the Maastricht Treaty, Wiley 1994.

Snyder, Constitutional law of the European Union, in: Collected courses of the Academy of European Law, vol.VI/1, Nijhoff 1998.

Gerkrath, L'émergence d'un droit constitutionnel pour l'Europe, Ed. de l'Univ. de Bruxelles, 1997.

Phelan, Revolt or revolution: the constitutional boundaries of the European Community, Sweet and Maxwell, 1997.

Chalmers, EU law, vol. I-II., Dartmouth 1998.

Ward, The European Constitution and the nation state, Oxford Journal of Legal Studies 1996 pp.161-174.

Shaw, The Treaty of Amsterdam: Challenges of flexibility and legitimacy, European Law Journal 1998 pp.63-86.

de Búrca, Reappraising subsidiarity's significance after Amsterdam, Harvard Law School, Jean Monnet papers, no. 7/99.

Bellamy - Castiglione, building the Union: The nature of sovereignty in the political architecture of Europe, Law and Philosophy 1997 pp.421-445.

Scott, Law, legitimacy and EC governance: prospects for partnership, Journal of Common Market Studies (JCMS) 1998 pp.175-194.

MacCormick, The Maastricht-Urteil: Sovereignty now, European Law Journal 1995 pp.259-266.

Eleftheriadis, Begging the constitutional question, JCMS 1998 pp.255-272.

Areilza, Sovereignty or management? The dual character of the EC1s supranationalism, Harvard Law School, Jean Monnet papers, no. 2/95.

Llorente, Constitutionalism in the integrated states of Europe, Harvard Law School, Jean Monnet papers, no. 5/98.

Kumm, Who is the final arbiter of constitutionality in Europe? Common Market Law Review 1999 pp.351-386.

Baud, Fédéralisme et souveraineté, Notes pour une théorie constitutionnelle de la fédération, Revue du Droit Public 1998 pp.83-122.

Weiler, European neo-constitutionalism: in search of foundations for the European constitutional order, in: Bellamy - Castiglione (eds.), Constitutionalism in transformation: European and theoretical perspectives, Blackwell 1996, pp.105-121.

MacCormick, Risking constitutional collision in Europe? Oxford Journal of Legal Studies 1998 pp.517-532.

THE CONSTITUTION AND ACCESSION OF THE REPUBLIC OF POLAND TO THE EUROPEAN UNION

Mr Marek SAFJAN
President of the Constitutional Court of Poland

I. Introductory Remarks

It should initially be noted that the norms of the new Constitution of the Republic of Poland of 2 April 1997 provide very favourable legal conditions for the implementation of the process

of integration. It is a constitution which was drafted at the time when the Republic of Poland was bound by the association treaty with the European Union, when serious preparations for the negotiations concerning integration were under way and when, which is worth stressing, all the significant parliamentary groups expressed their support for the very idea of integration. This did not, however, necessarily imply unanimity with regard to the negotiating positions and the very conditions of integration.

Over the past 10 years, beginning with the fall of the communist system and the regaining of sovereignty, Polish society has experienced significant evolution. During the early years, the integration of Poland with the European Union was perceived more as an element of symbolic return of the country to the European family and hence of the recovery of its own identity in opposition to the reality which had dominated it for 45 years which had forced alien political models upon the nation, a different system of values and very little room for decisions concerning its own fate. The European Union embodied the society's yearning for not only a better life, but above all for the return to its own roots, historically embedded in the values of Western culture. In that sense the European option coincided with a particular choice of civilisation.

That early or "childhood" Euro-enthusiasm of Polish society is now over. Although the pro-European option continues to be strongly present among the political and juridical elite, and still enjoys strong support of the population, the spontaneous enthusiasm for the prospects of European integration has been replaced by a more balanced and more serious reflection on the consequences of the processes of integration, including the considerable cost of such, which need to be measured by the enormous effort undertaken by society in making up, in a short period of time, for the economic and civilisational collapse in which the Republic of Poland had found itself in the aftermath of communist rule. The reasons behind that dampening of Euro-enthusiasm are probably more complex. They include, I believe, the entrenchment of normal democratic mechanisms, which by their very nature permit a more multifaceted, diversified and thereby more objective and independent insight into the essence of the integration processes and the evaluation of Poland's position in a united Europe. Undeniably, one of the factors weakening the pro-European attitudes is also the steady flow of information about the reluctance towards such integration manifested by the statistical majority of inhabitants (citizens) of the European Union, especially in such countries as France, Austria or Germany. Today, the prospects for integration still do not seem to be threatened, and it is expected that in our society the pro-European option would receive a substantial majority of about 60% in favour. But the prolongation of the period of negotiations, the postponement of integration to an unspecified future date will not have a positive influence on the continuation of pro-European attitudes in our society.

We should keep in mind the social and political context of the on-going debate on the future of Poland's integration with the European Union. Indeed, in the end – that social and political reality will tip the balance for the outcome of that debate, and not the purely formal and legal disputes concerning the otherwise important issues related to the adaptation of the legal system of the Republic of Poland to that of the European Union.

II. Constitutional Juridical Instruments of Integration

The law of the European Community has been recognised in the constitutional regulations as separate from the norms of international public law system of regulations which, given the objectively present differences, will have a favourable influence on the processes of

implementing the entire *acquis communautaire* within the framework of the legal order of the Republic of Poland.¹⁴³ One should not overlook, however, the fact that the legal system of the European Community is composed of norms of diverse legal character, classified as belonging to the so called primary law on the one hand, and to the secondary law on the other hand. We shall attempt to describe the legal position of Community law with regard to the above indicated categories, focusing above all on the issues relating to the evaluation of Community law from the point of view of the hierarchical review of norms under Polish law.¹⁴⁴

The Act of Accession and its Consequences

The founding treaties, the accession treaties, and, above all, the regulations concerning the structure and internal functioning of the European Union, which form the unique constitution of the Communities,¹⁴⁵ have to be classified as belonging to the body of so-called primary law. Initially, it can be assumed here that their evaluation will be subject to the criteria proper to the norms of international public law. Two significant constitutional principles concerning treaty norms, specified in Article 91, should be noted here: first, that a ratified international agreement, having been published in the Official Journal of Laws, becomes part of the domestic legal order and is directly applicable, unless its application requires the enactment of a respective statute (section 1); second, that an international agreement which has been ratified upon the consent granted by statute has precedence over the statute, should such statute be irreconcilable with the respective international agreement (section 2). *Prima facie* this construction seems very clear and sufficiently precise, as it expresses the concept of incorporation of treaty norms into the internal legal order (the monistic theory) and,

¹⁴³ Concerning the notion of the *acquis communautaire*, see i.a.: Z. Brodecki, *Acquis communautaire. Pojęcie nieznanie Konstytucji RP. [Acquis communautaire. A Notion Unknown to the Constitution of the Republic of Poland.]*, / in: / *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej. [The Constitution of the Republic of Poland of 1997 and Poland's Membership of the European Union.]*, ed. by Cezary Mik, Toruń 1999, from p. 75 onwards.

¹⁴⁴ Polish literature of that subject is currently rather voluminous; See, i.a. the recently published cycle of papers: *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym. [International and Community Law in the Internal Legal Order.]*, ed. by Maria Kruk, Warszawa 1997; *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej. [The Constitution of the Republic of Poland of 1997 and Poland's Membership of the European Union.]*, ed. by Cezary Mik, Toruń 1999; *Konstytucja. Trybunał Konstytucyjny. Zbiór studiów. [The Constitution. The Constitutional Tribunal. Collected papers.]*, ed. by Cezary Banasiński and Jerzy Oniszczyk, Warszawa 1998; *Wzajemne relacje prawa międzynarodowego, wspólnotowego oraz prawa krajowego. [Mutual Relationships Between International Law, European Union Law and Internal Law.]*, ed. by A. Jeneralczyk-Sobierajska, Instytut Europejski [European Institute], Łódź 1998.

¹⁴⁵ The notion of the "European constitution" is used, above all, with regard to the acts on the Establishment of the European Community (TWE) and the Treaty on the European Union, the Amsterdam Treaty in the Jurisprudence of the Court of Justice in Luxembourg; see also: R. Arnold, *Perspektywy prawne powstania konstytucji europejskiej. [The legal prospects for the establishment of a European constitution.]*, PiP 2000, Vol. 7, from p. 35 onwards.

additionally, *expressis verbis*, the principle of the validity of such norms *ex proprio vigore* as prevailing over domestic law.

As a side-note, we can only observe that within the context of the current constitutional regulations there are no serious doubts as to the status and the binding force of the Association Treaty of the Republic of Poland with the European Communities (the European Treaty).¹⁴⁶ As an act subject to the regulation of Article 91 section 1 and 2 of the Constitution, it constitutes a part of the internal legal order, is assured direct application (unless the application of its provisions requires the enactment of respective statutes), as well as precedence in the event of a conflict with statutory norms. Therefore, from the point of view of the hierarchy of the sources of universally binding laws, the European Treaty occupies a higher position than statutory regulations. Owing to the clear formulation of Article 91 section 2 of the Constitution, a court may refuse to apply a provision of domestic law which contravenes a norm of the Treaty, and in the event when – due to the nature of such norm (lack of direct application) – its direct application is not imminent, a contravention of that kind may lead to repeal of a provision of domestic law by the Constitutional Tribunal (see: Article 188 section 2 of the Constitution).¹⁴⁷

With regard to the primary law of the Community, however, we are dealing with distinct specificity as compared to the classic regulations of international public law. Firstly, in the Polish constitution, the ratification procedure for the accession treaty is subject to special regulation, which differs from a typical ratification of an international agreement.

Secondly, the consequences of the accession treaty from the point of view of the implications of accession for the internal legal order are not automatically extended to all of the acts of Community law (the constitutive acts of the Community and the acts of law derived from them) which, from then on constitute the *acquis communautaire*, and thereby become a part of the legal order in force in the Republic of Poland, which does not indicate, at least in terms of secondary law, that it is at the same time a part of domestic law, as it is a particular, autonomous legal order.¹⁴⁸ They imply the relinquishment of certain legislative competences by the respective state organs in the areas reserved for the agencies of the Communities; they introduce the exclusivity of the Communities' organ of jurisdiction with regard to the norms of Community law, especially with regard to their interpretation, and disputes over their validity and scope.¹⁴⁹

¹⁴⁶ Official Journal of Laws – Dz. U. 1994 No 11, item 38 with subsequent amendments.

¹⁴⁷ Concerning the association agreements concluded by the European Community, see: Ewa Latoszek, *Podmiotowość prawna Wspólnoty Europejskiej i jej kompetencje w zakresie zewnętrznych stosunków umownych. [The juridical personality of the European Community and its competencies concerning external contractual relations.]*, Warszawa 1999, from p. 28 onwards.

¹⁴⁸ See i.a. the famous ruling of the ECJ defining univocally the independent and autonomous nature of the Community law in the case *Costa Falmino v. Enel*, ECR 1964, p. 585 (in that judgment also the principle of unconditional precedence over the internal national law was pointed out).

¹⁴⁹ In particular see: Article 230 TWE concerning the competencies of the European Court of Justice, and also the well known ruling on the case *Hendelsgesellschaft 11/70*, ECR

The new Polish constitution provides the ratification of the accession treaty with a special status:

Firstly, the constitutional regulation stipulates *expressis verbis* that in certain areas the competences of the state organs be delegated to an international organisation (Article 90 section 1).

Secondly, consent to the ratification of such an international agreement is required by both the lower chamber (Sejm) and the upper chamber (Senate) of Parliament and should pass the respective statute by a qualified 2/3 majority of votes in the presence of at least half of the statutory number of deputies and the corresponding statutory number of senators (Article 90 section 2). As a side-note it can be pointed out that the requirement of majority in this case is more rigorous than in the case of a bill to amend the constitution, since in that latter case it is sufficient to have an absolute majority in the Senate in the presence of at least half of the statutory number of senators (Article 235 section 4 of the Constitution).

Thirdly, the granting of consent for the ratification of the accession treaty may be passed by a nationwide referendum (Article 90 section 3). According to the Constitution, a referendum may be held on matters of particular significance for the state (Article 125). In such case, of course, there is no vote in the Sejm or the Senate on the bill of consent for the respective ratification.

The constitutional norms provide thus two alternative legal procedures for the granting of consent for ratification: an act of parliament or a referendum, whereby the enactment of a statute should be regarded as an ordinary or basic procedure, while the decision to hold a referendum requires a separate resolution by the parliament passed by an absolute majority of the vote in the presence of at least half of the statutory number of deputies.

On this occasion it should be noted that the competence of the Sejm concerning the choice of procedure for granting consent to ratification is of an exclusive nature and, as a result, the general principles of ordering a referendum stipulated in Article 125 of the Constitution do not apply in such a case (in my opinion, Article 90 section 4 constitutes a *lex specialis* in relation to the more general norm of Article 125 section 2). The question of substantive justification for the selection of one of the two procedures provided for by the constitution is, of course, an entirely separate issue. Accession to the European Union, considering its importance and far-reaching consequences for the entire nation, should by its very nature be based on the broadest possible consensus, which might be expressed by a for-ratification outcome of the referendum. Will the political elites of the country, however, not be faced with the dilemma resulting from the gradually but systematically declining approval of society for membership in the Union? Will there not arise the risk and fear that the referendum may bring an outcome contrary to the expectations of the elites, and that the Norwegian scenario will be repeated? On the other hand, however, if there existed such forecasts with respect to the attitudes of society – mostly negative towards accession, then the parliamentary vote in favour

1972, p. 1125. See also: E. Podgórska, *Podstawowe koncepcje prawa Wspólnot Europejskich a perspektywa członkostwa Polski w Unii Europejskiej*, [Fundamental concepts of the law of the European Communities and the prospects of Poland's membership in the European Union], KPP 1995, vol. 1, from p. 73 onwards.

of consent for the ratification of the agreement, against the will of the society's majority, would be charged with enormous dramatic tension.

This gives rise to the question (which is explicitly voiced in constitutional literature)¹⁵⁰, whether a statute passed pursuant to the procedure of Article 90 section 2 of the Constitution, granting consent to the agreement on the accession of Poland to the Communities, and especially the accession treaty itself, may be the subject of review by the Constitutional Tribunal. What is the status of that agreement and, subsequently, of other acts of the Community's primary law in the constitutional legal order?

On the face of it the matter should not generate any doubts. The competences of the Constitutional Tribunal include adjudication of conformity to the constitution of any statute, and therefore – one may justifiably claim – also of an act adopted under the special procedure specified in Article 90 of the Constitution. According to that point of view, the accession agreement would be subject to review by the Constitutional Tribunal even then, when the decision is made through a referendum, since according to Article 188 section 1 of the Constitution, any international agreement may undergo direct review of its conformity with the Constitution.¹⁵¹ Moreover, it would be possible to apply the preventive review procedure (the President refers the act of consent for ratification to the Constitutional Tribunal pursuant to the procedure of Article 133 section 2 of the Constitution), as well as the subsequent review procedure. It should be noted that this approach, if adopted consistently, would also imply subjecting all treaty-like Community regulations of primary law to constitutional review (as they are introduced via the act of accession into the binding legal order).

In theory, however, one could also consider a different position. The accession agreement, being subject to the special ratification procedure (comparable with the amendment of the constitution) should not be the subject of control by the constitutional court.

