


The Law of the EUROPEAN UNION

Teaching Material



**PRINCIPLES OF CONSTITUTIONAL LAW:
THE RELATIONSHIP BETWEEN THE COMMUNITY
LEGAL ORDER AND THE NATIONAL
LEGAL ORDERS:
SUPREMACY**

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TABLE OF CONTENTS

<i>NOTE AND QUESTIONS</i>	1
1. SUPREMACY BEFORE THE EUROPEAN COURT OF JUSTICE	2
1.1 Case 6/64: Costa v ENEL	2
1.2 Case 45/76: Comet.....	4
1.3 Case C-106/77: Simmenthal	7
2. SUPREMACY AND NATIONAL CONSTITUTIONS: RECEPTION BY THE MEMBER STATES THROUGH LEGISLATION	11
2.1 The Netherlands	11
2.2 Luxembourg	13
2.3 Greece.....	14
2.4 Spain.....	14
2.5 Portugal.....	16
2.6 Belgium	16
2.7 France	18
2.8 Germany	20
2.9 Italy	23
2.10 Denmark	25
2.11 Ireland.....	28
3. SUPREMACY AND NATIONAL CONSTITUTIONS: RECEPTION BY THE MEMBER STATES IN THE CASE-LAW OF HIGH NATIONAL COURTS	36
3.1 Germany	36
3.1.1 Internationale Handelsgesellschaft (Solange I).....	36
3.1.2 J. Abr. Frowein: Solange II.....	41
3.2 Italy	44
3.2.1 Frontini	44
3.2.2 Granital	48
3.3 Belgium	53
3.3.1 Minister for Economic Affairs v. Fromagerie Franco-Suisse 'Le Ski'	53
3.4 France	55
3.4.1 Cafés Jacques.....	55
3.4.2 Semoules.....	58
3.4.3 Nicolo	61

3.5	United Kingdom	72
3.5.1	Macarthy’s v Smith.....	72
3.5.2	Factortame	75
4.	<i>THE NEW CHALLENGES</i>	89
4.1	Decision of the German Constitutional Court on Maastricht.....	89
4.2	Decision of the German Constitutional Court (Banana Saga).....	100
4.3	Decision of the Belgian “Cour d’arbitrage” (European Schools).....	101
4.4	Decision of the Italian Constitutional Court on Art. 234 (ex 177)	106
4.5	Decision of the Spanish Constitutional Court on Maastricht (Municipal Electoral Rights)	109
4.6	Decision of the French “Conseil Constitutionnel” on Amsterdam	117
4.7	Decision of the Danish Supreme Court on Maastricht.....	125
5.	<i>FURTHER READING</i>	131
5.1	Treatises	131
5.2	Articles	131



NOTE AND QUESTIONS

This Unit contains primary sources pertaining to the doctrine of supremacy of Community law within the Community legal order.

It is divided into four sections:

- 1. *Supremacy before the Court of Justice***
- 2. *Supremacy and national constitutions: reception by the Member States through legislation***
- 3. *Supremacy and national constitutions: reception by the Member States through case-law of high national courts***
- 4. *The new challenges***

This topic will be covered by lecture. The lecture will help you to understand this mass of national constitutional provisions and case law.

1. SUPREMACY BEFORE THE EUROPEAN COURT OF JUSTICE

1.1 Case 6/64: Costa v ENEL

Flaminio Costa v ENEL

Case 6/64

15 July 1964

Court of Justice

[1964] ECR 585

<http://www.curia.eu.int/en/content/juris/index.htm>

- [1] By Order dated 16 January 1964, duly sent to the Court, the Giudice Conciliatore of Milan, 'having regard to Article 177 of the Treaty of 25 March 1957 establishing the EEC, incorporated into Italian law by Law No 1203 of 14 October 1957, and having regard to the allegation that Law No 1643 of 6 December 1962 and the presidential decrees issued in execution of that Law ... infringe Articles 102, 93, 53 and 37 of the aforementioned Treaty', stayed the proceedings and ordered that the file be transmitted to the Court of Justice.

On the application of Article 177

On the submission regarding the working of the question

- [2] The complaint is made that the intention behind the question posed was to obtain, by means of Article 177, a ruling on the compatibility of a national law with the Treaty.
- [3] By the terms of this Article, however, national courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of Justice so that a preliminary ruling may be given upon the 'interpretation of the Treaty' whenever a question of interpretation is raised before them. This provision gives the Court no jurisdiction either to apply the Treaty to a specific case or to decide upon the validity of a provision of domestic law in relation to the Treaty, as it would be possible for it to do under Article 169.
- [4] Nevertheless, the Court has power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty. Consequently a decision should be given by the Court not upon the validity of an Italian law in relation to the Treaty, but only upon the interpretation of the abovementioned Articles in the context of the points of law stated by the Giudice Conciliatore.

On the submission that an interpretation is not necessary

- [5] The complaint is made that the Milan court has requested an interpretation of the Treaty which was not necessary for the solution of the dispute before it.

[6] Since, however, Article 177 is based upon a clear separation of functions between national courts and the Court of Justice, it cannot power the latter either to investigate the facts of the case or to criticize the grounds and purpose of the request for interpretation.

On the submission that the court was obliged to apply the national law

[7] The Italian Government submits that the request of the Giudice Conciliatore is 'absolutely inadmissible', inasmuch as a national court which is obliged to apply a national law cannot avail itself of Article 177.

[8] By contrast with ordinary international treaties, the EEC Treaty has created 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.

[9] By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

[10] The integration into the laws of each Member State of provisions which derive from the Community, 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. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.

[11] The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions (for example Articles 15, 93 (3), 223, 224 and 225). Applications, by Member States for authority to derogate from the Treaty are subject to a special authorization procedure (for example Articles 8 (4), 17 (4), 25, 26, 73, the third subparagraph of Article 93 (2), and 226) which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.

[12] The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

[13] It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

[14] The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.

[...]

1.2 Case 45/76: Comet

Comet BV v Produktschap voor Siergewassen

Case 45/76

16 December 1976

Court of Justice

[1976] ECR 2043

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By order of 25 May 1976, received at the Court Registry on 26 May 1976, the College van Beroep voor het Bedrijfsleven referred the following question to the Court under Article 177 of the EEC Treaty: 'Does any provision or any principle of Community law prohibit the raising of an objection against a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law on the ground that he has allowed the period for lodging an appeal under national law to elapse, either in the sense that the action of the litigant may be declared inadmissible by the court for failure to observe the time-limit or in the further sense that the administration may derive from the failure to comply with the time-limit a right to refuse to reconsider its decision?'
2. The question was submitted in connection with proceedings brought before that court by the plaintiff in the main action for a declaration that, on exports of bulbs and corms of flowering plants to West Germany effected during the concluding months of 1968 and the early months of 1969, it made an undue payment to the Produktschap voor Siergewassen (hereinafter referred to as 'the Produktschap'), the defendant in the main action, of levies constituting charges having an effect equivalent to customs duties on exports which are contrary to Article 16 of the Treaty and are, moreover, prohibited by Article 10 of Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, which was applicable with effect from 1 July 1968.
3. The plaintiff in the main action asks the national court to recognize that it is entitled to set off the undue payments made against amounts being claimed from it by the Produktschap under a different head.
4. The Produktschap does not dispute that the contested levy constitutes a charge having an effect equivalent to a customs duty on exports and concedes that the national provisions for its imposition had, with effect from 1 July 1968, the date of entry into force of Regulation No 234/68, become incompatible with Article 10 of the Regulation which, in the internal trade of the Community in the horticultural products covered by the regulation, prohibited the levying of any customs duty or charge having equivalent effect.
5. It must, however, be observed that this incompatibility came into being on 1 January 1962 by virtue of Article 16 of the Treaty, under which the Member States are enjoined to abolish between

themselves customs duties on exports and charges having equivalent effect by the end of the first stage at the latest.

6. There can, therefore, be no doubt that the levies imposed on the plaintiff in the main action by the levy notices and by the reminder sent to it on 7 July 1969, 19 September 1969 and on 8 July 1971 were in breach of the prohibition in Article 16 of the Treaty.
7. Nevertheless these levies were paid by the plaintiff in the main action which, on the ground that it paid them in error, is claiming reimbursement by way of set-off before the national court.
8. The Produktschap contends that the plaintiff in the main action can no longer impugn the contested levies or claim their reimbursement because it failed to bring proceedings against the levy notices and the reminder which had been sent to it within the period prescribed by national law for such proceedings.
9. The applicant in the main action contends, on the other hand, that the primacy of Community law means that it overrules any decision which constitutes an infringement of it and that, before the national courts, which are bound to protect the rights conferred on it by Article 16, it possesses, in consequence, an independent right of action which is unaffected by limitations provided for under national law which are liable to weaken the impact of the direct effect of that article in the legal order of the Member States.
10. Thus, the question referred seeks to establish whether the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire as the result of the direct effect of a Community provision, in the present case Article 16 of the Treaty and Article 10 of Regulation No 234/68, especially the rules concerning the period within which an action must be brought are governed by the national law of the Member State where the action is brought or whether, on the other hand, they are independent and fall to be determined only by Community law itself.
11. The prohibition laid down in Article 16 of the Treaty and that contained in Article 10 of Regulation No 234/68 have direct effect and confer on individuals rights which the national courts must protect.
12. Thus, in application of the principle of cooperation laid down in Article 5 of the Treaty, the national courts are entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law.
13. Consequently, in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter.
14. Articles 100 to 102 and 235 of the Treaty enable the appropriate steps to be taken as necessary, to eliminate differences between the provisions laid down in such matters by law, regulation or administrative action in Member States if these differences are found to be such as to cause distortion or to affect the functioning of the common market.
15. In default of such harmonization measures, the rights conferred by Community law must be exercised before the national courts in accordance with the rules of procedure laid down by national law.

16. The position would be different only if those rules and time-limits made it impossible in practice to exercise rights which the national courts have a duty to protect.
17. This does not apply to the fixing of a reasonable period of limitation within which an action must be brought.
18. The fixing, as regards fiscal proceedings, of such of a period is in fact an application of a fundamental principle of legal certainty which protects both the authority concerned and the party from whom payment is claimed.
19. The answer must therefore be that, in the case of a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law, that law, in its present state, does not prevent the expiry of the period within which proceedings must be brought under national law from being raised against him, provided that the procedural rules applicable to his case are not less favourable than those governing the same right of action on an internal matter.

[...]

On those grounds, THE COURT in answer to the question referred to it by the College van Beroep voor het Bedrijfsleven by order of 25 May 1976, hereby rules:

In the case of a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law, that law, in its present state, does not prevent the expiry of the period within which proceedings must be brought under national law from being raised against him, provided that the procedural rules applicable in his case are not less favourable than those governing the same right of action on an internal matter.

[...]

1.3 Case C-106/77: *Simmenthal*

Amministrazione delle Finanze dello Stato v Simmenthal

Case 106/77

9 March 1978

Court of Justice

[1978] ECR 629

<http://www.curia.eu.int/en/content/juris/index.htm>

1. By an order of 28 July 1977, received at the Court on 29 August 1977, the Pretore di Susa referred to the Court for a ruling pursuant to Article 177 of the EEC Treaty, two questions relating to the principle of the direct applicability of Community law as set out in Article 189 of the Treaty for the purpose of determining the effects of that principle when a rule of Community law conflicts with a subsequent provision of national law.
2. It is appropriate to draw attention to the fact that at a previous stage of the proceedings the Pretore referred to the Court for a preliminary ruling questions designed to enable him to determine whether veterinary and public health fees levied on imports of beef and veal under the consolidated text of the Italian veterinary and public health laws, the rate of which was last fixed by the scale annexed to Law No 1239 of 30 December 1970 (Gazzeta Ufficiale No 26 of 1 February 1971), were compatible with the Treaty and with certain regulations -- in particular Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187).
3. Having regard to the answers given by the Court in its judgment of 15 December 1976 in Case 35/76 (*Simmenthal S.p.A. v Italian Minister for Finance* [1976] ECR 1871) the Pretore held that the levying of the fees in question was incompatible with the provisions of Community law and ordered the Amministrazione delle Finanze dello Stato (Italian Finance Administration) to repay the fees unlawfully charged, together with interest.
4. The Amministrazione appealed against that order.
5. The Pretore, taking into account the arguments put forward by the parties during the proceedings arising out of this appeal, held that the issue before him involved a conflict between certain rules of Community law and a subsequent national law, namely the said Law No 1239/70.
6. He pointed out that to resolve an issue of this kind, according to recently decided cases of the Italian Constitutional Court (Judgments No 232/75 and No 205/76 and Order No 206/76), the question whether the law in question was unconstitutional under Article 11 of the Constitution must be referred to the Constitutional Court itself.
7. The Pretore, having regard, on the one hand, to the well-established case-law of the Court of Justice relating to the applicability of Community law in the legal systems of the Member States and, on the other hand, to the disadvantages which might arise if the national court, instead of declaring

of its own motion that a law impeding the full force and effect of Community law was inapplicable, were required to raise the issue of constitutionality, referred to the Court two questions framed as follows:

(a) Since, in accordance with Article 189 of the EEC Treaty and the established case-law of the Court of Justice of the European Communities, directly applicable Community provisions must, notwithstanding any internal rule or practice whatsoever of the Member States, have full, complete and uniform effect in their legal systems in order to protect subjective legal rights created in favour of individuals, is the scope of the said provisions to be interpreted to the effect that any subsequent national measures which conflict with those provisions must be forthwith disregarded without waiting until those measures have been eliminated by action on the part of the national legislature concerned (repeal) or of other constitutional authorities (declaration that they are unconstitutional) especially, in the case of the latter alternative, where, since the national law continues to be fully effective pending such declaration, it is impossible to apply the Community provisions and, in consequence, to ensure that they are fully, completely and uniformly applied and to protect the legal rights created in favour of individuals?

(b) Arising out of the previous question, in circumstances where Community law recognizes that the protection of subjective legal rights created as a result of "directly applicable" Community provisions may be suspended until any conflicting national measures are actually repealed by the competent national authorities, is such repeal in all cases to have a wholly retroactive effect so as to avoid any adverse effects on those subjective legal rights?

The reference to the Court

8. The Agent of the Italian Government in his oral observations drew the attention of the Court to a judgment of the Italian Constitutional Court No 163/77 of 22 December 1977 delivered in answer to questions of constitutionality raised by the courts of Milan and Rome, which declared that certain of the provisions of Law No 1239 of 30 December 1970 including those at issue in the action pending before the Pretore di Susa, were unconstitutional.
9. It was suggested that since the disputed provisions have been set aside by the declaration that they are unconstitutional, the questions raised by the Pretore no longer have relevance so that it is no longer necessary to answer them.
10. On this issue it should be borne in mind that in accordance with its unvarying practice the Court of Justice considers a reference for a preliminary ruling, pursuant to Article 177 of the Treaty, as having been validly brought before it so long as the reference has not been withdrawn by the court from which it emanates or has not been quashed on appeal by a superior court.
11. The judgment referred to, which was delivered in proceedings in no way connected with the action giving rise to the reference to this Court, cannot have such a result and the Court cannot determine its effect on third parties.
12. The preliminary objection raised by the Italian Government must therefore be overruled.

The substance of the case

13. The main purpose of the first question is to ascertain what consequences flow from the direct applicability of a provision of Community law in the event of incompatibility with a subsequent legislative provision of a Member State.

14. Direct applicability in such circumstances means that rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force.
15. These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law.
16. This consequence also concerns any national court whose task it is as an organ of a Member State to protect, in a case within its jurisdiction, the rights conferred upon individuals by Community law.
17. Furthermore, in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but -- in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States -- also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions.
18. Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community.
19. The same conclusion emerges from the structure of Article 177 of the Treaty which provides that any court or tribunal of a Member State is entitled to make a reference to the Court whenever it considers that a preliminary ruling on a question of interpretation or validity relating to Community law is necessary to enable it give judgment.
20. The effectiveness of that provision would be impaired if the national court were prevented from forthwith applying Community law in accordance with the decision or the case-law of the Court.
21. It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.
22. Accordingly any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent Community rules from having full force and effect are incompatible with those requirements which are the very essence of Community law.
23. This would be the case in the event of a conflict between a provision of Community law and a subsequent national law if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply Community law, even if such an impediment to the full effectiveness of Community law were only temporary.
24. The first question should therefore be answered to the effect that a national court which is called upon, within the limits of its jurisdiction, to apply provisions of 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 provision by legislative or other constitutional means.

25. The essential point of the second question is whether -- assuming it to be accepted that the protection of rights conferred by provisions of Community law can be suspended until any national provisions which might conflict with them have been in fact set aside by the competent national authorities -- such setting aside must in every case have unrestricted retroactive effect so as to prevent the rights in question from being in any way adversely affected.
26. It follows from the answer to the first question that national courts must protect rights conferred by provisions of the Community legal order and that it is not necessary for such courts to request or await the actual setting aside by the national authorities empowered so to act of any national measures which might impede the direct and immediate application of Community rules.
27. The second question therefore appears to have no purpose.

[...]

A national court which is called upon, within the limits of its jurisdiction, to apply provisions of 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.

[...]

2. SUPREMACY AND NATIONAL CONSTITUTIONS: RECEPTION BY THE MEMBER STATES THROUGH LEGISLATION

2.1 The Netherlands

Of all the Member States of the European Communities the Netherlands has gone furthest to ensure a constitutional acknowledgement of the supremacy of Community Law. By an amendment to the Constitution of the Kingdom of the Netherlands, made in 1963, it is expressly provided that in the event of a conflict between a domestic statute and a provision in a treaty, the latter shall prevail, whether the treaty is concluded before or after the passage of the statute, provided only that the provision binds natural or corporate persons. A similar rule is established in the case of a conflict between a statute and a rule duly established by an international organization in the exercise of legislative, administrative or judicial powers.

Constitution (Official Translation)

Article 60

Agreements with other Powers and with organizations based on international law shall be concluded by or by authority of the King. If required by such agreements they shall be ratified by the King.

The agreements shall be communicated to the States-General as soon as possible; they shall not be ratified and they shall not enter into force until they have received the approval of the States-General. The judge shall not be competent to judge of the constitutionality of agreements.

Article 61

Approval shall be given either explicitly or implicitly.

Explicit approval shall be given by an Act.

Implicit approval has been given if, within thirty days after the agreement has been submitted for that purpose to both Chambers of the States-General, no statement has been made by or on behalf of either Chamber or by at least one fifth of the constitutional number of members of either Chamber, expressing the wish that the agreement shall be subject to explicit approval.

The period referred to in the previous paragraphs shall be suspended for the time of adjournment of the States-General.

[In accordance with this Article the States-General approved the principal Community treaties by a series of Acts; these acknowledge, but do not purport to be the source of, the obligations and rights created within the Netherlands system by the treaties.]

Article 63

If the development of the international legal order requires this, the contents of an agreement may deviate from certain provisions of the Constitution. In such cases only explicit approval can be given; the Chambers of the States-General shall not approve a Bill to the effect but with a two-thirds majority of the votes cast.

Article 65

The provisions of agreements the contents of which may be binding on anyone shall have this binding effect as from the time of publication. Rules with regard to the publication of agreements shall be laid down by law.

Article 66

Legal regulations in force within the Kingdom shall not apply if this application should be incompatible with provisions--binding on anyone--of agreements entered into either before or after the enactment of the regulations.

Article 67

Subject, where necessary, to the provisions of Article 63, certain powers with respect to legislation, administration and jurisdiction may by or in virtue of an agreement be conferred on organizations based on international law.

With regard to decisions made by organizations based on international law, Articles 65 and 66 shall similarly apply.

2.2 Luxembourg

As in Belgium, the Constitution of Luxembourg was amended in view of the establishment of the European Communities but only after the creation of the European Coal and Steel Community. In the case of Luxembourg the amendments were made to Articles 37 and 49 bis of the Constitution, by a Law of 25 October 1956.

Constitution (Editor's translation)

Article 37

The Grand Duke shall conclude treaties. Treaties shall have no effect before being approved by Law and published in the manner prescribed for the publication of laws.

Treaties envisaged in Chapter 3, paragraph 4, Article 49 bis shall be approved by means of a Law enacted in conformity with Article 114, paragraph 5.

Secret treaties are abolished.

The Grand Duke shall make such regulation and decrees as are necessary for the execution of treaties, in the same form as measures for the execution of Laws and with the effects of attaching to such measures, without prejudice to those matters which are reserved by the Constitution for enactment by Law.

Article 49 bis

The exercise of functions reserved by the Constitution to the legislative, executive and judicial authorities may be temporarily delegated by treaty to institutions of public international law.

Article 114

The legislative authority shall have the right to declare that there is a case for embarking upon the revision of any Constitutional provision that it may specify.

After such a declaration is made, the Chamber shall be dissolved automatically.

A new Chamber shall be convened in accordance with Article 74 of the present Constitution.

This Chamber shall embark, in agreement with the Grand Duke, on the points submitted for revision.

In such a case the Chamber shall be unable to deliberate unless three quarters or more of the members composing it are present and no amendment shall be adopted unless supported by at least two thirds of those eligible to vote.

2.3 Greece

Constitution

Article 28(1)

'The generally acknowledged rules of international law, as well as international conventions as of the time they are sanctioned by law and become operative according to the conditions therein, shall be an integral part of domestic Greek law and shall prevail over any contrary provisions of the law. The rules of international law and of international conventions shall be applicable to aliens only under the condition of reciprocity.'

2.4 Spain

Constitution

Article 1

[State Principles, Sovereignty, Form]

- (1) Spain constitutes itself into a social and democratic state of law which advocates liberty, justice, equality, and political pluralism as the superior values of its legal order.
- (2) National sovereignty belongs to the Spanish people from whom emanate the powers of the state.
- (3) The political form of the Spanish State is the parliamentary Monarchy.

Article 13

[Aliens, Extradition, Asylum]

- (1) Aliens in Spain may enjoy the public freedoms guaranteed by the present Title under the terms which treaties or laws may establish.
- (2) Only Spaniards shall have the rights recognized in Article 23 except that which in keeping with the criteria of reciprocity may be established by treaty or law for the right to active and passive suffrage in municipal elections.
- (3) Extradition will only be granted in compliance with a treaty or the law in keeping with the principle of reciprocity. Excluded from extradition are political crimes and acts of terrorism not being considered as such.
- (4) The law shall establish the terms under which citizens of other countries and stateless persons may enjoy the right to asylum in Spain.

Article 23

[Participation, Election, Office]

(1) Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage.

(2) They also have the right to accede, under conditions of equality, to public functions and positions, in accordance with the requirements established by law.

Article 93

[Transfer of Sovereignty]

By means of an organic law, authorization may be established for the conclusion of treaties which attribute to an international organization or institution the exercise of competences derived from the Constitution. It is the responsibility of the Parliament or the Government, depending on the cases, to guarantee compliance with these treaties and the resolutions emanating from the international or supranational organizations who have been entitled by this session.

Article 94

[Prior Authorization]

(1) The giving of the consent of the State to obligate itself to something by means of treaties or agreements shall require prior authorization of the Parliament in the following cases:

- a) Treaties of a political nature;
- b) Treaties or agreements of a military nature;
- c) Treaties or agreements which affect the territorial integrity of the State or the fundamental rights and duties established in Title I;
- d) Treaties or agreements which imply important obligations for the public treasury;
- e) Treaties or agreements which involve modification or repeal of some law or require legislative measures for their execution.

(2) The House of Representatives and the Senate shall be immediately informed of the conclusion of the treaties or agreements.

Article 95

[Conflict With Constitution]

(1) The conclusion of an international treaty which contains stipulations contrary to the Constitution shall require a prior constitutional revision.

(2) The Government or either of the Chambers may request the Constitutional Court to declare whether or not such a contradiction exists.

Article 96
[Amendment, Abolishment]

(1) Validly concluded international treaties once officially published in Spain shall constitute part of the internal legal order. Their provisions may only be abolished, modified, or suspended in the manner provided for in the treaties themselves or in accordance with general norms of international law.

(2) To denounce international treaties and agreements, the same procedure established for their approval in Article 94 shall be used.

2.5 Portugal

Constitution

Article 3(2&3)

'The rules of international conventions duly ratified or approved shall, upon their publication, become operative in the domestic legal order in as much as they bind internationally the Portuguese State.

The measures adopted by the competent institutions or international organisations to which Portugal belongs automatically form part of the domestic legal order in accordance with the treaties establishing such organisations.'

2.6 Belgium

The Belgian Constitution dates from very shortly after establishment of the modern Belgian Kingdom in 1830. It was amended in 1970, in view of Belgian membership of the European Communities, by the addition of a new provision (now Article 34, Article 25 bis in 1970). The following are provisions from the Constitution in its 1994 version.

Constitution

Article 33 (ex Article 25) *[Sovereignty, Rule of Law]*

(1) All power emanates from the Nation.

(2) The power is exerted in the manner established by the Constitution.

Article 34 (ex Article 25 bis)
[Transfer of Sovereignty]

The exercising of determined power can be attributed by a treaty or by a law to international public institutions.

Article 167 (ex Article 18)
[Shared Responsibility]

(1.1) The King manages international relations, without prejudice to the ability of Communities and Regions to engage in international co-operation, including the signature of treaties, for those matters within their responsibilities as established by the Constitution and in virtue thereof.

(1.2) [...] He notifies the Houses as soon as State interests and security permit and he adds those messages deemed appropriate.

(1.3) [...]

(2) The King concludes treaties, with the exception of those described in Paragraph (3). These treaties may take effect only following approval of the Houses.

[...]

Article 106 (ex Article 64)
[Countersignature]

No actions of the King may take effect without the countersignature of a minister, who, in doing so, takes responsibility upon himself.

In accordance with the second paragraph of Article 68 (1970 version), both Houses of the Belgian Legislature approved the ratification by the King of the founding treaties of the European Communities. This they did by means of a series of Laws, for each of the principal treaties (ECSC Treaty: Law of 25 June 1952, Moniteur belge, 6 August 1952; EEC and Euratom treaties and Convention on Common Institutions: Law of 2 December 1957, Moniteur belge, 25 December 1957; Merger Treaty: Law of 13 May 1966, Moniteur belge, 8 July 1966; Budgetary Treaty: Law of 23 December 1970 II, Moniteur belge 29 January 1971; Accession Treaty: Law of 11 December 1972, Moniteur belge, 24 January 1973). These Laws are formal, brief and similar in construction to the French Law set out above.

2.7 France

The present French Constitution was adopted in September 1958, some six months after the conclusion of the EEC and Euratom treaties.

Constitution

Title VI Treaties and International Agreements

Article 52 *[President's Powers]*

- (1) The President of the Republic shall negotiate and ratify treaties.
- (2) He shall be informed of all negotiations leading to the conclusion of an international agreement not subject to ratification.