Firstly, it can be claimed that the special course of action established under the constitution exhausts all other premises and requirements concerning the legality of such an act.

Secondly, although the accession agreement is an international treaty from the point of view of public law, its status and its consequences are different in comparison with a typical or classic international agreement. It becomes, as already mentioned above, an element of the legal order in force in the Republic of Poland, but at the same time it belongs to the

¹⁵⁰ See, i.a.: J. Barcz, *Akt integracyjny Polski z Unią Europejską w świetle Konstytucji RP* [The act of the integration of Poland with the European Union in the light of the Constitution of the Republic of Poland], PiP, 1998, vol. 4, p. 121; also: W. Sokolewicz, *Ustawa ratyfikacyjna [Ratification law]/in/ Prawo międzynarodowe ...*, from p. 93 onwards.

¹⁵¹ In such case, of course, the Constitutional Tribunal would not rule on conformity with the constitution of the approval of accession to the Union, which is rightly pointed out in the respective literature; See e.g.: K. Wójtowicz, *Skutki przystąpienia Polski do Unii Europejskiej dla Sądów i Trybunału Konstytucyjnego. [The consequences of Poland's accession to the European Union for the Courts and the Constitutional Tribunal]* /in/ *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej [Entry into force of the new Constitution of the Republic of Poland]*, ed. by: Z. Witkowski, Toruń 1998, p. 89. That is irrelevant, however, from the point of view of the competences of the Constitutional Tribunal to rule on constitutional compliance of the very agreement.

Community order (*acquis communautaire*) forming an autonomous whole, characterised also by the separateness of regulations concerning the institutional mechanisms of creating the legal rules belonging to the system (derived law), as well as its interpretation and application.

Thirdly, the interference of the constitutional court could lead to consequences difficult to reconcile with the general principles in force in European law (the interpretation of the constitutive treaties of the Communities and of the accession treaty performed by the Constitutional Tribunal could infringe on the exclusive competences of the European Court of Justice in Luxembourg). The recognition of one of the elements (rules) of those treaties as non-conformant with the Constitution of the Republic of Poland would also contravene the principle of full acceptance of the entire legal order of the Communities upon accession.

Fourthly, the subsequent review of the accession agreement (or any other acts of primary law) performed by the Tribunal (which theoretically could not be ruled out, given the assumption adopted here), could lead to insurmountable complications with regard to the existing relations between the Republic of Poland and the Community, as well as the other member countries (e.g. what would have given grounds to the ruling about non-conformity to the Constitution of some of the clauses of the founding treaty? How could this be reconciled with the principle of uniform application and interpretation of the entire legal heritage of the Community?).

Fifthly, it could imply that the rank of the norms of primary law is to some extent lower than that of derived law – as only those former ones would be subject to the review of their constitutionality according to general principles, the latter ones, however, would be either exempt from such review altogether, or would be subject to review only to a limited extent (see the comments below).

The above presented argumentation is certainly of considerable substantive significance, and refers to the essential reasons of purpose related to the key principles of the integration process, but finding sufficient support for it in a formal semantic interpretation of the constitutional regulations currently in force might prove difficult. The scope of review of conformity to the constitution of international agreements has been unequivocally defined (Article 188 section 1 of the Constitution). There is no doubt, however, that a possible evaluation of the constitutionality of the agreement of accession to the European Union should include all of the consequences resulting from the acceptance of the principles on which the Community order is resting. *De lege lata fundamentalis* the principles of direct application of the Community law, of precedence over statutory regulations, of uniformity of interpretation and application of the derived Community norms (see below), may find, given the appropriate interpretation, their constitutional justification. And this is exactly what causes the thesis of the “constitutional environment” favouring the integration process to be more than a mere cliché.¹⁵²

Against the background of the currently binding constitutional regulations, however, there can be no doubt of CT’s the competence to review the accession agreement (and other norms of

¹⁵² See the polemic with that view in: J. Galster, *Tzw. opcja integracyjna konstytucji państw członkowskich a przychylność polskiego ustawodawstwa konstytucyjnego wobec przystąpienia do Unii Europejskiej* [So called integration option for the constitutions of member countries and the favouring by Polish constitutional jurisprudence of the accession to the European Union] in: *Konstytucja [Constitution ...] ..*, from p. 135 onwards.

primary law belonging to international public law), from the point of view of its conformity to the provisions of the Constitution of the Republic of Poland. *De lege ferenda* the intervention of the constitutional legislator in order to contain the scope of such review seems, however, very desirable, to say the least. Without eliminating the very admissibility of the Tribunal's review of the accession treaty, it would seem necessary to consider limiting it only to the procedure of preventive review, thus conducted prior to the final ratification of the agreement.¹⁵³ Although at present such a possibility exists, as has been mentioned above, within Article 133 section 2 of the Constitution, it is neither mandatory nor exclusive. As a side-note it should be added that in such a case the application of the so-called interpretative jurisprudence of the Constitutional Tribunal should be ruled out (a regulation is considered constitutional on condition of being interpreted as defined in the respective decision of the Tribunal), in order to prevent a collision in this matter with the exclusive competences of the ECJ in Luxembourg.

The Community Law and the Constitution

Based on the currently binding Constitution there is no ground for the thesis on the precedence of Community law (both primary and derived) over the entire body of the internal legal order, including constitutional norms. Therefore one cannot accept, as some representatives of the doctrine do, that the specificity of the act of integration expressed, among others, in the special procedure of accession,¹⁵⁴ secures the precedence of Community law not only over the statutes, but also over the constitution itself.

It is possible to indicate a number of formal arguments supporting the claim that Community law must yield in the event of conflict with a constitutional norm. According to the reading of the Constitution, it itself is the highest law of the Republic of Poland (Article 8 section 1). The above discussed regulation included in Article 91 section 2 stipulates *expressis verbis* the precedence of a Community provision in the event of conflict with a statutory regulation, but not with a constitutional norm. Finally, one should not overlook the fact that the binding force of Community regulations in the Republic of Poland does find its direct legitimacy in the constitutional norms (as discussed above), which determine the scope and the procedure for the delegation of certain competences of the organs of state authority (especially in the legislative field) to an international organisation. As for primary law, the conclusion is unequivocal: international agreements are in every case inferior to constitutional norms, and the principle of precedence with respect to the statutes is applicable only to the norms of

¹⁵³ A similar stipulation is proposed by S. Biernat: *Miejsce prawa pochodnego Wspólnoty Europejskiej w systemie konstytucyjnym RP [The Place of derived law of the European Union in the constitutional system of the Republic of Poland]*, in: *Konstytucja ... [Constitution ...]*, ed. by C. Mik, p.182.

¹⁵⁴ See e.g.: J. Barcz, *Akt integracyjny ...[The act of integration ...]*, op.cit. p. 12 (That author writes, i.a.: "From the theoretical point of view, however, the primary law of the European Union should have assured precedence of its application over the entire national law, including also constitutional law /.../ The primary (constitutional) law of the organisation should not have guaranteed precedence of application in the national legal order to a lesser extent than its derived law." A similar conclusion is derived also by K. Kójtowicz (op.cit., p. 87), when he concludes that Community law has precedence over all the other norms of domestic law, including the constitution.

treaties ratified upon consent by statute (see Article 188 section 2, Article 91 section 2; and the not overly precise regulation of Article 87 of the Constitution, which determines the sources of the universally binding law, in which all international agreements, regardless of their rank, are mentioned only after statutes – does not contradict this conclusion).

It can be noted further, that an inherent characteristic of Community law, its autonomy and independence from the system of internal law, would become involved in a certain contradiction if treated unconditionally. It is precisely because the status of the legal order in force on a given territory of a member country, is based on from a sovereign act of a state authority, therefore of domestic law, in particular on the constitution. The autonomy and independence of Community law cannot therefore be interpreted in absolute terms, and this is exactly why it is not possible to determine the supremacy of Community law over the Constitution.

How can this approach be reconciled with the fundamental idea of Community law, derived after all from the fundamental premise of European integration. In other words, from the universality of the rules adopted by the organs of the Communities, from their binding force in all the member countries, the uniformity of their application with respect for the principle of precedence, the recognition - in certain areas - of the exclusive jurisdictional competences of the European Court of Justice, excluding thereby the corresponding competence of the internal organs of jurisdiction?

It has to be recognised, above all, that the supremacy of the constitution over Community law should not be expressed in the admissibility of the review of the constitutionality of individual acts of Community law on the same principles that govern the exercise of such review with regard to all the provisions of domestic law. This control should appear in the sovereign act of accession to the Communities, and in the future – the acts of consent granted by the sovereign authorities to any modifications and amendments of the founding acts of the Communities. Those acts, as has already been mentioned above, are subject to review by the constitutional court as acts of international public law. By virtue of a sovereign act of accession to the European Union, the derived law, constituting an autonomous binding legal order, is from that moment on subject to the exclusion from internal review (see the remarks below). This appears to be the proper interpretation of the effects of the transfer of competencies of the state authorities to the organs of the Community. The supremacy of the constitution with respect to Community law is realised at the level of decisions concerning primary law, but not derived law. Indirectly, however, the control over derived law is maintained. Assuming, theoretically, incompatibility between the Community regulations and the Constitution, it should also be assumed that they can be neither waived nor amended, nor even subjected to a certain interpretative intervention within the domestic law. Such a state of affairs, however, might give grounds for renunciation of the act of accession. Thus, this approach comes close to the position expressed in the jurisprudence of the German Constitutional Court.¹⁵⁵

¹⁵⁵ See i.a.: M. A. Dausés, *Prawo Wspólnot Europejskich a prawo niemieckie w świetle niemieckiego porządku konstytucyjnego* [*The law of the European Communities and German law in the light of the German constitutional order*], *Przegląd Prawa Europejskiego* [European Law Review] 1998, No 1, from p. 23 onwards. See especially the famous sentence “Solange II” of 22 October 1986, BverfGE vol. 52, p. 187.

Our conclusions with regard to control over the constitutionality of derived law are confirmed by the regulations concerning the scope of competences of the Constitutional Tribunal. Article 188 of the Constitution does not provide for such control, as the derived Community law is neither a treaty norm (international agreement) subject to tribunal power pursuant to Article 188 section 1, nor can it be in any respect qualified as a set of regulations issued by the central organs of the state (section 3 of Article 188). Some doubt arises only with regard to the possibility of appeal against a Community regulation in accordance with the procedure for constitutional complaints. Article 79 of the Constitution provides for an appeal against a statute or any other normative act violating constitutionally guaranteed rights and freedoms. Theoretically, therefore, a conflict between a constitutional norm and a derived provision of Community law is conceivable. It seems, however, that this possibility should be ruled out. The concept of a normative act, defined in Article 79 of the Constitution, does not embrace the Community's derived law, which forms, as has already been mentioned, an autonomous legal order alongside the domestic law.¹⁵⁶ Community law is not included in the sources of universally binding law in Article 87 of the Constitution. A similar position should be adopted with regard to the possibility of control over a regulation of derived Community law through a legal inquiry, directed to the Constitutional Tribunal by a court adjudicating a specific case. For, as a matter of consistency, a provision of the Community law cannot be regarded as a normative act in the sense of Article 193 of the Constitution. One cannot exclude, however, the possibility of a legal inquiry for the purpose of adjudication of conformity of a provision of the internal law with the Community law. But this matter requires further analysis and discussion.

The Legal System of the Republic of Poland and Derived Law

The evaluation of provisions constituting the so called secondary law of the Community, with regard to the relationship of those provisions with internal statutory regulations, presents the next substantial problem. As previously indicated, the constitution grants a distinct character to secondary law – recognising its specificity in comparison to the classic treaty norms. The provision Article 91 section 3 of the Constitution reads: “If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.”

Although this formula constitutes a clear opening of the Polish law towards the Community order, it is not the most appropriate one and – as noted in literature (see: Mik, Biernat, Glaser) – leaves a number of doubts. They concern, among others, the position of the norms of Community law within the system of the sources of the law in force in the Republic of Poland (as already indicated, Article 87 of the Constitution concerning the sources of universally binding law does not mention Community law at all), the concept and the scope of direct application, the concept and the effects of precedence of Community law, and finally, they

¹⁵⁶ Theoretically, the possibility remains of basing a constitutional complaint on the contradiction of a provision of primary Community law with the Constitution. See e.g.: K. Wójtowicz, op.cit. p. 89; also J. Barcz, *Akt integracyjny z Unią Europejską ... [The act of integration with the European Union...]*, p. 16. Similarly, S. Biernat, *Miejsce prawa pochodnego ... [The position of derived law ...]*, p. 186. A different view of that issue seems to be held by: C.Mik, *Zasady ustrojowe ...*, p.38. S. Biernat's comment is to the point, that at least indirectly, the notion of a normative act subject to control by the Constitutional Tribunal stems, i.a., from Article 191 section 1, Article 190 sections 2, 3, 4 of the Constitution.

concern the possible conflict between the provisions of Community law and the statutes, and the possible competences of the Constitutional Tribunal with regards to these issues.

On the basis of the general formula of Article 91 section 3, however, certain conclusions have been derived and a consensus with regard to at least some of the issues is gradually emerging. It is assumed that Community law, which constitutes an autonomous legal order, does not thereby belong to the system of sources of internal law.¹⁵⁷ The Community regulations are based on the constitutive acts of the European Communities, and their legality, their binding force and direct effectiveness are defined according to these acts.¹⁵⁸ They function in the area where the state authority has divested itself of its legislative competences on behalf of the organs of the Community. MIK is of the opinion that the notion of direct effectiveness should be interpreted in the way that has been determined by the jurisprudence of the European Court of Justice in Luxembourg, and therefore more broadly than the provisions of the founding treaty directly imply.¹⁵⁹ As a consequence, the notion of direct effectiveness can be applied not only to regulations (which the founding act refers directly to, see Article 249 EC Treaty), but to other community regulatory acts, and in particular to the directives, which at least in a vertical order, and therefore in conflicts between the state and the citizen, may have specific legal implications and constitute a direct source of the citizen's rights and the correlated duties of the state.¹⁶⁰ The possibility of indemnification liability of the state for the failure to implement Community norms confirms that belief. Finally, it is recognised that the precedence of Community norms over the statute, established by the constitutional norm,

¹⁵⁷ For example: K. Wójtowicz, op.cit., p. 86. But also the view is being expressed that the institutional (derived) law belongs by the force of a ratified international agreement to the national legal order. It would thereby become a source of Polish law, in spite of the lack of a clear mention of that in Article 87 of the Constitution. (See also: C. Mik: *Przekazanie kompetencji ... [Transfer of competencies ...]*, p. 159.). That stipulation is doubtful for at least two reasons. First, it remains in contradiction to the concept of autonomy and relative independence of the community order; second, it has to lead to the undermining of the principle of the exclusive jurisdiction of the ECJ.

¹⁵⁸ The notions of direct application and direct effectiveness have giving rise to essential discrepancies in European doctrine for a long time. See the pertinent comments on that issue by E. Podgórska (op.cit. from p. 89 onwards) and the jurisprudence and literature sources quoted there.