Article 53 *[Important Treaties]*

- (1) Peace treaties, commercial treaties and treaties, or agreements relating to international organization, or implying a financial commitment on the part of the State, or modifying provisions of a legislative nature, or relating to the status of persons, or entailing a cession, exchange or ad junction of territory, may be ratified or approved only by act of Parliament.
- (2) They shall take effect only after having been ratified or approved.
- (3) No cession, exchange, or adjunction of territory shall be valid without the consent of the populations concerned.

Article 54 *[Constitutional Revisions for Ratification]*

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

Article 55

[Force of Law, Principle of Reciprocity]

Duly ratified or approved treaties or agreements shall, upon their publication, override laws, subject, for each agreement or treaty, to its application by the other party.

The former Constitution (of 1946) had also contained a provision, comparable with that in Article 53, requiring legislative authorisation for the conclusion of certain treaties. Accordingly, French ratification of the EEC and Euratom treaties, and of the Convention relating to Common Institutions, was authorised by a Law.

Law No. 57-880 of 2 August 1957

(JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE, LOIS ET DECRETS, 1957, P.7716;
EDITOR'S TRANSLATION).

Article 1

The President of the Republic is authorised to ratify:

- (1) the Treaty establishing the European Economic Community and its annexes;
- (2) the Treaty establishing the European Atomic Energy Community;
- (3) the Convention relating to Certain Institutions common to the European Communities: signed at Rome on 25 March 1957, the texts of which are annexed to the present Law.

Article 2

The Government shall present annually to Parliament, for its approval, an account of the application of the Treaty of the European Economic Community, and of the economic, fiscal and social measures undertaken in the Community, disclosing therein the measures which it has taken or which it intends to take to facilitate the adaptation of national policies to the new conditions of the Market.

The French Constitution of 1958 differs from that of 1946 in making the superiority of a treaty over legislation contingent upon the reciprocal application of that treaty by the other contracting parties; but it conforms with French tradition in providing that a treaty requires for its internal application no legislative act other than that required for its ratification. That tradition, encapsulated in Article 55 of the present Constitution, proved inadequate in one early case to secure a reference from the Conseil d'Etat to the Court of Justice of the European Communities under Article 177 of the EEC Treaty. The Conseil d'Etat applied to the case a doctrine familiar in French jurisprudence, according to which a court will conclude that there is no preliminary 'question' to be referred to another court unless there is a real difficulty raised by the parties or spontaneously recognised by the judge and such as to give rise to doubt in the enlightened mind. The doctrine is known as that of *acte clair*.

2.8 Germany

The Basic Law, i. e. the constitution of the Federal Republic of Germany invests the President with the power to conclude treaties (Article 59). It incorporates within the federal system general rules of public international law including the principal *pacta sunt servanda* (Article 25). It even confers on the legislature authority to delegate powers to international organizations (Article 24). On the other hand, it fails to provide for the recognition by German courts of norms contained in treaties to which Germany is a party. For this reason, on the establishment of the European Communities, the federal legislature enacted the Law of 27 July 1957, for the purpose of giving force of law within the Republic to the basic treaties and to acts of the institutions.

Basic Law
(Official translation)

Article 59
(Authority to represent Federation in international relations)

(1) The Federal President shall represent the Federation in its international relations. He shall conclude treaties with foreign states on behalf of the Federation. He shall accredit and receive envoys.

(2) Treaties which regulate the political relations of the Federation or relate to matters of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies competent in any specific case for such federal legislation. As regards administrative agreements, the provisions concerning the federal administration shall apply *mutatis mutandis*.

Preamble
(amended 1992)

Conscious of their responsibility before God and men, animated by the purpose to serve world peace as an equal part in a unified Europe, the German People have adopted, by virtue of their constituent power, this Constitution. The Germans in the States of Baden-Wurttemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Constitution is thus valid for the entire German People.

Article 25
(International law integral part of federal law)

The general rules of public international law shall be an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory.

Article 23 (inserted 1992)

(Realization of the European Union, participation of federal council and federal government)

The Federal Republic of Germany shall co-operate in the development of the European Union in order to realize a united Europe which is bound to observe democratic, constitutional, social and federal principles and the principle of subsidiarity, and which guarantees the protection of basic rights in a way which is substantially comparable to that provided by this Basic Law. The

Federation may, by law, with the approval of the Federal Council, assign sovereign rights. Article 79, paras. 2 and 3 shall apply with respect to the establishment of a European Union and amendments to its foundations by treaty, and with respect to comparable regulations, under which this Basic Law shall be substantively amended or supplemented or such amendments or supplements shall be made possible.

[...]

Article 24

(Entry into a collective security system)

(1) The Federation may be legislation transfer sovereign powers to intergovernmental institutions.

(1a) [...]

(2) For the maintenance of peace, the Federation may enter a system of mutual collective security; in doing so it will consent to such limitations upon its rights of sovereignty as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world.

(3) For the settlement of disputes between states, the Federation will accede to agreements concerning international arbitration of a general, comprehensive and obligatory nature.

Law of 27 July 1957 [1957] BGBl 373

(Editor's translation)

Article 1

The Treaties signed in Rome on 25 March 1957 establishing the European Economic Community and the European Atomic Energy Community, together with their annexes and protocols, and the Convention simultaneously signed regarding the Common Institutions of the European Communities, including the Protocol signed in Brussels on 17 April 1957 regarding the establishment of a Court of Justice of the European Economic Community, the privileges and immunities of the European Economic Community, the establishment of a Court of Justice of the European Atomic Energy Community and the privileges and immunities of the European Atomic Energy Community are hereby approved. The Treaties, their annexes, the attached protocols and the Convention are set out below.

Article 2

The Federal Government shall keep the Bundestag and Bundesrat constantly informed of the proceedings of the Council of the European Community and the Council of the European Atomic Energy Community. Insofar as any measure of a council may require the enactment of a domestic German law or may produce direct effects in the Federal Republic of Germany, the appraisal must precede the Council's measure...

Article 4

(1) This Law shall apply also to the Land Berlin, insofar as the Land Berlin may determine. Statutory orders made pursuant to this Law shall be valid in Berlin by virtue of paragraph 14 of the third Transnational Law of 4 January 1952 (BGBl IS 1).

(2) This Law shall apply also in the Saarland from the expiration of the transnational period according to Article 3 of the Saar Treaty (BGBl IIS 1587).

Despite the enactment of that Law, the relationship between European Community law and the German legal order remains contentious. This is so not least because certain provisions of the Basic Law, notably Articles 1-19 dealing with fundamental rights, are entrenched in the sense that they cannot be amended at all, so long as the Basic Law continues in force. No great ingenuity is required to envisage situations in which a conflict could arise between a rule of Community law and one of the entrenched provisions of the Basic Law.

Basic Law

Article 79

[Amendment of the Basic Law]

(1) This Basic Law can be amended only by laws which expressly amend or supplement the text thereof. In respect of international treaties the subject of which is a peace settlement, the preparation of a peace settlement, or the abolition of an occupation regime, or which are designed to serve the defense of the Federal Republic, it shall be sufficient, for the purpose of clarifying that the Provisions of this Basic Law do not preclude the conclusion and entry into force of such treaties, to effect a supplementation of the text of this Basic Law confined to such clarification.

(2) Any such law shall require the affirmative vote of two thirds of the members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments of this Basic Law affecting the division of the Federation into Länder, the participation on principle of the Länder in legislation, or the basic principles laid down in Articles 1 and 20, shall be inadmissible.

2.9 Italy

The Italian Constitution, like the French, provides that certain treaties to which the Republic is a party may be brought into effect within the domestic legal system only by means of a Law (French Constitution, Article 53, above; Italian Constitution, Article 11, below). The similarity between the two is, however, more apparent than real. Not only do they differ in determining which treaties require to be authorised by an ordinary or a constitutional Law; they are also at variance on the question of the relationship between provisions in the Constitution and those in treaties. The Italian Constitution is silent on the question of the relative authority of a treaty and of the Constitution (unlike the Constitution of France, Article 55). When, therefore, a conflict arises in Italy between these two types of legal rules, the question resolves itself immediately into one of jurisdiction: the Court must ask whether it is constitutionally authorised to review the treaty or the Law giving effect to it. It may, of course, reach the same conclusions as a French court, but it will always do so by a different means.

Constitution

(Translation, Blaustein and Flanz, Constitutions of the World, NY 1975)

Article 10

Italy's legal system conforms with the generally recognized principles of international law [...].

Article 11

Italy condemns war as an instrument of aggression against the liberties of other peoples and as a means for settling international controversies; it agrees, on conditions of equality with other states, to such limitation of sovereignty as may be necessary for a system calculated to ensure peace and justice between Nations; it promotes and encourages international organizations having such ends in view.

Article 80

The Chambers authorise, by Law, ratification of international treaties of a political nature, or which provide for arbitration of judicial regulation, or imply modification to the nation's territory or financial burdens or to laws.

Article 134

The Constitutional Court decides:

- on controversies concerning the constitutional legality of laws and acts having the force of law, emanating from central or regional government;
- on controversies arising over constitutional assignment of powers within the State, between the State and the Regions, and between Regions.

On the establishment of the European Economic Community and of Euratom the Chambers authorised Italy's ratification of the founding treaties by Law No. 1203 of 1957. This Law, passed in accordance with Article 80 of the Constitution, is said by the Italian Constitutional Court to have a sure basis of validity in Article 11 thereof.

Law of 14 October 1957, No. 1203
(*Supplement to Gazzetta Ufficiale no. 317, 23 December 1957*)

Article 1

The President of the Republic is authorised to ratify the following international Treaties concluded in Rome on 25 March 1957:

- (a) the Treaty establishing the European Atomic Energy Community and connected instruments;
- (b) the Treaty establishing the European Economic Community and connected instruments;
- (c) the Convention relating to Certain Institutions Common to the European Communities.

Article 4

The Government is authorised, following the entry into force of the second stage of the transitional period defined in Article 8 of the Treaty establishing the European Economic Community, to set out by decrees having the force of ordinary laws and confirming with the basic principles contained in the Treaty establishing the European Economic Community and the European Atomic Energy Community, the rules necessary:

- (a) to carry out the obligations specified in Article 11 of the Treaty establishing the European Economic Community and Chapter 9 of the Treaty establishing the European Atomic Energy Authority;
- (b) to implement the measures specified in Articles 37, 46, 70, 89, 91, 107, 108, 109, 115 and 226 of the Treaty establishing the European Economic Community subject to the limitations and in the circumstances indicated therein;
- (c) to secure the implementation, in conformity with the progressive realisation of the Customs Union specified in Chapter 1 of Title 1 of the Second Part of the Treaty establishing the European Economic Community, of the provisions and principles thereof and to Articles 95, 96, 97 and 98 of the aforesaid Treaty, in order to arrive at the normalisation of conditions of competition of the producers of the Member States of the Community;
- (d) to establish, with respect to the combined effect of Articles 85 and 88 of the Treaty establishing the European Economic Community, the derogations specified in Article 85, paragraph 3 of the said Treaty [...]

2.10 Denmark

The present Danish Constitution is based on the Act of Constitution of 5 June 1953. Section 19 of this Act invests the Queen with power to act on behalf of the realm in international affairs. For these purposes the Queen is represented by her ministers: Sections 12 and 13. The power to engage in international transactions under Section 19 is, however, subject to certain limitations. Among these is the rule that the Queen requires the consent of the legislative assembly (Folketing) before engaging the realm in any obligation 'of major importance'.

Constitutional Act *(Official translation)*

19. (1) The King shall act on behalf of the Realm in international affairs, but, except with the consent of the Folketing, the King shall not undertake any act whereby the territory of the Realm shall be increased or reduced, nor shall he enter into any obligation which for fulfillment requires the concurrence of the Folketing, or which is otherwise of major importance; nor shall the King, except with the consent of the Folketing, terminate any international treaty entered into with the consent of the Folketing.

(2) Except for purposes of defence against an armed attack upon the Realm or Danish forces the King shall not use military force against any foreign state without the consent of the Folketing. Any measure which the King may take in pursuance of this provision shall forthwith be submitted to the Folketing. If the Folketing is not in session it shall be convened immediately.

(3) The Folketing shall appoint from among its members a Foreign Affairs Committee which the Government shall consult before making any decision of major importance to foreign policy. Rules applying to the Foreign Affairs Committee shall be laid down by statute.

Section 19 would have been inadequate for the purposes of Danish accession to the European Communities, since it deals with the capacity of the Crown to engage in international transactions, but not with the effect of those transactions in internal Danish law. Indeed, the Constitutional Act imposes strict limits upon the exercise of executive legislative and judicial power other than by the authorities of the realm--the Queen and Council of State, the Folketing and the Danish judiciary. The limits imposed by that Act on the Folketing's capacity to alter it are no less strict:

88. Should the Folketing pass a Bill for the purposes of a new constitutional provision, and the Government wish to proceed with the matter, writs shall be issued for the election of members of a new Folketing. If the Bill is passed unamended by the Folketing assembling after the election, the Bill shall, within six months after its final passage, be submitted to the electors for approval or rejection by direct voting. Rules for this voting shall be laid down by statute. If a majority of the persons taking part in the voting, and at least 40 percent of the electorate, have voted in favour of the Bill as passed by the Folketing, and if the Bill receives the Royal Assent, it shall form an integral part of the Constitutional Act.

In view of the inadequacy of Section 19 to deal with the problem that would arise in the event of Danish accession to the European Communities the Folketing amended the Constitutional Act by inserting a new Section 20.

20. (1) Powers vested in the authorities of the realm under this Constitutional Act may, to such extent as shall be provided by statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and cooperation.

(2) For the enactment of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in section 42.

It was in accordance with the procedure laid down in this section that the Danish Government in 1972 introduced in the Folketing the Accession to the European Communities Bill, which received royal assent on 11 October of that year and became Act No.447.

***The Accession to the European Communities Act
No.447, 11 October 1972***

(Translation by O. Due and C. Gulmann; 9 CML Rev (1972) 256).

Section 1

[Contains the parliamentary consent to the ratification on behalf of Denmark of the Treaty of Accession and to the decision to admit Denmark to the ECSC.]

Section 2

Powers vested in the authorities of the Realm under the Constitution may, to the extent specified in treaties, etc., referred to in Section 4, be exercised by the institutions of the European Communities.

Section 3

(1) The provisions of the treaties, etc., referred to in Section 4 shall take effect in Denmark to the extent that they are directly applicable in Denmark under Community Law.

(2) This shall also apply to the acts adopted by the institutions of the Communities before Denmark's accession to the Communities and published in the Official Journal of the European Communities.

Section 4

[Enumerates the treaties mentioned in Sections 2 and 3.]

Section 5

The competent Minister may lay down provisions to the effect that legal requirements as to nationality, residence and place of registered seat in Denmark shall be set aside where necessary in consequence of Denmark's obligations under the Community's rules on the rights of establishment, exchange of services and the free movement of workers.

Section 6

(1) The Government shall report to the Folketing on developments in the European Communities.

(2) The Government shall notify a committee appointed by the Folketing of proposals for Council Decisions which will become directly applicable in Denmark, or whose implementation requires action by the Folketing.

Section 7

This Act shall enter into force on the same date as the Treaty referred to in Section 1 (1), except that the provisions of Section 1 shall be put into force by a publication in the Statstidende (Official Gazette).

Section 8

This Act shall not apply to the Faroe Islands.

2.11 Ireland

In the case of the Republic of Ireland, the Constitution provided prior to 1972 that the Oireachtas should have the sole and exclusive power of making laws for the State, subject only to the Competence of subordinate legislatures. It also provided that, subject to the conditions laid down by law, the Government might adopt any instrument used for similar purposes by members of any group of nations with which Ireland is associated. Because these provisions were inadequate to adapt the Irish legal system to European Community law, the Irish Constitution was amended by the addition of paragraph 3 to Article 29 (4) by the Third Amendment of the Constitution Act 1972.

Constitution

Article 15

[...]

2. (1) The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

(2) Provision may however be made by law for the creation of recognition of subordinate legislatures and for the powers and functions of these legislatures.

Article 29

[...]

4. (1) The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government.

(2) For the purpose of the exercise of any executive function of the State in or in connection with its external relations, the Government may to such extent and subject to such conditions, if any, as may be determined by law, avail of or adopt any organ, instrument, or method of procedure used or adopted for the like purpose by the members of any group or league of nations with which the State is or becomes associated for the purpose of international co-operation in matters of common concern.

(3) The State may become a member of the European Coal and Steel Community (established by Treaty signed at Rome on the 25th day of March, 1957) and the European Atomic Energy Community (established by Treaty signed at Rome on the 25th day of March, 1957). No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities, or Institutions thereof, from having the force of law in the State.

The change in the provisions of the Constitution was later supplemented by the European Communities Act 1972 (No. 27).

European Communities Act 1972 (No. 27)

(amended by the European Communities (Amendment) Act 1973 (No. 20)).

1. - (1) In this Act -

'the European Communities' means the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community;

'the treaties governing the European Communities' means -

- (a) 'the ECSC Treaty', that is to say, the Treaty establishing the European Coal and Steel Community, signed at Paris on the 18th day of April, 1951.
- (b) 'the EEC Treaty', that is to say, the Treaty establishing the European Economic Community, signed at Rome on the 25th day of March, 1957,
- (c) 'the Euratom Treaty', that is to say, the Treaty establishing the European Atomic Energy Community, signed at Rome on the 25th day of March, 1957,
- (d) the convention on certain Institutions common to the European Communities, signed on the 25th day of March, 1957,
- (e) the Treaty establishing a single Council and a single commission of the European Communities, signed at Brussels on the 8th day of April, 1965.
- (f) the Treaty amending certain Budgetary Provisions of the Treaties establishing a single Council and a single Commission of the European Communities, signed at Luxembourg on the 22nd day of April, 1970.
- (g) the Treaty relating to the accession of Ireland to the European Economic Community and the European Atomic Energy Community, signed at Brussels on the 22nd day of January, 1972.
- (h) the decision, of the 22nd day of January, 1972, of the Council of the European Communities relating to the accession of Ireland to the European Coal and Steel Community,

as supplemented or amended by treaties or other acts of which the dates of entry into force are dates not later than the 1st day of January, 1973,

(2)

- (a) does not include a treaty or other act of which the date of entry into force is later than the 22nd day of January, 1972, unless the Government have, not later than the 1st day of January, 1973, by order declared that this section applies to it.
- (b) Where an order under this section is proposed to be made, a draft thereof shall be laid before each House of the Oireachtas and the order shall not be made until a resolution approving of the draft has been passed by each such House.

2. From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties.

3. (1) A Minister of State may make regulations for enabling section 2 of this Act to have full effect.

(2) Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending or applying, with or without modification, other law, exclusive of this Act).

(3) Regulations under this section shall not create an indictable offence.

(4) Regulations under this section may be made before the 1st day of January, 1973, but regulations so made shall not come into operation before that day.

4. (1) (a) Regulations under this Act shall have statutory effect.

(b) If the Joint Committee on the Secondary Legislation of the European Communities recommends to the Houses of the Oireachtas that any regulations under this Act be annulled and a resolution annulling the regulations is passed by both such Houses within one year after the regulations are made, the regulations shall be annulled accordingly and shall cease to have statutory effect, but without prejudice to the validity of anything previously done thereunder.

(2) (a) If when regulations under this Act are made, or at any time within one year thereafter and while the regulations have statutory effect, Dail Eireann stands adjourned for a period of more than ten days and if, during the adjournment, at least one-third of the members of Dail Eireann by notice in writing to the Ceann Comhairle require Dail Eireann to be summoned, the Ceann Comhairle shall summon Dail Eireann to meet on a day named by him being neither more than twenty-one days after the receipt by him of the notice or less than ten days after the issue of the summons.

(b) If when regulations under this Act are made, or at any time within one year thereafter and while the regulations have statutory effect, Seanad Eireann stands adjourned for a period of more than ten days and if, during the adjournment, at least one-third of the members of Seanad Eireann by notice in writing to the Cathaoirleach require Seanad Eireann to be summoned, the Cathaoirleach shall summon Seanad Eireann to meet on a day by him being neither more than twenty-one days after the receipt by him of the notice or less than ten days after the issue of the summons.

(c) Paragraphs (a) and (b) of this subsection shall not apply to regulations in relation to which a resolution for their annulment has been refused by either House of the Oireachtas.'

(2) This section shall have effect in relation to regulations under the European Communities Act, 1972, other than regulations confirmed by the European Communities (Confirmation of Regulations) Act, 1973, and regulations that ceased to have statutory effect before the passing of this Act.

5. The Government shall make a report twice yearly to each House of the Oireachtas on developments in the European Communities.

In the case of the United Kingdom the power to ratify and denounce treaties is, according to traditional theory, exercised by HM Government as a prerogative enjoyed by the Crown. According to this theory, the United Kingdom's accession to the treaties establishing the EEC, ECSC and Euratom did not by itself effect any change in domestic law. It follows that it is not open to the domestic courts to impugn the Government's exercise of the prerogative either before or after accession to those treaties.

Once it was agreed between the several Governments and institutions that the United Kingdom would accede to the European Communities, but before the accession had become effective, Parliament passed the European Communities Act 1972. This was designed to give effect in the United Kingdom (and also in the Channel Islands, Isle of Man and Gibraltar) to provisions of European Community Law.

European Communities Act 1972
(amended by the Northern Ireland Constitution Act 1973)

PART 1

GENERAL PROVISIONS

Short title and interpretation

1.

(1) This Act may be cited as the European Communities Act 1972.

(2) In this Act and, except in so far as the context otherwise requires, in any other Act (including any Act of the Parliament of Northern Ireland) -

'the Communities' means the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community;

'the Treaties' or 'the Community Treaties' means, subject to subsection (3) below, the pre-accession treaties, that is to say, those described in Part 1 of Schedule 1 to this Act, taken with -

- (a) the treaty relating to the accession of the United Kingdom to the European Economic Community and to the European Atomic Energy Community, signed at Brussels on the 22nd January 1972; and
- (b) the decision, of the same date, of the Council of the European Communities relating to the accession of the United Kingdom to the European Coal and Steel Community;

and any other treaty entered into by any of the Communities, with or without any of the Member States, or entered into, as a treaty ancillary to any of the Treaties, by the United Kingdom;

and any expression defined in Schedule 1 to this Act has the meaning there given to it.

(3) If Her Majesty by Order in Council declares that a treaty specified in the Order is to be regarded as one of the Community Treaties as herein defined, the Order shall be conclusive that it is to be so regarded; but a treaty entered into by the United Kingdom after the 22nd January 1972, other than a pre-accession treaty to which the United Kingdom accedes on terms settled on or before that date, shall not be so regarded unless it is so specified, nor be so specified unless a draft of the Order in Council has been approved by resolution of each House of Parliament.

(4) For purposes of subsections (2) and (3) above, 'treaty' includes any international agreement, and any protocol or annex to a treaty or international agreement.

General implementation of Treaties

2.

(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used

in the United Kingdom shall be recognized as available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.

(2) Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by regulations, make provision -

- (a) for the purpose of implementing any Community obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or
- (b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;

and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the Communities and to any such obligation or rights as aforesaid.

In this subsection 'designated Minister or department' means such Minister of the crown or government department as may from time to time be designated by Order in Council in relation to any matter or for any purpose, but subject of such restrictions or conditions (if any) as may be specified by the Order in Council.

(3) There shall be charged on and issued out of the Consolidated Fund or, if so determined by the Treasury, the National Loans Fund the amounts required to meet any Community obligation to make payments to any of the Communities or Member States, or any Community obligation in respect of contributions to the capital or reserves of the European Investment Bank or in respect of loans to the Bank, or to redeem any notes or obligations issued or created in respect of any such Community obligation; and, except as otherwise provided by or under any enactment,--

- (a) any other expenses incurred under or by virtue of the Treaties or this Act by any Minister of the Crown or government department may be paid out of moneys provided by Parliament; and
- (b) any sums received under or by virtue of the Treaties or this Act by any Minister of the Crown or government department, save for such sums as may be required for disbursements permitted by any other enactment, shall be paid into the Consolidated Fund or, if so determined by the Treasury, the National Loans Fund.

(4) The provision that may be made under subsection (2) above includes, subject to Schedule 2 to this Act, any such provision (of any such extent) as might be made by

Act of Parliament, and any enactment passed or to be passed, other than one contained in this Part of this Act, shall be construed and have effect subject to the foregoing provisions of this section; but, except as may be provided by any Act passed after this Act. Schedule 2 shall have effect in connection with the powers conferred by this and the following sections of this Act to make Orders in Council and regulations.

(5) [...]: and the references in that subsection to a Minister of the Crown or government department and to a statutory power or duty shall include a Minister or department of the Government of Northern Ireland and a power or duty arising under or by virtue of an Act of the Parliament of Northern Ireland.

(6) A law passed by the legislature of any of the Channel Islands or of the Isle of Man, or a colonial law (within the meaning of the Colonial Laws Validity Act 1865) passed or made for Gibraltar, if expressed to be passed or made in the implementation of the Treaties and of the obligations of the United Kingdom thereunder, shall not be void or inoperative by reason of any inconsistency with or repugnancy to an Act of Parliament, passed or to be passed, that extends to the Island or Gibraltar or any provision having the force and effect of an Act there (but not including this section), nor by reason of its having some operation

outside the Island or Gibraltar; and any such Act or provision that extends to the Island or Gibraltar shall be construed and have effect subject to the provisions of any such law.

Decisions on, and proof of, Treaties and Community instruments etc.

3.

(1) For the purposes of all legal proceedings any questions as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect to any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).

(2) Judicial notice shall be taken of the Treaties, of the Official Journal of the Communities and of any decision of, or expression of opinion by, the European Court on any such question as aforesaid; and the Official Journal shall be admissible as evidence of any instrument or other act thereby communicated of any of the Communities or of any Community institution.

(3) Evidence of any instrument issued by a Community institution, including any judgment or order of the European Court, or of any document in the custody of a Community institution, or any entry in or extract from such a document, may be given in any legal proceedings by production of a copy certified as a true copy by an official of that institution; and any document purporting to be such a copy shall be received in evidence without proof of the official position or handwriting of the person signing the certificate.

(4) Evidence of any Community instrument may also be given in any legal proceedings -

- (a) by production of a copy purporting to be printed by the Queen's Printer;
- (b) where the instrument is in the custody of a government department (including a department of the Government of Northern Ireland), by production of a copy certified on behalf of the department to be a true copy by an officer of the department generally or specially authorised to do so;

and any document purporting to be such a copy as is mentioned in paragraph (b) above of an instrument in the custody of a department shall be received in evidence without proof of the official position or handwriting of the person signing the certificate, or of his authority to do so, or of the document being in the custody of the department.

(5) In any legal proceedings in Scotland evidence of any matter given in a manner authorised by this section shall be sufficient evidence of it.

The rules of the Supreme Court have now been modified in order to accommodate references for preliminary rulings to the Court of Justice of the European Communities, in accordance with Section 3 of the European Communities Act 1972.

Rules of the Supreme Court

ORDER 114

Added by R.S.C. (Amendment No. 3) 1972
(S.I. 1972 No. 1899).

REFERENCES TO THE EUROPEAN COURT

Interpretation (O. 114, r. 1)

1. In this Order -

'the court' means the court by which an order is made and includes the Court of Appeal;
'the European Court' means the Court of Justice of the European Communities:

and

'order' means an order referring a question to the European court for a preliminary ruling under Article 177 of the Treaty establishing the European Economic Community, Article 150 of the Treaty establishing the European Atomic Energy Community or Article 41 of the Treaty establishing the European Coal and Steel Community.

Making an order (O. 114, r.2)

2. (1) An order may be made by the Court of its own motion at any stage in a cause or matter, or an application by a party before or at the trial or hearing thereof.

(2) Where an application is made before the trial or hearing, it shall be made by motion.

(3) In the High Court no order shall be made except by a judge in person.

Schedule to order to set out request for ruling

(O. 114, r. 3)

3. An order shall set out in a schedule the request for the preliminary ruling of the European Court, and the Court may give directions as to the manner and form in which the schedule is to be prepared.

Stay of proceedings pending ruling (O. 114, r. 4)

4. The proceedings in which an order is made shall, unless the Court otherwise orders, be stayed until the European Court has given a preliminary ruling on the question referred to it.

Transmission of order to the European Court

(O. 114, r. 5)

5. When an order has been made, the Senior Master shall send a copy thereof to the Registrar of the European Court; but in the case of an order made by the High Court, he shall not do so, unless the Court otherwise orders, until the time for appealing against the order has expired or, if an appeal is entered within that time, until the appeal has been determined or otherwise disposed of.

Appeals from the orders made by High Court (O. 114. r. 6)

6. An order made by the High Court shall be deemed to be a final decision, and accordingly an appeal against it shall lie to the Court of Appeal without leave; but the period within which a notice of appeal must be served under O. 59, r. 4 (1), shall be 14 days.

A comparable modification has been made in the County Court Rules, CCR 19 (3); but there are no similar rules governing references by other tribunals or authorities such as magistrates' courts, national insurance commissioners and the Ombudsman. See *R. v. Marlborough Street Magistrate, ex parte Bouchereau*, [1977] 3 All ER 365; *Case 1776, Brack v. Insurance Officer*, [1976] ECR 1429, below. p. 375. and *Re Medical Expenses Incurred in France*, [1977] 2 CMLR 317.

3. SUPREMACY AND NATIONAL CONSTITUTIONS: RECEPTION BY THE MEMBER STATES IN THE CASE-LAW OF HIGH NATIONAL COURTS

3.1 Germany

3.1.1 Internationale Handelsgesellschaft (Solange I)

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreibe und Futtermittel

Case 2 BvG 52/71

Bundesverfassungsgericht: Federal Constitutional Court

[1974] 2 CMLR 540

Summary of the facts and procedure

Article 12(1) of EEC Regulation 120/67 provided that imports or exports of certain products to or from the Community should be subject to issuance of a license to the importer or exporter by a Member State. It provided also that issuance of a license should be conditional on the lodging of a deposit which should be forfeited in whole or part if the transaction should not be effected within the period of the license's validity. Exceptions were permitted only in the case of force majeure. In accordance with these provisions, the German cereals intervention agency, Einfuhr- und Vorratstelle für Getreide und Futtermittel (EVSt) decided that an export deposit lodged by the appellant should be forfeited, since the appellants had exported only part of the maize covered by its license.

The appellants sued to recover the deposit, and the matter came before the Verwaltungsgericht of Frank/Main, which first asked the Court of Justice of the European Communities to rule whether Article 12 (1) of EEC Regulation 120/67 was valid. That Court ruled that the Article was indeed valid (Case 11/70). The Verwaltungsgericht then requested the Federal Constitutional Court of Germany for ruling under Article 100 of the Basic Law as to whether the obligation to export and the associated duty to make an export deposit are compatible with the Basic Law and, if so, whether the rule that the deposit is to be released only in the case of force majeure is compatible with the Basic Law.

Judgement

[...]

[17] I. The reference is admissible.

[18] I. An essential preliminary for this ruling is the closer, though not yet conclusive, determination of the relationship between the constitutional law of the Federal Republic of Germany and European Community law, which has come into being on the basis of the Treaty establishing the European Economic Community (hereinafter referred to as 'Community law'). The present case demands only

the clarification of the relationship between the guarantees of fundamental rights in the Constitution and the rules of secondary Community law of the EEC, the execution of which is in the hands of administrative authorities in the Federal Republic of Germany. For there is at the moment nothing to support the view that rules of the Treaty establishing the EEC, that is, primary Community law, could be in conflict with provisions of the Constitution of the Federal Republic of Germany. It can equally remain open whether the same considerations apply to the relationship between the law of the Constitution outside its catalogue of fundamental rights, and Community law, as apply, according to the following reasoning, to the relationship between the guarantees of fundamental rights in the Constitution and secondary Community law.

- [19] 2. This Court--in this respect in agreement with the law developed by the European Court of Justice--adheres to its settled view that Community law is neither a component part of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source; for the Community is not a State, in particular not a federal State, but 'a sui generis community in the process of progressive integration', an 'inter-State institution' within the meaning of Article 24 (1) of the Constitution.
- [20] It follows from this that, in principle, the two legal spheres stand independent of and side by side one another in their validity, and that, in particular, the competent Community organs, including the European Court of Justice, have to rule on the binding force, construction and observance of Community law, and the competent national organs on the binding force, construction and observance of the constitutional law of the Federal Republic of Germany. The European Court of Justice cannot with binding effect rule on whether a rule of Community law is compatible with the Constitution, nor can the Bundesverfassungsgericht rule on whether, and with what implications, a rule of secondary Community law is compatible with primary Community law. This does not lead to any difficulties as long as the two systems of law do not come into conflict with one another in their substance. There therefore grows forth from the special relationship which has arisen between the Community and its members by the establishment of the Community first and foremost the duty for the competent organs, in particular for the two courts charged with reviewing law--the European Court of Justice and the Bundesverfassungsgericht--to concern themselves in their decisions with the concordance of the two systems of law. Only in so far as this is unsuccessful can there arise the conflict which demands the drawing of conclusions from the relationship of principle between the two legal spheres set out above.
- [21] For, in this case, it is not enough simply to speak of the 'precedence' of Community law over national constitutional law, in order to justify the conclusion that Community law must always prevail over national constitutional law because, otherwise, the Community would be put in question. Community law is just as little put in question when, exceptionally, Community law is not permitted to prevail over entrenched (zwingende) constitutional law, as international law is put in question by Article 25 of the Constitution when it provides that the general rules of international law only take precedence over simple federal law, and as another (Foreign) system of law is put in question when it is ousted by the public policy of the Federal Republic of Germany. The binding of the Federal Republic of Germany (and of all member-States) by the Treaty is not, according to the meaning and spirit of the Treaties, one-sided, but also binds the Community which they establish to carry out its part in order to resolve the conflict here assumed, that is, to seek a system which is compatible with an entrenched precept of the constitutional law of the Federal Republic of Germany. Invoking such a conflict is therefore not in itself a violation of the Treaty, but sets in motion inside the European organs the Treaty mechanisms which resolves the conflict on a political level.
- [22] 3. Article 24 of the Constitution deals with the transfer of sovereign rights to inter-State institutions. This cannot be taken literally. Like every constitutional provision of a similar fundamental nature, Article 24 of the Constitution must be understood and construed in the overall context of the whole Constitution. That is, it does not open the way to amending the basic structure of the Constitution, which forms the basis of its identity, without a formal amendment to the Constitution, that is, it does not open any such way through the legislation of the inter-State institution. Certainly, the competent

Community organs can make law which the competent German constitutional organs can make law which the competent German constitutional organs could not make under the law of the Constitution and which is nonetheless valid and is to be applied directly in the Federal Republic of Germany. But Article 24 of the Constitution limits this possibility in that it nullifies any amendment of the Treaty which would destroy the identity of the valid constitution of the Federal Republic of Germany by encroaching on the structures which go to make it up. And the same would apply to rules of secondary Community law made on the basis of a corresponding interpretation of the valid Treaty and in the same way affecting the structures essential to the Constitution. Article 24 does not actually give authority to transfer sovereign rights, but opens up the national legal system (within the limitations indicated) in such a way that the Federal Republic of Germany's exclusive claim to rule is taken back in the sphere of validity of the Constitution and room is given, within the State's sphere of rule, to the direct effect and applicability of law from another source.

- [23] 4. The part of the Constitution dealing with fundamental rights is an inalienable essential feature of the valid Constitution of the Federal Republic of Germany and one which forms part of the constitutional structure of the Constitution. Article 24 of the Constitution does not without reservation allow it to be subjected to qualifications. In this, the present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution and therefore allows a comparison and a decision as to whether, at the time in question, the Community law standard with regard to fundamental rights generally binding in the Community is adequate in the long term measured by the standard of the Constitution with regard to fundamental rights (without prejudice to possible amendments) in such a way that there is no exceeding the limitation indicated, set by Article 24 of the Constitution. As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of the further integration of the Community, the reservation derived from Article 24 of the Constitution applies. What is involved is, therefore, a legal difficulty arising exclusively from the Community's continuing integration process, which is still in flux and which will end with the present transitional phase.
- 24] Provisionally, therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism.
- [25] 5. From the relationship between Constitution and Community law outlined above, the following conclusions emerge with regard to the jurisdiction of the European Court of Justice and of the Bundesverfassungsgericht.
- [26] (a) In accordance with the Treaty rules on jurisdiction, the European Court of Justice has jurisdiction to rule on the legal validity of the norms of Community law (including the unwritten norms of Community law which it considers exist) and on their construction. It does not, however, decide incidental questions of national law of the Federal Republic of Germany (or in any other member-State) with binding force for this State. Statements in the reasoning of its judgements that a particular aspect of a Community norm accords or is compatible in its substance with a constitutional rule of national law--here, with a guarantee of fundamental rights in the Constitution--constitute non-binding obiter dicta.
- [27] In the framework of this jurisdiction, the European Court determines the content of Community law with binding effect for all the member-States. Accordingly, under the terms of Article 177 of the

Treaty, the courts of the Federal Republic of Germany have to obtain the ruling of the European Court before they raise the question of the compatibility of the norm of Community law which is relevant to their decision with guarantees of fundamental rights in the Constitution.

- [28] (b) As emerges from the foregoing outline, the Bundesverfassungsgericht never rules on the validity or invalidity of a rule of Community law. At most, it can come to the conclusion that such a rule cannot be applied by the authorities or courts of the Federal Republic of Germany in so far as it conflicts with a rule of the constitution relating to fundamental rights. It can (just like, vice versa, the European Court) itself decide incidental questions of Community law in so far as the requirements of Article 177 of the Treaty, which are also binding on the Bundesverfassungsgericht, are not present or a ruling of the European Court, binding under Community law on the Bundesverfassungsgericht, does not supervene.
- [29] 6. Fundamental rights can be guaranteed by law in numerous ways and may accordingly enjoy numerous types of judicial protection. As its previous decisions show, the European Court also considers that it has jurisdiction by its decisions to protect fundamental rights in accordance with Community law. On the other hand, only the Bundesverfassungsgericht is entitled, within the framework of the powers granted to it in the Constitution, to protect the fundamental rights guaranteed in the constitution. No other court can deprive it of this duty imposed by constitutional law. Thus, accordingly, in so far as citizens of the Federal Republic of Germany have a claim to judicial protection of their fundamental rights guaranteed in the Constitution, their status cannot suffer any impairment merely because they are directly affected by legal acts of authorities or courts of the Federal Republic of Germany which are based on Community law. Otherwise, a perceptible gap in judicial protection might arise precisely for the most elementary status rights of the citizen. Moreover, no different constitution of a community of States with a constitution based on freedom and democracy which is called in question than apply to a federal State with a constitution based on freedom and democracy: It does not harm the Community and its constitution based on freedom (and democracy) if and in so far as its members in their constitutions give stronger guarantees of the liberties of their citizens than does the Community.
- [30] 7. In detail, judicial protection by the Bundesverfassungsgericht is measured exclusively according to the constitutional law of the Federal Republic of Germany and according to the more precise rules laid down in the Bundesverfassungsgerichtsgesetz.
- [31] (a) In proceedings for judicial review on a reference by a court, it is always a question of examining a provision of a statute. Since the traditional distinction in national law between provisions of a formal statute and provisions of a regulation based on a formal statute is unknown to Community law, every provision of a Community regulation is a provision of a statute within the meaning of the rules of procedure for the Bundesverfassungsgericht.
- [32] (b) An initial barrier to the jurisdiction of the Bundesverfassungsgericht emerges from the fact that it can only make the subject of its review acts of German State power, that is, decisions of the courts, administrative acts of the authorities and measures of the constitutional organs of the Federal Republic of Germany. For this reason, the Bundesverfassungsgericht regards as inadmissible a constitutional action (Verfassungsbeschwerde) by a citizen of the Federal Republic of Germany directly against a Community regulation.
- [33] (c) If a Community regulation is implemented by an administrative authority of the Federal Republic of Germany or dealt with by a court in the Federal Republic of Germany, then this is an exercise of German State power: and, in this process, the administrative authority and the courts are also bound to the constitutional law of the Federal Republic of Germany. According to the procedural law of the Bundesverfassungsgericht, if one disregards the constitutional action (Verfassungsbeschwerde), which is only admissible after all other legal remedies are exhausted--the exception in section 90 (2) of the Bundesverfassungsgerichtsgesetz (BVerfGG) hardly comes into consideration in a case involving the challenging of an administrative act based on a rule of

Community law--the protection of fundamental rights is carried out by way of reference by the court concerned in so-called proceedings for judicial review of constitutionality (Normenkontrollverfahren) before the Bundesverfassungsgericht. In view of the special features, outlined above, of the relationship between national constitutional law and Community law, these proceedings require some modifications, of the kind that have also been considered necessary in the past by the Bundesverfassungsgericht in other decided cases. Thus, for example, it has in the framework of judicial review proceedings held that the existing legal position with regard to a constitutional application (Verfassungsantrag) is not in keeping with the Constitution: it has contented itself with holding that a particular set of regulations are incompatible with the provision on equality, without declaring the regulations void; it has declared a set of regulations brought into being by the Occupying Powers to be in conflict with the Constitution and put the Federal Government under an obligation to make efforts to have them brought into harmony with the Constitution by the German legislator; it has developed preventive judicial review in respect of ratification statutes. It lies in the nature of these previous decisions for the Bundesverfassungsgericht to restrict itself in cases like the present one to determining the inapplicability of a rule of Community law by the administrative authorities or courts of the Federal Republic of Germany in so far as it conflicts with a guarantee of basic rights in the Constitution.

- [34] The concentration of this power of decision in the hands of the Bundesverfassungsgericht is not only necessary, from the point of view of constitutional law, for the same reason which has led to the Court's so-called monopoly of rejection (Verfassungsmonopol), but is also in the interests of the Community and of Community law. According to the underlying idea of Article 100(1) of the Constitution, the Bundesverfassungsgericht's task is to prevent any German court disregarding the intention of the legislator by failing to apply the statutes decided on by the legislator on the grounds that the court considers they violate the Constitution. National statute law thereby received protection of its validity vis-a-vis courts which would deny it validity on constitutional grounds. The position is similar with the rule contained in Article 100(2) of the Constitution, under which the advice of the Bundesverfassungsgericht must be sought in cases of doubt as to whether a general rule of international law creates rights and duties for the individual. Therefore the underlying idea of Article 100 requires that the validity of Community law should be protected from impairment in the Federal Republic of Germany in the same way as that of national law.
- [35] The result is: As long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the Constitution, a reference by a court in the Federal Republic of Germany to the Bundesverfassungsgericht in judicial review proceedings, following the obtaining of a ruling of the European Court under Article 177 of the Treaty, is admissible and necessary if the German court regards the rule of Community law which is relevant to its decision as inapplicable in the interpretation given by the European Court, because and in so far as it conflicts with one of the fundamental rights in the Constitution.

[...]

3.1.2 J. Abr. Frowein: Solange II

(25 C.M.L. Rev 201 (1988))

1. The Decision

On 22 October 1986 the Second Senate of the Federal Constitutional Court, under the late President Zeidler, reversed its approach to European Community law in a remarkable way. By this decision the German Constitutional Court, following its Italian counterpart, accepted that the safeguards existing against possible interference with fundamental rights in European Community law, especially by virtue of the case law of the European Court of Justice, are sufficiently developed to be fully recognized by German Constitutional Law. This means that the Federal Constitutional Court will no longer control the compatibility of EEC law with German fundamental rights.

2. The background

The decision has a very peculiar history. The Constitutional Court had already confronted with matters of EEC Law in the 1960's. It recognized the autonomy and priority of EEC Law over national law in decisions of 1967 and 1971. However, in 1974 the Court came to the conclusion that this was not the case in the area of fundamental rights. The Court argued that Article 24 of the German Constitution, being the basis for the accession of the Federal Republic to the European Communities, does not permit the violation of fundamental rights. The Court held that it was its responsibility to safeguard fundamental rights and control EEC legislation as to its compatibility with German fundamental rights as long as no Bill of Rights exists in European Community law, such Bill of Rights being adopted by a European Parliament.

The decision of 29 May 1974 met with strong criticism from the very beginning, three judges having dissented very forcefully from the majority of the Court. Between 1974 and 1987 several decisions of the Second Senate indicated that the day might come when the Court would reverse its decision, which was clearly not in line with the obligations of the Federal Republic of Germany under European Community Law.

Probably the most important change of approach took place when the Senate, in June 1981, dealt with the rather unimportant and now dismantled European organisation called "Eurocontrol". In this decision the Court pronounced that it is the Federal Constitutional Court's task to make sure that violations of public international law which could incur the international responsibility of the Federal Republic of Germany should be avoided or redressed. Under those circumstances the Court may have the right to fully control the applicability of the norms concerned. It was clear from the beginning that while "Eurocontrol" seemed to be an organisation without any real future, the principle laid down by the Court could become of great importance to the European Convention of Human Rights. Even at that time, one could speculate that this would lead to a reversal of the decision of 1974.

3. The reasoning

The Court relies heavily on the practice of the European Court of Justice by which an effective protection of fundamental rights has come about in European Community law. However, according to the holding of 1974 it was clear that this in itself could not be sufficient. The Federal Constitutional Court had thought it right to require a formal Bill of Rights adopted by a Federal Parliament. This condition has not been met.

In 1986 the Federal Constitutional Court is now of the opinion that what has developed in the meantime substantially satisfies the requirement the Court laid down in 1974. The decision refers to the fact that all Member States of the Community have acceded to the European Convention on Human Rights, this

accession having been approved by their parliaments. Secondly, the decision refers to the common declaration of 5 April 1977 which was approved by the European Parliament. The court accepts this development as sufficient and adequate under German constitutional law. It especially draws attention to the link existing between the fundamental rights guaranteed in the basic law and the aims of the Constitution including the intention to build a united Europe, as foreseen by the preamble which expressly mentions that the German people will contribute as an equal partner in a united Europe to peace in the world.

4. The legal consequences

As the Court points out, its finding leads to the result that the Federal Constitutional Court will no longer exercise jurisdiction over the applicability of secondary Community law in the Federal Republic of Germany and will no longer control such law on the basis of the fundamental rights in the basic law. It is clear that the Federal Court did not give up its jurisdiction or come to the conclusion that no such jurisdiction exists. It only states that it will not exercise the jurisdiction as long as the present conditions as to the protection of fundamental rights by the European Court of Justice prevail. One may ask whether the Court could have gone further. However, at least for practical purposes this could hardly be expected after the decision of 1974 had clearly claimed jurisdiction on this question.

Moreover, it seems doubtful whether one should not accept the great wisdom which exists in constructing a rather careful balance with eventual safeguards on the national level. There is no dispute under British constitutional law that the House of Commons could, by Act of Parliament, immediately stop the applicability of European Community Law on British soil. The Italian Constitutional Court has reserved a final position for extreme cases. Under German law the legislature cannot intervene in Community matters, because of the acceptance of the priority of Community law. The Federal Constitutional court wanted to preserve its final authority to intervene where real problems concerning the protection of fundamental rights in Community law could arise. As long as the Community system has not developed into a federal structure, questions of sovereignty or final priority as to sources of law have to be kept in suspense. Only where the rules concerning conflict between the same result can a harmonious development take place.

By the decision of the Federal Constitutional court it is now clear that, except for extreme and unimaginable cases, there exist parallel norms in Community and in German constitutional Law that for Community law only Community safeguards shall apply. In that respect, one may find it at least understandable if not desirable that national Constitutional Courts have not completely abandoned their responsibility for the final development. It may be added that the decisions of the Italian and the German constitutional Courts can hardly be neglected when the history of the recognition of fundamental rights by the European court of Justice of written.

It is necessary to recognize that the final condition upheld by the Federal Constitutional Court can only come into operation if the Community system should substantially deviate from its present course. As long as there exists a general and effective protection of fundamental rights against Community acts, which is essentially equivalent to the protection of fundamental rights in German constitutional law, the Federal Constitutional Court will no longer exercise jurisdiction.

5. An important procedural consequence

The Federal Constitutional Court took the opportunity to reach one result in its decision which is of great importance for German litigants who rely on Article 177 and similar rules of the Treaties. The Federal Constitutional Court recognized, as had been proposed much earlier in the literature, that the European Court of Justice is the "gesetzlicher Richter" ("lawful judge") within the meaning of Article 101 of the Basic Law. This means that a litigant can complain to the Federal Constitutional court where a German Court of last instance has neglected its obligation to refer a case to the European Court of Justice. The Federal Constitutional court will control decisions rejecting a reference to the European Court of Justice only as to

arbitrariness. This means that the Court will not look into all the details of the possible application of European Community law. However, as a later decision of the Federal Constitutional Court has already shown, this means that a constitutional complaint will be successful whenever a court in a clear case has refused to refer the matter to the European Court of Justice. It is on this basis that the Federal Constitutional Court reversed the decision of the Bundesfinanzhof which refused to give direct applicability to a directive.

6. Evaluation

It does not seem to be an exaggeration to conclude that the second Senate of the Federal Constitutional Court, as composed up until November 1987 under the presidency of the late Wolfgang Zeidler, has contributed in a remarkable way to shape the principles of German Constitutional Law where European and international cooperation are at stake. One may only express the wish that the Court as newly composed will contribute in the same direction.

3.2 Italy

3.2.1 Frontini

Frontini v. Ministero Delle Finanze

Case 183/73

Italian Constitutional Court

[1974] 2 CMLR 372

Summary of the facts and procedure:

Franco Frontini was an Italian forwarding agent who cleared through the Novara Customs, between 27 and 29 December 1967, three consignments of mascarpone cheese. On the clearance of the cheese through the customs, the EEC agricultural levy was applied at the rate of 16,626 lire per quintal, in accordance with EEC Regulation 111/64 of 30 July 1964.

The customs authorities subsequently presented a revised claim for an additional levy, since the rate had been increased by Regulation 1028/67, which had come into force on 24 December 1967. Frontini appealed against the imposition of the additional levy on the grounds (among others) that the relevant parts of Regulation 1028/67 were not directly applicable in Italian law, and that in any event they were void by reason of their incompatibility with Article 23 of the Italian Constitution (which provides that taxes imposed only by means of parliamentary statutes). The case came to be heard by the Tribunale of Turin, which stayed the proceedings and referred to the Constitutional Court the question of the constitutionality of Section 2 of Law No. 1203 of 1957.

Judgement:

[...]

3. The Treaty instituting the EEC provides in Article 189 (1) that 'in order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions'. The effect of these various acts is then defined, and in paragraph (2) of Article 189 it is stated: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all member-States'.

The constitutional validity of this provision of the Treaty is being questioned under various aspects by means of an impugning of the implementation statute which adapted our internal law to it. It is noted in the reference orders that by Article 189 the binding effect and immediate applicability as against the state and Italian citizens of acts which have the force and power of ordinary statutes, issued from organs other than those to which the Constitution attributes the exercise of the legislative function; that thereby is introduced into our system a new source of primary legislative process, with the resultant removal of legislative power from the normal constitutionally authorised organs of the state, in matters of wide and generically characterised content; that as against

Community regulations there are lacking the guarantees laid down by the Constitution for the ordinary statute of the state (forms of promulgation and publication, possibility to promote repeal referendum, admissibility of control by this court to protect the fundamental rights of the citizens); that, finally, via these regulations financial obligations (prestazioni patrimoniali) can be imposed on Italian citizens in violation of the statute monopoly (riserva di legge) laid down by Article 23 of the Constitution. Article 189 of the Rome Treaty would involve not only limitations on sovereignty but also 'an inadmissible surrender of sovereignty, or an alteration of the fundamental constitutional structure itself of our state', and Article 11 of the Constitution would not remove the envisaged constitutional doubt 'either because, apart from its value as a statement of guiding policy, it does not exclude the need of a constitutional statute for limitations of national sovereignty or because it would seem directed to ends other than the typically economic ends pursued by the setting up of the EEC'.

The question must be dismissed. The EEC Treaty Ratification Act 1957, whereby the Italian Parliament gave full and complete execution to the Treaty instituting the EEC, has a sure basis of validity in Article 11 of the Constitution, whereby Italy 'consents, on condition of reciprocity with other States, to limitations of sovereignty necessary for an arrangement which may ensure peace and justice between the nations' and then 'promotes and favours the international organisations directed to such an aim'. That provision, which not by chance is included in the 'fundamental principles' of the Constitution, indicates a clear and precise political aim: the makers of the Constitution referred, in the preamble, to the adherence of Italy to the United Nations Organisation, but were inspired by policy principles of general validity, of which the Economic Community and the other European regional organisations constitute a concrete actualisation. It is sufficient to consider the solemn recitals contained in the preamble to the Treaty and the rules concerning the principles (Articles 1 et seq.), the foundations (Articles 9 et seq.) and the policy of the Community (Articles 85 et seq.) to see how the setting up of the EEC was made by the common will of the member-States to 'lay the foundations of an ever closer union among the peoples of Europe', in order to 'ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe', all this with the precise aim to 'preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts' and to 'confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations'. There is therefore no possible doubt of the full concordance of the Rome Treaty with the aims indicated in Article 11 of the Constitution.