¹⁵⁹ See: C. Mik: *Przekazanie kompetencji ... [Transfer of competencies ...]*, p. 161; by the same author: *Zasady ustrojowe europejskiego prawa wspólnotowego a polski porządek konstytucyjny [Principles of the system of European Community law and the Polish constitutional order]*, PiP 1998, vol.1, p.27; see also: W. Czaplński, *Akty prawne Wspólnot Europejskich w orzecznictwie Trybunału Sprawiedliwości [Legal acts of the European Communities in the jurisprudence of the Court of Justice]*, in: *Prawo międzynarodowe ... [International law...]*, p. 188.

¹⁶⁰ See also: A. Wyrozumska: *Formy zapewnienia skuteczności prawu międzynarodowemu w porządku krajowym [Forms of assurance of effectiveness of international law in the national order]*, in: *Prawo międzynarodowe i wspólnotowe ... [International and community law ...]*, from p. 193 onwards.

implies, in particular, the demand addressed to the courts to apply the Community provision in the event of such a conflict (this is not treated as tantamount to the effect of derogation with respect to the provision of internal law which cannot be reconciled with the Community norm).

Also, the postulate of such interpretation of the norms of domestic law, as to allow for its reconciliation with the Community regulation to a maximum extent is deemed to be universally accepted. It is therefore a requirement to interpret and apply the law in a manner which is as favourable to Community law as possible, and which expresses a particular presumption in favour of the adoption of such a meaning of the norm of domestic law, from among many conceivable meanings of that norm according to the rules of inference, which corresponds with Community norm.¹⁶¹ However, there exists a number of doubts, which still require resolution, and which are the subject of serious discrepancies in the available literature.

The general formula of precedence of application of the provisions of the Community law as expressed in Article 91 section 3 does not remove all of the doubts. A fairly clear situation will exist if a conflict (inconsistency) arises between a norm of Community law and a provision of a statutory regulation in a situation, while the direct nature of the effects of the Community regulation will present itself unequivocally. The imperative of precedence expressed in the quoted constitutional norm must be interpreted as a demand to apply the Community provision, and therefore, at the same time, a refusal to apply a provision of domestic law contradicting it. This position is not obstructed by any other basic constitutional formula (Article 178 section 1), expressing the principle of subjection of the judges to the constitution and the statutes, from which one could draw the conclusion that it is unacceptable to refuse to apply a statute which is formally in force and has not been waived, even if it remains in conflict with a Community norm. The existence of clear constitutional regulation regarding the precedence of application of the Community norm enables Article 178 of the Constitution to be interpreted in conjunction with the entire body of constitutional regulations concerning the application of the law, therefore including in particular the Article 91 section 3 of the Constitution. Of course, it would probably have been better if that issue were resolved *expressis verbis* by an appropriately edited formula of Article 178 of the Constitution (although here I could not agree with the view that Article 178 of the Constitution should limit the subjection of the judges to the Constitution only; such formula would become a source of anarchic phenomena in law, and, in essence, it would question the purpose of existence of the constitutional court).¹⁶² In any case, with the above indicated reservations, *de lege lata fundamentalis*, the problem of precedence of application of a Community norm, having a univocally-direct effect, over a statute, can be correctly resolved.¹⁶³ By that univocal character I understand both the direct binding force in the legal system (and therefore without

¹⁶¹ See i.a.: S. Biernat, *Wykładnia prawa krajowego zgodnie z prawem Wspólnot Europejskich [Interpretation of national law in compliance with the law of the European communities]*, in: *Implementacja prawa ... [Implementation of the law ...]*, p. 123.

¹⁶² See: C.Milk, *Zasady ustrojowe ... [Principles of political system ...]*, p.36.

¹⁶³ Formally speaking, that requirement of the precedence of the application by national courts of community regulations is referred by the ETS only to the regulations which exert a direct outcome; see e.g. the case Simmenthal, ECJ 1979, p. 629.

the need for implementation), and the possibility to define the rights of the addressee of the norm, resulting from the sufficiently precise contents of the regulation.

A much more serious problem arises in the situation when the conflict concerns a Community regulation (eg. a directive), which requires its implementation in the internal order. In the face of a sufficiently precise content of the Community regulation (subject to easy and univocal reconstruction by way of interpretation), which enables to assign it a direct effect (in the broader sense of that term – see above) in the sphere of the rights of the subject as a legal or physical person, can the court refuse to apply a statute or another type of provision of internal law, referring to the principle of precedence expressed in Article 91 section 3? The problem is controversial, the more so, as even applying a broad interpretation of direct effect, in the case of a directive does not arise in the area of horizontal relations (in the relationships between private individuals; in the relationships between the citizen and the state, the directive cannot be a source of obligations arising in violation of the *lex retro non agit* principle, either).¹⁶⁴ We should also not lose sight of the fact that the implementation of Community rule may occur by way of various legislative methods – the determination of the procedure for the implementation of a directive belongs to the internal competences of each state. It is also probably easier when the scope of regulation covered by the directive embraces an area not previously included in the legal reclamation of the internal order; the case of an obvious conflict between a binding statutory norm of a country and a Community one is more complicated.

The direct application of a directive (or another type of Community regulation yet requiring to be implemented) by the organ applying the law, and the simultaneous refusal to apply the conflicting norm of domestic law, seems to result in generating many doubts and difficulties, at least on the grounds of *legis latae*. The approach purporting the direct effect of Community regulations (interpreted at the same time as the possibility of their direct application), presented by the ECJ jurisprudence also with respect to that category of provisions, which require implementation, is *prima facie* encumbered by inconsistency, if only because the direct effects do not emerge on every facet, but only in the vertical relationship (the state – vs. – the individual citizen). Thus the direct effect (applicability) of the legal regulation, approached in the above manner, is in consequence at least deficient. Undeniably, by its very nature, the directive is addressed to the member state, and creates on its behalf the obligation to abstain from introducing regulations inconsistent with Community rule, to remove any regulations in conflict with such rule, or to establish laws which implement the norms of Community law.¹⁶⁵

¹⁶⁴ See: C.Milk, *Zasady ustrojowe ... [Principles of political system ...]*, p.29.

¹⁶⁵ In accordance with the contents of Article 249 of the Treaty on the European Community, a directive is binding “with regard to the intended effect, in relation to each member country to which it is addressed”. The national authorities are provided with the choice of the forms and methods of its implementation. It should be added that no internal legislative objections resulting from the constitutionally defined procedures shall provide for the justification of a state’s reluctance to apply community regulations. See also the comments on that issue by E. Podgórska, *op.cit.*, 84-85.

If one pursues the already developed jurisprudence of the ECJ on that matter,¹⁶⁶ it should be assumed that at least within such deficient scope of direct applicability (dispute state – individual), there would appear a possibility for direct application of the directive with precedence over domestic law, according to the solution adopted in Article 91 section 3 of the Constitution. As a result, it would imply at the same time that also those acts which require implementation generate a direct effect (in the sense of direct applicability), within the scope resulting from the jurisprudence of the ECJ. Given such an assumption, the differentiation between the direct effect and direct application loses its practical significance.

But there is yet another possibility of looking at the problem of conflict between a regulation of the Community law a statutory regulation. In the Polish legal system there exists a mechanism of legal questions, which makes that kind of conflict possible to resolve. In accordance with Article 193 of the Constitution, “any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question of law will determine the outcome of an issue currently before such court”. I express the view that the model of review of a regulation of internal law can also be – albeit only indirectly – the rule of Community law. Although Article 193 of the Constitution does not *expressis verbis* mention Community rules, but it is entirely legitimate to adopt the position, that in a situation of conflict between a norm of domestic law and a Community norm, *eo ipso* a treaty norm of primary law (of the founding treaty or the accession agreement) is being infringed upon, which fully justifies the application of the instrument of legal inquiry. The finding by the Constitutional Tribunal of the conflict between a statute (or another provision of domestic law) and Community rule will be tantamount with the loss of binding force by such a normative act. It is worth noting on this occasion, that the Constitutional Tribunal does not enter in that manner into the field reserved exclusively to the competence of the ECJ, as the object of the judgement is a provision of domestic law, and the model is a treaty norm (indirectly – a derived rule of the Community). The establishment of the actual content of the model, of course, will at times also present a complicated exercise of interpretation.

In the future one might consider the need for the establishment of a procedure for submission of a case to the ECJ in the event of doubts concerning the interpretation of a Community provision itself, also by the Constitutional Tribunal.¹⁶⁷

The Issue of Indemnity for Damage Resulting from Infringement of the Community Law – a Comment

¹⁶⁶ At least since the time of the well known ruling on the case *Van Duyn v. Home Office*, ECJ 1974, p. 1337; see also the case *Becker v. Finanzamt Munster Innenstadt*, ECJ 1982, p. 53. See also with regard to the significance of the position of the ECJ on that issue for the interpretation of Article 91 section 3: J. Skrzydło, *Konieczne zmiany w prawie polskim w perspektywie współpracy sądów polskich z Trybunałem Wspólnot (na podstawie Art. 177 Traktatu WE)* [*The necessary changes in the Polish law in the perspective of cooperation of Polish courts with the Court of Justice of the Communities (on the basis of Article 177 of the Treaty on the European Community)*], PiP 1998, vol 8. P. 91.

¹⁶⁷ On the grounds of the existing state of the law it would be doubtful whether Article 234 of the Treaty on the European Community could be applied to proceedings before the Constitutional Tribunal (that any court institution of a member country may ask for the ruling on a preliminary issue connected with the interpretation of a community provision).

There arises an interesting question of whether it is possible for the state to be held liable for damages on the grounds of *legis latae* for infringement of the rights of an individual which result directly from a Community regulation. This is reflected in the jurisprudence of the ECJ, which has relatively precise criteria, according to which the liability of the state in this respect should be determined.¹⁶⁸ It is significant, after all, that the determination of the grounds and the procedure for claiming damages belong to the domain of domestic law. Domestic regulations, as indicated in the jurisprudence of the ECJ, must not make the indemnification of damage impossible or especially difficult. The problem cannot be reviewed in more depth here. I express the belief, however, that the Constitution of the Republic of Poland (considering above all Article 77 section 1) provides a basis for the triggering of liability for damages in case of damage suffered by a private individual resulting from he/she being subject to the application of the domestic law regulations which contradicted a Community rule.¹⁶⁹ The premise for the liability of the state would need to involve not so much the lack of implementation of a Community provision or the rule of a statutory norm contradicting such a provision, but the shape of the legal status of the subject concerned – through an individual judgement (and therefore an individual act of application of the law) – on the basis of a norm not conformant with a provision of the Community law.

The binding of a regulation contradictory to a provision of Community law or a hierarchically higher act alone, would not, in my belief, fulfil such a requirement, which in some situations may be regarded as the infringement of the requirements imposed upon a member country in accordance with Article 10 of the Treaty on the European Community.¹⁷⁰

Prospects for the Establishment of the European Constitution

¹⁶⁸ See more on this topic: N. Półtorak, *Konstytucyjne prawo do wynagrodzenia szkody wyrządzonej przez organ władzy publicznej a odpowiedzialność odszkodowawcza państwa w prawie Wspólnot Europejskich* [The constitutional right to the reparation of damage inflicted by an organ of public authority and the liability of the state for damages in the law of the European Communities], in: *Konstytucja RP a członkostwo ...* [Constitution of the Republic of Poland and membership ...], from p. 201 onwards; M. Górka, *Zasada odpowiedzialności odszkodowawczej państwa za naruszenie prawa wspólnotowego* [The principle of liability of the state for damages on account of infringement of community law], *Przegląd Prawa Europejskiego* [European Law Review] 1997, No 1, from p. 32 onwards. See also particularly characteristic judgement by the ECJ on the case Francovich, ECJ 1991, p. 5114, paragraph 35.

¹⁶⁹ See i.a. my own article, *Odpowiedzialność państwa na podstawie art. 77 Konstytucji RP* [Liability of the state on the grounds of Article 77 of the Constitution of the Republic of Poland], *PiP* 1999, vol. 4 pp. 3-18. I agree with the general conclusion of N. Półtorak on the possibility of constructing the liability of the state in the discussed situation, although the relation between Article 77 of the Constitution and Article 417 and what follows of the Civil Code require much more careful evaluation.

¹⁷⁰ In accordance with that provision, the member states shall undertake every possible measure of a general or special nature in order to assure the fulfilment of the obligations resulting from that Treaty.

There is no doubt that the fundamental issues related to the relationship of domestic law with Community law, including those deciding the position of the constitutional norms of each member state, may be consistently and comprehensively resolved only by an act, which is increasingly often referred to as the European Constitution. Preparations for the adoption of such a document by the European Union have begun, although not all significant issues related to the structure of such an act and the procedure for its implementation have been resolved so far. Preliminary assumptions include the positioning of the future European Constitution in the hierarchy of the binding laws of the member states above their national constitutions. It becomes particularly important for the future to grant univocal guarantees to the basic rights of the individual, and thus a specific incorporation of the provisions of the "*European Convention on Human Rights*" within the framework of that future constitutional regulation.¹⁷¹ There is no doubt that both the procedure for the adoption of the European constitution, and the consequences which it will generate in the constitutional sphere of each member state, will require the introduction of appropriate significant changes to national constitutions.

The prospects related to the creation of the Constitution of the European Union are so essential for the future of European integration that the candidate countries aspiring to the Union, and bound by the association agreements, should be ensured the opportunity to present their points of view. Work on the formulation of such positions should begin as early as possible, given that its subject consists of an array of problems of particular complexity, both in legal and political terms. The opening towards the expansion of the European Union must be expressed not only in the efforts of the preparatory stage and on the candidate states' determination, but it should be reciprocated by the commensurate determination of the European Union itself. The participation of the candidate countries in the debate on the future of the European Union, strongly dominated by the prospects of the European Constitution, would not only provide a great opportunity for dialogue, but also reinforce the belief in the real will of the Union to open itself towards a new formula of integration resulting from its expansion in the not too distant future.

Conclusions

The above presented considerations seem to confirm the thesis formulated already in the introduction, that the Polish constitutional regulations provide legal solutions which are in principle favourable for the process of European integration. The constitutional European clause contained in Article 90, which opens the system to the accession of Poland to the European Union and anticipates the transfer of a part of the competences of the sovereign organs of state authority to the organs of the Community determines, at the same time, the legal framework within which the process of Poland's accession to the Community will be implemented.

In the face of the prospect of Poland's membership of the European Union, the special constitutional status of Community law (differing from international law interpreted as the

¹⁷¹ It should be noted, however, that the particular incorporation of the provision of the European Human Rights Convention into Community law has already taken place, first, through the jurisprudence of the ECJ indicating the obligation to observe in Community law the basic rights guaranteed by the constitutions of the member states, and subsequently, in Article 6 of the Treaty on the European Union.

law of treaties), assuming an explicit clause of precedence of its application over internal legislation, is of enormous importance.

At the same time, Poland does not renounce its own constitutional identity, conceived in this case as maintaining the hierarchical superiority of the constitutional regulations over any other legal norms in force in the Republic of Poland. Poland, has not followed the example of some of the states in the Community, which have guaranteed the precedence of Community law also over their constitutional regulations. But it should be firmly stressed at this point that such a position is not tantamount to the introduction of the Constitutional Tribunal's control of derived Community law with regard to its conformity with the constitution. Therefore, the possibility exists, within the scope related to interpretation and evaluation of the validity of the Community regulations, to respect the principle of the exclusive competence of of the Community's organ of jurisdiction. The Polish constitutional court, however, maintains its competence to adjudicate on the constitutionality of the accession agreement and, in consequence, of the other norms of the primary law of the European Union. The proposals on how to resolve the dilemmas arising in this context have been presented above.