[...]

5. The makers of the Constitution, after having stated in Article 10 that the Italian legal system was in conformity with the rules of general international law, intended in Article 11 to define the opening of Italy to the most binding forms of international collaboration and organisation, and to that end formally authorised the acceptance through treaty, on conditions of equality with the other States and for the ends there set out, of the necessary 'limitations of sovereignty'. That formula legitimates those limitations of the powers of the state in the exercise of the legislative, executive and judicial functions as are made necessary by the setting up of a Community among the European States, or rather of a new inter-State organisation, of a supra-national type, permanent, with legal personality and capacity of international representation. On the Economic Community, open to all the other European States (Article 237 of the Treaty) and conceived as an instrument of integration of the participating States, for common ends of economic and social development and consequently also for the ends of defence of the peace and of liberty, Italy and the other promoting States have conferred and recognized certain sovereign powers, constituting it as an institution characterised by its own autonomous and independent legal order. In particular, by Article 189 of the instituting Treaty, the power is given to the Council and the Commission of issuing regulations of general application, or rather, according to the interpretation given by the Community case law and by that of the various member-States, as well as by prevalent doctrine, acts having a general normative content on the same level as national statutes, being of obligatory effect in all their elements and

directly applicable in each of the member-States, i.e. immediately binding on the States and their citizens, without the necessity of internal norms of adaptation or reception.

This normative power is given to the organs of the Community 'in order to carry out their task...and in accordance with the provisions of this Treaty" there is thus made by each of the member-States a partial transfer to the Community organs of the legislative function, on the basis of a precise criterion of division of jurisdiction by subject matter indicated analytically in the second and third parts of the Treaty, in necessary correlation with the aims of general interest laid down by the Treaty itself for the economic and social policy of the Community.

This grant of normative power to the organs of the EEC, with the corresponding limitations of that held by the constitutional organs of the individual member-States, was not granted unilaterally nor without Italy having acquired powers within the compass of the new institution. In signing the Rome Treaty Italy freely made a political choice of historical importance and has acquired, with its participation in the European Economic Community, the right to nominate its own representatives in the institutions of the Community—the Assembly and the Council—and to take part in the appointments to the Commission and the Court of Justice. The limitations on its sovereignty to which it has agreed have therefore their equivalent in the powers acquired in the much bigger Community of which Italy is part and with which has been actively initiated the process of integration of the States of Europe.

6. The doubt that the limitations of sovereignty consequent upon the signature of the Rome Treaty and the entry of Italy into the EEC could require the use of the procedure of constitutional amendment for approval of the ratification and implementation Bill has its exact equivalent in the analogous doubt already expressed in 1951 on the occasion of the approval of the Treaty instituting the European Coal and Steel Community: a doubt correctly resolved by the Italian Parliament deciding that the ratification and implementation of that Treaty could be made by means of an ordinary statute. In truth, as this Court has already stated in *COSTA v. ENEL*, Article 11 means that, when its pre-conditions are met, it is possible to sign treaties which involve limitation of sovereignty and to agree to make them executory by an ordinary statute. The provision would finish emptied of its specific normative content if it were held that for every limitation of sovereignty covered by Article 11 recourse had to be had to a constitutional statute. It is clear that it has not only a substantive but also a procedural value, in the sense that it permits such limitations of sovereignty, on the conditions and for the ends therein set out, releasing Parliament from the necessity of making use of its power of constitutional amendment.
7. With reference to the Treaty instituting the ECSC, this Court has already had occasion to declare the autonomy of the Community order as compared with the internal order (*soc. Acciaierie San Michele Spa v. High Authority*). The regulations issuing from the organs of the EEC within the meaning of Article 189 of the Treaty of Rome belong to the Community's own order: its laws and the internal law of the individual member-States can be described as autonomous and distinct legal systems, albeit co-ordinated in accordance with the division of power laid down and guaranteed by the Treaty. Fundamental requirements of equality and legal certainty demand that the Community norms, which cannot be characterised as a source of international law, nor foreign law, nor of internal law of the individual States, ought to have full compulsory efficacy and direct application in all the member-States, without the necessity of reception and implementation statutes, as acts having the force and value of statute in every country of the Community, to the extent of entering into force everywhere simultaneously and receiving equal and uniform application to all their addressees. It is also in accordance with the logic of the Community system that EEC regulations, provided that they are complete in themselves, which as a rule characterises norms governing inter-citizen relations as the immediate source of rights and obligations both for the States and for their citizens in their capacity as subjects of the Community, should not be the subject of state-issued provisions which reproduce them, either in full or in an executory manner, and which could differ from them or subject their entry into force to conditions, even less which take their place, derogate from them or abrogate them, even in part. And where one of these regulations involves the

necessity for the state to issue norms creating the organisation for the restructuring or new constitution of administrative agencies or services, or else to provide for new or increased expenditure, outside the financial dealing required by Article 81 of the Constitution, through appropriate variations in the budget, it is obvious that compliance with these obligations on the part of the state could not constitute a condition or ground for suspending the applicability of the Community legislation, which, at least in its inter-citizen content, enters immediately into force.

8. The system of relationship between Community order and internal order, as set out above, provides a sure solution for the doubts expressed in the reference order about the absence, in relation to the EEC regulations, of the guarantees which our Constitution has regarding state legislation, the enactment and publication of statutes, the admissibility of the repeal referendum and the judicial review of constitutionality. The constitutional provisions govern solely the legislative activity of the organs of the Italian State, and by their nature are not referable or applicable to the activity of the Community organs, which are governed by the Rome Treaty, which constitutes the [basic foundation] (lo statuto fondamentale) of the Community.

[...]

3.2.2 Granital

Granital S.p.a. v. Amministrazione delle Finanze dello Stato

Decision No. 170

8 June 1984

Constitutional Court (Italy)

21 C.M.L. Rev. 756 (1984)

Summary of the facts and procedure:

In 1972 S.p.a. Granital, an Italian company, imported from Canada into Italy 500 tons of malt. An agricultural levy was imposed at the rate applicable on the day the goods were taken out of customs: this rate was more favourable to the importer than that applicable on the date when the customs declaration had been received by the Italian authorities; a Presidential Decree (No. 723 of 1965) entitled the importer to request the application of the more favourable rate and Granital had acted accordingly. In the judgement given on 15 June 1976 by the Court of Justice in Frecassetti Article 15 of EEC Regulation No. 120/67 of 13 June 1967 was interpreted to the effect that the critical date for the application of an agricultural levy is the day the importer's declaration has been received by customs authorities. On 28 April 1977 the Italian authorities requested from Granital payment of the balance between what had been paid and the levy assessed at the rate applicable on the day when the relevant customs declaration had been accepted. Granital refused to pay and requested the Court of Genoa to state that payment for the balance was not due. While the case was pending, Presidential Decree No. 723 of 1965--referred to above--was modified by Presidential Decree No. 695 of 1978. One of the changes concerned the critical date for rates applicable to agricultural levies: the interpretation given by the Court of Justice was adopted by the new Decree, but its Article 3 specified that the change would take effect as from 11 September 1976--the date on which the operative part of the Court of Justice's judgement had been published in the Official Journal. By an order given on 30 April 1979 the Court of Genoa referred to the Constitutional Court the question of the constitutionality of the said provision, which in the referring Court's opinion "implicitly but unequivocally provides that a rate other than that in force at the date when the customs declaration is accepted may be applied to imports which took place before 11 September 1976" and is therefore "clearly inconsistent with Community law".

As the Constitutional Court recalled in the part of the decision that is not reproduced here, the Court of Justice stated on 27 March 1980 in Salumi I' and on 12 November 1981 in Salumi II' some principles that are relevant to the instant case. both rulings were given by the Court of Justice on the basis of questions of interpretation referred by the Italian Court of Cassation in another case. The Court of Justice first said that an interpretation given by the same Court must be applied by national courts "even to legal relationships arising and established before the judgement ruling on the request for interpretation" and that, in the absence of any specific Community rule, the collection and post-clearance recovery of agricultural levies are governed by the rules applicable in the legal system of each Member State--provided that these do not restrict the powers given to national authorities for ensuring the collection more than with regard to national charges of the same kind. In its second judgement, the court of Justice declared that Regulation No. 1697/79 of 24 July 1979 does not apply to the recovery of import or export duties which had to be paid before July 1st, 1980.

Judgement:

[...]

2. First of all, it is necessary to state that the question of constitutionality was raised on the assumption that--according to existing case-law--provisions in a statute which conflict with a Community regulation cannot be deemed void or inoperative, but are regarded as unconstitutional and must therefore be referred to this Court because they are in breach of Article 11 of the Constitution. In this Court's opinion, this aspect of the question referred must be considered first, given its preliminary nature.
3. The system of the relationship between community law and national legislation has been the subject-matter of several decisions by this Court and has undergone an evolution: the principle now is that EEC regulations prevail over conflicting provisions in national legislation. This has a variety of implications. First of all, as far as interpretation is concerned, national statutes must be presumed to be consistent with Community regulations. Thus, among all the possible interpretations of the text of national legislation, the one that is consistent with obligations under Community law must prevail: this interpretation therefore also conforms with the provision in the Constitution which guarantees that the Treaty of Rome and the ensuing secondary legislation (see decisions No. 176 and 177 of 1981) will be respected. When the conflict between national legislation and Community law cannot be solved by way of interpretation, the latter prevails. This principle applies in a different way according to whether the regulation follows or precedes national legislation in time. In the first instance, national legislation must be considered as having been abrogated by the conflicting provision included in the subsequent Community regulation, which will have to be applied by national courts. As this Court stated in its more recent decisions, abrogation entails a retrospective effect whenever the new Community rule confirms some provisions previously enacted by EEC institutions with regard to the same subject-matter, before the conflicting national legislation entered into force. Thus, in this case national provisions are considered to be inoperative from the time when the conflict arose with previously existing rules of Community law which are confirmed by the new regulation.

A different solution has up to now been given by this Court where a provision of municipal law has conflicted with previously existing Community law. It has been held that any such provision is in breach of Article 11 of the Constitution because it is inconsistent with Community law or else derogates from it or reproduces its content: the said provision may as a consequence be removed only through a declaration that it is unconstitutional.

This solution was outlined in an earlier decision (see decision No. 232 of 1975) and substantively reasoned in the following manner: the transfer of powers to the Community does not entail a radical abolition of State sovereignty with regard to the subject-matter to which it applied. Therefore it follows that ordinary courts cannot assess and declare that a provision in a statute is void in the sense that, with regard to provisions enacted after a Community regulation, there is "an absolute lack of competence on the part of the national legislator"; courts must refer the question of the constitutionality of these provisions to the Constitutional Court with reference to the breach of Article 11 of the Constitution.

For the following analysis, it is necessary to consider the approach taken on the whole by this Court's previous decisions with regard to Community law. In fact, these decisions allow one to draw some useful elements in order to reconsider the correctness of the principles adopted up to now. As will be explained later, there is no reason for holding that simply because of the chronological order of the respective enactment, an ordinary court may assess the inconsistency of national legislation with Community rules or else only refer a question of constitutionality to the Constitutional Court. It is useful to recall some theoretical premises which were stated in this Court's previous decisions, in order to appreciate their meaning and specify the results of fresh consideration of the problem.

4. There is a firm line in this Court's decisions concerning the relationship between Community law and municipal law. Each is regarded as an independent and separate legal system, although there is coordination which flows from the division of competences established and guaranteed by the Treaty. As this Court stated in its decision No. 183 of 1973, "fundamental elements of legal equality and certainty require that Community law--which cannot be considered as either international law, foreign law or municipal law--should be regarded as fully binding and directly applicable in all Member States, regardless of incorporating or implementing legislation, in the same way as statutes of the Member States, so that Community rules enter into force everywhere at the same time and are equally and uniformly applied in respect of all their legal addresses". This was the first decision in which the supremacy of Community regulations over municipal legislation was asserted. This principle must be understood in the context in which it was expressed--that is as closely and necessarily connected with the principle that the two legal systems are separate and at the same time coordinated. In fact, the acceptance of this principle--as constantly outlined in this Court's decisions--implies that Community legal rules are directly applicable in Italy, but do not belong to the municipal law system of legal sources. This means that Community rules cannot logically be affected by the models provided for the solution of conflicts among rules pertaining to Italian law. The assertion, contained in decision No.232 of 1975, that national rules do not defer to Community rules on the basis of their respective force of resistance, must be read accordingly. The principle stated by this Court with regard to Community law--in the case under review, Community law and Italian law, while separate and independent, must necessarily be coordinated, as the Treaty of Rome requires. This coordination stems from the fact that the Law implementing the Treaty transferred to Community institutions--according to Article 11 of the Constitution--those powers that these institutions exert with regard to subject-matters reserved for them.

However, it is necessary to clarify further the way in which the relationship between the two legal systems works in respect of the problem under review. The following comment can be made. Rules contained in EEC regulations are meant to be immediately applied in Italy as well as in all the other Member-States, while municipal law opens up so that these rules may be applied in Italy as they were enacted by the competent institutions. In its decision No. 183 of 1973 this Court asserted that the exercise of the powers transferred to the said institutions involves legislation which municipal law recognizes to be "as binding as a statute". This characterization of Community regulations needs some further elaboration. Rules contained in a regulation are immediately applicable in Italy on the basis of their own strength. They need not, and may not, be reproduced or transformed into corresponding provisions of municipal law. The separation of Italian law from Community law further means that the rules in question do not become part of municipal law, nor do they come under the principles applying to municipal statutes or other municipal legislative acts which are as binding as statutes. Therefore, what was said in the decision referred to above only means that Italian law--on the basis of its specific relationship with EEC law and the underlying restriction of State sovereignty--allows Community regulations to operate as such in Italy. Regulations are given the same binding force as statutes only in the sense that the binding force of regulations in their system of origin is recognised.

5. Conclusions reached in previous decisions must therefore be rewritten in accordance with the approach implicit in those decisions, but to completely worked out with regard how Community legal sources are taken into consideration by Italian law. When an Italian court finds that a provision stemming from that source covers the case in issue, this provision is applied with reference only to the legal system that governs the supranational organization--that is, only the system that governs the legislative act to be applied and specifies its effects. Conflicting provisions in a national statute cannot constitute an obstacle to the recognition of the binding force conferred by the Treaty on Community regulations as a source of directly applicable rules. With regard to the effects of regulations thus recognized, municipal legislation appears to 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.

On the other hand, on the basis of Article 11 of the Constitution--as stated above--the full and continuous application of Community law is guaranteed. Directly applicable EEC legal provisions enter and stay in force in Italy on the same basis, without their direct effect being impaired by any municipal statute. It is irrelevant, for this purpose, whether a statute was previously or subsequently enacted. A Community regulation is in any event paramount with regard to the matter it covers. Therefore, a Community regulation, when in force, does not abrogate, in the proper meaning of the word, a provision of municipal law which is inconsistent with it, but prevents this provision from becoming relevant in the settlement of a dispute before a national court. Anyway, the phenomenon under review must be distinguished from that of abrogation, or any other form of termination or derogation, which may affect rules pertaining to a municipal system through the work of one of its sources. It was held in decision No.232 of 1975 and is here restated that a provision of municipal law which is inconsistent with Community law is not affected by any invalidity that may be assessed and declared by an ordinary court. It is necessary to recall that regulations are given effect as acts pertaining to Community legislation and cannot abrogate, modify or derogate provisions of municipal law which are inconsistent with them, nor can they make those provisions invalid. A different solution would apply if the Community's and the Italian State's legal systems--including their law-making processes--were parts of the same whole. On the contrary, in the Court's opinion the two systems, although coordinated, are separate and independent from each other. Given the distinction between the two legal systems, the supremacy of regulations adopted by EEC institutions must be understood in the way outlined in the present decision: that is in the sense that municipal legislation does not interfere with matters covered by regulations and these matters are entirely governed by Community law.

Nevertheless the consequence thus defined applies with regard to a source of municipal law only in so far as powers transferred to the Community are exercised in producing legal rules which are complete and immediately applicable by municipal courts. Beyond the substantive and temporal scope of this Community legislation, municipal provisions keep their value and produce their effects. It is hardly necessary to add that these provisions fall under the principles applying to ordinary statutes--including the principle concerning the control of their constitutionality.

6. Community regulations are therefore always to be applied, whether they follow or precede in time statutes that are inconsistent with them. National courts entrusted with the task of applying regulations may refer a question of interpretation under Article 177 of the Treaty. The fundamental requirement of legal certainty can only be satisfied in this way. This requirement, which has always been acknowledged in this Court's decisions, involves the need for equality and uniformity of criteria in the application of regulations throughout the European Community.

This assertion is supported by two separate and concurring remarks. First of all, the Luxembourg Court also reached the same conclusion. It is true that it views the legal sources of Community law and of the Member-State's municipal law as integrated in one system only and therefore starts from different premises to those accepted in this Court's decisions. However, what really matters is that there is agreement between the two Courts to the extent that direct and continuous effects must be ensured for Community secondary legislation of the type considered here. This supports the principle that Community regulations are always and immediately to be applied by Italian courts--the existence of conflicting provisions of municipal law notwithstanding.

Moreover, as far as this Court knows, in all the Member States' legal systems, Community regulations immediately apply to the exclusion of conflicting provisions--whether antecedent or subsequent--of municipal law, whatever reason is given in each Member State in accordance with its own Constitution. It certainly is significant that the assessment of the consistency of municipal legislation with Community regulations is also entrusted to ordinary courts where a specific judicial body, such as this Court, is given the power to assess the constitutionality of statutes. This is also the case in the German federal system, although for reasons which are partly different from those explained above. Therefore, the principle in question serves to establish and ensure equality among

Member States and among their nationals with regard to the way in which the Common Market rules and organization operate.

7. However, the remarks hitherto made do not imply that the whole area of the relationship between Community law and municipal law falls outside this Court's competence. In its decision No. 183 of 1973, this Court has already stated that the Law implementing the Treaty may come under this Court's control with regard to basic principles of the Italian legal system and the respect for fundamental human rights in the case envisaged--albeit as an unlikely possibility--in part 9 of the reasons given for the said decision. In the present decision a further specification may be usefully made. Provisions of municipal law which are assumed to be unconstitutional because they intend to prevent or impair the continuous respect of the Treaty--with regard to the Community system or the fundamental core of its principles--must be referred to this Court. This case clearly differs from municipal provisions which are inconsistent with some specific Community regulations. In the case now considered the Court would be requested to assess whether the municipal legislator has unjustifiably removed some of the restrictions put on State sovereignty by the same legislator through the Law which implemented the Treaty, thereby complying with Article 11 of the Constitution in a direct and specific way.
8. In conclusion, the question referred to this Court by the Court of Genoa must be held to be inadmissible. The referring Court should assess whether, and for what reason, regulations and principles of Community law invoked in the order allow the regime pertaining to agricultural levies--under the aspect considered in the present case--to be given retrospective effect only up to the date in which the Luxembourg Court's judgement on interpretation referred to above (under 1 B) was published".

[...]

3.3 Belgium

3.3.1 Minister for Economic Affairs v. Fromagerie Franco-Suisse 'Le Ski'

Minister for Economic Affairs v. Fromagerie Franco-Suisse 'Le Ski'

Belgian Cour de Cassation, First Chamber

[1972] CMLR 330

Summary of the facts and procedure

By an arrete royal dated 3 November 1958 the Belgian authorities imposed a special duty to be levied against the issue of import licenses for certain milk products. Etablissements Detry, which was engaged in the business of importing into Belgium milk products falling within the scope of the arrete royal, paid the special duties on its imports accordingly. The duties were abolished in 1964 but shortly thereafter the Court of Justice of the European Communities, in proceedings initiated by the Commission, held that the imposition and levying of those duties had amounted to a breach of Article 12 of the EEC Treaty (Joined Cases 90 and 91/63, Re Import of Milk Products, EEC Commission v. Luxembourg and Belgium). Etablissements Detry then instituted proceedings against the Minister for Economic Affairs to recover the duties that they had paid. The action was continued by the successors in title of Etablissements Detry, namely the SA Fromagerie Franco-Suisse 'Le Ski'.

By a retrospective Law dated 19 March 1968 the Belgian legislature enacted that payments made in the application of the arrete royal of 3 November 1958 (and certain other arretes) should be irrevocable 'and shall not be the subject of any claim before any authority'. The Law specified that it had effect retrospectively 'as from the date on which these arretes come into force'. Le Ski persisted in their action, and after failing at first instance, succeeded on appeal to the Cour d'Appel of Brussels. The Minister appealed to the Cour de Cassation.

Judgement

I. On the grounds alleging violation of Articles 25, 26, 28, 30, 68, 92, and 93 of the Constitution; of Articles 12, 169, 170, 171, 187 and 192 of the Treaty establishing the European Community, and of the sole Article of the Law of 19 March 1968:

- [1] Under Article 12 of the EEC Treaty, the member-States undertake to refrain from introducing as between themselves any new customs duties on imports and exports or taxes of equivalent effect and from increasing those which they apply in their trade with one another.
- [2] The special import duties, the refund of which has been claimed by the respondent, were levied by the applicant in pursuance of arretes royaux and ministerial orders, which were all adopted after 1 January 1958, the day on which the Treaty came into force.
- [3] These arretes royaux were repealed by Article 13 of the arrete royal of 28 December 1961 and by Article 1 of the arrete royal of 23 October 1965.

- [4] Nevertheless the Law of 19 March 1968 ratified with retrospective effect the arretes subsequent to 1 January 1958, under which the special duties, of which the respondent has claimed the refund, were levied. The sole Article of this Law provides that the moneys paid in pursuance of this arrete constitute 'definitive payment' and that 'this payment is irrevocable and shall not give rise to any claim before any authority whatsoever'.
- [5] The arretes, which imposed special duties on imports of some milk products after 1 January 1958, were contrary to Article 12 of the Treaty.
- [6] In so far as the Law of 19 March consolidated the effects of these arretes, it too is contrary to that clause.
- [7] Even if assent to a treaty, as required by Article 68 (2) of the Constitution, is given in the form of a statute, the legislative power, by giving this assent, is not carrying out a normative function. The conflict which exists between a legal norm established by a subsequent statute, is not a conflict between two statutes.
- [8] The rule that a statute repeals a previous statute in so far as there is a conflict between the two, does not apply in the case of a conflict between a treaty and a statute.
- [9] In the event of a conflict between a norm of domestic law and norm of international law which produces direct effects in the internal legal system, the rule established by the treaty shall prevail. The primacy of the treaty results from the very nature of international treaty law.
- [10] This is a fortiori the case when a conflict exists, as in the present case, between a norm of internal law and a norm of Community law.

The reason is that the treaties which have created Community law have instituted a new legal system in whose favour the member-States have restricted the exercise of their sovereign powers in the areas determined by those treaties.

- [11] Article 12 of the Treaty establishing the European Economic Community is immediately effective and confers on individual persons rights which national courts are bound to uphold.
- [12] It follows from all these consideration that it was the duty of the judge to set aside the application of provisions of domestic law that are contrary to this Treaty provision.
- [13] Having noted that in the present case the norms of community law and the norms of domestic law were incompatible, the judgment under attack was able to decide, without infringing the legal provisions set out in the application to this Court, that the effects of the Law of 19 March 1968 had been 'stopped in so far as it was in conflict with a directly applicable provision of international treaty law'. In this respect, the grounds of appeal fail for want of a legal basis.

[...]

3.4 France

3.4.1 Cafés Jacques

Administration des Douanes v Société “Cafés Jacques Vabre” et SARL Weigel et cie

Cour de Cassation

[1975] 2 CMLR 336

Summary of the facts and procedure

From 1 January 1964 Cafes Vabre bought from Dutch traders large quantities of soluble coffee. It imported these products into France through the agency of Societe J. Weigel et Cie. The imports were subjected to tax at a higher rate than that applicable to soluble coffee manufactured in France from green coffee and sold on French territory. Cafes Vabre and J. Weigel argued that the imposition of the tax entailed discrimination contrary to Article 95 of the EEC Treaty. They brought an action before a tribunal d'instance, claiming a refund of tax and damages. The tribunal upheld their claim except as regards imports effected before 5 January 1967, before which date the tribunal held that the claimants were statute-barred. The French Customs Administration appealed to the Court of Appeal of paris, which affirmed the tribunal's decision. The Customs Administration appealed again to the Court of Cassation.

Judgement

On the first ground, both parts

- [1] It follows from the judgement under appeal that from 5 January 1967 to 5 July 1971 the Soc. Cafes Jacques Vabre imported from Holland, a member-State of the European Economic Community, certain quantities of soluble coffee with a view to their consumption in France. Clearance of these goods through customs was carried out by the Soc. J. Weigel et Cie, customs agent. On the occasion of each of these importations the Soc. Weigel paid to the Customs Administration the internal consumption tax laid down for such goods by head Ex. 21.02 of Table A of section 265 of the Customs Code. Claiming that in violation of Article 95 of the Treaty of 25 March 1957 instituting the European Economic Community the said goods had thus been subjected to tax greater than that which was applied to soluble coffee manufactured in France from green coffee for consumption in that country, the two companies sued the Customs Administration for repayment of the amount of the tax levied (the Soc. Weigel) and compensation for the damage allegedly suffered through being deprived of the money paid as such tax (the Soc. Vabre).

[...]

On the second ground

- [4] It is also complained against the judgement that it held illegal the internal consumption tax laid down by section 265 of the Customs Code as a consequence of its incompatibility with the provisions of Article 95 of the Treaty of 25 March 1957 on the ground that by virtue of Article 55 of the Constitution the latter has an authority higher than that of internal statute, even if the statute be later

in time; whereas, according to the appeal, it is for the fiscal court to judge the legality of regulations laying down a tax which is challenged, but it could not without exceeding its powers discard the application of an internal statute on the pretext that it is unconstitutional. The provisions of section 265 of the Customs Code taken together were enacted by the Act of 14 December 1966, which conferred on them the absolute authority which belongs to legislative provisions and which are binding on all French courts.

- [5] But the Treaty of 25 March 1957, which by virtue of the above mentioned Article of the Constitution has an authority greater than that of statutes, institutes a separate legal order integrated with that of the member-States. Because of that separateness, the legal order which it has created is directly applicable to the nationals of those States and is binding on their courts. Therefore the Cour d'Appel was correct and did not exceed its powers in deciding that Article 95 of the Treaty was to be applied in the instant case, and not section 265 of the Customs Code, even though the latter was later in date. Whence it follows that the ground must be dismissed.

On the third ground

- [6] It is also complained that the judgement applied Article 95 of the Treaty of 25 March 1957 when, according to the appeal, Article 55 of the Constitution expressly subjects the authority which it gives to treaties ratified by France to the condition that they should be applied by the other party. The judge at first instance was not therefore able validly to apply this constitutional provision without investigating whether the State (Holland) from which the product in question was imported has met this condition of reciprocity.
- [7] But in the Community legal order the failings of a member-State of the European Economic Community to comply with the obligations falling on it by virtue of the Treaty of 25 March 1957 are subject to the procedure laid down by Article 170 of that Treaty and so the plea of lack of reciprocity cannot be made before the national courts. Whence it follows that this ground must be dismissed.

On the fourth ground

- [8] It is also complained that the judgement held the tax in dispute to be discriminatory within the meaning of Article 95 of the Treaty of 25 March 1957 whereas, according to the appeal, the Court of Justice of the European Communities has held that the 'similarity' required by Article 95 of that Treaty only exists in so far as the products in question have the 'same fiscal, customs or statistical classification'. The finished product imported (soluble coffee extract) and the raw material, determined by the first instance court as a reference element (green coffee), fall under two separate tariff heads. The proportion in which these two products were respectively taxed--which incidentally was abolished at a date (1964) prior to the period not covered by limitation of action (see the lower [first instance] judgement affirmed)--in no way implies that the French manufacturers of soluble extract would really use 3,600 gr. of green coffee to make one kg. of soluble coffee, the coffee content of this preparation being extremely variable not only within the Common Market but also within French territory. Furthermore, the national rules, based on the decree of 3 September 1965, impose on the French manufacturers a number of requirements, which inter alia relate to the quality of the green coffee, which noticeably reduce the return and consequently modify the content of the components of the finished product. Thence it follows that the judgement under challenge does not correctly establish the similarity between the products in question, the burden of proof of which fell on the Soc. Weigel and Vabre.
- [9] But while the cited judgement of the Court of Justice of the European Communities giving a preliminary ruling under Article 177 of the Treaty says that

'Similarity between products within the meaning of the first paragraph of Article 95 exists when the products in question are normally to be considered as coming within the same fiscal, customs or statistical classification, as the case may be.'

it adds that

'the second paragraph of the same Article forbids the imposition on imported products of any form of taxation [which would] impose a heavier burden on an imported product than on a domestic product with which the imported product is...in competition, even though the condition of similarity for the purposes of the first paragraph of Article 95 is not fulfilled'.

It is thus correct that having found that, although the coffee extract imported from Holland and the green coffee used in France for the manufacture of the same goods do not appear under the same customs classification, these products are nevertheless in competition with one another and, after finding those facts which it considered relevant, having found as an unappealable finding of fact the proportion of green coffee necessary for the production of a given quantity of soluble coffee extract, the Cour d'Appel applied to the case the abovementioned Article of the Treaty. Whence it follows that the ground must be dismissed.

[...]

3.4.2 Semoules

Syndicat Général de Fabricants de Semoules de France

Summary of the facts and procedure

E.C. council Regulation No. 19, 4 April 1962, initiated Community action in the field of common agricultural policy and entered in to force 1 July 1962. The Regulation affected trade in cereals between Member States and non-Member States, and required upon importation the issuing of import licences and levying of duties. Prior to 3 July 1962, the date of Algeria's independence, France had maintained a customs union with Algeria resulting in no customs duties on imports from Algeria. Prior to Algeria's independence, France intended that the customs union would continue but not enabling act was passed until 19 September 1962, i.e. after the effective date of Regulation No. 19. From 1 November 1963 to 31 October 1964, 400,000 quintals of semolina were imported into France from Algeria but the responsible agency did not require either an import license or payment of duties. The Syndicat, a trade organization, brought a complaint against the government for authorizing these imports.

The decision under attack is in law based on the provisions of national law and, if it is not for you to put aside its application in favour of the provisions of the Community regulation and the Treaty, the mere wish to verify its conformity with the international undertakings of France cannot justify sending the case to the European Court.

In that hypothesis you cannot, in our opinion, control the conformity of the ordonnance with the Treaty.

To be sure, under Article 55 of the Constitution a treaty which has been duly ratified has, as from its publication, an authority superior to that of statutes. The Constitution thus affirms a preeminence of international law over internal law and numerous voices nearly all of the academic writers have been raised to say that a proviso which makes our Constitution one of the most receptive to an international legal order should not remain a dead letter.

But the administrative court cannot make the effort which is asked of it without altering, by its mere will, its institutional position.

It may neither criticise nor misconstrue a statute. That consideration has always led it to refuse to examine grounds based on the constitutional invalidity of a statute (ARRIGHI and an abundant case law which declares ineffective both those grounds alleging that a statute violates the Constitution and grounds based on violation of the Constitution against a decision taken from the application of a statute and so lawful by virtue of that statute). And what is true for the control of a statute as against the generally superior rules in the Constitution is equally so as against any text which is expressly described, as is an international treaty, as having a value superior to statute. Certainly it is maintained that the traditional abstention of the courts before acts of the legislature would be less justified once our Constitution no longer recognises the supremacy of Parliament. But the constitution has specifically dealt with the judicial review upon the Constitutional Council; above all, while modifying the balance of legislative power and regulatory power, it did not think it good to define in a new way the powers of the courts; the task of the latter remains the subordinate one of applying the statute.

A judge is not qualified to implement a hierarchy between laws, as M. Odent wrote in an article entitled 'L'article 177 du Traite de Rome et la jurisprudence du conseil d'Etat'.

And he may not rely on the obligation to apply a text of so-called higher validity in order to disregard in a way a subsequent statute. It is also maintained that, in the opening made by the Treaty, a judge should examine the subsequent laws, without criticising them, and if he finds that they are contrary to the Treaty avoid applying them, for if he applies them he would himself be misconstruing Article 55. But you cannot, in our opinion, follow this path. A judge may make a great effort to reconcile them when the statute is silent or ambiguous, that it did not intend to breach the international rule; he has indeed always reasoned thus with regard to the principles in the Constitution. But if the legislator has manifested a precise will, if the national statute insinuates itself as a necessary intermediary between the Treaty and the application required of it, no provision of the Constitution, Article 55 in particular, excuses the judge from respecting that will. It is difficult to imagine that there should be created in all the areas affected by an international treaty whole zones in which the laws would be deprived of effect by the judge, and on the basis of texts which he is not fully entitled to interpret. The argument is enticing in order to encourage the development of a Community legal order; its evolution is more difficult to imagine if it withdraws from the action of the legislator whole sections of the life of the country because treaties have appeared in the area in question, the interpretation of which belongs to the Minister of Foreign Affairs.

The control exercised by the administrative courts thus does not permit this contradiction to be evaded and consequently, while it is neither necessary nor even possible without an interpretation of the Treaty to know if it exists in this case, you should dismiss those complaints based on the violation of the Community regulation as soon as the decision under attack is justified in law in the light of the ordonnance of 19 September 1962.

But that would not amount to giving up efforts to avoid such a situation. It is perfectly conceivable, as we have said, that in the interpretation of statutes the judge should reason with regard to Community law just as he reasons with regard to general principles and start from the idea that the legislator did not intend to derogate from it. The only obstacle to such unofficial collaboration of the national judge in the building of Community law is that it comes up against the problems of interpretation of that law, and that such rearrangements are easier when the powers of interpretation of the judge are undivided. But such was the desire of the negotiators of the Treaty. The present case well illustrates these difficulties since it leads you to be the arbiter between a simple and almost simplistic interpretation, which from the beginning is opposed to the application of the Community regulation, and a more hazardous interpretation which, in the Community spirit, immediately poses problems of interpretation of the Treaty. The effort of interpretation would in any case be frustrated by the redoubled inconvenience of having to compare the national statute, once the European Court has given its reply.

But this case appears in an exceptional context and doubtless recourse to the coercive procedure laid down in Article 169 et seq. of the Treaty when a State misconstrues its obligations is, in a case like this one, the best means for knowing whether the member-States, which have not provided means for leaving the Community, object to the transitional measures of the French State.

In general, the harmonisation effort between internal law and Community law, which one might hope to be more easy, may be efficaciously supported by the Conseil d'Etat in its non-judicial function. It is then in a position to prevent contradictions by recalling the obligation which appears in Article 55 of the Constitution when it gives opinions of draft Bills. In particular, these contradictions will most often be revealed in the frequent cases in which they are involuntary, in litigation, and the report procedure can indicate to the government the situations in which a harmonisation effort should be undertaken on the legislative level.

In the present case, at any rate, the ordonnance of 19 September 1962 forbade the Government to subject the importation in question to the application of the Community levies or to the system of import certificates. And it can even be maintained that the answer given to the complainant syndicate, although silent on the question of import certificates, constitutes not a decision, since it is difficult to see on what basis the Minister of Agriculture would regulate the importation, but a mere interpretation of the legal regime in force. But rather than add more to the paradox of our legal relations with Algeria, we do not envisage upholding this non-suit against the complainant syndicate and shall merely conclude that its application be dismissed and that it be liable in costs.

Judgement

[...]

- [1] The abovementioned application of the Syndicat General des Fabricants de Semoules de France should be regarded as aimed not only against the decision dated 20 December 1963 whereby the Minister of Agriculture authorised the importation into France of 400,000 quintals of grain semolina from Algeria, but also against the decision of the same Minister of 23 January 1964 which stated that that importation was not subject to the levy laid down in EEC Regulation 19.
- [2] There is no need to give judgement on the non-suit plea submitted by the Minister of Foreign Affairs and the Minister of Agriculture.
- [3] Article 1 of the ordonnance of 19 September 1962 on the customs regime governing trade between Algeria and France, which was promulgated under the powers conferred on the President of the Republic by the Law of 13 April 1962, provides:

'Until the entry into force of the statute provided for in Title II of the declaration of principles regarding economic and financial cooperation of 19 March 1962, goods coming from Algeria remain subjected, in the circumstances previously fixed, to the customs regime which was applicable to them before 3 July 1962 by virtue of Articles 1, 303 and 304 of the Customs Code'.

These provisions, which have force of law under Article 50 of the law of 15 January 1963, have maintained, as a transitional measure as regards the entry into France of goods coming from Algeria, the customs regime which was in force before Algeria gained independence. Under that regime the entry into France of cereal products from Algeria, which was then included in the French customs area, was not subject to the levy which the decree of 28 July 1962 substituted for those duties in application of EEC Regulation 19. Consequently, the aforementioned provisions of the ordonnance of 19 September 1962 prevent the levy being applied and the possession of the certificate laid down in article 8 of the decree of 27 January 1962 for the importation of cereals into the French customs area being required when those goods enter the metropolitan territory of France or the territory of France or the territory of its overseas departments. Consequently the complainant syndicate cannot maintain that by taking the attacked decisions the Minister of agriculture has exceeded his powers.

THE COURT, for these reasons,

HEREBY DECIDES:

1. The abovementioned application by the Syndicat General des Fabricants de Semoules de France is dismissed.
2. The Syndicat General des Fabricants de Semoules de France shall bear the costs of the action.
3. The present decision shall be transmitted to the Prime Minister, the Minister of Foreign Affairs, the Minister of Agriculture and the Minister of Economy and Finance.

3.4.3 Nicolo

Nicolo (Raoul Georges)

Conseil d'Etat

20 October 1990

1989 [1990] 1 CMLR 173

Opinion of the Commissaire du gouvernement

On 18 June 1989 French citizens were called upon, for the third time since 1979, to elect by direct universal suffrage their representatives to the Assembly of the European Communities, which since the entry into force of the 'Single Act' of 28 February 1986 has become the 'European Parliament'.

Although it hardly enthused the electorate, as shown by the high rate of abstention, the election seems to have aroused a great deal of interest on the part of persons with a taste for litigation.

Accordingly two of them, Messrs Nicolo and Roujansky, in actions nos 108243 and 1083031, in their capacity as electors are asking you today to annul the election.

Let me say immediately that Mr Roujansky's application will only merit a very brief consideration. Apart from various eccentric observations totally unconnected with the election, his argument in effect amounts to a single submission, that the Act of 7 July 1977 on the election of representatives to the Assembly of the European Communities violates various provisions of the Constitution. However, to decide whether legislation is constitutional is obviously not within your remit (See Ass, 6 November 1936, ARRIGHI AND DAME COUDERT: [1936] Recueil Lebon, 966; or Ass, 28 January 1972, CONSEIL TRANSITOIRE DE LA FACULTE DES LETTRES ET DES SCIENCES HUMAINES DE PARIS: [1972] Rec Lebon 86), and the propositions which I intend to put to you in a few moments will in no way cast doubt on the cogency of this settled case law. Therefore this first appeal will be dismissed.

Mr Nicolo's application on the other hand will require to be considered at greater length.

Furthermore, it is not the substantive question raised by this matter which makes it interesting. It will be easy to rebut the plaintiff's argument, which seeks to persuade you that it was unlawful to hold the European election in the overseas departments and territories and to elect candidates originating from those same areas. What will require our attention is the plaintiff's legal reasoning which is based simultaneously on the alleged disregard of the Act of 7 July 1977 and the EEC Treaty of 25 March 1957.

In fact, if Mr Nicolo had confined himself to arguing, as he does at first, that the overseas departments and territories are excluded from the electoral territory defined by the Act of 1977, which refers only to the European territory of France, it would be sufficient for you to reply that any such allegation is untrue. Section 7 of the Act provides that 'the territory of the Republic shall form a single constituency' for the election of French representatives to the European Parliament. And it follows from the combined provisions of Article 2 of the Constitution, which states the principle of indivisibility of the Republic, and Article 72, which lists the different French territorial authorities, that the overseas departments and territories form an integral part of the French Republic. Therefore, pursuant to the provisions of Book I of the Electoral Code, persons with the capacity of electors in those departments and territories could take

part in the vote. It is equally clear that they are eligible for election because section 5 of the Act of 7 July 1977 made applicable to the same election the provisions of section LO 127 of the Electoral Code, under which any elector can be elected as a Member of Parliament.

Here, however, the plaintiff puts forward his second argument that if this is how the 1977 Act should be interpreted it would then be contrary to the EEC Treaty. Once again, it goes without saying that there is no foundation for this argument. Article 227(1) of the Treaty states that 'this Treaty shall apply to . . . the French Republic' which includes, as we have just said, the overseas departments and territories. Although it is true that Article 227(2) and (3) applied special arrangements to these areas with regard to Community law, it is clear that these provisions did not intend to exclude them from the ambit of the Treaty. Furthermore, this was expressly decided by the Court of Justice of the European Communities, in relation to the overseas departments, by a judgment of 10 October 1978, HANSEN (Case 148/77: [1978] ECR 1787, [1979] 1 CMLR 604), and a reference to the Court for additional interpretation on this point seems to me unnecessary.

However, the whole difficulty is then to decide whether, in conformity with your settled case law, you should dismiss this second argument by relying on the 1977 Act alone, without even having to verify whether it is compatible with the Treaty of Rome, or whether you should break fresh ground today by deciding that the Act is applicable only because it is compatible precisely with the Treaty.

This amounts to raising before you once again the question of the conditions of application of Article 55 of the Constitution, under which: 'treaties or agreements which have been duly ratified or approved shall, on publication, have higher authority than that of statutes, provided that the agreement or treaty in question is applied by the other party' ('Les traites ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie).

It should be said immediately that there is practically no difficulty in applying this Article, which was incorporated in the Constitution as a solemn reaffirmation of France's regard for the theoretical supremacy of international law, in cases of incompatibility between a treaty and an earlier law. In this situation the court will naturally give precedence to the treaty (See for example: Ass, 7 July 1978, KLAUS CROISSANT: [1978] Rec Lebon 292; Ass, 15 February 1980, GABOR WINTER: [1980] Rec Lebon 87; or again Ass, 22 January 1982, CONSEIL REGIONAL DE PARIS DE L'ORDRE DES EXPERTS-COMPTABLES: [1982] Rec Lebon 28, [1983] 2 CMLR 192). The only uncertainty in this connection is as to whether this conclusion is due to the fact that it must then be presumed (as is sometimes said, wrongly in my opinion) that the later treaty repealed the Act by implication, or whether it must only be presumed that the treaty renders the Act inapplicable (which is my position), in which case the Act would recover its full effect subsequently if the applicability of the treaty itself were questioned. But this dilemma is negligible compared with that arising from applying Article 55 in the converse situation where the treaty is prior to the Act.

In this connection we know that you held, in the famous divisional decision of 1 March 1968, SYNDICAT GENERAL DES FABRICANTS DE SEMOULES DE FRANCE [1968] Rec Lebon 149, [1970] CMLR 395 (opinion of Mme Questiaux, President), that an administrative court cannot accord treaties precedence over subsequent legislation which conflicts with them, and that this case law applies to Community rules just as much as to ordinary international conventions, as you immediately made clear at the time by a judgment of 19 April 1968, HEID ([1968] REC Lebon 243).

The theoretical foundation of these decisions, which clearly does not take the form of an objection to the principle of the superiority of treaties over statutes, which is expressly stated by Article 55, should rather be sought in your wish to uphold the principle that it is not for the administrative courts to review the validity of legislation.

It seems to me that there are three main considerations which led you to that conclusion, and they all relate to this fundamental rule. Firstly, it seemed to you that to refuse to apply the Act on the ground that it conflicted with an earlier treaty would constitute a violation of the principle of the separation of powers. There is no doubt whatever that this principle, as particularly expressed with regard to the obligations of courts by section 10 of the Act of 16 and 24 August 1790 prohibiting courts from suspending the application of laws, is a principle of the Constitution in the same way as Article 55 itself. Secondly, you no doubt took the view that, although it is true that the 1958 Constitution does not adhere to the theory that laws are unchallengeable, the Constitutional Council alone is granted power by the Constitution to review the validity of laws if necessary, and that therefore you could have no jurisdiction in the matter. Finally, the decision should no doubt be considered in the light of a judicial philosophy which is found to be applied in many other examples among your decisions, according to which your power to review acts of the authorities may prove to be more effective to the extent that you simultaneously avoid any conflict with the legislature.

These arguments, which serve more generally as the basis for your so-called 'loi-écran' theory, which prevents you above all from refusing to apply an unconstitutional law, were at that time and to some extent still are of considerable weight. That is why you have hitherto always followed your 1968 judgment particularly in five carefully considered decisions (See Ass, 22 October, 1979, UNION DEMOCRATIQUE DU TRAVAIL: [1979] Rec Lebon 383 (opinion of Mme Hagelsteen) and ELECTION OF REPRESENTATIVES TO THE ASSEMBLY OF THE EUROPEAN COMMUNITIES: [1979] Rec Lebon 385 (opinion of Mr Morisot, President); then 31 October 1980, LAHACHE: [1980] Rec Lebon 403; 13 May 1983, SOCIETE ANONYME RENE MOLINE [1983] Rec Lebon 191; or again 23 November 1984, ROUJANSKY AND OTHERS: [1984] Rec Lebon 383) delivered, without concerning yourselves with developments in the case law of other courts.

It is certainly not my intention today to submit that these decisions are open to objection from the legal viewpoint. On the contrary, I believe that they conform in every respect to strict principles and traditional orthodoxy. Nevertheless, it seems to me that a different reading of Article 55 is certainly equally conceivable in law and is infinitely preferable from the viewpoint of expediency, as we shall now see.

First let me mention that, whatever certain commentators may say, the review which the Court may be asked to apply to legislation to see that it is compatible with earlier treaties cannot in all cases constitute a genuine review of the constitutionality of laws, in my opinion.

This assertion is very close to the position of the Constitutional Council which, in the decision of 15 January 1975 concerning the Act on the voluntary termination of pregnancy ([1975] Recueil 19), expressly held that 'a statute contrary to a treaty would not for that reason be contrary to the Constitution,' before concluding that it was not for the Council to consider, by virtue of its power of review pursuant to Article 61 of the Constitution, whether statutes were compatible with international treaties in force.

It is true that the reasoning which was then stated to justify this decision, and which has since been followed on two occasions (See the decisions of 20 July 1977: [1977] Recueil 39, and 18 January 1978: [1978] Recueil 21) is certainly not persuasive in itself. The Constitutional Council took the view that the precedence of treaties over statutes was merely relative and contingent because, firstly, it is limited to the ambit of the treaties and, secondly, it is subject to a condition of reciprocity the meeting of which may vary in time at the will of the signatory States. But, in the first place, to take account of the different respective ambits of the treaty and the statute can only have the effect of limiting the areas of actual conflict between the provisions in question. And it should be noted that it is hardly meaningful in the case of multilateral agreements, sometimes described as 'treaty-laws' (*traites-lois*) which form the greater part of present international law. Secondly, it seems to me difficult to justify, in the light of the principles of public law, such a reference to a possible questioning of the temporal legal effects of a treaty, which in any case would not apply to 'treaty-laws' because reciprocal application of these is generally ensured. The constitutionality or legality of an act is assessed *ab initio* and it is difficult to see why the Court should take account here of what happens to the relevant legislation subsequently.

However, the conclusion reached by the Constitutional Council ought still to be approved without qualification, in my opinion, for another reason, which is that the violation of the Constitution which would result from disregarding a treaty seems to me too indirect to be open to criticism as such. No doubt, by passing a law incompatible with a prior treaty the legislature would infringe the principle of the supremacy of international law as expressed by Article 55. But as we shall see, this provision, the main object of which is to establish a system of priority among rules for use by the courts, rather than to prohibit Parliament from acting without regard to that system, did not aim to make disregard of a treaty by the legislature a ground which would render a statute unconstitutional. To accept the opposite argument would amount to including all international treaties, regardless of their content or ambit, in the constitutional corpus which has hitherto been limited to the Constitution itself, the principles to which it refers and 'organic statutes'. Although this concept of the primacy of international law has been defended by such eminent jurists as Kelsen or, more recently, professor Luchaire, it seems to me that it cannot reasonably be accepted. Finally it should be noted that, with the sole exception of the Austrian Constitutional Court, which is still partly influenced by Kelsen's theories, the main constitutional courts of other European States, while acknowledging the supremacy of international rules over national law, do not consider themselves, for that reason, more competent than the French Constitutional Council to scrutinise the compatibility of statutes with treaties.

It seems to me, therefore, that the issue here does not relate to reviewing the constitutionality of states. Nevertheless, to envisage the possibility of setting aside a statute contrary to an international rule inevitably comes down to the question of reviewing the validity of the statute by reference to the treaty. And this is in fact the vital question, because it is precisely the review of validity as a whole which in principle is not possible for you -- the question whether this could be described as a review of constitutionality is, in truth, only of interest from the viewpoint of the Constitutional Council itself, whose powers it determines.

On this decisive point I for my part shall part company with the reasoning which you have hitherto always applied. To tell the truth, I do not agree for all that with the main argument put forward by most academic lawyers against your current case law, viz that the court, by giving the treaty precedence over statute to settle a dispute, is really doing no more than choosing an applicable rule, without at the same time criticising, even by implication, the provision which it excludes. This reasoning seems to me specious. If the court refuses to apply the statute it is because, in the final analysis -- regardless of the meanderings of its reasoning -- it considers that the statute should not be applied by reason of the very fact that it is contrary to the treaty. It is at least difficult not to regard this approach as a review of the validity of the statute. It would be pointless to object that this amounts only to declaring the statute inapplicable to a particular case, and not to criticising it. We know that it is precisely by this indirect means that the validity of legislation is reviewed in countries where this is a function of the ordinary courts, as in the United States. Finally, it should be observed that to follow this reasoning would inevitably lead to calling into question your theory of the 'loi-écran' in its entirety. What applies to statutes contrary to a treaty would also apply in effect, under the same conditions, to unconstitutional statutes. And it is difficult to see what would then prevent you from ruling out a statute on the ground that, being contrary to the Constitution, it should not be applied.

On the other hand, I believe it is possible to take the view that, as such authoritative writers as Professor Chapus or M Genovois, have argued previously, Article 55 of itself necessarily enables the courts, by implication, to review the compatibility of statutes with treaties. Indeed, we must attribute to the authors of the Constitution an intention to provide for actual implementation of the supremacy of treaties which they embodied in that provision. However, this could not be done through the legislature, which in any case has no interest in contributing to this end, and to whom Article 55 is not directly addressed. In truth, in the terms in which it is worded this constitutional provision, which has the sole object of laying down a system of priority for different rules, seems to me to be addressed primarily to the courts. Thus they are given the task of setting aside statutes which are contrary to treaties, and for this purpose they have a genuine constitutional power which, though only implied, seems to me to be nevertheless intrinsically contained in the text. Let me add that this interpretation would make it possible to resolve all the legal difficulties you have previously encountered. No doubt this means reviewing the compatibility of statutes, but this violation

of the constitutional principle of the separation of powers has its foundation in the Constitution itself. On this reasoning, furthermore, the theory of the *loi-écran* is not called into question. The enabling power implicitly given to the courts could, by definition, only apply within the strict limits laid down by Article 55 and would therefore relate only to reviewing the compatibility of statutes with treaties.

On this basis, therefore, I propose that you should agree to give treaties precedence over later statutes.

By doing this you would only be following the practice of the ordinary courts. Indeed, by an important judgment of 24 May 1975 of the Mixed Chamber (*ADMINISTRATION DES DOUANES V SOCIETE DES CAFES JACQUES VABRE*: [1975] *Dall Jur* 497, [1975] 2 *CMLR* 336), the *Cour de Cassation*, in accordance with the opinion of Advocate General Touffait, reached the same conclusion. This case law has now become settled (Cf for example *Ch Commerciale*, 24 June 1986, *MME DUMMOUSSAUD Bulletin*, no 134, and 5 May 1987, *SOCIETE ANONYME AUCHAN*, no 189 or *Ch Criminelle*, 5 December 1983, *JEAFFRA AND PATREX*, no 352 and 3 June 1988, *KLAUS BARBIE*, no 246).

It is true that this result is somewhat paradoxical. In the first place, it could obviously be argued that the treaty in this case is better protected than the Constitution itself because both the administrative and the ordinary courts refuse, on the contrary, to set aside unconstitutional statutes. Secondly, as the Constitution allows certain agreements to be ratified or approved without the authorisation of Parliament, it will be noted that certain later laws could succumb to measures drawn up by the executive alone. However, I can only reply to these arguments -- which in fact could apply, under the same circumstances, to treaties which are subsequent to statutes -- that this is indeed a device embodied in Article 55 of the Constitution and that it is obviously not your task to correct any imperfections it may have.

Therefore it seems to me possible in law to overrule the 1968 judgment. However, there are several considerations which lead me to believe that this would be highly expedient also.