It is finally important to note that the interpretation of a solution, favourable to Community law and, above all, to the principle of direct consequence, is contained in Article 91 section 3 of the Constitution. This will enable the adoption of that directive in the jurisprudence of the ECJ, which extends the principles of direct effectiveness and precedence to include also those legal acts which require implementation (above all the directives).

As to the question, at what stage with regard to the future processes of integration into the European Union the Republic of Poland finds itself, we may answer that progress in the creation of an architecture of legal constructions, on which the very accession of Poland to the European Union will be based, together with the application of the legal order of the Community, can be assessed very positively. The state of preparation of the Polish legal community seems good, which is reflected in the on-going extensive and deep discussion on the consequences of our country's integration into the Union. In every field, however, symmetry and balance is required. Is it also expressed in the determination and the political will on the part of the Community itself, in order to realise its prompt expansion?

THE NECESSITY AND SCOPE OF THE CONSTITUTIONAL AMENDMENT REQUIRED FOR THE ACCESSION OF THE SLOVAK REPUBLIC TO THE EUROPEAN UNION

Mr Jan KLUČKA
Judge, Constitutional Court of Slovakia
Member of the Venice Commission

1. The necessity for amendment of the Constitution of the Slovak Republic *before its accession* to the European Union results from several factors. Firstly, such amendment arises from the fact that existing constitutional provisions are not adapted to the European Union with its supra-national features (as an international entity *sui generis*) and community law, which is not a mere set of rules of traditional international law, but an autonomous and specific legal system. Secondly, the legal nature of primary and secondary community law prevents the use of the existing constitutional mechanism providing for enforcement of

community law. The Slovak Constitution in its present wording enables neither full membership of Slovakia in the European Union nor fulfils the requirements of the Union's legislation. Full membership of the Slovak Republic in the European Union therefore requires prior adaptation of its Constitution to the requirements of the Union's *primary law treaties*. Generally speaking, changes in primary law of the European Union necessitate appropriate constitutional amendments and that is why member states of the European Union when ratifying amendments of primary law must enact partial constitutional amendments whenever there is contradiction with their constitutional laws. It is worth noting in this context that the parts of the *acquis communautaire* directly applicable in the member states of the European Union do not require any transposition into national constitutional orders of member states at all. The constitutional amendments concern therefore not the directly applicable parts of *acquis* but the relevant requirements of its primary law. Adapting national constitutions to such requirements reflects the interdependence between the constitutional framework at national and international level. Neither the Europe (Association) Agreement of 3 October 1993 (providing the framework for bilateral relations between the European Communities and their member states on the one hand, and the Slovak Republic as an associated member on the other)¹⁷² nor the so-called White Book, stipulating obligations for approximation of legislation, contain any requirements for amendment of the Slovak Constitution and provide for supremacy, direct, universal and immediate effect of community law in the territory of Slovakia as an associated member of the European Communities. Such approximation of legislation seems to be partly the transplantation of certain foreign standards into Slovak legislation and partly an introduction of international legal norms into the domestic legal system of the Slovak Republic. The amendment of the Slovak Constitution is necessary within the context of the approximation of laws that is currently taking place on the basis of the aforementioned Europe Agreement, and its main purpose is to avoid any discrepancy between the final text of the Accession Treaty and the relevant provisions of the Slovak constitutional order. From the practical point of view, it should be pointed out that such constitutional amendment would allow fulfilment of the obligations which European Union membership entails and ensures that the Slovak Republic and its nationals derive full benefit from European integration. Currently, the Constitution of Slovakia contains *some gaps* with respect to its future accession in the European Union, namely:

- 1) Restriction and a partial transfer of state sovereignty of the Slovak Republic to the extent necessary for the implementation of the basic treaties of the European Union;
- 2) Direct effect and supremacy of Community Law in the domestic legal order of the Slovak Republic; and
- 3) Ratification procedure of the Accession Treaty.

These gaps should be eliminated by the draft of the constitutional amendment put forward by the deputies of the National Council of the Slovak Republic in May 2000¹⁷³. According to the

¹⁷² *The Europe Agreement between the European Communities and their member states and the Slovak Republic; Collection of Laws No. 158/1997.*

¹⁷³ *Parliamentary Press No. 643, May 2000.*

Act on the Rules of Procedure of the National Council of the Slovak Republic¹⁷⁴, the initial reading took place at the June meeting of the National Council of the Slovak Republic and it is reasonable to expect that the second and third readings will take place during its September and October regular sessions. It should be noted however, that the process of the preparation of this amendment started approximately one year ago and through a series of conferences organised by the National Council of Slovakia, both constitutional lawyers and the public have had real opportunity to comment upon this amendment. Approximately twenty successive working versions of constitutional amendments fully confirm on the one hand the willingness and readiness of their authors to accept any reasonable proposal improving the proposed constitutional text and on the other, their effort to reach a maximum level of consent between relevant political forces, state institutions and Slovak society as a whole. It should be pointed out, however, that this draft *exceeds the scope* of the requirements connected with the accession of the Slovak Republic to the European Union (*integration clause*) and regulates other topics which have become “ripe” (since 1992)¹⁷⁵ for constitutional regulation or rewording. For the purpose of this paper, it suffices to note that a prevailing number of these topics (concerning enlargement of the competences of the Constitutional Court and the Supreme Audit-Office, local self-governing bodies, immunities of the deputies of the National Council, etc.) has no direct relevance to the accession of the Slovak Republic to the European Union or its legislation. The sole exemption concerns the cancellation of the probationary period for judges of ordinary courts and the appropriate changes to their nominations and removal procedures, whereas the European Commission in its Regular Report on the Progress toward Accession of Slovakia (13 October 1999) rightly stated that: “The independence of the judiciary has improved *de facto* but needs to be consolidated *de iure* notably through an amendment to the constitution eliminating the probation period for judges and modifying the nomination and removal procedures”.

2. The draft of the constitutional amendment in the scope of its aforementioned “integration clause” seems to be sufficient for the accession of the Slovak Republic to the European Union and the practical application of community law in its territory. This draft however leaves aside (for the moment) some contradictory provisions of the Slovak Constitution such as the property rights of foreigners to land and other real property (the purchase of agricultural or forestry land by foreigners is banned in Slovakia under Article 20 of the Constitution), the fact that only Slovak citizens can run in local elections of self-governing bodies (including the election of mayors, Article 30 paragraph 1 and Article 69 paragraph 3 of the Constitution), and the fact that only the Slovak Central Bank is charged with the issue of currency (Article 56 of the Constitution). Future constitutional changes of these issues shall depend both upon the results of the accession negotiation process and upon the existence of a transitional period (particularly for Chapters 1, 3 and 4 – Free movement of goods, services and capital). The range and the potential scope of any future constitutional amendment of the Slovak Constitution shall be pre-determined by the degree of evolution of primary law of the European Union at the moment of Slovak accession and by the upcoming trends and developments of the European Union’s “constitutional order”.

1. Restrictions and Partial Transfer of Sovereignty to the European Union

¹⁷⁴ *Rules of Procedure Act of the National Council of the Slovak Republic; Collection of Laws No. 350/1996.*

¹⁷⁵ *The Constitution of the Slovak Republic adopted on 3 September 1992; published in Collection of Laws No. 460/1992.*

1. According to Article 1 of the Constitution, the “*Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound by any ideology or religion*”. The theory of a nation’s sovereignty which finds its reflection in the principles of parliamentary democracy embodied in the Slovak Constitution has, however, to be restricted in favour of the European Union and its bodies. As there is a lack of specific constitutional provision (“constitutional gap”) that would allow transferring appropriate parts of sovereign rights of Slovakia in favour of the European Union, a special constitutional authorisation (“integration clause”) is required to permit such transfer. Such constitutional authorisation seems to be a necessary pre-condition for the conclusion of the Accession Treaty of the Slovak Republic with the member states of the European Union. According to point 2 of the draft of the constitutional amendment (Article 7 paragraph 2 of the reworded version of the Constitution): “The Slovak Republic may by international treaty or by virtue of international treaty transfer to an international organisation the membership of which it has acquired part of its sovereign rights...” There is no doubt that such provisions shall restrict the competences of the relevant state bodies of Slovakia (and mainly the Parliament) to the extent necessary for the implementation of the basic treaties of the European Union in the Slovak Republic.

2. This transfer of competences constituting a certain limitation of Slovak sovereignty shall nonetheless be made in the context of a very strict reservation introduced by point 29 of the draft of the constitutional amendment (Article 84 paragraph 4 of the reworded version of the Constitution): “the majority of at least three-fifths of all deputies of the National Council of the Slovak Republic shall be required to consent to international treaty provisions as mentioned in Article 7, paragraph 2 of this Constitution”. In order therefore to guard sovereignty, an additional requirement has been placed, namely that to carry out the act of delegation of national competences, the qualified majority voting of three-fifths of all deputies of the National Council of the Slovak Republic is required.

3. Taking into consideration the far reaching implications for the division of powers in the state resulting from the Treaty on Accession, the consent of Parliament as “*pouvoir constitué*” (although highly qualified) seems to be insufficient and a direct expression of the people’s vote as *pouvoir constituant* through a nation-wide referendum would seem essential. Such referendum is required to secure the control of the people over the delegation of appropriate powers of Slovak organs to the supranational body of European Union. At this moment there is no legal norm which requires a referendum for the Slovak Republic to join the European Union. Neither the Slovak Constitution nor the draft of the constitutional amendment expressly presuppose approval of the accession of the Slovak Republic to the European Union by referendum. According to the General Position of the Slovak Republic on Accession Negotiations, however: “...a ratification referendum by means of which the citizens of Slovakia will declare their will to enter the EU is to be held.”¹⁷⁶ Despite the fact that the exact position and timing for organising such a referendum is currently unclear, this form of people’s consent with one of the “crucial issues of public interest” (Article 93 paragraph 2 of the Constitution) may to be considered as an integral part of the ratification procedure which will follow after signature of the Accession Treaty by the Slovak Republic.¹⁷⁷

¹⁷⁶ For the full text of “General Position of the Slovak Republic on Accession Negotiations” see: <http://integracia.government.gov.sk>

¹⁷⁷ According to the latest results of the public inquiry held by the Slovak Media and Information Centre (7-12 July 2000) 71.8 % of respondents were in favour of the accession of

2. Direct effect and supremacy of community law in the domestic legal order of the Slovak Republic

1. During the almost fifty year existence of the European Union, an extensive body of principles, policies, obligations and objectives has been adopted, laid down primarily in basic treaties of the European Union (Treaty of Paris, Treaties of Rome, Single European Act, Amsterdam Treaty), secondary legislation (directives, decisions of the European Union) and the decisions of the European Court of Justice. These results achieved by the European Union, commonly referred to as *acquis communautaire*, are a finite set of rights, but which may be expanded. Taking this fact into consideration, the community legal order cannot be considered merely as a system of treaty-based international law. It is a complex and independent legal system applying both to the member states of the European Union and their nationals. As the Court of Justice has consistently held, the community treaties established a new legal order for the benefit of which the states have limited their sovereign rights in ever-increasing fields and subjects of which comprise not only member states but also their nationals. The essential characteristics of the community legal order are in particular *its primacy* over the law of member states; the direct effect of a whole series of provisions which are applicable to their nationals and to the member states themselves.¹⁷⁸ The Accession Treaty of the Slovak Republic which shall be concluded according to Article 49 of the Maastricht Treaty on the European Union (former article 0) will regulate *inter alia*: “The conditions of admission and the adjustments to Treaties on which the Union is founded which such admission entails...”. Such treaty will also set out the ways in which the candidate’s entry will change the contractual and institutional framework of the European Union. The legal regime of generally binding and direct applicable rules of its secondary law “in all member states” forms an integral part of the Rome Treaty establishing the European Economic Community (as amended by subsequent treaties) (Article 249 of the Rome Treaty - former Article 189).¹⁷⁹ To guarantee the direct application of such rules in the territory of each new member state of the European Union, the following task is connected with the accession of every candidate country to the European Union.

2. Assuming that primary law of the European Union is suitable for “transplantation” through the mechanism of adopting international law norms in the domestic legal order the issue of the *acquis communautaire* and its internal effects in member states cannot be solved

Slovak Republic to the European Union. In the long term the support for the accession of Slovakia to the European Union among Slovak citizens is within the range 60-70 %.

¹⁷⁸ Point 21 of Opinion No. 1/1991, 12 December 1991.

¹⁷⁹ “In order to carry out their task and in accordance with the provisions of the Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.” For the full text of all basic treaties see: europa.eu.int/en/record/mt/title2.html

in such a manner because of its specific character (supranational, direct, immediate and universal effect on all legal subjects within the territories of member states of the European Union) in comparison with norms of “traditional” international law. Although the effects of community “secondary law” in the member states of the European Union are based upon community law itself (and not on the national constitutions), the authors of the Slovak draft constitutional amendment have nevertheless decided to expressly confirm such effects through a specific provision. Its main goal is to avoid and prevent any doubts, problems or discussions which could arise with respect to the direct and immediate effects of community legislation in the Slovak Republic after its accession to the European Union. According to point 2 of the draft constitutional amendment (Article 7 paragraph 2 of the reworded version of the Constitution): “The Slovak Republic may by international treaty or by virtue of international treaty transfer to an international organisation the membership of which it has acquired part of its sovereign rights, *if such international treaty stipulates and provided that such an international organisation enacts legally binding acts these acts are directly binding in the Slovak Republic and shall prevail over its laws.*” This special provision confirms both the directly binding nature of European Union secondary legislation and its supremacy over the laws of the Slovak Republic.

3. With respect to the *primary* (conventional) law of the European Union, the problem has arisen as to how to guarantee direct effect and supremacy over the domestic legal order of the Slovak Republic. Unlike the secondary law of the Union, no special constitutional provision dealing with the position and effects of the “founding treaties” of the European Union within the Slovak legal order has been proposed. The intention of the authors of the draft constitutional amendments was to resolve the problem of the relationship between international and national law in its entirety (monistic or dualistic system) and within the framework of such a solution to also resolve the position of the founding treaties of the European Union. Both the legislative proposal and explanatory report to the draft constitutional amendment clearly confirm the intention of its authors to depart from the dualistic approach of the Slovak Republic to its international commitments and to replace it by a simpler and more wide-spreading monistic approach. This clearly results from point 2 of the draft constitutional amendment (Article 7 paragraph 5 of the reworded version of the Constitution) according to which: “*Binding international treaties, ratified and promulgated in the manner determined by law, the application of which do not depend on the enactment of a statute, shall prevail over the statutes of the Slovak Republic*”. At this moment there are no serious doubts about the direct and immediate “self-executing” effects of large sections of the primary law of the European Union and their supremacy over the national legal orders of its member states. This statement may also be supported by the large volume of judgments of the European Court of Justice.¹⁸⁰ According to the monistic approach, this provision of the constitutional amendment therefore confirms and respects both the direct effects and primacy of “self-executing treaties” in the domestic legal order, provided that they have come into force in respect of the Slovak Republic and have been promulgated in its Collection of Laws. Any additional “internal” legislative or other measure is not required for direct application in the legal order of the Slovak Republic. Application of this approach with respect to the basic treaties of the European Union means both the guarantee of their direct effects and supremacy over the statutes of the Slovak Republic. The above quoted provisions of Article 7 paragraphs

¹⁸⁰ *The European Court of Justice formulated the doctrine of supremacy of EC Law in relation to national law in the 1964 decision in Costa v. Enel Case-Case 6/64 (1964) ECR 1141.*

2 and 5 of the draft constitutional amendment (in its entirety) confirm the direct effect and supremacy of the secondary and primary law rules of the European Union within the legal order of the Slovak Republic.

3. Ratification procedure of the Accession Treaty

The signature of the Accession Treaty by the member states of the European Union will be followed by the ratification process i.e. its approval by the parliaments of the member states and by the European Parliament. This treaty shall be ratified by the Slovak Republic according to the procedure similar to that applicable for constitutional amendments (Article 84 paragraph 4 in connection with Article 102 of the Constitution). A special ratification referendum as an integral part of the ratification procedure has been mentioned above (1.3). The ratification of other treaties of primary law needs however no special constitutional regulation.

4. The role of the national courts (preliminary rulings procedure)

1. After accession of the Slovak Republic to the European Union, the position of the national judiciary as a power enforcing community law *vis à vis* the legislative and executive body will become much stronger. The national courts which by virtue of the fact that they ultimately have to rule on the matters at issue and apply community law may also be considered as community courts. One of the important competences resulting for national courts and tribunals of member states from Article 234 (former Article 177) of the Treaty establishing the European Community (as amended by subsequent treaties) is their right to request the Court of Justice to give preliminary rulings concerning:

- a) interpretation of the Treaty;
- b) the validity and interpretation of acts of the institutions of the Community and of the European Central Bank;
- c) the interpretation of the statutes of bodies established by an act of the Council, where such statutes so provide.

This provision of the EC Treaty permits national courts to seek a preliminary ruling by the Court of Justice on the interpretation of community law and its validity if a community legislative provision is at issue in a case before a national court.

2. The role and position of international treaties (including the primary law treaties of the European Union) in the Slovak legal order has been analysed above (2.3.) and according to the monistic approach, both the direct effect and supremacy of their provisions over the statutes is to be confirmed and respected. In this connection it should be mentioned that any exemption from this approach has been taken with respect to primary law treaties of the European Union. Regardless of this “global” and fully sufficient approach, the authors of the draft constitutional amendment intended to regulate *expressly and specifically* the relation of the Slovak judiciary and judges to the international treaties by virtue of specific provisions. According to point 83 of the draft constitutional amendment (Article 144 paragraph 1 of the reworded version of the Constitution): “In exercising their functions the judges shall be independent and bound by the Constitution, constitutional statute, international treaties mentioned in Article 7, paragraph 5 of this Constitution and by law”. According to these

provisions the Slovak judges will be able to apply community law immediately from the moment of entry into force of each European Union primary law treaty. The competence to bring the matter concerning the interpretation of community law (in the scope of Article 234 of the Treaty) will be given to Slovak judges from the same moment.

5. The role of the Constitutional Court

1. After accession of the Slovak Republic to the European Union, the position of its Constitutional Court will change. Its competence as a unique authority for reviewing the constitutionality of laws and other forms of generally binding legal regulations *will not apply* in the settlement of conflicts between national law and community law. Such a task will be for the ordinary courts in close cooperation with the Court of Justice.

2. The Constitutional Court of Slovakia may however play certain role in the process of adapting community law in the Slovak Republic. To comply with such a requirement, a new competence of the Constitutional Court has been proposed in the draft constitutional amendment. According to point 59 of the draft (Article 125a paragraph 1 of the reworded version of the Constitution): *“The Constitutional Court decides on the conformity of concluded international treaties (the consent of the National Council is required prior to their ratification by the President of the Republic) with the Constitution and constitutional statutes.”* According to paragraph 4 of the same provision: *“If the Constitutional Court decides that the international treaty is not in accordance with the Constitution or constitutional statute, its ratification is only possible after the amendment of the Constitution or constitutional statute”*. Any contradiction between such treaty and a constitutional provision would then be avoided by non-ratification of such treaty or by a change of the Constitution or constitutional statute. The application of these provisions in practice should prevent any discrepancy between international treaties concluded by the Slovak Republic and constitutional provisions. This provision will have the same effect with respect to each of the treaties of European Union primary law.

6. The role of the parliament and government

The balance of power between the supreme legislative and executive body of the Slovak Republic will be dramatically changed after its accession to the European Union. It should be pointed out that the law-making potential of the government will become much stronger during the process of drafting of community acts as well as during their transposition into the legal order of the Slovak Republic (directives). The entire legislative process is therefore to be analysed in detail in the context of this aspect. The draft constitutional amendment reacts to this tendency by strengthening the role of the government within the process of transposition of European secondary legislation by decrees. According to point 57 (Article 120 paragraph 2 of the reworded version of the Constitution): *“If the statute provides the government of the Slovak Republic shall be entitled to enact decrees for the implementation of the Europe Agreement between the European Communities and their member states and the Slovak Republic”*. Such legislative competences of the government can render existing legislative process more flexible and can contribute to accelerating the adoption of community secondary law rules into the national legal order of the Slovak Republic.

Final remarks

To summarise the existing state of readiness of the Slovak Republic for its accession to the European Union and the application of its legislation it seems that the draft constitutional amendment deals adequately with all relevant problems raised by this process. Other legislative acts will however be needed in order to comply with all requirements of full membership of the Slovak Republic in the European Union.

EUROPEAN INTEGRATION AND THE CONSTITUTIONAL LAW OF THE REPUBLIC OF SLOVENIA

Mr Peter JAMBREK
Former President of the Constitutional Court of Slovenia
Member of the Venice Commission

1. As to the hierarchy of legal norms within the Slovenian legal order, the Constitutional Court of Slovenia has already held, whilst rendering its opinion on ratification of the Europe Association Agreement (Judgement No. Rm-1/97, of June 5, 1997), that the competent State body in Slovenia may not approve any such commitment of the Republic of Slovenia under international law which would be in disagreement with the Constitution. Such a commitment would be in disagreement with the Constitution if by coming into force of an international agreement, it creates directly applicable unconstitutional norms in internal law, or if it bound the State to adopt any such instrument of internal law which would be in disagreement with the Constitution.

2. Let us first review the respective Slovenian constitutional norms. Slovenia is a sovereign state, in which the supreme power is vested in the people (Article 3, para. 1). Citizens exercise this power directly or indirectly, through the unlimited power of the legislature to adopt and execute laws (Article 3, para. 2). Statutes and other legislative measures shall comply with the generally accepted principles of international law and shall accord with the international agreements, which bind Slovenia (Article 153). Ratified and promulgated international agreements shall take direct effect (Article 8). International agreements must be in conformity with the Constitution. The Constitutional Court is therefore empowered to render an opinion as to the conformity of an international agreement with the Constitution in the process of its adoption by the Parliament (preventive review of constitutionality, Article 160 on powers of the Constitutional Court). It is still not resolved in the Slovenian constitutional doctrine whether the Constitutional Court is also empowered to exercise the subsequent control of constitutionality of an international agreement (treaty) in the absence of an explicit constitutional provision to that effect. According to the prevailing view, which was never before tested by the court, the judiciary is no doubt empowered to review the constitutionality of the Parliament's law on ratification of an agreement. Nullification of such law would *ipso facto* nullify the appended agreement.

3. According to the prevailing views among Slovenian constitutional experts, the Accession Agreement between Slovenia and the EC may not be justified by Article 8 of the Constitution alone. That Article regulates incorporation of "normal" international agreements. The EU Accession Treaty, on the other hand, will create a new situation for the Slovenian state and for its legislative body. Ratification of the Accession Treaty will bind Slovenia to recognise, as a valid law with immediate effect, a number of currently valid and future EU-

acts, including some EC-directives and “framework decisions”. Therefore, the constitutionality of a longer-lasting transfer of legislative, executive and judicial powers from the national to the supranational, i.e. EU bodies is at issue. We will firstly inspect whether the present text of the Slovenian Constitution already permits such transfer.

4. The Republic of Slovenia was founded following the plebiscite held on 23 December 1990. According to the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia, which was promulgated on 25 June 1990, the plebiscite expressed the will of the Slovenian people and the citizens of Slovenia as a federal unit of the Socialist Federative Republic of Yugoslavia to establish Slovenia as an independent and sovereign state. The Charter proclaimed in its Preamble, *inter alia*, that the Republic of Slovenia already had the status of a sovereign state within the previously existing constitutional order of the former Yugoslavia, and that it already exercised its own part of sovereign rights within the Socialist Federal Republic of Yugoslavia (SFRY). In its normative section the Charter stated, *inter alia*, that the Republic of Slovenia is an independent and sovereign state and also that the Republic of Slovenia hereby assumes all rights and obligations which, by the Constitution of SFRY, had been transferred to federal authorities of SFRY. The Constitution of the Republic of Slovenia, adopted one year later on 29 December 1991, justified the independence process by the constitutional doctrine of the right to self-determination. In the Preamble it acknowledged that “we Slovenians created our own national identity and attained our nationhood... on the fundamental and permanent right of the Slovenian people to self-determination...” In its introductory normative section the Constitution again states that “Slovenia...is based on the permanent and inalienable right of the Slovenian people to self-determination. In Slovenia, supreme power is vested in the people.” (Article 3).

5. The above-mentioned provisions may thus be summarised as follows: The plebiscite, the Charter and the Constitution are the key expressions of the will of the people and of the right of the people to self-determination. That right is fundamental, permanent and inalienable, therefore, ultimate sovereignty rests with the people. The people are entitled, by that same right to self-determination, to transfer certain sovereign rights to another sovereign entity, in the case at hand to the federal state of Yugoslavia, so that they may be exercised by the bodies of that sovereign entity. The people are, on the other hand also entitled to take the transferred sovereign rights back, that is to empower their own state with the exercise of the returned and newly assumed rights to the authorities of the national state.

6. We may, for the purposes of the present report, apply the Slovenian constitutional doctrine and its recent practical exercise also to the forthcoming membership in the European Union. The Slovenian Constitutional law, understood in a broad sense, states that the Republic of Slovenia is a sovereign and independent state, its sovereignty thus is “fundamental, permanent and inalienable.” It therefore follows that the Constitution does not permit an irreversible and permanent transfer of the sovereign rights of the Slovenian people to another state or international entity, including the European Union. It does allow, however, for the transfer of such rights in principle, given that such transfer takes the form of the exercise of the otherwise inalienable right to self-determination. In other words, both the Slovenian entry into the Union and its exit from the Union are allowed provided that both take the form of the right to self-determination of the people.

7. The Preamble to the Slovenian Constitution should, in my view, also reflect recent constitutional experience of Slovenia. As of now such rests solely upon entry and exit from Yugoslavia. Slovenia's recent exit was justified with the argument that Yugoslavia “is not a

state which observes the rule of law but rather grossly violates human rights, minority rights and rights of constituent republics and autonomous provinces” (Basic Constitutional Charter, December 23, 1991). It should be stated that in the context of the envisaged European enlargement, there are good reasons for Slovenia to join the European Union such as securing further progress of democracy, social justice and the freedom and basic rights of the people. The basic Slovenian doctrine of self-determination would in this framework serve as reinforcement to that purpose.

8. The Slovenian self-determination theory and practice in respect of the transfer of sovereign powers, requires in substantive terms the proper expression of the will of the people, and in formal terms a constitutional amendment. It remains unclear whether the constitutional amendment on the specific transfer of sovereign rights must follow an expression of the popular will in the form of a constitutional referendum or plebiscite, or whether it should only require the qualified majority of two thirds of all deputies. The Slovenian Constitution provides for both. The National Assembly may only enact legislation to amend the Constitution upon the vote of a two-thirds majority of all elected deputies (Article 169). Any proposal for the amendment of the Constitution must be presented to the electorate at a referendum if the same is demanded by no less than thirty of its deputies (Article 170). In formal terms even the constitutional amendment to transfer the sovereign rights to the European Union may only be passed by a qualified majority of the deputies. In substantive terms, and given the due respect for the recent Slovenian experience in the process of dissolution of Yugoslavia and the European experience of accession of new member states to the Union, the referendum would be a necessity.

9. The right to exit is part and parcel of the Slovenian doctrine and may thus require the respective Slovenian reservation to the Treaty of Accession – if the Treaty itself would not be clear on the point of the right of the new member state to terminate its membership whenever it so wishes, given that the procedural conditions for the one-sided termination of membership are met.

10. A number of authors on the other hand are convinced that Slovenian Constitution requires “the European provision”, thus following the examples of a number of EU member states, e.g., France or Germany, in order to allow for the present and future transfer of sovereign rights. Experts of the Slovenian government office for legal affairs seem to agree with the following formulation of the Slovenian “European provision”, proposed by Dr. Gerhard Rambow, the former chief of the office for the European affairs of the German Ministry of Economy:

Slovenia's future is within the European Union. Slovenia will, together with its European partners, contribute toward further European integration, in order to provide a framework in which peace, democracy, freedom, the basic rights of the people and social progress will be secured. The Parliament shall ratify the accession treaty of Slovenia to the European Union by a majority of its members (*by two thirds of its members*) and future changes of the treaties on the European Union (*by a majority of its members*). The Parliament shall pass all laws necessary to implement the membership of Slovenia in the European Union and all laws necessary to fulfil the obligations deriving therefrom.

It was also suggested to amend the Preamble to the Constitution with the following text: “and, acknowledging the desire (*aim*) to establish (*secure*) Slovenia's future within the European Union (an integrated Europe)”.

11. Such a European constitutional provision is, in my view, redundant if the present constitutional provisions on self-determination and on the respective legislative procedure for the amendment of the constitution are retained. It would be very difficult to strike them out of the Slovenian Constitution given their symbolic and historic value. I would therefore suggest that after the successful conclusion of accession negotiations, and prior to the attainment of full membership, Slovenia amends its constitution with a number of specific European clauses.

12. These would include, *inter alia*, the provision whereby certain powers of the legislative, executive, judicial and central banking powers (monetary sovereignty) are transferred to the respective bodies of the European Union.

13. Article 3 of the Slovenian Constitution provides that, "In Slovenia, supreme power is vested in the people. Citizens exercise that power directly, and most notably, at elections..." Article 43 provides that "The right to vote shall be universal and equal." Article 3 of the First Protocol of the European Convention on Human Rights, which is incorporated into the Slovenian legal system states, that "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." In the Case of *Matthews v. the United Kingdom* of 18 February 1999, the European Court of Human Rights addressed the issue of whether Article 3 of Protocol No. 1 is applicable to an organ such as the European Parliament, i.e., whether the term "legislature" refers only to the national legislature or also to the supranational legislative body, and whether the European Parliament has characteristics of a "legislature." The Court recalled that the word "legislature" in the European Convention does not necessarily mean the national parliament: the word has to be interpreted in the light of the constitutional structure of the State in question. According to the Community case law, it is an inherent aspect of the EC law that such law sits alongside, and indeed also has precedence over, domestic law. Elections to the legislature represent an important characteristic of an effective political democracy. At the time when Slovenia will be a full member of the EC, the European Parliament will be sufficiently involved in the general democratic supervision of the activities of the European Community, to constitute part of the "legislature" of Slovenia for the purposes of Article 3 of Protocol No. 1. Therefore, the present Slovenian law – to the degree that it incorporates case law developed by the Strasbourg Court – implicitly allows for the anticipated "transfer" of the legislative power from the national legislature to the supranational European Parliament. It would nevertheless contribute to legal clarity and foreseeability if the Slovenian Constitution would be amended by an explicit recognition that supreme power vested in the people may be exercised directly, and most notably, *at local, national and supranational elections*. It may be noted that the Slovenian Constitution allows already for voting rights of foreigners. Article 43, para. 3 provides that their voting rights may be determined by statute.