This arises, firstly, from the need to fill the 'judicial gap' characterising the present state of the law. In view of the Constitutional Council's position since 1975 your case law leads in practice to removing an effective sanction of any kind for a violation of Article 55. It is inconceivable that a constitutional provision should remain a dead letter in this way on the ground that no court considers it has jurisdiction to secure compliance with it. Moreover we know that this is precisely the main reason why, since the same year 1975, the *Cour de Cassation*, breaking with the converse principle previously applied -- and known as the 'Matter doctrine' -- considered itself bound to grant precedence to treaties over statutes. Even though it is based more on considerations of expediency than of law, it seems to me difficult to condemn this reaction. The opposite conclusion, which would result in permitting Parliament to frustrate with ease the actual application of any international measures -- particularly those of the Community -- which it considers inappropriate, is hardly justifiable in the light of Article 55. The perverse effects which would follow in practice from the absence of any judicial control of law are readily apparent.

Secondly, the legal inconsistencies arising from the 1968 judgment are as serious as they are numerous.

In the first place, it could be pointed out that this decision leads in fact to rendering inapplicable in municipal law treaties which are disregarded by subsequent statutes although they continue to bind France in international law. This is obviously a serious anomaly in a French legal system which, since 1946, has professed to be based on the doctrine of monism.

Moreover, the divergence between your case law and that of the *Cour de Cassation* on this point, which is unanimously regarded as the most serious now existing between your two courts, leads to absurd practical consequences. However, it is not justifiable intellectually. As Mr Abraham noted in his *Manuel de droit international*, p 120, which I shall quote here: 'it is in accordance with the logic of the system [of the separation of courts] that one court should apply private law and the other public law. However, that one should apply the treaty and the other the statute does not conform to logic of any kind'. I would add that I am hardly convinced by the idea, although it is widespread, that this divergence in case law could be

explained logically by a difference in the manner in which the two courts are called upon to give a ruling. In both cases the court has, in effect, to determine the law applying to the dispute before it, and the fact that it has to draw conclusions from this which are obviously more limited in the case of a private dispute than in that of an action on the ground that a measure is ultra vires seems to me totally irrelevant, at least in the context of strict law.

Finally, it is quite shocking, this time with reference specifically to European law that citizens cannot rely, before the French administrative courts, on a regulation which they would be allowed to rely on in other countries of the Community, solely on the ground that, in our country, the regulation has been set aside by a contrary statute. This is indeed a difference in treatment which is difficult to reconcile with the very principles of Community law.

In the third place, it is clear -- and this is confirmed by what has just been said -- that current case law will in future constitute a serious obstacle to the introduction in France of international law, particularly Community law. It cannot be repeated often enough that the era of the unconditional supremacy of internal law is now over. International rules of law, particularly those of Europe, have gradually conquered our legal universe, without hesitating furthermore to encroach on the competence of Parliament as defined in Article 34 of the Constitution. In this way certain entire fields of our law such as those of the economy, employment or protection of human rights, now very largely originate from genuinely international legislation. However, the fact that it is impossible to give the treaty priority over statute obviously constitutes a brake on this development. France cannot at one and the same time accept restrictions on sovereignty and uphold the supremacy of its own law before the courts: there is an element of logicity here which, it seems to me, your 1968 decision may have underestimated.

Finally, the very foundations of your current case law, as I have just tried to identify them, seem to me to have lost something of their strength.

This conclusion is perfectly clear from your intention at the time to preserve the powers of the Constitutional Council itself. We have seen that it found that it had no jurisdiction precisely to secure compliance with Article 55 and it would hardly be reasonable to expect further development of the case law on this point. Apart from the fact that the 1975 decision is certainly justified in law it is clear in fact that the Constitutional Council would not be able, for practical reasons, to undertake a review within the time limits available to it for giving a ruling. It is easy to imagine the difficulties inherent in a matter of this kind requiring complicated assessment, which may also involve preliminary rulings on certain points concerning the scope of international rules or fulfilment of the condition of reciprocity laid down by

Article 55. Quite obviously the Conseil d'Etat, which is not subject to delays in judgment, is better placed to undertake a review of this kind.

The need to avoid, in the interest of administrative justice itself, any potential conflict between the Conseil d'Etat and the legislature, which played the part I mentioned in the development of your case law, also seems to me to be less urgent than in the past. We are no longer at the stage when Mr Latournerie CG could say, in his opinion in the ARRIGHI case of 1936, cited above, that reviewing statutes would risk compromising the settled principles of case law by casting doubt on the very position of the Conseil d'Etat among the institutions. The autonomy, independence and specific powers of the administrative courts have since then been recognised judicially, particularly by the very constructive case law of the Constitutional Council, inaugurated by the important decisions of 22 July 1980, p 46, and 23 January 1987, p 8 and once again recently confirmed by a decision of 28 July 1989.

Finally, and above all, today statute is certainly no longer the 'sacred' text which it was by tradition in the eyes of the courts, even though it remains unchallengeable in principle after promulgation. The profound questioning of the supremacy of statute under the Fifth Republic, whose actual establishment of a means of reviewing constitutionality is obviously an important factor, is bound to have consequences from the viewpoint of the ordinary courts with the task of applying it. Two symptoms seem to me particularly

indicative of this development. First, we have seen that the ordinary courts are today capable of showing not the slightest inhibition in discarding the respect due to the authority of legislation in favour of the authority of treaties. And it is obviously somewhat paradoxical to see the Conseil d'Etat refusing to follow this logic because of its humility with regard to the legislature when every day ordinary courts of first instance examine, by this indirect approach, the validity of the laws which they have to apply. Secondly it may be observed that, according to information so far published, the draft amendments to the Constitution which are now being prepared in order to widen the scope for bringing a matter before the Constitutional Council will no doubt use the preliminary ruling machinery which empowers the ordinary courts to decide, as a preliminary question, whether objections concerning the validity of laws are genuine. This practice would certainly have the effect of involving the court, even though with moderation, in the process of examining the legislative provision, which would have been difficult to imagine only a few years ago. To question the supremacy of statute in this way seems to me therefore to strike a serious blow at the final pillar of your traditional case law.

The fact is that the considerations of expediency which I have just described are such that my reply has already been largely suggested to you by converging developments affecting the case law of the main foreign supreme courts as well as that of the Constitutional Council and even your own to some extent.

So far as foreign courts are concerned, and here I shall confine myself to the framework of European law, all I would say is that your Court is now the last which formally refuses to apply Community measures which are contradicted by later laws. By way of example, it is sufficient to mention that the Constitutional Court of the Federal Republic of Germany for its part finally accepted the opposite principle no less than eighteen years ago, by a decision of 9 June 1971 (31 BVerfGE 145). And even more significant is the case of the Italian Constitutional Court which, although hindered by a dualistic legal tradition and preliminary reference machinery applying to international law, finally went so far as to authorise the ordinary courts of their own motion not to apply laws contrary to Community regulations, by an important judgment of 8 June 1984, GRANITAL SpA ([1984] I Guir It 1521).

The Constitutional Council's attitude merits your attention just as much. It is an understatement to say that that court is seeking with some insistence a change in your case law, although it obviously has now power to impose it upon you. The decision of 3 September 1986 ([1986] Receueil 135) on the Act on the conditions of entry and residence of aliens already stated at p 135 that 'the rule laid down by Article 55 of the constitution must be followed, even if the law is silent' and that 'it is for the different institutions of the State to secure the application of international conventions in the framework of their respective terms of reference'. However, this was only the first stage because in an important decision of 21 October 1988 (Election of the Deputy for the Fifth Constituency of Val d'Oise: [1988] JORF 13474), the Constitutional Council made its thinking quite explicit by agreeing to examine, by way of exception, the compatibility of a statute with a treaty when it gave its ruling in the capacity of an electoral court in exactly the same way as the administrative courts are required to do. Consequently this is indeed the approach which the Constitutional Council would like you to take, and it could not, without encroaching on your own free will, express itself more clearly in condemning your traditional reply.

Finally, I think I can find in your own case law a first hint -- a very timid one, it is true -- of the reasoning which I suggest you should adopt today. In two recent decisions (S, 13 December 1985, SOCIETE INTERNATIONALE SALES AND IMPORT CORPORATION: [1985] Rec Lebon 174, and 19 November 1986, SOCIETE SMANOR [1986] Rec Lebon 260) you held that it falls to you to determine directly whether an administrative act is compatible with a treaty when, although a later statute is applicable, it confines itself in fact to delegating a function to an authority with power to make regulations, without laying down any guidelines to ensure that the power is exercised. In a situation of this kind the material content of the administrative act cannot be assessed by reference to the legislative provision, which by definition it cannot misconstrue, but it can by reference to the treaty which alone lays down the relevant substantive rules. Obviously here I do not wish to assert that this proposition, known as the 'transparent screen', would entail of itself a more general overruling of your 1968 decision. But it seems to me to make it somewhat easier in so far as, in my opinion, it has the merit of constituting a first qualification to the logical principle

that a statute subsequent to a treaty, if there is such a statute, should alone apply to cases submitted for your judgment.

It is true that various objections have often been raised to the approach which I suggest you adopt. These relate to the foreseeable extent of its practical consequences and the difficulties which it may create.

However, neither of these arguments seems to me decisive.

In the first place, we should be clear that cases of actual conflict between a treaty and subsequent legislation will undoubtedly be relatively exceptional, whatever may have been said on this subject. On the one hand a very important part is played by your administrative divisions because, at the drafting stage of Bills, they obviously study them to see that they are in keeping with international rules of law and, in particular, those of the European Community. In this way the risks of conflict are considerably reduced. On the other hand, this time in your capacity as a court, you still have the very useful resource of interpretation which will enable you, so to speak, to 'remove the conflicting elements from the relevant provisions'. In this way you will quite often be able to consider that a statute which is apparently contrary to a treaty will, in reality, have been intended to allow for cases where the latter may apply, and moreover you have already committed yourselves to take this approach on several occasions (See eg 7 April 1965, HURNI: [1965] Rec Lebon 226; Ass, 2 May 1975, MATHIS: [1975] Rec Lebon 279, or 27 January 1978, ASSOCIATION FRANCE TERRE D'ASILE: [1978] Rec Lebon 33). Finally, the experience of the ordinary courts confirms that situations of conflict between statutes and international agreements are far from frequent. In this connection a study of Community law annexed to the 1984 report of the Cour de Cassation states that 'cases of conflict are extremely rare'. Although it is true that, unlike the ordinary courts, you for your part may sometimes be required to consider of your own motion the disregard of a treaty, it is unlikely that this will have much affect on the statistics.

In the second place, I am not much impressed by the frequent argument regarding the complexity said to be involved in determining which provision has become applicable again, when the court has previously set aside an Act. It seems to me that all the conflicts which may then arise between different measures could be settled without any particular difficulty by reference to the hierarchy of national laws or, in the case of conflict between different treaties, on the basis of the relevant principles laid down by the Vienna Convention of 23 May 1969.

In the third place, although it may be argued that this new case law would result in making the procedure more cumbersome because the court would have to refer to the Minister for Foreign Affairs on the question of actual application of the treaty by signatory States, I do not find this consideration persuasive either. No doubt the obligation to verify that the condition of reciprocity referred to by Article 55 has been fulfilled will occasionally necessitate preliminary references of this kind. But, firstly, the question arises in reality in strictly identical terms for all treaties, whether they have been contradicted by subsequent statutes or not, whereas the main conclusion from your case law is that this requirement of reciprocity determines not only the priority of the international agreement over statute, but also its applicability -- even in national law (See Ass, 29 May 1981, REKHOU: [1981] Rec Lebon 220, or 27 February 1987, MINISTER FOR THE BUDGET V NGUYEN VAN GIAO: [1987] Rec Lebon 77). The difficulty thus revealed is therefore neither specific nor new. Secondly, a reference will obviously be necessary only if there is serious doubt as to whether the treaty is applicable, and here you can proceed from the same principles as those which, with regard to the interpretation of legal measures, have given rise to the theory of the 'acte clair'. Finally, it should be added that the principle itself of reference to the Minister for Foreign Affairs, which has the double disadvantage of entrusting the interpretation of an international agreement to one of its signatories and of putting the State in the position of both judge and party in a good many causes, is now the subject of considerable dispute and the possibility cannot be ruled out that one day soon it will be abandoned.

With regard to the main objection usually raised to my suggested reply, which concerns the obligation henceforward to verify that statutes are compatible with the main international conventions on human rights, this does not seem to me to be an obstacle either.

It has often been said that the possibility of criticising the validity of laws by reference to the numerous principles set out in such fertile measures as the International Covenants on Human Rights of 29 December 1966 or, above all, the European Convention on Human Rights of 4 November 1950 would inevitably give rise to improper actions likely to congest the courts. However, the importance of this practical problem should not be overestimated. A reading of the case law of the Cour de Cassation and of judgments delivered by you in situations where these conventions were applicable shows it is generally possible to refute such arguments without real difficulty and that, furthermore, this can be done on the basis of very concise reasoning.

It is true that ascertaining whether a statute is compatible with those same conventions gives rise to a more difficult theoretical problem connected with the fact that it may appear to give the administrative court the role of a court determining the constitutionality of laws. It must be admitted that the principles laid down by these measures are very often identified with the principles of constitutional force recognised in France by the Preamble to the 1946 Constitution and the provisions to which the Preamble refers. Therefore the review of statutes which you would have to undertake could turn out in a way to be concurrent with the review carried out, for its part, by the Constitutional Council. However, it should be stressed that, firstly, the risks of divergent case law between the two courts in relation to one and the same Act are virtually nil. In this connection it is sufficient to note that only two of the numerous statutes which the Cour de Cassation has compared with treaties between 1975 and now were submitted beforehand to the Constitutional Council and that the judgments by the two courts agreed with each other in both cases. Secondly, although the inclusion in international treaties of principles which in reality have constitutional force does raise a legal difficulty, nonetheless it arises directly from the political will expressed by Parliament and the executive when they ratified those agreements. Therefore I do not see on what grounds a court could rely for refusing to draw all the automatic conclusions from the entry into force of the agreements in question. Finally, I would point out that it is certainly appropriate, at a time when the European Commission and the European Court of Human Rights are for their part beginning occasionally to examine the compatibility of French laws with the 1950 convention, that you should yourselves assume this function and break their monopoly.

In the last place, if you agree to review your case law, the question arises of the extent of the change, which you may perhaps be tempted to confine to the case of certain international agreements, referring otherwise to your various criteria.

In this connection I suggest at the outset that you should discard without hesitation the various theories put forward by some legal writers, which would lead you to make a distinction between international agreements depending on whether they are bilateral or multilateral, either in order to grant the benefit of your new approach to the former category or to restrict its ambit to the latter. Firstly, although it has been argued that Article 55 makes the applicability of treaties subject to the condition that they are fulfilled 'by the other party' -- which could appear to refer to bilateral treaties only -- this conclusion should not be drawn from the use of the singular in the text, which only shows that the authors of the Constitution in truth omitted to provide for the special case of multilateral agreements, which were still relatively rare in 1958. Secondly, although the converse is true, viz that it is easier or even unnecessary to verify fulfilment of the condition of reciprocity in the case of certain multilateral agreements -- and therefore it could be tempting to restrict the benefit of your new case law to these -- it is difficult to see how the ambit of Article 55 could depend, in law, on a criterion which would arise from purely practical considerations only.

Finally, you might be tempted, for reasons of expediency, to limit the scope of your new case law to Community measures only.

Although it is supported by some, this judgment of Solomon seems to me to represent the worst possible solution in many respects.

In the first place, I think a decision of this kind would in reality have no legal foundation whatever -- and this is not the least of its disadvantages.

In fact it would assume that you stand by your interpretation of Article 55 of the Constitution. Although I believe this provision amounts to an implied authorisation to the courts to refuse to apply laws which are contrary to international agreements, one would seek in vain for any such enabling power in the EEC Treaty. In particular neither the direct applicability of certain Community measures nor the establishment of an autonomous court to deal with European law can in themselves be interpreted in this way.

Secondly, I am aware that the Court of Justice of the European Communities -- which, as we know, gives Community law absolute supremacy over the rules of national law, even if they are constitutional -- has not hesitated for its part to affirm the obligation to refuse to apply in any situation laws which are contrary to Community measures (See in particular *COSTA V ENEL*, (6/64): [1964] ECR 585, [1964] CMLR 425, and *SIMMENTHAL*, (106/77): [1978] ECR 629, [1978] 3 CMLR 263).

I do not think you can follow the European Court in this judgment law which, in truth, seems to me at least open to objection. Were you to do so, you would tie yourself to a supranational way of thinking which is difficult to justify, to which the Treaty of Rome does not subscribe expressly and which would quite certainly render the Treaty unconstitutional, however it may be regarded in the political context.

No doubt it could then be objected, it is true, that the supreme courts of certain member-States of the Community, particularly those of the Federal Republic of Germany or Italy, have for their part submitted to this case law in a disciplined way. However, that situation is due to the specific nature of the legal system of those States which, unlike ours, attributes equal value to laws and treaties and therefore necessitated special arrangements for Community law. In other words, it is precisely the absence of any provision equivalent to our Article 55 which seems to have compelled those courts to take this approach, which is no more logical in the legal system of the State concerned than it would be in the French system. Since this providential Article of the Constitution saves you for your part from having to seek the right, it would be most regrettable not to take it as the foundation of your new approach.

In the third place, it should be noted that the considerations of expediency which could encourage you to limit the overruling of your case law to Community law alone seem to me themselves to be of very little weight. There is no doubt that the rare conflicts of different measures which you will encounter will concern precisely Community rules. Therefore it is difficult to see what practical benefit there would be in any case in your excluding other categories of international law from the ambit of your new case law.

Finally, it should be emphasised that the Cour de Cassation, although it seems to hesitate on this point, has applied its 1975 decision to all international acts, whether by the Community or not. Nor does the Constitutional Council make any distinction in this respect because, by its abovementioned decision of 21 October 1988, it was required specifically to compare a statute with the stipulations of an additional protocol to the European Convention on Human Rights, ie a non-Community agreement. Obviously it would be troublesome if the overruling of your 1968 decision were to give rise to a new divergence in case law, which would merely replace the old one instead of resolving it.

I therefore suggest that you should base your decision on Article 55 of the Constitution and extend its ambit to all international agreements.

If you agree, you should then, in the case before you today, take care to point out that the Act of 7 July 1977 is compatible with the Treaty of Rome before relying on its provisions against Mr Nicolo's arguments.

Finally, it will remain for you to give a ruling on the submissions in defence by the Minister for the Overseas Departments and Territories, to the effect that you should impose a fine on the plaintiff for an improper application. However, you have already held that your power to impose such fines is a matter for your own discretion, and consequently a submission by a party that you should use it is inadmissible (See 24 January 1986, *MME ROSSET*: [1986] Rec Lebon 671). For my part, I shall not suggest that you impose such a fine in the present case.

On all these grounds I submit that the Court should dismiss the two applications as well as the submission by the Minister for the Overseas Departments and Territories to the effect that Mr Nicolo be fined for making an improper application.

Judgement

[...]

Submissions of the application by Mr Nicolo

Pursuant to section 4 of Act 77-729 of 7 July 1977 on the election of representatives to the Assembly of the European Communities, 'the territory of the Republic shall form a single constituency' for the election of the French representatives to the European Parliament. Under this provision, in conjunction with Articles 2 and 72 of the Constitution of 4 October 1958, which make it clear that the overseas territories and departments form an integral part of the French Republic, such departments and territories are necessarily included in the single constituency within which representatives are elected to the European Parliament.

Pursuant to Article 227(1) of the Treaty of 25 March 1957 establishing the European Economic Community, 'this Treaty shall apply to . . . the French Republic'. The rules set out above, laid down by the Act of 7 July 1977, are not incompatible with the clear stipulations of the abovementioned Article 227(1) of the Treaty of Rome.

It is clear from the foregoing that persons who, pursuant to the provisions of Chapter 1 of Part 1 of Book 1 of the Electoral Code, have the capacity of electors in overseas departments and territories also have that capacity for electing representatives to the European Parliament. They are also eligible pursuant to section LO 127 of the Electoral Code, which was rendered applicable to elections to the European Parliament by section 5 of the abovementioned Act of 7 July 1977. Therefore Mr Nicolo is not justified in contending either that the participation of French citizens of the overseas departments and territories in the election of representatives to the European Parliament or that the presence of some of them on lists of candidates invalidated the said election. Therefore his application must be dismissed.

Submission of the Minister for Overseas Departments and Territories seeking the imposition by the Conseil d'Etat of a fine on Mr Nicolo for an improper application:

Submissions for such a purpose are not admissible.

Claim and counter claim dismissed.

3.5 *United Kingdom*

3.5.1 *Macarthy's v Smith*

Macarthy's Limited v. Wendy Smith

Before the English Court of Appeal

- [1] Macarthy's Ltd. are wholesale dealers in pharmaceutical products. They have warehouses in which they keep the goods and send them out to retailers. Each warehouse is divided into four departments. One of these is the stockroom. In 1974 the manager of the stockroom was a man named McCullough. He left on 20 October 1975. For four months the post was not filled. But on 1 March 1976 a woman was appointed to be manageress of the stockroom. Her duties were not quite the same as those of Mr. McCullough. For instance she did not know anything about the maintenance of vehicles whereas he did: but he had assistants to help him whereas she did not. The tribunal found that her work was of equal value to his. They said:

'Whilst it cannot be said that Mrs. Smith's work was the same as that of Mr. McCullough, it was of a broadly similar nature and we do not think that the differences between the work of Mrs. Smith and Mr. McCullough were practical differences to warrant the terms and conditions of the contract being any different. We accordingly find that Mrs. Smith was employed on like work with her immediate predecessor Mr. McCullough.'

- [2] Nevertheless, although they were employed on like work, the employers paid Mrs. Smith only fifty pounds a week whereas they had paid Mr. McCullough sixty pounds a week. The tribunal found that this difference was not due to any material difference other than the difference of sex. That is, it was due to the difference in sex. In short, because she was a woman and he was a man. In these circumstances the industrial tribunal held unanimously that she was entitled to be paid at the same rate as Mr. McCullough. She remained in the employment as manageress from 1 March 1976 to 9 March 1977. The industrial tribunal affirmed that decision. The employers appeal to this court.
- [3] The employers say that this is not within the Equal Pay Act 1970. In order to be covered by that Act, the employers say that the woman and the man must be employed by the same employer on like work at the same time: whereas here Mrs. Smith was employed on like work in succession to Mr. McCullough and not at the same time as he.
- [4] To solve this problem I propose to turn first to the principle of equal pay contained in the Treaty of Rome, for that takes priority even over our own statute.

The Treaty of Rome

- [5] Article 119 of the Treaty of Rome says that: 'Each member-State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.'
- [6] That principle is part of our English law. It is directly applicable in England. So much so that, even if we had not passed any legislation on the point, our courts would have been bound to give effect to Article 119. If a woman had complained to an industrial tribunal or to the High court and provided

that she was not receiving equal pay with a man for equal work, both the industrial tribunal and the court would have been bound to give her redress (see *Defrenne v. Sabena* and *Shields v. Coombes*).

- [7] In point of fact, however, the United Kingdom has passed legislation with the intention of giving effect to the principle of equal pay. It has done it by the Sex Discrimination Act 1975 and in particular by section 8 of that Act amending section 1 of the Equal Pay Act 1970. No doubt the Parliament of the United Kingdom thinks that it has fulfilled its obligations under the Treaty. But the European Commission take a different view. They think that our statutes do not go far enough.
- [8] What then is the position? Suppose that England passes legislation which contravenes the principle contained in the Treaty, or which is inconsistent with it, or fails properly to implement it. There is no doubt that the European Commission can report the United Kingdom to the European Court of Justice: and that Court can require the United Kingdom to take the necessary measures to implement Article 119. That is shown by Articles 169 and 171 of the Treaty.
- [10] It is unnecessary, however, for these courts to wait until all that procedure has been gone through. Under section 2 (1) and (4) of the European Communities Act 1972 the principles laid down in the Treaty are 'without further enactment' to be given legal effect in the United Kingdom: and have priority over 'any enactment passed or to be passed' by our Parliament. So we are entitled--and I think bound--to look at Article 119 of the Treaty because it is directly applicable here: and also any directive which is directly applicable here (see *Van Duyn v. Home Office*). We should, I think, look to see what those provisions require about equal pay for men and women. Then we should look at our own legislation on the point--giving it, of course, full faith and credit--assuming that it does fully comply with the obligations under the Treaty. In construing our statute, we are entitled to look to the Treaty as an aid to its construction: but not only as an aid but as an overriding force. If on close investigation it should appear that our legislation is deficient--or is inconsistent with Community Law--by some oversight of our draftsmen--then it is our bounden duty to give priority to Community law. Such is the result of section 2 (1) and (4) of the European Communities Act 1972.
- [11] I pause here, however, to make one observation on a constitutional point. Thus far I have assumed that our Parliament, whenever it passes legislation, intends to fulfill its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act--with the intention of repudiating the Treaty or any provision in it--or intentionally of acting inconsistently with it--and says so in express terms--then I should have thought that it would be the duty of our courts to follow the statute of our Parliament. I do not however envisage any such situation. As I said in *Blackburn v. Attorney-General*:

But if Parliament should do so, then I say we will consider that event when it happens.'

Unless there is such an intentional and express repudiation of the Treaty, it is our duty to give priority to the Treaty. In the present case I assume that the United Kingdom intended to fulfil its obligations under Article 119. Has it done so?

[...]

Lawton L.J.:

- [39] We cannot, as Mr. Turner submitted, ignore Article 119 and apply what I consider to be the plain meaning of the Act. The problem of the implementation of Article 119 is not one for the Council of the European Communities to take up with the Government of the United Kingdom and Northern Ireland, as Mr. Turner submitted it was. Article 119 gives rise to individual rights which our courts must protect. The European Court of Justice has already adjudged that this is so: see *Defrenne v*

Sabena (paragraph 24). The doubts which I have about the meaning of Article 119 are not dissipated by Article 1 of the Council of the European Communities' Directive of 10 February 1975.

- [40] Being in doubt as to the ambit of Article 119 and being under an obligation arising both from the decisions of the European Court of Justice in the two cases to which I have referred and section 2 of the European Communities Act 1972 to apply that Article in our courts, it seems to me that this is a situation to which Article 177 of the Treaty of Rome applies. I consider that a decision is necessary as to the construction of Article 119 and I would request the European Court of Justice to give a ruling on it. Parliament by its own Act in the exercise of its sovereign powers has enacted that European Community law shall 'be enforced, allowed and followed' in the United Kingdom of Great Britain and Northern Ireland (see section 2 (1) and the European Communities Act 1972) and that 'any enactment passed or to be passed...shall be construed and have effect subject to' section 2--see section 2 (4) of that Act. Parliament's recognition of European Community law and of the jurisdiction of the European Court of Justice by one enactment can be withdrawn by another.

[...]