14. The respective Article 3 should be further amended so as to allow for the indirect exercise of that power by *national and supranational executive and judicial powers*.

15. Further specific change is required of Article 47 of the Slovenian Constitution, which states that "No citizen of Slovenia may be extradited to a foreign country." Member states of the EC will remain "foreign" for the purposes of constitutional control. The above provision will therefore contradict the Community law and should therefore be struck out before entry to the EC.

16. It would further be in line with the basic Slovenian doctrine of self-determination to constitutionalise a number of other specific provisions on the nature of the sovereign status of Slovenia within the European Union. The principle of subsidiarity is already one of the groundstones of the European public order. It may also be stated in the Slovenian Constitution. The reservation related to the basic principles of the Slovenian Constitution (Part One of the Constitution) and of basic human rights and fundamental freedoms may be written into the Accession Treaty whereby both parties would agree that neither the Treaty nor the subsequently enacted European law may contradict the stated Slovenian constitutional principles. The Slovenian Constitutional Court should, following the example of the case law of the German Federal Constitutional Court, be instituted with sort of a double control: the Constitutional amendment should reserve for the Slovenian court the power to decide if any act of the European Union exceeded the transfer of competences by the ratification of the Treaties and their amendments. Normally it is the task of the European Court of Justice. The Slovenian provision would eliminate problems which stem from its practice to interpret the Treaties in the widest possible fashion. It would also assist in avoiding tension between the European Treaties and the national constitution. This is due to the fact that the European Union is not a state, but has a growing number of state-like qualities.

THE CONSTITUTION OF THE CZECH REPUBLIC AND ACCESSION TO THE EUROPEAN UNION

Dr Jiří MALENOVSKY
Judge of the Constitutional Court of the Czech Republic

I. Czech law and international law

Not only does the Constitution of the Czech Republic not contain any general rule fully and unequivocally defining the relationship between international law and Czech law, it does not even mention the term “international law”.

The Constitution refers only to international treaties, in terms of both powers (the power to conclude treaties is divided between Parliament, the President and the Constitutional Court) and internal effects. According to Article 10 of the Constitution, “Ratified and promulgated treaties on human rights and fundamental freedoms, to which the Czech Republic has committed itself, are immediately binding and take precedence over law”. This provision, which fulfils the role of a special rule of incorporation, also helps to determine the basic rule of incorporation which, in the absence of any written constitutional provision, has to be deduced from the evolution of the relevant constitutional provisions under the former Czechoslovakia, the full text of the current Constitution and the practice of Czech constitutional institutions.

An analysis of the Constitution and the practice of Czech constitutional institutions reveals the main elements of the rules governing the incorporation of international law into Czech law. They may be summarised as follows:

- a. The model for the incorporation of international law in the Czech Republic is apparently a mixed one (it contains both monist and dualist elements).
- b. In substance, though, it is a dualist model: where there is no specific rule of Czech law explicitly giving an international rule the force of domestic law, it is generally the case that the relevant international rule (whether convention-based or customary) has no immediate effect within the state¹.
- c. A convention-based or customary international rule may only be directly applied in domestic law if it is referred to in Czech legislation or the Constitution, or any international convention incorporated into Czech law.
- d. Decisions of international organisations and of international judicial and quasi-judicial institutions do not have direct effect in Czech law.

¹ M. Hošková: *Die tschechische Perspektive. In: Zukunftsprobleme der Europäischen Union. Erweiterung nach Osten oder Vertiefung oder beides R.I.Z. Schriften 7, Walter de Gruyter - Berlin - New York, 1998, p. 120.*

International treaties may be incorporated into Czech law via the Constitution or in ordinary legislation. If an international treaty has not been incorporated into Czech law, its provisions must be the subject of Czech legislation or another source of domestic law.

The Constitution incorporates into Czech law international treaties on human rights and fundamental freedoms. These treaties form part of domestic law, so long as their provisions are self-executing, and they must be applied by the courts. Treaties on human rights have the same status as constitutional laws.

Certain other treaties have been incorporated into Czech law by way of ordinary legislation, in which a clause provides for the international treaty to take precedence over the law, so long as it does not contravene that law. This legislative practice is nevertheless inconsistent and haphazard. Certain statutes refer to international treaties, while others do not. The result is that certain parts of numerous international treaties by which the Czech Republic is bound are enforceable in Czech law, via domestic legislation that incorporates the relevant provisions, and other parts are not, because the relevant Czech legislation lacks incorporation clauses. This applies also to the association agreement between the Czech Republic and the European Union, which cannot be enforced, particularly in relation to the Preservation of Economic Competition Act of 1991 (see below).

The Constitutional Court is not empowered to apply international human rights treaties. Nor can it consider the constitutionality of international treaties or the consistency of ordinary legislation with international conventions.

II. The Constitution of the Czech Republic and Community law

As can be seen from the preceding section, the Constitution does not yet satisfy the conditions for the country's accession to the EU, particularly regarding the domestic law effects of the accession agreement and of other Community law derived from conventions². Academics and politicians nearly all agree that the Czech Republic's accession to the EU will therefore necessitate constitutional amendments. There are two main options. The "maximalist" one is to add a new chapter to the Constitution which would specify in fairly substantial detail the accession conditions, the status of Community law in domestic law and how the bodies for which the Constitution provides would be involved in its preparation and internal application. The minimalist option, which has far greater support, is to add a very restricted number of principal provisions to the Constitution, which would then be clarified and elaborated on by ordinary legislation and by the courts.

According to the weight of professional and political opinion, the minimalist option should include the following elements:

1. A provision on **the transfer of certain legislative, executive and judicial powers** to an international institution. Such a provision seems inevitable in the light of Articles 1 ("The Czech Republic is a sovereign, unified, and democratic law-observing state ...") and 2.2 ("All state power derives from the people; they exercise this power by means of their legislative,

² *The seminar "Constitutional aspects of the Czech Republic's integration into the European Union", organised by the Czech Senate, Prague, 4 May 2000, statements by P. Rychetský and J. Zemánek.*

executive, and judicial bodies”) of the Constitution. Most political opinion considers that the EC and the EU should not be mentioned specifically in the transfer provision, which should be drafted in vaguer terms (like the Polish Constitution), with a reference to unspecified international “organisations” or “institutions”.

2. The domestic procedure for approving the accession agreement (democratic legitimation)

Initially, three politically equivalent variations were proposed (constitutional legislation enacted by Parliament, a referendum or a combination of the two). Over the last twelve months, though, a fairly clear preference has emerged for approval by referendum. The principle of referendums is recognised in Article 2, paragraph 2 of the Constitution (“A constitutional law may stipulate the cases when the people exercise state power directly”), but the necessary constitutional legislation has not yet been enacted. There is no agreement in Parliament on whether there should be a general constitutional act on referendums or one exclusively concerned with membership of the EU. In 1999, the Chamber of Deputies, one of the houses of Parliament, approved draft constitutional legislation providing for the institution of referendums on preliminary draft constitutional legislation and a specific referendum on the country’s accession to the EU. However, this proposed compromise did not receive the support of the Senate, the second chamber. By 2000, there appeared to be a growing preference for a constitutional act concerned solely with an EU accession referendum, the result of which would be binding.

3. Provision to ensure that Community law takes precedence over domestic law

In earlier discussions, the most widely held view was that the Constitution should refer expressly to the primacy and the direct applicability of Community law. However, in accordance with the minimalist approach there is now growing acceptance that primacy and direct applicability are automatic consequences of the transfer of sovereign legislative powers to the Community and that the inclusion of these characteristics of Community law in the Constitution is therefore superfluous. What is now proposed is a provision directed mainly at the courts, to the effect that Czech law (including the country’s constitutional legislation) cannot be interpreted and applied in a manner that is incompatible with Czech commitments as a future member of an international organisation such as the EC³.

III. Draft constitutional amendment approved by the government on 28 April 1999

The aim of this amendment was to rectify the deficiencies in the international dimension of the Czech Constitution⁴ and establish the right constitutional conditions for the country’s accession to the EU. It included the following main elements:

- a. repeal of the specific constitutional provision relating to international human rights treaties;

³ V. Balaš: *Legal and quasi-legal thresholds of the accession of the Czech Republic to the E.C : Report presented to the international conference in The Hague, September 2000.*

⁴ J. Malenovský: *Deficiencies of the international dimension of the Czech Constitution and possible treatments (in Czech). Právník (The Lawyer), 1997, No 7, p. 537.*

- b. greater parliamentary involvement in the treaty-making process, through the extension and specification of the types of treaty requiring parliamentary approval;
- c. a strengthening of the Constitution's monist approach to international treaties (all ratified treaties that have received parliamentary approval should become immediately enforceable and take precedence over ordinary legislation);
- d. optional prior reviews of the constitutionality of important international treaties by the Constitutional Court;
- e. a solemn provision obliging the Czech Republic to respect "the generally recognised rules of international law and its other international commitments" (the Polish Constitution contains a similar provision);
- f. a provision on the transfer of the state's sovereign powers to an international organisation, which would of course include the EC;
- g. a provision on the primacy of Community law over Czech law and its direct effect;
- h. a provision concerning the need for accession to the EU to be approved by an enhanced (constitutional) majority in Parliament and/or by referendum.

The draft amendment, produced by the current minority social democratic government, was not sufficiently discussed in advance with the other political parties in Parliament. In June 1999 it was rejected on its first reading by the lower house - the Chamber of Deputies - by 116 votes out of a possible 200.

A joint committee of representatives of the government, parliamentary political associations and specialists in constitutional and international law recently resumed discussions on the same set of constitutional problems. The committee is chaired by the Deputy Prime Minister, who is responsible for legislative matters. It has taken as its starting point the government proposals that were rejected in 1999, but the representation of political parties on the committee gives it a much greater chance of success. It is scheduled to complete its work in autumn 2000, and the government should then submit draft constitutional legislation to amend the Constitution, based on the joint committee's work, before the end of 2000. Parliament would then debate the new draft in 2001.

IV. Relations between the different branches of the state

In accordance with the minimalist approach, politicians and specialists tend to agree that any changes in the relationship between the legislative, executive and judicial branches of the state or changes in the balance between them cannot be settled by constitutional amendments. They prefer to work through the internal regulations of the government and the two houses of Parliament, and above all the "Contacts Act", which governs all relations within Parliament and between it and the government (in other words, solely through ordinary legislation), and possibly through the development and clarification of the corresponding constitutional usages and customs.

However, attempts to broaden the government's constitutional powers in the process of approximating domestic law to Community law proved the exception to the minimalist approach. Under the draft constitutional amendment referred to above, the government would have been given new authority to issue orders with force of law, which Parliament could have rejected within 30 days of their submission to it. In the absence of parliamentary opposition, the order would have been vested with statutory authority. This was the most controversial provision in the proposed amendment and was categorically rejected by Parliament. It is therefore unlikely that the government will revive this proposal.

Parliament is beginning to recognise the dangers of being deprived of information or otherwise isolated by the government when the rules of Community legislation are being drawn up. Its reactions to these fears have not yet taken concrete form, and it is not (yet) insisting on an amendment to the Constitution. The government is not taking the initiative on this point. Experts believe that the government should be required to inform Parliament about any draft legislation produced by EU institutions as soon as it is presented. If the proposals contained rules necessitating legislation in the Czech Republic, the government should consult the European affairs committees of the two houses of Parliament⁵. In fact there is a precedent. Act No. 98/2000 of the Official Journal on the application of international sanctions for the maintenance of international peace and security authorises the government to order the application of international sanctions domestically, but only after it has received the prior consent of the relevant committee of the Chamber of Deputies (see below).

Amendments to the rules of procedure of the two houses of Parliament, or possibly a specific provision in the "Contacts Act", are needed to enable each European Affairs Committee to act on behalf of its particular chamber. It will also be difficult to achieve the goal of flexible and rapid co-operation between the two chambers, for example through the creation of a joint European affairs committee (for which there is no precedent).

In the case of the judicial branch, the prevailing opinion is that, with the exception of the constitutional amendments previously listed, amendments to ordinary legislation (in particular, the Code of Civil Procedure in the case of referrals for preliminary rulings) should suffice for the domestic implementation of Community law⁶. Little progress has been made in adapting Czech law, particularly on account of the failure in 2000 of the government's proposed amendments to the Constitution for the purpose of reforming the structure of the judiciary (one of the proposals concerned the establishment of a supreme judicial council). Major problems can be expected with the application of Community law, particularly in the lower courts and administrative bodies⁷.

Chapter 7 of the Constitution describes the powers of local and regional authorities. Municipalities have been in operation since the 1990 elections, but for a long time it was

⁵ V. Týč: *Other necessary modifications to the Constitution in connection with the Czech Republic's accession to the EU (in Czech)*. *Parlamentní zpravodaj (The Parliamentary Rapporteur)*, 1999, No. 7, p. 19.

⁶ J. Zemánek, R. Král: *Constitutional law aspects of the Czech Republic's entry into the European Union (in Czech)*. In: *Yearbook of European Law*, vol. IV, 1998, *Acta Universitatis Brunensis-Iuridica*, No. 237, p. 78.

⁷ V. Balaš, *op. cit. supra*, sub 3.

impossible to institute the regions because of lack of agreement in Parliament about their size, powers and number. They have finally been established *de jure* and will come into operation on 1 January 2001.

It is generally thought that, given the requirements of EU regional policy and the size of the Czech Republic's population (ten million), fourteen regions - the number decided on - is too high. It has therefore been necessary to combine them and reduce their numbers, purely for the purpose of dealings with the Community, to make co-operation with the EU more effective (the constitutional provisions relating to the regions naturally remain unaltered).

V. The founding principles of the state and their application

According to the Statute of the Council of Europe, the principles of democracy, the rule of law and respect for human rights are preconditions for membership of the organisation. Czechoslovakia became a member in February 1991 and, after its dissolution, the Czech Republic was admitted in June 1993. The Council's Parliamentary Assembly and Committee of Ministers stated on a number of occasions that the Czech Constitution and legislation were compatible with the three main principles of the Statute, and this enabled the country to enter the Council of Europe. All the Council of Europe's monitoring procedures, particularly those of the Parliamentary Assembly and the Committee of Ministers, have since reached the same positive conclusions⁸.

Unlike other constitutions of countries of central and eastern Europe, the Czech one does not include a catalogue of human rights. Such a catalogue has, however, been enshrined in the Charter of Fundamental Rights and Freedoms, approved by the Czechoslovak Federal Assembly in 1991. According to Article 3 of the Constitution, the Charter forms part of the constitutional order of the Czech Republic and has constitutional force of law. The human rights referred to in the Charter are protected by the Constitutional Court, which may receive constitutional applications from individuals. Applicants may ask for decisions of the courts that violate their constitutional human rights to be set aside. The Constitutional Court is also empowered, if so requested, to set aside a statute or regulation, or part of one, if it finds it incompatible with the Charter. In 2000, the number of constitutional applications will probably reach 3,200.

As already noted, international treaties on human rights and fundamental freedoms have a privileged place in Czech law. Under the Constitution, they are incorporated into Czech law and directly applicable (so long as they are self-executing) and have the status of constitutional legislation. As far as the Constitutional Court procedures relating to

⁸ J. Malenovský: *La succession au Conseil de l'Europe. In: Dissolution, continuation et succession en Europe de l'Est (Succession at the Council of Europe, in Dissolution, continuation and succession in eastern Europe)*. CEDIN-PARIS I, Cahiers internationaux 9, Montchrestien, 1994, pp. 136-138; J. Malenovský: *Problèmes juridiques liés à la partition de la Tchécoslovaquie (legal problems linked to the partition of Czechoslovakia)*. AFDI, 1993, pp. 332-334; J. Malenovský: *Suivi des engagements des Etats membres du Conseil de l'Europe par son Assemblée parlementaire: une course difficile entre droit et politique (Parliamentary Assembly monitoring of commitments of the Council of Europe's member states: a difficult course between law and politics)*. AFDI, 1997, pp. 650-651.

constitutional applications and the setting aside of legislation are concerned, these treaties have the same status as the Charter of Fundamental Rights and Freedoms. Under Article 10 of the Constitution, all the important international human rights instruments, including the two United Nations human rights covenants, the European Convention on Human Rights and the Framework Convention for the Protection of National Minorities, are considered to be human rights treaties.

However, it is generally held in the Czech Republic that the introduction of a special constitutional category of human rights treaties has not proved justified. It lowers the domestic status of other international treaties. It also makes ratification of human rights treaties more complicated, since they require the same special majority as is needed to adopt or amend the Constitution, and prevents the incorporation into Czech law of human rights provisions that are scattered among instruments that themselves do not have the status of human rights treaties, within the meaning of the Constitution. The government has therefore proposed the abolition of the constitutional category of international human rights treaties, so that in future all international treaties ratified by the President of the Republic (including, of course, human rights treaties) would be incorporated into Czech law. Individual human rights provisions in these treaties would be placed under the protection of the Constitutional Court. Parliament should once again be considering these proposed amendments to the international dimension of the Constitution in 2001 (see above).

The Czech Republic is continuing to improve the standard of its human rights protection by setting up new institutions for that purpose. It is not just the Constitution that delineates their responsibilities. The government has used resolutions to establish, in 1998 and 1999, the post of government agent for human rights and a government council for human rights, as its consultative bodies. The post of Public Mediator, or ombudsman, elected by and answerable to the Chamber of Deputies, has recently been established (Act No. 349/1999 of the Official Journal). The Mediator defends persons against the actions or omissions of ministries and other authorities when these conflict with the law, or are inconsistent with the principles of democracy and the rule of law or good administration. The Mediator can act on the initiative of Parliament or members of parliament, but also responds to individual applications. The institution of Mediator was established to improve the protection of fundamental rights and freedoms, and its activities therefore have constitutional implications.

In 1997, the Czech Republic ratified the Framework Convention for the Protection of National Minorities, which, under the Constitution, is immediately binding, takes precedence over Czech law and has the status of constitutional legislation. It has not yet signed or ratified the European Charter for Regional or Minority Languages. The Charter of Fundamental Rights and Freedoms also contains various provisions offering protection to members of national minorities:

- a. the prohibition of discrimination on grounds of membership of a national or ethnic minority;
- b. the right of everyone freely to decide their nationality;
- c. the prohibition of any sort of pressure to renounce one's nationality;
- d. membership of any national or ethnic minority must not place persons at a disadvantage;

- e. the right of members of these minorities to full development;
- f. their right to be taught in their own language;
- g. their right to use their own language in official contacts;
- h. their right to be involved in settling matters concerning national or ethnic minorities.

According to the Charter, the details of these rights must be laid down in law. Hitherto, these rights have been scattered among different items of legislation according to their subject matter (for example the new Civil Status Register Act, approved in 2000, grants women members of national minorities the right not to have their surnames changed to their feminine equivalent if their minority language does not allow this, even though such a change is obligatory for Czech language surnames). However, specific legislation has not so far been enacted on the rights of persons belonging to national minorities. There is therefore no legal definition of the national minorities whose members are protected by the Framework Convention or the Charter⁹. However, in June 2000 the government approved preliminary draft legislation on the rights of national minorities and instructed the relevant deputy prime minister to submit the formal bill by the end of September 2000. The objectives of the preliminary draft are fully consistent with the Framework Convention and with the requirements of the European Council of the EU. It includes a general definition of national minorities which covers, among others, the Roma minority. Local and regional authorities would be obliged to institute “national minority committees”, and a central “council for minorities” would act as a consultative body for the government. Unless otherwise provided for in law, members of minorities would be entitled to use their language in official contacts. Also to be introduced was the possibility of bilingual place names and education.

The Roma are the most vulnerable minority in the Czech Republic, enjoying the same constitutional and statutory protection as other minorities, but in practice receiving much closer attention from the state, and in particular the executive branch, than the others do. In June 2000, the government approved the main lines of its policy towards the Roma community over the period 2001 to 2020, the aim being to integrate them into society. It has already established an interministerial committee for Roma community affairs and will be taking steps to bring Roma up to the level of the rest of society in the employment, retraining and housing fields, to provide special classes in ordinary schools, and so on. The government will also be supporting efforts to secure emancipation for the Roma as a distinctive European ethnic group and even, in its own words, respects the principle that the Roma minority in the Czech Republic forms part of the European Roma people.

VI. Specific rights in Community law

The provisions of the Charter of Fundamental Rights and Freedoms apply to foreigners in the Czech Republic, except those explicitly confined to citizens, which particularly include the right to property, in connection with which the Charter authorises legislation restricting the ownership of certain assets to citizens or corporations residing in the Czech Republic. The country’s Constitutional Court has frequently ruled that the condition that only citizens are

⁹ J. Malenovský: *The ratification of the Framework Convention for the Protection of National Minorities by the Czech Republic (in Czech)*. *Právník*, 1998, no 3, p. 176.

eligible for the restoration of expropriated property under the legislation to remedy damage suffered under the Communist regime is not incompatible with the Charter or the Constitution (unlike the legal condition of “permanent residence”, which has been repealed as being incompatible with the Charter). Only citizens have the right to found and be members of political parties and movements. Citizens are also eligible to take part in the management of public affairs, either directly or by freely choosing their representatives. The rules governing the exercise of the right to vote are laid down in law. The Charter also authorises legislation that is less favourable to foreign nationals in connection with certain social rights, for example entitlement to free medical care and primary and secondary education.

Membership of the European Union will undoubtedly necessitate certain amendments to the Charter of Fundamental Rights and Freedoms, but not necessarily in all the cases to which I have alluded. In the case of property rights, modification of the Charter does not appear to be inevitable, since the wording of the relevant article does not exclude foreigners. The Charter simply authorises legislation restricting ownership of certain assets to citizens. Ordinary legislation could therefore be used to extend property rights to foreigners, without conflicting with the Charter as a constitutional act. The extension of voting rights to foreign nationals in elections to local or regional representative bodies through ordinary legislation is also unlikely to conflict with the Charter or the Constitution. The latter simply stipulates that only citizens can vote for the two houses of Parliament. In the case of representative bodies of self-governing local and regional authorities, the Constitution merely states that their members shall be elected by universal, equal, direct and secret suffrage, with no reference to citizenship. It would probably be necessary to amend the Charter to authorise the activities of any cross-national political parties and movements which foreigners might found or belong to.

VII. Economic aspects of the Constitution

The free market convictions of the authors of the Charter and Constitution are reflected in the almost total absence of rules governing economic relationships in society. Their regulation is, as a matter of principle, the subject of ordinary legislation. For example, according to the Charter, “the law shall specify which property essential for securing the needs of society as a whole, development of the national economy and public welfare may be owned exclusively by the state, local authorities or specified bodies”.

The Constitution has just one article concerned with the status of the Czech National Bank, laying down that it is the state central bank and that its main purpose is to maintain currency stability. Interference in its activity is possible only in accordance with law. Its status and responsibilities are established by law. In 2000, the Chamber of Deputies approved a draft amendment to the Czech National Bank Act to bring the Act into line with Community law. The proposal was immediately rejected by the Senate, on the grounds that it was unconstitutional, since it introduced a new objective of price (as opposed to currency) stability. The government then submitted to the Chamber of Deputies, to which the defeated amendment had been returned, a draft constitutional amendment that would have overcome the problem raised. The Chamber of Deputies approved the original version of the draft amendment to the National Bank Act in September 2000.

The harmonisation of competition law is another issue that has not yet been resolved satisfactorily. Competition law is currently dealt with under the Preservation of Economic Competition Act, No 63/1991 of the Official Journal. The Act has been amended twice and is only partly in compliance with the EU’s competition regulations, since it was enacted before

the conclusion of the country's association agreement with the EU. However, in summer 2000 the government approved proposals for new competition legislation that is entirely in line with Community competition law. The bill includes:

- an express provision on how the act will apply to public utilities providing general public services in the economic field;
- an unambiguous definition of the *de minimis* rule;
- clarification of the conditions for granting individual exemptions to the general ban on agreements harmful to competition;
- a definition of dominant position based on the principle of market strength;
- introduction of the concept of collective dominance;
- clarification of the definition of an association of competitors;
- extension of the procedural rights of third parties and the introduction of time limits;
- clarification of the provisions governing the imposition of fines.

The Preservation of Economic Competition Bill is expected to be passed by Parliament in the first half of 2001.

VIII. Other issues

As an immediate neighbour of two European Union member states, the Czech Republic has to adapt its emigration and immigration policy significantly and as a matter of urgency to bring it into line with Schengen. The relevant provisions appear in ordinary legislation, but the specific rights granted to foreign nationals by the Charter of Fundamental Rights and Freedoms, which has constitutional status, set limits to and have constitutional implications for amendments to this legislation. Of particular relevance are Article 14 of the Charter ("A foreign citizen may be expelled only in cases specified by law") and Article 43 ("The Czech Republic shall grant asylum to citizens of other countries, persecuted for asserting political rights and freedoms. Asylum may be denied to a person who has acted contrary to fundamental human rights and freedoms").

In the early 1990s, the Czech and Slovak Federal Republic decided to take action through legislation, namely the Refugees Act of 1990 and the Foreign Nationals' Residence Act of 1992. Both were generally consistent with the country's international commitments of that time (particularly the Convention on the Status of Refugees), but not with Community law. It was largely in order to harmonise Czech law with the Schengen arrangements that three new pieces of legislation were drawn up and enacted in the late 1990s. All were approved in late 1999 and are already in force. They comprise two special acts (No. 310/1999 of the Official Journal on the stationing of other countries' armed forces in the Czech Republic and the Asylum Act, No. 325/1999) and a general act - No. 326/1999 - on foreign nationals' residence in the Czech Republic. The latter governs all situations not covered by the two special acts.

The Asylum Act and the Foreign Nationals' Residence Act are fully compatible with Community legislation. The former defines "safe third countries" as well as "safe countries of origin" and stipulates that an asylum application should be rejected as manifestly ill-founded if the applicant arrives from either a country of origin or a third country that the Czech Republic considers to be safe, unless this country can be shown not to be "safe" for this particular applicant. Although the Ministry of the Interior grants asylum, decisions on appeals are made by a committee, most of the members of which represent non-governmental organisations, and asylum seekers may appeal to the courts against final administrative decisions, with suspensive effect.

Among other subjects, the Foreign Nationals' Residence Act deals with the arrangements for temporary residence of foreign nationals entering on a renewable short-stay (up to 90 days) or long-stay visa (365 days). Unless the act states otherwise, visa applications must be made to the relevant diplomatic or consular mission of the Czech Republic abroad, and not at the frontier or after entry into the country. The act introduces the notion of airport visas and also contains detailed provisions governing administrative expulsions with the possibility of judicial review. It came into force on 1 January 2000 and from the outset has been strongly criticised abroad. According to the critics, certain aspects of the new legislation are too strict, particularly formalities that are seen to be excessive (such as overcomplicated border-crossing documentation), and certain administrative procedures connected with the lodging of visa applications are said to be inflexible and impractical. However, the Act's compatibility with Community law has not been disputed. Government and Parliament are aware of the shortcomings of the new legislation, and there is a political consensus on the need to amend the criticised provisions as soon as possible. The amendments could be approved in late 2000 or the first half of 2001.

Czech legislation on the domestic application of international sanctions also has constitutional limits and implications. The provision of the Charter of Fundamental Rights and Freedoms according to which "everybody may do what is not prohibited by law and nobody may be forced to do anything which the law does not impose" has made it necessary to enact legislation on the subject. In 2000, Parliament approved Act No. 98/2000 of the Official Journal on the application of international sanctions for the maintenance of international peace and security. The act sets limits to the government's powers to oblige individuals and legal persons within the country to abide by sanctions. The government has sole authority under this legislation to introduce, modify, suspend, abolish or reintroduce internationally declared sanctions, after obtaining the prior consent of the relevant committee of the Chamber of Deputies. Sanctions declared by EU bodies are also deemed to be international sanctions under the act, which, for example, authorises the domestic application of EU "common actions" and "common attitudes", even though, as a non-member country of the EU, the Czech Republic is not legally bound by them.

CONCLUDING REPORT

Luis LOPEZ GUERRA
Vice-President, General Council of the Judiciary, Spain

1. Sovereignty, National Constitutions and Integration into the EU

When considering the impact of integration into the European Union upon the constitutional Law of applicant countries, it is obvious from reports submitted at the Seminar that the inevitable point of departure is the principle of state sovereignty which, as the reports indicate, is present in each constitution of the countries in question.¹⁰ Without the need to reproduce here the main tenets of classical theory of State and sovereignty as *summa ab omnibus soluta potestas*, it will suffice to recall, as was done in the reports, that sovereignty implies the supremacy of the power of the State vis-à-vis any other internal or external powers, and the exercise of a series of functions and tasks traditionally associated with that position of supremacy. As was underscored in the Latvian report, sovereignty means "having the last word".¹¹

Membership in the European Union necessarily has, however, great consequences for the exercise of powers traditionally derived from the sovereignty of the State. Each report recognised that from an initial and formal perspective, accession to the European Union is tantamount to concluding an international treaty, since signatory States accept a series of obligations which greatly restrict their sphere of autonomy and freedom of action. However, the peculiar characteristics of the European Union, and the obligations resulting from accession, imply consequences for Member States that reach far beyond the general terms governing international Law and the internal and external applications of such. "European law" cannot be equated with "international law", and the classical principles of the latter differ from the ones governing the legal order of the European Union. As discussions during the Seminar have demonstrated, terms such as "monism" and "dualism" are not useful in explaining the relationship between national and European law, or the way in which administrations and courts must apply European regulations and directives.¹²

From an organic (or organisational) perspective, the European Union has created a new entity (or, rather, a series of entities under the common umbrella of the EU) different from its component States, and having its own powers and functions. As Mr. Toledano's report highlighted, from the point of view of the normative structure, this has resulted in the creation of an autonomous European legal order, different, although not isolated, from the legal orders of the Member States.¹³ Certainly, the process of European integration does not imply the disappearance or loss of significance of the national legal orders, or the lack of relevance of national Constitutions as the supreme norms of member states. On the contrary, the European Union is based upon the plurality of the European peoples and upon the need for constitutional and democratic orders in each. As stated in *Costa v. ENEL*, both legal orders, European and national, must function in an integrated manner.