Cumming-Bruce L.J.:

I take the view that Article 119, which expresses a general principle, may be perfectly consistent with the English legislation as I construe it. But I am not sure about that, and therefore agree that the Court at Luxembourg should give an authoritative answer to that question. Secondly, I do not think that it is permissible, as an aid to construction, to look at the terms of the Treaty. If the terms of the Treaty are adjudged in Luxembourg to be inconsistent with the provisions of the Equal Pay Act 1970, European law will prevail over that municipal legislation. But such a judgement in Luxembourg cannot affect the meaning of the English statute.

- [51] For these reasons I agree with the order proposed by Lawton L.J., subject only to an appropriate revision of the question to be put to the European court after counsel have had the opportunity to consider it.

[...]

3.5.2 Factortame

Factortame LTD and others v. Secretary of State for Transport

[on appeal from Regina v. Secretary for Transport, ex parte Factortame Ltd. And others]

18 May 1989

House of Lords

[1989] 3 CMLR 1

LORD BRIDGE OF HARWICH. My Lords, the applicants are a number of companies incorporated under the laws of the United Kingdom and also the directors and shareholders of those companies, most of whom are Spanish nationals. The applicant companies between them own or manage 95 deep sea fishing vessels, which were until 31 March 1989 registered as British fishing vessels under the Merchant Shipping Act 1894. Of these vessels 53 were originally registered in Spain and flew the Spanish flag. These 53 vessels were registered under the Act of 1894 at various dates from 1980 onwards. The remaining 42 vessels had always been British fishing vessels. These vessels were purchased by the applicants at various dates mainly since 1983.

The statutory regime governing the registration of British fishing vessels was radically altered by Part II of the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 (SI 1988 No 1926) both of which came into force on 1 December 1988. The following are the critical provisions of the Act which affect the applicants:

"14(1) Subject to subsections (3) and (4), a fishing vessel shall only be eligible to be registered as a British fishing vessel if -- (a) the vessel is British-owned; (b) the vessel is managed, and its operations are directed and controlled, from within the United Kingdom; and (c) any charterer, manager or operator of the vessel is a qualified person or company. (2) For the purposes of subsection (1)(a) a fishing vessel is British-owned if -- (a) the legal title to the vessel is vested wholly in one or more qualified persons or companies; and (b) the vessel is beneficially owned -- (i) as to not less than the relevant percentage of the property in the vessel, by one or more qualified persons, or (ii) wholly by a qualified company or companies, or (iii) by one or more qualified companies and, as to not less than the relevant percentage of the remainder of the property in the vessel, by one or more qualified persons (7) In this section -- 'qualified company' means a company which satisfies the following conditions, namely -- (a) it is incorporated in the United Kingdom and has its principal place of business there; (b) at least the relevant percentage of its shares (taken as a whole) and of each class of its shares, is legally and beneficially owned by one or more qualified persons or companies; and (c) at least the relevant percentage of its directors are qualified persons; 'qualified person' means -- (a) a person who is a British citizen resident and domiciled in the United Kingdom, or (b) a local authority in the United Kingdom; and 'the relevant percentage' means 75 per cent or such greater percentage (which may be 100 per cent) as may for the time being be prescribed."

Fishing vessels previously registered as British under the Act of 1894 require to be re-registered under the Act of 1988, subject to a transitional period prescribed by the Regulations of 1988 which permitted their previous registration to continue in force until 31 March 1989.

At the time of the institution of the proceedings in which this appeal arises, the 95 fishing vessels in question failed to satisfy one or more of the conditions for registration under section 14(1) of the Act of 1988, and thus failed to qualify for registration, by reason of being managed and controlled from Spain or

by Spanish nationals or by reason of the proportion of the beneficial ownership of the shares in the applicant companies in Spanish hands. The applicants sought by application for judicial review to challenge the legality of the relevant 1988 legislation on the ground that it contravened the provisions of the EEC Treaty (Cmnd 5179-II) and other rules of law given effect there under by the European Communities Act 1972 by depriving the applicants of rights of the kind referred to in section 2(1) of the Act of 1972 as enforceable Community rights. It will be convenient to use the expression "Community law" as embracing the Treaty, subordinate legislation of institutions of the European Economic Community ("the EEC") and the jurisprudence developed by the Court of Justice of the EEC ("the ECJ") and to use the expression "directly enforceable Community rights" as referring to those rights in Community law which have direct effect in the national law of member states of the EEC. The defence of the Secretary of State to the applicants' challenge was and is, first, that Community law does not in any way restrict a member state's right to decide who is entitled to be a national of that state or what vessels are entitled to fly its flag and, secondly, that, in any event, the new legislation is in conformity with Community law and, indeed, is designed to achieve the Community purposes enshrined in the common fisheries policy.

The applicants' application for judicial review was heard by the Divisional Court (Neill LJ and Hodgson J) who, in judgments delivered on 10 March 1989, decided to request a preliminary ruling from the ECJ in accordance with article 177 of the Treaty on the substantive questions of Community law which they considered necessary to enable them finally to determine the application. The precise terms of the questions proposed to be referred by the Divisional Court have not yet been settled. The Divisional Court went on to consider an application by the applicants for interim relief and made an order for the interim protection of the directly enforceable Community rights claimed by the applicants in the following terms:

"It is ordered that: (1) pending final judgment or further order herein the operation of Part II of the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988 be disapplied and the Secretary of State be restrained from enforcing the same in respect of any of the applicants and any vessel now owned (in whole or in part) managed operated or chartered by any of them so as to enable registration of any such vessel under the Merchant Shipping Act 1894 and/or the Sea Fishing Boats (Scotland) Act 1886 to continue in being"

An appeal against this order was heard by the Court of Appeal (Lord Donaldson of Lynton MR, Bingham and Mann LJJ) who on 16 March 1989 allowed the appeal, set aside the order for interim relief and granted leave to appeal to your Lordships' House, giving their reasons for their decision on 22 March.

Since the only issue before your Lordships on the appeal relates to the grant of interim relief, your Lordships have not been called on to examine in any detail the rival arguments of the parties on the substantive issues of Community law which will determine the final outcome of the application for judicial review, nor to consider the voluminous affidavit evidence which was fully examined by the Divisional Court. In these circumstances I shall gratefully adopt so much of the admirably lucid judgment of Neill LJ in the Divisional Court as is necessary to appreciate the nature of these arguments and the factual and historical background against which the substantive issues fall to be determined.

Having set out the terms of the principal articles of the Treaty relied on by the appellants, Neill LJ continued:

"On the basis of these articles it was argued on behalf of the applicants that they had a number of relevant rights under Community law, including the following: (a) the right not to be discriminated against on the grounds of nationality (article 7); (b) the right in the case of the individuals to establish a business anywhere in the EEC (article 52) (including the right to carry on fishing at sea) and, in the case of the companies, [to be treated in the same way] (article 58); and (c) the right in the case of the individual applicants to participate in the capital of the applicant companies: article 221. It was further argued that these provisions of Community law were provisions which had direct effect and that the applicants' rights would be infringed by the application to them of the Act of 1988 and the Regulations of 1988. It was submitted that these rights were fundamental rights which could not be swept away or submerged by the common fisheries policy and that all provisions of the common fisheries policy had to be read subject to

these fundamental provisions. On behalf of the Secretary of State, on the other hand, it was argued that the provisions of the Treaty were of no direct relevance in this case because each member state has a sovereign right to decide questions of nationality: that is, who are permitted to be nationals and who are permitted to fly the national flag. In the alternative, it was argued, the whole matter was governed by the common fisheries policy, which was established to cope with the special problems in the fishing industry and which recognised the importance, and the need for protection, of national fishing fleets and national fishing communities, and that the legislation merely gave effect to the common fisheries policy and was therefore wholly consistent with the Community law."

The judgment then traces the history of the common fisheries policy from its origins before the accession of the United Kingdom to the Common Market through various Community regulations up to the establishment of the system laid down for the conservation of stocks of certain fish and the allocation of quotas to member states in 1983 which is embodied in the relevant Council Regulations now applicable. The judgment continues:

"The system adopted by the Council to ensure fair distribution was by the establishment of national quotas. These national quotas were directly linked to vessels flying the flag or registered in the individual member state. As I have already observed, in article 10 of the Regulations of 1983 and article 11 of the Regulations of 1987, all relevant fish caught by vessels flying the flag counted against the quota of that state. In order to decide how to share out the available fish between member states the Council took into account the quantities of fish which had been caught, on average, by the fishing fleets of the relevant state between 1973 and 1978. Once the area governed by the common fisheries policy was extended as from 1 January 1977 to a range of 200 miles from the coastline of member states, the common fisheries policy began to make an impact on areas of the eastern Atlantic, including the Western Approaches, which had traditionally been fished by Spanish fishing vessels. Prior to the accession of Spain to the Community in 1986, the rights of Spain to fish in the waters of the member states was governed by an agreement reached between the EEC and Spain in 1980. This agreement laid down strict limits on fishing by Spanish-registered boats. The principle of national quotas was incorporated into the Act of Accession of 1985 whereby Spain and Portugal became members of the EEC. The Act of Accession prohibited more than 150 Spanish fishing vessels fishing in specified areas. From about 1980 onwards the applicants and others began to register vessels which had formerly been Spanish fishing vessels (that is, vessels which had formerly flown the flag of Spain) as British fishing vessels under the Merchant Shipping Act 1894. Some 53 of these vessels are those owned by the applicants. In addition, the applicants and others bought British fishing vessels with a view to using them for fishing in the area covered by the common fisheries policy. The fish were, in the main, destined for the Spanish market. As time went by the United Kingdom Government became concerned at the growth of the practice whereby Spanish interests were either buying British fishing vessels or re-registering Spanish vessels under the Act of 1894. The United Kingdom Government therefore decided to make use of the powers contained in section 4 of the Sea Fish (Conservation) Act 1967 to impose some additional conditions for the licences which are required before fishing for stocks which are subject to quotas under the common fisheries policy by vessels of 10 metres length and over. These new conditions were announced on 6 December 1985. The conditions were of three kinds: operating, crewing and social security. The conditions were described by Mr Noble [on behalf of the Secretary of State] in his first affidavit in paragraph 22, and can be summarised as follows. The operating conditions were designed to ensure that the vessels concerned had a real economic link with the United Kingdom ports. That link was to be demonstrated in one of two ways: first, by selling a portion of the catch in the United Kingdom (the landing test) or, secondly, by making a specified number of visits to the United Kingdom (the visiting test). The crewing condition required that at least 75 per cent of the crew should be made up of EEC nationals (excluding, for a period, nationals of Spain, Greece and Portugal) ordinarily resident in the United Kingdom. The social security condition required that all the crew should contribute to the United Kingdom's national insurance scheme. These conditions came into force in January 1986. They have been challenged by Spanish interests in the European Court in Luxembourg. It has been contended that they are contrary to Community law. The decision of the European Court in the two relevant references is now awaited. The cases have been brought, respectively, at the suit of a company called Agegate Ltd (Reg v Minister of Agriculture, Fisheries and Food, Ex parte Agegate Ltd (Case 3/87)) and another company called Jaderow Ltd (Reg v Minister of Agriculture, Fisheries and Food,

Ex parte Jaderow Ltd (Case 216/87)). In the course of the argument were referred to the opinions in these two cases of Mr Advocate General Mischo in which he expressed views about the validity of the conditions. In summary, his opinion was this: that the crewing and social security conditions were valid, that the visting test would be valid provided it did not interfere with exports, but that the landing test (included as part of the operating conditions) was in breach of article 34 of the Treaty. It should be remembered that earlier I referred to the terms of article 34. It has been the contention of the Secretary of State that these conditions have not been observed by the applicants and that the further measures prescribed in the Act of 1988 and the Regulations of 1988 have been necessary to secure that the purposes of the common fisheries policy are duly carried out, and also to ensure that proper policing and safety control are improved. Such then, in summary, is the background to this case and these are the relevant provisions both of the Treaty and of the common fisheries policy to which our attention was particularly directed."

I add a footnote to this summary to observe that the preliminary rulings of the ECJ in the Agegate and Jaderow cases referred to by Neill LJ had still not been given at the conclusion of the argument of this appeal before your Lordships.

Against this background and in view of the nature of the questions of Community law involved, the discretionary decision of the Divisional Court to seek a preliminary ruling from the ECJ under article 177 was, it seems to me, unquestionably right. The questions are of great difficulty and depend, I would think, on a wide range of considerations which only the ECJ has the competence to assess.

Having indicated his reasons for the conclusion that the case called for a reference under article 177, Neill LJ said in considering the application for interim relief:

"For my part, I do not propose to express even a tentative view of the likely result in the present reference, but neither side's arguments in my judgment can be described as weak. They both merit the more careful scrutiny. The applicants' contentions invoke the support of fundamental principles of the EEC Treaty. The Solicitor-General relies on sovereign rights over nationality, and on the special provisions of the common fisheries policy. In these circumstances I think it is right to look at the matter on the basis that the cogent and important arguments put forward on behalf of the applicants are to be set against arguments of a like weight urged with equal force on behalf of the Secretary of State."

Hodgson J expressed the view that the applicants had "a strong prima facie case" and was critical of some of the arguments advanced on behalf of the Secretary of State. Your Lordships have not, however, been invited to make your own independent assessment of the relative strengths of the rival contentions on the substantive issues of Community law which arise, and I think both sides accept that, in relation to the grant of interim relief, nothing turns on any difference between the assessments made by Neill LJ and Hodgson J.

It is estimated that the preliminary ruling requested by the Divisional Court from the ECJ will not be given for two years from the date when the reference is made. The applicants claim that unless they are protected during this period by an interim order which has the effect of enabling them to continue to operate their 95 vessels as if they were duly registered British fishing vessels (which would be necessary to enable them to continue to hold licences to fish against the British quota of controlled stocks of fish) they will suffer irreparable damage. The vessels are not eligible to resume the Spanish flag and fish against the Spanish quota. To lay the vessels up pending the ruling of the ECJ would be prohibitively expensive. The only practical alternative would be to sell the vessels or the Spanish holdings in the companies owning the vessels in what would be a glutted market at disastrously low prices. In addition many of the individual applicants are actively engaged in the operation and management of the vessels and would lose their livelihood. No doubt has been cast on the factual accuracy of these claims and I approach the question of interim relief on the footing that they are well founded. Moreover, as the law presently stands on the authority of *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 the applicants would have no remedy in damages for losses suffered pending the ruling of the ECJ.

It is more difficult to assess, in practical terms, the adverse consequences of granting interim relief if the preliminary ruling of the ECJ is in the event given in favour of the Secretary of State. Certainly there is no question of requiring from the applicants a cross-undertaking in damages, since it would be impossible to identify any damage sustained by individuals in the British fishing industry as a result of the continued operation of the applicants' vessels. But it is right to recognise that the policy of Her Majesty's Government endorsed by Parliament in Part II of the Act of 1988 is to ensure that the quota of controlled stocks of fish allocated to the United Kingdom in accordance with the common fisheries policy, of which a sizeable proportion is presently taken by the applicants, should be fully available to be enjoyed by those engaged in the British fishing industry.

The familiar situation in English law in which the question arises as to whether or not an interim injunction should be made to protect some threatened right of the plaintiff or applicant for judicial review is one in which the facts on which the right depends are in dispute and the court cannot proceed immediately to the trial which will resolve that dispute. In this situation the court has a discretion to grant or withhold interim relief which it exercises in accordance with the principles laid down by your Lordships' House in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. In deciding on a balance of convenience whether or not to make an interim injunction the court is essentially engaged in an exercise of holding the ring. In private law as between private parties the plaintiff will be required, if granted interim relief, to give a cross-undertaking in damages and the court is thus enabled to make a pragmatic decision as to who is likely to suffer the greater injustice, the plaintiff on the one hand if interim relief is withheld and he eventually establishes his right but is left to his remedy in damages, or the defendant on the other hand if he is wrongly restrained in the interim and he is left to his remedy in damages on the plaintiff's cross-undertaking.

The situation which arises in the present case is fundamentally different from this familiar situation in two respects. The first which I wish to examine is that the dispute on which the existence or non-existence of the rights for which the applicants claim protection depends is one of law, not of fact, and the postponement of the resolution of that dispute arises, of course, from the necessity to seek a preliminary ruling from the ECJ under article 177.

By virtue of section 2(4) of the Act of 1972 Part II of the Act of 1988 is to be construed and take effect subject to directly enforceable Community rights and those rights are, by section 2(1) of the Act of 1972, to be "recognised and available in law, and . . . enforced, allowed and followed accordingly; . . ." This has precisely the same effect as if a section were incorporated in Part II of the Act of 1988 which in terms enacted that the provisions with respect to registration of British fishing vessels were to be without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC. Thus it is common ground that, in so far as the applicants succeed before the ECJ in obtaining a ruling in support of the Community rights which they claim, those rights will prevail over the restrictions imposed on registration of British fishing vessels by Part II of the Act of 1988 and the Divisional Court will, in the final determination of the application for judicial review, be obliged to make appropriate declarations to give effect to those rights.

It is difficult to envisage a parallel situation arising out of the disputed construction of an English statute not involving any question of Community law which would call for a decision as to whether or not the court could grant interim relief of the kind which the applicants are seeking here. Suppose that an English statute contained two sections allegedly in conflict with each other, one clear and unambiguous in its terms, the other of doubtful import. If an English court were faced with a claim by a party litigant to rights granted by the doubtful section which were denied by the unambiguous section, the court confronted with the issue at any level would decide it and no question of interim relief could possibly arise.

The nearest parallel arises where subordinate legislation which in its terms is clear and unambiguous is challenged as ultra vires and a question arises as to the enforcement of the subordinate legislation before the challenge to the vires has been resolved. This indeed was the question which arose in *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, but it is important to appreciate the context in which it arose. The Secretary of State had made a statutory order under the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 which had been approved by both

Houses of Parliament and which had the effect of restricting the price at which Hoffmann-La Roche could sell certain drugs. It was Hoffmann-La Roche who brought proceedings against the Secretary of State for a declaration that the statutory order was ultra vires on the ground that the proceedings before the Monopolies Commission and the findings of the Monopolies Commission on which the statutory order was based were vitiated by breaches of the rules of natural justice. Under the provisions of the Act of 1948 the only means by which the statutory order could be enforced was by injunction to restrain Hoffmann-La Roche from selling the drugs in question above the stipulated price. The Secretary of State accordingly moved for such an injunction and the motion was heard as if made in Hoffmann-La Roche's action. The primary question in issue was whether the Secretary of State could be required to give an undertaking in damages as a condition of the grant of an interim injunction pending trial of the action at which the issue as to the validity of the statutory order would be determined. But the House also had to determine whether it was appropriate to grant an interim injunction to enforce the terms of the statutory order at a time when a challenge to the vires of the order had not been resolved.

The House in Hoffmann-La Roche affirmed by a majority (Lord Wilberforce dissenting) the decision of the Court of Appeal that the interim injunction should be granted without requiring the Secretary of State to give any cross-undertaking. The Solicitor-General relies on passages in the speeches of the majority as establishing the principle that the unambiguous terms of delegated legislation, and, as he would say, a fortiori of an Act of Parliament, must be presumed to be the law and must be enforced as such unless and until declared to be invalid in the one case or declared to be incompatible with Community law in the other. Lord Reid said, at p 341:

"It must be borne in mind that an order made under statutory authority is as much the law of the land as an Act of Parliament unless and until it has been found to be ultra vires But I think that it is for the person against whom the interim injunction is sought to show special reason why justice requires that the injunction should not be granted or should only be granted on terms."

Lord Morris of Borth-y-Gest said, at p 349:

"The order then undoubtedly had the force of law. Obedience to it was just as obligatory as would be obedience to an Act of Parliament."

Lord Diplock said, at p 365:

"Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed."

Mr Vaughan, for the applicants, relies on passages in the speeches of the majority and in the dissenting speech of Lord Wilberforce as qualifying the proposition that legislation whose validity is called in question must in all circumstances be enforced unless and until invalidated: see per Lord Morris of Borth-y-Gest, at p 350B; per Lord Diplock, at p 367B-C; per Lord Cross of Chelsea, at p 371E-G; and the dissenting view of Lord Wilberforce, at p 358E-G. I do not find it necessary to set out these passages, since I accept that the court may in its discretion properly decline to exercise its jurisdiction to grant an interim order in aid of the enforcement of disputed legislative measures in a situation where, as in Hoffmann-La Roche, it is necessary to invoke the court's jurisdiction in order to secure their enforcement.

The application of this principle in relation to the enforcement of the provisions of Part II of the Act of 1988 admits of a simple illustration. Section 22, as its side note indicates, creates certain "offences relating to, and liabilities of, unregistered fishing vessels." If any of the applicants were to be prosecuted for an offence in relation to an unregistered fishing vessel or if proceedings for forfeiture of the vessel were instituted under section 22 and the rights under Community law now claimed were relied on in defence, it is very properly conceded by the Solicitor-General that the court before which the prosecution or forfeiture proceedings were brought, if it decided to refer questions of Community law to the ECJ, could grant a stay

of the prosecution or forfeiture proceedings pending the preliminary ruling of the ECJ. This would be a proper case of the court staying its hand until the issue as to the claim of Community rights was settled. The prosecution or the forfeiture proceedings would not be frustrated but suspended. If eventually the claimed Community rights were not upheld by the ECJ, there could still be a conviction or a forfeiture of the vessel. Precisely the same principle underlies the decision of the Irish Supreme Court in *Pesca Valentia Ltd v Minister for Fisheries and Forestry, Ireland and Attorney General* [1985] IR 193, on which Mr Vaughan relies, where a prosecution for an offence in contravention of Irish legislation regulating fisheries alleged to be incompatible with Community law was stayed.

In the light of these considerations I do not believe that *Hoffmann-La Roche* provides the conclusive answer, as a matter of English law, to the applicants' claim for interim relief. But this brings me to what I believe to be the nub of the appeal, in so far as it depends on English law, and to the second critical distinction between the claim to interim relief advanced by the applicants and any claim to interim relief which an English court has ever previously entertained. Unlike the statutory order which the Secretary of State for Trade and Industry sought to enforce by interim injunction against *Hoffmann-La Roche*, the provisions of Part II of the Act of 1988 require no assistance from the court for their enforcement. Unambiguous in their terms, they simply stand as a barrier to the continued enjoyment by the applicants' vessels of the right to registration as British fishing vessels. In this situation the difficulty which confronts the applicants is that the presumption that an Act of Parliament is compatible with Community law unless and until declared to be incompatible must be at least as strong as the presumption that delegated legislation is valid unless and until declared invalid. But an order granting the applicants the interim relief which they seek will only serve their purpose if it declares that which Parliament has enacted to be the law from 1 December 1988, and to take effect in relation to vessels previously registered under the Act of 1894 from 31 March 1989, not to be the law until some uncertain future date. Effective relief can only be given if it requires the Secretary of State to treat the applicants' vessels as entitled to registration under Part II of the Act in direct contravention of its provisions. Any such order, unlike any form of order for interim relief known to the law, would irreversibly determine in the applicants' favour for a period of some two years rights which are necessarily uncertain until the preliminary ruling of the ECJ has been given. If the applicants fail to establish the right...e effect of the interim relief granted would be to have conferred upon them rights directly contrary to Parliament's sovereign will and correspondingly to have deprived British fishing vessels, as defined by Parliament, of the enjoyment of a substantial proportion of the United Kingdom quota of stocks of fish protected by the common fisheries policy. I am clearly of the opinion that, as a matter of English law, the court has no power to make an order which has these consequences.

It follows that this appeal must fall to be dismissed unless there is, as the applicants contend, some overriding principle derived from the jurisprudence of the ECJ which compels national courts of member states, whatever their own law may provide, to assert, and in appropriate cases to exercise, a power to provide an effective interlocutory remedy to protect putative rights in Community law once those rights have been claimed and are seen to be seriously arguable, notwithstanding that the existence of the rights is in dispute and will not be established unless and until the ECJ so rules. But before turning to consider the applicants' submissions on this aspect of Community law, a further and, as some may think, narrower and more technical question of English law has to be decided.

The Solicitor-General accepted in the courts below that it was not open to him to argue that the court had no jurisdiction to grant an interlocutory injunction against the Crown in the light of the majority judgments of the Court of Appeal in *Reg v Licensing Authority Established under Medicines Act 1968, Ex parte Smith Kline & French Laboratories Ltd (No 2)* [1989] 2 WLR 378 affirming the previous judgment of Hodgson J in *Reg v Secretary of State for the Home Department, Ex parte Herbage* [1987] QB 872. The point was kept for argument in your Lordships' House. Strictly speaking, I think that the views expressed in the two cases referred to were obiter, since in neither case did the court act on its view by proceeding to make an interim injunction against the Crown. But this matters not. The question for your Lordships is whether Hodgson J in *Herbage* and Woolf and Taylor LJJ, who were the majority in *Ex parte Smith Kline & French (No 2)*, were right in the conclusion they reached that, although the court has no jurisdiction to grant an interim injunction against the Crown in proceedings begun by writ, it has such a jurisdiction in proceedings on an application for judicial review.

The question at issue depends, first, on the true construction of section 31 of the Supreme Court Act 1981 which provides, so far as material:

"(1) An application to the High Court for one or more of the following forms of relief, namely -- (a) an order of mandamus, prohibition or certiorari; (b) a declaration or injunction under subsection (2); . . . shall be made in accordance with rules of court by a procedure to be known as an application for judicial review. (2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to -- (a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari; (b) the nature of the persons and bodies against whom relief may be granted by such orders; and (c) all the circumstances of the case, it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be. (3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates. (4) On an application for judicial review the High Court may award damages to the applicant if -- (a) he has joined with his application a claim for damages arising from any matter to which the application relates; and (b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages."

The essence of the reasoning leading to the conclusion that this section on its true construction confers a jurisdiction which never existed before to grant injunctions against the Crown appears from the following passage in the judgment of Woolf LJ in *Ex parte Smith Kline & French* (No 2), at pp 390-391:

"Turning to consider the provisions of the Act of 1981, it is important to note that there is a distinction between the way that the Act deals with the power of the courts to grant relief by way of injunction or by way of declaration from that which exists in relation to damages. Here, section 31(2) and section 31(4) are important."

The judgment then sets out the provisions of section 31(2).

"The effect of section 31(2), read literally, is that the court has a discretion to grant a declaration or grant an injunction at least in that class of cases where it was the practice previously to grant an order of mandamus, prohibition or certiorari, subject to the qualification that application is against the type of body or persons in relation to whom those orders normally would be available. This is a different basis of jurisdiction from that which previously existed."

The judgment then sets out the provisions of section 31(4).