¹⁰ See, for instance, the reports on Lithuania, p. 6; the Czech Republic, pp. 2-3; Estonia, pp. 2 ff.; Slovenia, p. 2; and Latvia, pp. 3 ff.

¹¹ Report on Latvia, by Mr. Aivars Endzins, p. 4.

¹² In general, it is accepted that, if some classical category of international law must be applied to the relationships between Community and national law, the most adequate would be the monist approach. In that regard, see, for instance, the report on the Czech Republic, p.3, which refers to the constitutional amendment project providing for a reinforcement of the monist approach to the Constitution vis-à-vis international treaties. See also the report on Slovakia, p.5, and Malta, pp. 5-6.

¹³ "Rapport Introductif" p.1 ff.

The reports presented to the Seminar dealt mainly with the question of how such integration should be made possible. The content of the reports readily provides a list of problems or subjects to be considered, each relating to the tasks to be performed at the constitutional level by the applicant countries as prerequisites for accession to the European Union.

a) A subject present in each report concerns the need for a constitutional clause (“European clause”) that would confer sufficient authority to the treaty-making authorities of the State to enable them to transfer sovereign powers from the State to the organs of the European Union by means of a treaty of accession. Closely related to this subject is the matter of defining the scope of that enabling clause, in other words, the specification of the powers that may and may not be transferred by means of a treaty of accession, or on future occasions, in the event Union Treaties are subject to reform.

b) A second point treated in practically all of the reports is the need for the amendment of a series of specific constitutional clauses which are in direct conflict with the terms of the Union Treaties (as they stand today). The reform of such clauses appears to be an inevitable prerequisite for the ratification of the accession treaty to become constitutional.

c) From a dynamic point of view, the reports also posed the question as to how to guarantee not only the efficacy and binding force of primary European law in the Member States after accession, but also how to comply with the consequences of the peculiar characteristics of direct effect and primacy or secondary or derived Community law, and to achieve its application by the courts. A specific topic present in many reports concerned which role, if any, national constitutional courts should play in reviewing whether not only the treaty of accession, but also European secondary law, agree with mandates of the national constitution.

2. *The Need for a Constitutional Empowerment Clause: the “European Clause”*

As for the first topic, the need for a constitutional clause authorising the transfer of powers, most reports point out that the autonomous European legal order, superior in its realm (i.e. within the terms of the Union Treaties) and different from the legal orders of the Member States (despite being integrated and co-ordinated with such), is the result of conferring to European Community the exercise of legislative, executive and judiciary powers, initially belonging to the constitutional authorities of the State.¹⁴ As stressed in one report,¹⁵ this transfer of powers does not imply a loss of independence on the part of the Member States, but it does result in the disempowerment of some organs of the State in relation to specific tasks and functions which have been traditionally associated with the very concept of sovereignty and which were expressly attributed to those organs by a Constitution. As a result of integration into the European Union, the executive, legislative and judiciary organs of the State relinquish an element of their powers which, thereafter, will be exercised by the organs of the EU. Obviously, so as to ensure that this transfer of powers in favour of the EU does not contradict the distribution of powers established in the constitution, a constitutional mandate to that effect is required. This means that a clause within the constitution must expressly

¹⁴ For instance, the reports on Lithuania, p.6; Poland, p.4; Slovenia, p.2; and Slovakia, p.4 contain such a reference.

¹⁵ Report on Latvia, p.4.

empower the treaty-making authorities of the State to ratify a treaty transferring constitutional powers. Almost all of the reports presented at the Seminar recognise that the clauses governing treaties currently present in the constitutions of the applicant countries would not permit the ratification of a treaty which not only establishes new obligations for the signatory states, but also attributes to the organs of a supranational organisation the exercise of functions and powers formerly belonging to the powers of those states.

Therefore, all of the reports recognise the necessity (or least the advisability) of adopting a constitutional clause (a "European clause") which would allow powers closely bound to the notion of sovereignty to be attributed to the European Union. In addition to the specific provisions of the Union Treaties, and their interpretation by the Court of Justice of the European Community, this clause would provide a basic tool for reinterpreting the constitutional distribution of powers resulting from accession to the European Union. Moreover, from a dynamic point of view, in the event of reform or amendment of the Union Treaties requiring an additional transfer of powers to the European institutions, this enabling clause would be required to ascertain whether new attributions could be transferred (and ratified) without the need for further constitutional reform. In other words, a "European clause" is necessary not only to empower the treaty-making authorities to confer powers, but also to define the scope and limits of such attribution.

In that regard, almost all of the reports presented during the Seminar indicate that such clauses are, at present, lacking in the national constitutions of the applicant countries.¹⁶ The Slovakian report defines this situation as a constitutional gap. In consequence, there is a generally perceived need for constitutional reform to enact an enabling clause, since the constitutional mandates referring to the ratification of international treaties do not provide for the necessary transfer of powers.¹⁷

As regards the specific content of such clauses, two types of comments were offered in the reports. On the one hand, it was suggested that in any event, future reforms of Treaties must preclude any curtailment of the main principles of democracy, separation of powers and fundamental rights. The Estonian report thus refers to limits derived from the respect for human rights, while the report on Slovenia stressed the right to exit as a necessary reserve to the present transfer of powers required by virtue of the Treaty, or to any future reform thereof.¹⁸

A second comment concerns the advisability of including in the enabling clause a specific reference to the purpose for which it was intended, (i.e. to permit the state to accede to the European Union), following the examples of the constitutions of several present Member

¹⁶ *The report on Poland states that art. 90.1 of the Poland Constitution already allows for the transferral of powers to the UE. The reports on Lithuania (p. 2), the Czech Republic (p. 2), Estonia (pp. 5-3), Malta (p. 6), Slovenia (p. 2), Slovakia (p. 2), Cyprus (p. 8) and Latvia (p.1 ff.) recognise the need for such a clause.*

¹⁷ *Only the report on Bulgaria seems (p. 2) to consider sufficient for entry into the EU the constitutional clauses referring to international treaties.*

¹⁸ *Report on Estonia, p. 6; report on Slovenia, p. 5: "The right to exit is part and parcel of the Slovenian doctrine and may thus require the respective Slovenian reservation to the Treaty of Accession".*

States.¹⁹ An exception to this point of view can be found in the report on the Czech Republic, which maintains the opposite position.²⁰

3. *Amendments to Specific Clauses of the Constitution*

A second topic considered in the reports presented during the Seminar refers to the need to modify specific clauses of the constitutions of the applicant countries prior to ratification of the treaties of accession, due to the presence of express contradictions between those clauses and primary Community law. In that regard, the reports and discussions during the Seminar considered the experience of present Member States which were obliged to amend their Constitutions before being able to ratify the reforms of the Treaties in Maastricht and Amsterdam.

As highlighted in the discussions, European integration constitutes an ongoing dynamic process from at least two perspectives. On the one hand, in a progressive and continuous manner, the scope and content of the matters subject to European law have increased as a result of the successive reforms of the original Community Treaties. On the other hand, new countries have continually acceded to the Community, six initial members of the European Communities grew to fifteen – which are presently members of the European Union – alongside which should be seen the expected increase derived from the accession of the present applicant countries.

Accession to and membership in the Union imply not only a redistribution of the powers of the State due to the transfer of public functions to European institutions, but also accepting a set of specific principles and rules included in primary Community law. These principles and rules may also conflict with specific clauses of the national constitution of a given member state. To avoid such conflicts, reforms in the European Treaties have required amendments to the constitutions of some of the Member States, prior to ratifying the reformed text of the Treaties, in order to render those constitutional clauses compatible with the changes in the new content and scope of European law.

In the case of the applicant countries, accession to the Union would require that those constitutional provisions which conflict with clauses in the Treaties at the moment of ratification be amended, so that Union law may be applied without the obstacles resulting from the presence of constitutional mandates directly opposed to that law. Only by eliminating any contradiction between the Member State's constitution and the performance of the obligations resulting from membership in the European Union, may the uniform application of European law be guaranteed. Certainly, from the point of view of internal law, the suppression or reform of constitutional mandates contrary to the content of the Treaties is mandatory as a prerequisite to the ratification of the Treaties, so as to preclude unconstitutional acts on the part of the treaty-making authorities, just as constitutional amendments were required in some Member States prior to the ratification of the Maastricht and Amsterdam reforms.

¹⁹ *French Constitution, art. 88.1 to 4; Portuguese Constitution, art. 7.6; German Constitution art. 23; Belgian Constitution, art. 168, among others.*

²⁰ *Report on the Czech Republic, p. 3: "Selon l'opinion politique prépondérante la disposition sur le transfert ne devrait pas mentionner explicitement les CE ou l'UE, mais être rédigée de façon plus vague [...]".*

The majority of the reports contain examples of the types of constitutional mandates which must be amended prior to the ratification of treaties of accession. They refer to clauses found in many of the constitutions, concerning matters such as the limitation or prohibition of non-nationals to own property,²¹ or to vote or become elected.²² Another example of constitutional clauses to be reformed are those concerning the exclusive powers of Central Banks to mint and issue currency.²³

4. *Guaranteeing the Direct Effect and Primacy of Community Law*

A third subject analysed in many of the reports refers to techniques for guaranteeing the implementation of primary and secondary Community law, respecting the principles of direct effect and primacy over national law. The transfer of law-making powers to European institutions implies that these institutions will continually produce rules, by virtue of the mandates contained in the Union Treaties. The application and enforcement of these rules (which are different from the Treaties, although derived from them their binding force) must be assured in all Member States, even in the case of failure to act on the part of national authorities, or the existence in the national legal order of rules which are in direct contradiction with Community laws. The well-know judgements of the Court of Justice of the European Community in the cases *Van Gend en Loos*, *Costa v. ENEL* and *Simmenthal* are generally quoted in this respect in the reports.

Some reports refer to the adoption, either real or proposed, of a specific constitutional clause to guarantee the direct effect and primacy of secondary Community law.²⁴ The model, quoted in the report on Cyprus, and discussed extensively in the debates, is Article 29, paragraph 5 of the Irish Constitution.²⁵ A similar clause has been included in both the Polish Constitution (Article 91, paragraph 3), and the draft reform of the Slovakian Constitution.

As indicated in the report on Slovakia²⁶ and discussed in the Seminar, strictly speaking, a "primacy clause" would not be necessary to ensure the direct effect and primacy of European law in Member States. In effect, no such clause is present in the majority of the Member States' constitutions. Indeed, the guarantee of these principles is implied in the mere

²¹ See for example the reports on Lithuania, p. 3; Slovakia, p. 3; Bulgaria, p. 6.

²² Reports on Lithuania, p. 3; Estonia, p. 7; Slovakia, p. 5.

²³ Reports on Estonia, p. 9; Slovakia, p. 3.

²⁴ Reports on Poland, p. 10; the Czech Republic, p. 4; Slovakia, p. 5; Hungary, p. 28 (which states that "the level of expression of the supremacy principle should not be the Constitution but its proper place is in the legislation promulgating the Accession Treaty").

²⁵ "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership in the European Union or of the Communities, or prevents laws enacted, acts done, or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State". See the report on Cyprus, p. 10.

²⁶ p. 5

ratification of the Treaties, since the Treaties include not only provisions concerning the law-making powers of the European Community, but also those concerning the powers of the European Court of Justice, which in exercising those powers has interpreted the provisions of the Treaties and established the principles of direct effect and primacy of European law in the above mentioned decisions. The provisions of the Treaties themselves, their interpretation on the part of the Court, and the binding force of the Court's case law guarantee the direct effect and primacy of Community law. As stated in the report on Slovakia, "the effects of community secondary law in the Member States of the European Union are based on the community law itself, and not on the national constitutions". Nevertheless the presence of a "primacy clause" would certainly not be detrimental to the primacy of Community law, and would serve to underscore the commitments undertaken when acceding to the European Union.

In connection with these matters, several reports make reference to the role of the national Courts (and, mainly, the Constitutional Court) in checking or reviewing the compatibility of European law, whether primary or derived, with the mandates of the Constitution.²⁷ In other words, the question refers to the conduct the national Courts must follow if they perceive a contradiction between the national Constitution and some disposition included in the Union Treaties or in delegated (secondary) Community law.

Concerning primary Community law (i.e. the Treaties) not only the reports but also the discussions held during the Seminar took into account the experiences derived from previous Treaty reforms, and particularly the fact that in several cases, the national Constitutional Courts or equivalent institutions of Member States were obliged to rule as to whether the proposed amendments to the Treaties conformed to their respective constitutions.²⁸ In this respect, the role of the Courts or Councils charged with reviewing the constitutionality of laws is of paramount importance (within the provisions of the respective legal systems) to avoid including in the national legal order provisions that conflict with constitutional mandates. The preventive review of constitutionality, (i.e. before the Treaties are ratified) appears to be advisable since it renders it possible to amend the conflicting constitutional clauses before the entry into force of primary European law. Of course, the existence of a preventive constitutional review depends upon the specific regulations in that respect in each country. In any case, the task of reviewing the constitutionality of primary European law falls to the national Constitutional Courts.

With respect to derived or secondary Community law, the situation is somewhat different, since the institution in charge of reviewing the conformity of secondary European law to the basic norms of the Community (the European Union Treaties) is the Court of Justice of the European Community. It is thus the task of the European Court of Justice to verify whether rules emanating from European authorities contradict provisions of the Treaties (such as, for instance, the *ultra vires* nature of their content). This task must be developed by any of the procedural rules established in the Treaties. It must be taken into account that Article 234 (formerly Article 177) of the European Community Treaty bestows upon the national courts a relevant role in this procedure, providing that they may refer a case to the European Court for a preliminary ruling if they detect the presence of possible contradictions between primary

²⁷ *Report on Poland, p. 6, Slovenia, p. 6, Slovakia, p. 7, Hungary, p. 22 ff., and Malta, p. 6.*

²⁸ *See, for instance, the report on Hungary, pp. 19 ff.*

and derived Community law. By referring a case to Luxembourg for a preliminary ruling, the national judge becomes, in practice, a European Community judge.

At the moment when accession negotiations are taking place between the European Union and twelve States, the question of conformity between domestic law and Union law is a major topic of research, which has a considerable impact. On the basis of experiences of member States, which have already been considered by the Venice Commission, it is possible to study the situation in candidate states, which are called upon to solve very rapidly the problems which have progressively appeared over the last half century.

This volume brings together a general report on the situation in member States, twelve national reports concerning the candidate states, as well as a concluding report. As constitutional law is no longer solely a domestic issue but has become a European issue, this volume aims to find common problems which will appear in fundamental charters in the perspective of accession to the Union, without neglecting individual situations in any state, both from the institutional point of view and in material law.