"The position with regard to a claim for damages, therefore, is quite distinct from that in relation to a claim for a declaration or injunction because in respect of a claim for damages it has to be a situation where if the claim had been included in an action damages would be awarded. The key to the distinction between subsection (2) and subsection (4) of section 31 is that subsection (2) has the innovative effect of making a declaration or injunction for the first time a public law remedy in addition to being a private law remedy which could be used to obtain relief on the same basis against private bodies and public bodies, which was the position prior to the coming into force of the new procedure of judicial review. However, in the case of damages the

situation is otherwise. Damages could previously only be obtained in private law proceedings against a public body if private law, common law or statutory rights were breached and now the same restrictions apply in judicial review, that is public law proceedings, where damages are claimed. In my view, looking at the language of section 31 of the Act of 1981 alone, it is quite clear that the court's jurisdiction was being extended in relation to declarations and injunctions, but the court's jurisdiction was not being extended in relation to damages, and in relation to damages all that has happened is that there is a procedural

change, whereas in relation to declarations and injunctions not only has there been a procedural change there has also been a jurisdictional change Against that background to the statutory provisions I ask myself whether or not there is a power to grant an injunction against the Crown, and subject to what I have to say hereafter I conclude that there clearly is such a power under the new procedure."

The question at issue depends, secondly, on the true construction of RSC, Ord 53, r 3(10)(b) which provides:

"Where leave to apply for judicial review is granted, then -- . . . (b) if any other relief is sought, the court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ."

Proceeding from the premiss that section 31(2) of the Act of 1981 confers jurisdiction by statute in judicial review proceedings to grant injunctions against the Crown, the view of the majority in *Ex parte Smith Kline & French (No 2)* affirming Hodgson J in *Herbage* was that this provision in the rules, on its true construction, enables that statutory jurisdiction to be exercised to grant an interim injunction.

In my opinion, it is impossible to construe section 31 of the Act of 1981 except in the light of the relevant preceding history. In much that follows I am indebted to the submissions on this part of the case made on behalf of the Secretary of State by Mr Laws.

Before the passing of the Crown Proceedings Act 1947 the only means by which the Crown might be impleaded in court were by petition of right, action against the Attorney-General for a declaration and action against certain ministers or government departments which had been made liable to suit by statute. None of these procedures involved claims for injunctions. Officers of the Crown, acting as such, were likewise immune from suit. An exception to this proposition is said by Mr Forwood, who presented the argument for the applicants on this part of the case, to be established by *Tamaki v Baker* [1901] AC 561 where the defendant Baker was the New Zealand Commissioner of Crown lands. Lord Davey, delivering the judgment of the Privy Council, said, at p 576:

"Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority."

But the exception is apparent, not real. The same passage from Lord Davey's judgment was relied on by counsel for the plaintiff in *Hutton v Secretary of State for War* (1926) 43 TLR 106 in seeking to resist a preliminary point taken by the Attorney-General that an action against the Secretary of State for War, as such, would not lie. Referring to this passage in his judgment, Tomlin J said, at p 107:

"The plaintiffs' contention really received no support from the passage referred to when it was read in its context. What Lord Davey was really saying was that in a case where an official was sued as an individual for a wrongful act it was no defence to say that the wrongful act was done by him as an officer of the Crown. The argument that an action would lie against a Crown official, as such, when a wrong had been done which purported to be an exercise of a statutory authority, entirely failed."

Injunctions were never available in proceedings on the Crown side invoking the ancient jurisdiction to issue the prerogative writs of mandamus, prohibition and certiorari, which were transformed by section 7 of the Administration of Justice (Miscellaneous Provisions) Act 1938 into orders to the same effect.

The Act of 1947 by section 1 gives the right to sue the Crown in tort and in section 2 defines the scope of the Crown's liability in tort. Section 21 provides, so far as material:

"(1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require: Provided that:- (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; . . . (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

By definition in section 38(2)

"civil proceedings' includes proceedings in the High Court or the county court for the recovery of fines or penalties, but does not include proceedings on the Crown side of the King's Bench Division; . . . "

In the light of this definition, Hodgson J was, in my view, clearly right in *Reg v Secretary of State for the Home Department, Ex parte Herbage* [1987] QB 872 to reject an argument that proviso (a) to section 21(1) should be construed as extending to Crown side proceedings. The ambit of the words "any proceedings" in the proviso can be no wider than the ambit of the words "any civil proceedings" in the body of the subsection to which the proviso applies. Dicta to the contrary effect in *Reg v Inland Revenue Commissioners, Ex parte Rossminster Ltd* [1980] AC 952, on which Mr Laws relied with undisguised lack of enthusiasm, must be regarded as having been expressed per incuriam. But, having said that, it is important to add that the absence from the Act of 1947 of any express prohibition of the grant of injunctions against the Crown in proceedings on the Crown side is of no significance since, as already stated, injunctions were not available in Crown side proceedings and such a prohibition would have been otiose.

The previous common law position where an injunction is sought against an officer of the Crown is, in my view, effectively preserved by the combined effect of section 21(2) and the definition of the phrase "civil proceedings by or against the Crown" in section 23(2)(b) which provides:

"(2) Subject to the provisions of this section, any reference in this Part of this Act to civil proceedings against the Crown shall be construed as a reference to the following proceedings only:- . . . (b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action against the Attorney-General, any government department, or any officer of the Crown as such; . . . and the expression 'civil proceedings by or against the Crown' shall be construed accordingly."

In *Merricks v Heathcoat-Amory* [1955] Ch 567 the plaintiffs sought a mandatory injunction against the defendant requiring him to withdraw a draft scheme under the Agricultural Marketing Acts 1931-1949 which had been laid before both Houses of Parliament but was alleged to be ultra vires. It was argued that the defendant was not acting as a representative of the Crown but either in an official capacity as a person designated to perform statutory functions or in an individual capacity. Upjohn J rejected the argument. He said, at pp 575-576:

"It seems to me that from start to finish he was acting in his capacity as an officer representing the Crown. That being so, it is conceded that no injunction can be obtained against him, and therefore the motion falls in limine. I am not satisfied that it is possible to have the three categories which were suggested. Of course there can be an official representing the Crown, that is plainly this case. But if he were not, it was said that he was a person designated in an official capacity but not representing the Crown. The third suggestion was that his capacity was purely that of an individual. I understand the conception of the first and the third categories, but I confess to finding it difficult to see how the second category can fit into any ordinary scheme. It is possible that there may be special Acts where named persons have special duties to perform which would not be duties normally fulfilled by them in their official capacity; but in the normal

case where the relevant or appropriate minister is directed to carry out some function or policy of some Act, he is either acting in his capacity as a minister of the Crown representing the Crown, or is acting in his personal capacity, usually the former. I find it very difficult to conceive of a middle classification."

This judgment has been subject to academic criticism (see Wade, *Administrative Law*, 6th ed (1988), p 589) and Mr Forwood has submitted that Merricks was wrongly decided. It seems to me, however, that the judgment of Upjohn J accords entirely with the position in law before 1947, as explained in the judgment of Tomlin J in *Hutton v Secretary of State for War*, 43 TLR 106, which, as I have said, the Act of 1947 appears to me to be specifically intended to preserve.

The new Order 53 of the Rules of the Supreme Court was introduced in 1977 following the Law Commission's Report on Remedies in Administrative Law (1976) (Law Com No 73) (Cmd 6407). The relevant recommendations are set out in Part V headed "Recommendations for Reform." Under the sub-heading "(a) An application for judicial review," paragraph 43 reads:

"Our basic recommendation is that there should be a form of procedure to be entitled an 'application for judicial review.' Under cover of the application for judicial review a litigant should be able to obtain any of the prerogative orders, or, in appropriate circumstances, a declaration or an injunction"

Under the later sub-heading "(h) Interim relief on an application for judicial review, with special reference to the Crown" the Law Commission addressed as a quite distinct problem the lack of jurisdiction to grant interim injunctions against the Crown and set out its reasoning and recommendation in this regard in paragraph 51 as follows:

"We have pointed out that, where an application is being made for certiorari or prohibition, the court can give interim relief preserving the status quo pending a final decision under Ord 53, r 1(5); and where an injunction is being sought such interim relief can be obtained by means of an interlocutory injunction. However, an injunction cannot be obtained against the Crown although it is possible in such a case to get a declaration. But there is at present no form of interim declaration which in effect preserves the status quo pending the final declaration. We think it desirable that there should be a form of relief which would have this interim effect where a declaration is being sought against the Crown. We therefore recommend that section 21 of the Crown Proceedings Act 1947 should be amended to provide that, in addition to the power there given to make a declaratory order in proceedings against the Crown, there is also power to declare the terms of an interim injunction which would have been granted between subjects. In spite of the judicial doubts which have been expressed as to the logical character of a provisional declaration, we see no reason to doubt that the Crown would respect a declaration of the terms of an interim injunction in the same way as it respects a final declaratory order."

The Law Commission appended to its report a draft Bill by which it proposed that its recommendations should be implemented. The recommendation that interim relief should be available against the Crown was proposed to be implemented by clause 3(2) of the draft Bill in the following terms:

"In section 21 of the Crown Proceedings Act 1947 (nature of relief in civil proceedings by or against Crown), for paragraph (a) of the proviso to subsection (1) there shall be substituted the following paragraph:- '(a) the court shall not grant an injunction, or order specific performance, against the Crown but may in lieu thereof -- (i) in a case where the court is satisfied that it would have granted an interim injunction if the proceedings had been between subjects, declare the terms of the interim injunction that it would have made; or (ii) make an order declaratory of the rights of the parties;'"

The decision taken following the report to proceed by amendment of the Rules of the Supreme Court rather than by primary legislation limited the extent to which it was possible to implement the recommendations of the Law Commission, since the Rule Committee is only empowered to legislate in matters of practice and procedure and cannot extend the jurisdiction of the High Court. Accordingly the new Order 53 proceeded to implement the recommendation in paragraph 43 of the report (and clauses 1

and 2 of the proposed draft Bill) but did not, as it could not, seek to implement the recommendation in paragraph 51 (and clause 3(2) of the proposed draft Bill). The terms of Ord 53, r 1(1) and (2) are and were when the order was first promulgated in 1977 in all relevant respects identical with the terms subsequently enacted by section 31(1) and (2) of the Act of 1981.

If section 31 of the Act of 1981 were to be construed in isolation, I would see great force in the reasoning set out in the judgment of Woolf LJ in *Ex parte Smith Kline & French (No 2)*, [1989] 2 WLR 378, 390-391, which I have cited. But in the light of the history it seems to me that there are three reasons why it is impossible to construe section 31(2) as having the effect attributed to it by Woolf LJ of conferring a new jurisdiction on the court to grant injunctions against the Crown. First, section 31(2) and Ord 53, r 1(2) being in identical terms, the subsection and the sub-rule must have the same meaning and the sub-rule, if it purported to extend jurisdiction, would have been *ultra vires*. Secondly, if Parliament had intended to confer upon the court jurisdiction to grant interim injunctions against the Crown, it is inconceivable, in the light of the Law Commission's recommendation in paragraph 51 of its Report, that this would not have been done in express terms either in the form of the proposed clause 3(2) of the Law Commission's draft Bill or by an enactment to some similar effect. There is no escape from the conclusion that this recommendation was never intended to be implemented. Thirdly, it is apparent from section 31(3) that the relief to which section 31(2) applies is final, as opposed to interlocutory, relief. By section 31(2) a declaration may be made or an injunction granted "where an application for judicial review . . . has been made" But by section 31(3) "no application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; . . ." Under the rules there are two stages in the procedure, first the grant of leave to apply for judicial review on *ex parte* application under Ord 53, r 3, secondly the making of the application for judicial review which by rule 5 is required to be by originating motion or summons duly served on all parties directly affected. Section 31(2) is thus in terms addressed to the second stage, not the first, and is in sharp contrast with the language of Ord 53, r 3(10), which by its terms enables appropriate interim relief to be granted by the court at the same time as it grants leave to apply for judicial review. This point appeared to me at first blush to be one of some technicality. But on reflection I am satisfied that it conclusively refutes the view that section 31(2) was intended to provide a solution to the problem of the lack of jurisdiction to grant interim injunctions against the Crown. The form of final relief available against the Crown has never presented any problem. A declaration of right made in proceedings against the Crown is invariably respected and no injunction is required. If the legislature intended to give the court jurisdiction to grant interim injunctions against the Crown, it is difficult to think of any reason why the jurisdiction shall be available only in judicial review proceedings and not in civil proceedings as defined in the Act of 1947. Hence, an enactment which in terms applies only to the forms of final relief available in judicial review proceedings cannot possibly have been so intended.

Mr Forwood, replying for the applicants to Mr Laws' submissions on this part of the case, did not address any of the issues to which I have referred in the foregoing paragraph, but submitted instead that the power to grant interim injunctions against the Crown in judicial review proceedings derived from a purely procedural change effected by the introduction of the new Order 53 in 1977 which involved no extension of the court's jurisdiction and which it was within the power of the Rule Committee to make. I note that this submission runs entirely counter to the reasoning of Woolf LJ in *Ex parte Smith Kline & French (No 2)* in the passage from his judgment which I have cited. Mr Forwood relied in support of the submission on passages from the speeches delivered in your Lordships' House in *Reg v Inland Revenue Commissioners*, *Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 and *O'Reilly v Mackman* [1983] 2 AC 237. I do not find in those passages anything which supports the submission, since it is clear from the context that none of their Lordships had addressed their minds to the question of injunctions against the Crown.

I have accordingly reached the conclusion that the views expressed by Hodgson J in *Reg v Secretary of State for the Home Department*, *Ex parte Herbage* [1987] QB 872 and by the majority of the Court of Appeal in *Ex parte Smith Kline & French (No 2)* were erroneous and that, as a matter of English law, the absence of any jurisdiction to grant interim injunctions against the Crown is an additional reason why the order made by the divisional Court cannot be supported.

In turn finally to consider the submission made on behalf of the applicants that, irrespective of the position under national law, there is an overriding principle of Community law which imposes an obligation on the national court to secure effective interim protection of rights having direct effect under Community law where a seriously arguable claim is advanced to be entitled to such rights and where the rights claimed will in substance be rendered nugatory or will be irretrievably impaired if not effectively protected during any interim period which must elapse pending determination of a dispute as to the existence of those rights. The basic propositions of Community law on which the applicants rely in support of this submission may be quite shortly summarised. Directly enforceable Community rights are part of the legal heritage of every citizen of a member state of the EEC. They arise from the Treaty itself and not from any judgment of the ECJ declaring their existence. Such rights are automatically available and must be given unrestricted retroactive effect. The persons entitled to the enjoyment of such rights are entitled to direct and immediate protection against possible infringement of them. The duty to provide such protection rests with the national court. The remedy to be provided against infringement must be effective, not merely symbolic or illusory. The rules of national law which render the exercise of directly enforceable Community rights excessively difficult or virtually impossible must be overridden.

Mr Vaughan, in a most impressive argument presented in opening this appeal, traced the progressive development of these principles of the jurisprudence of the ECJ through a long series of reported decisions on which he relies. I must confess that at the conclusion of his argument I was strongly inclined to the view that, if English law could provide no effective remedy to secure the interim protection of the rights claimed by the applicants, it was nevertheless our duty under Community law to devise such a remedy. But the Solicitor-General, in his equally impressive reply, and in his careful and thorough analysis of the case law, has persuaded me that none of the authorities on which Mr Vaughan relies can properly be treated as determinative of the difficult question, which arises for the first time in the instant case, of providing interim protection of putative and disputed rights in Community law before their existence has been established. This is because the relevant decisions of the ECJ, from which the propositions of Community law asserted by Mr Vaughan are derived, were all made by reference to rights which the ECJ was itself then affirming or by reference to the protection of rights the existence of which had already been established by previous decisions of the ECJ.

In the light of the course which I propose that your Lordships should take, it would serve no useful purpose for me to attempt an analysis of the voluminous Community case law to which the main arguments have been directed. It is significant to note, however, that Community law embodies a principle which appears closely analogous to the principle of English law that delegated legislation must be presumed to be valid unless and until declared invalid. In *Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten* (Case 101/78) [1979] ECR 623 the validity of a regulation made by the Council of the EEC was challenged in proceedings before the court of a member state. In answering questions referred to it under article 177 of the Treaty the ECJ held that every regulation which is brought into force in accordance with the Treaty must be presumed to be valid and must be treated as fully effective so long as a competent court has not made a finding that it is invalid. On the other hand, in *Firma Foto-Frost v Hauptzollamt Lubeck-Ost* (Case 314/85) [1988] 3 CMLR 57, 80 the ECJ said in giving judgment, again on a reference under article 177:

"It should be added that the rule that national courts may not themselves declare Community acts invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures; however, that case is not referred to in the national court's question."

In the light of these two authorities and in application of the principle laid down by the ECJ in *SRL CILFIT v Ministry of Health* (Case 283/81) [1982] ECR 3415, I do not think that it is open to your Lordships' House to decide one way or the other whether, in relation to the grant of interim protection in the circumstances of the instant case, Community law overrides English law and either empowers or obliges an English court to make an interim order protecting the putative rights claimed by the applicants. It follows, I think, that your Lordships are obliged under article 177 of the Treaty to seek a preliminary ruling from the ECJ. I would propose that the questions to be referred should read as follows:

1. Where -- (i) a party before the national court claims to be entitled to rights under Community law having direct effect in national law ("the rights claimed"), (ii) a national measure in clear terms will, if applied, automatically deprive that party of the rights claimed, (iii) there are serious arguments both for and against the existence of the rights claimed and the national court has sought a preliminary ruling under article 177 as to whether or not the rights claimed exist, (iv) the national law presumes the national measure in question to be compatible with Community law unless and until it is declared incompatible, (v) the national court has no power to give interim protection to the rights claimed by suspending the application of the national measure pending the preliminary ruling, (vi) if the preliminary ruling is in the event in favour of the rights claimed, the party entitled to those rights is likely to have suffered irremediable damage unless given such interim protection, does Community law either (a) oblige the national court to grant such interim protection of the rights claimed; or (b) give the court power to grant such interim protection of the rights claimed? 2. If question 1(a) is answered in the negative and question 1(b) in the affirmative, what are the criteria to be applied in deciding whether or not to grant such interim protection of the rights claimed?"

The adjournment of further consideration of the appeal which must necessarily follow is, I recognise, a most unsatisfactory result from the applicants' point of view, and I venture to express the hope that the ECJ will, so far as their procedures permit, treat the reference made by your Lordships' House as one of urgency to which priority can be given.

4. THE NEW CHALLENGES

4.1 Decision of the German Constitutional Court on Maastricht

Constitutional Court

12 October 1994

193 33 I.L.M. 388 (1994)

Headnotes:

1. Art. 38 GG [Grundgesetz] forbids the weakening, within the scope of Art. 23 of the GG, of the legitimation of State power gained through an election, and of the influence on the exercise of such power, by means of a transfer of duties and responsibilities of the Federal Parliament, to the extent that the principle of democracy, declared as inviolable in Art. 79, para. 3 in conjunction with Art. 20, paras. 1 and 2 of the GG, is violated.

2. The principle of democracy does not prevent the Federal Republic of Germany from becoming a member of an inter-governmental community which is organised on a supranational basis. However, it is a precondition of membership that the legitimation and influence which derives from the people will be preserved within an alliance of States.

3. a) If a community of States assumes sovereign responsibilities and thereby exercises sovereign powers, the peoples of the Member States must legitimate this process through their national parliaments. Democratic legitimation derives from the link between the actions of European governmental entities and the parliaments of the Member States. To an increasing extent in view of

the degree to which the nations of Europe are growing together, the transmission of democratic legitimation within the institutional structure of the European Union by the European Parliament elected by the citizens of the Member States must also be taken into consideration.

b) The important factor is that the democratic foundations upon which the Union is based are extended concurrent with integration, and that a living democracy is maintained in the Member States while integration proceeds.

4. If the peoples of the individual States (as is true at present) convey democratic legitimation via the national parliaments, then limits are imposed, by the principle of democracy, on an extension of the functions and powers of the European Communities.

The German Federal Parliament must retain functions and powers of substantial import.

5. Art. 38 of the GG is violated if a law which subjects the German legal system to the direct validity and application of the law of the supranational European Communities does not give a sufficiently precise specification of the assigned rights to be exercised and of the proposed program of integration (see BVerfGE 58, 1<37>). This also means that any subsequent substantial amendments to that program of integration provided for by the Maastricht Treaty or to its authorizations to act are no longer covered by the Act of Accession to this Treaty. The German Federal Constitutional Court must examine the question of

whether or not legal instruments of European institutions and governmental entities may be considered to remain within the bounds of the sovereign rights accorded to them, or whether they may be considered to exceed those bounds (see BVerfGE 75, 223).

6. When standards of competence are being interpreted by institutions and governmental entities of the Communities, the fact that the Maastricht Treaty draws a basic distinction between the exercise of limited sovereign powers and amendment of the Treaty must be taken into consideration. Thus, interpretation of such standards may not have an effect equivalent to an extension of the Treaty; if standards of competence were interpreted in this way, such interpretation would not have any binding effect on Germany.

7. Acts of the particular public power of a supranational organisation which is separate from the State power of the Member States may also affect those persons protected by basic rights in Germany. Such acts therefore affect the guarantees provided under the Basic Law and the duties of the Federal Constitutional Court, which include the protection of basic rights in Germany, and not only in respect of German governmental institutions (notwithstanding BVerfGE 58, 1 <27>). However, the Federal Constitutional Court exercises its jurisdiction regarding the applicability of derivative Community law in Germany in a "cooperative relationship" with the European Court of Justice.

8. The Maastricht Treaty establishes an inter-governmental community for the creation of an ever closer union among the peoples of Europe, which peoples are organised on a State level (Art. A of the Maastricht Treaty), rather than a State which is based upon the people of one State of Europe.

9. a) Art. F, para. 3 of the Maastricht Treaty does not empower the Union to acquire by itself the financial or other means it believes it requires to attain its objectives.

b) Art. L of the Maastricht Treaty excludes the jurisdiction of the European Court of Justice only for those provisions of the Maastricht Treaty which do not authorise the Union to take actions to which holders of basic rights in the sovereign territory of the Member States are subject.

c) The Federal Republic of Germany is not, by ratifying the Maastricht Treaty, subjecting itself to an uncontrollable, unforeseeable process which will lead inexorably towards monetary union; the Maastricht Treaty simply paves the way for gradual further integration of the European Community as a community of laws. Every further step along this way is dependent either upon conditions being fulfilled by the parliament which can already be foreseen, or upon further consent from the Federal Government, which consent is subject to parliamentary influence.

Grounds for the Decision:

A.

The constitutional complaints concern German participation in the establishment of the European Union by the Act amending the Basic Law [Gesetz zur Änderung des Grundgesetzes] of 21 December 1992 (BGBl. [Federal Law Gazette] I p. 2086 and the Law of 28 December 1992 on the Treaty on European Union of 7 February 1992 (BGBl. II p. 1251).

I.

1. On 7 February 1992 the Treaty on European Union (hereinafter "Maastricht Treaty") negotiated by the Member States of the European Communities was signed in Maastricht in the Netherlands.

[...]

2. The Act Amending the Basic Law of 21 December 1992 (which, among other things, added Art. 23, Art. 28 para. 1 sentence 3, Art. 52 para. 3a, and Art. 88 sentence 2 to the Basic Law) was promulgated in the Federal Law Gazette I of 24 December 1992 (p. 2086), and entered into force on 25 December 1992.

Art. 23, para. 1 of the Basic Law [Grundgesetz, hereinafter GG] reads as follows:

The Federal Republic of Germany shall co-operate in the development of the European Union in order to realize a united Europe which is bound to observe democratic, constitutional, social and federal principles and the principle of subsidiarity, and which guarantees the protection of basic rights in a way which is substantially comparable to that provided by this Basic Law. The

Federation may, by law, with the approval of the Federal Council, assign sovereign rights. Article 79, paras. 2 and 3 shall apply with respect to the establishment of a European Union and amendments to its foundations by treaty, and with respect to comparable regulations, under which this Basic Law shall be substantively amended or supplemented or such amendments or supplements shall be made possible.

[...]

A second sentence has been added to Art. 88 of the Basic Law concerning the German Central Bank [Deutsche Bundesbank]:

Its duties and competences may, within the scope of the European Union, be assigned to a European Central Bank which is independent and which undertakes to attain the overriding objective of price stability.

3. On 2 December 1992 the Federal Parliament [Bundestag] adopted in the final reading the Law approving the Maastricht Treaty (Sten.Ber. 12/126 pp. 10879 ff.) by 543 out of 568 votes cast; on 18 December 1992 the Federal Council [Bundesrat] approved the law by a unanimous vote (BRDrucks. 810/92, Sten.Ber. of the 650th session of 18 December 1992). The law was promulgated on 30 December 1992 in the Federal Law Gazette and entered into force on 31 December 1992 (BGBl II pp. 1251 ff.). In the session of 2 December 1992, the Federal Parliament adopted a resolution on the economic and monetary union which reads:

[...]

4. Pursuant to Art. R., Para. 1 of the Maastricht Treaty, the Treaty is subject to ratification by all Member States in accordance with their respective constitutional requirements. The instruments of ratification are to be deposited with the government of the Italian Republic.

After the complainants had filed an application for the issuance of a temporary injunction in order to prevent the Federal Republic of Germany from being bound by the Maastricht Treaty under international law, the Federal President explained via the Chief of the Office of the Federal President that he would not sign the instrument of ratification until the Federal Constitutional

Court had reached a decision on the main issue. The Federal Government gave an assurance that the instrument of ratification would not be deposited for the time being.

II.

The constitutional complaints relate to the Act of Accession [Zustimmungsgesetz] to the Maastricht Treaty and to the Act Amending the Basic Law. Complainant Number One claims that his basic rights and

constitutional guarantees equivalent to basic rights arising from the following provisions of the Basic Law have been violated:

[...]

B.

The constitutional complaint filed by Complainant Number One against the Act of Accession to the Maastricht Treaty is only admissible to the extent that it claims that rights arising from Art. 38 of the GG have been violated. Otherwise, the constitutional complaints are inadmissible.

[...]

C.

To the extent that the constitutional complaint filed by Complainant Number One is admissible, it is unfounded. The only criterion which the Federal Constitutional Court may apply in examining the granting of sovereign powers to the European Union and to those Communities associated with it in this case is that of the guarantee contained in Art. 38 of the GG (see I. below). This guarantee is not violated by the Act of Accession, as the content of the Treaty demonstrates. The Treaty establishes a European community of States which is borne by the Member States and which respects the national identities of those Member States; it is concerned with Germany's membership in supranational organisations, and not with membership in a single European State (II.1.). The functions of the European Union and the powers granted for its realisation are standardised by the Treaty in a manner sufficiently foreseeable to ensure that the principle of limited individual powers is observed, that no exclusive competence for jurisdictional conflicts is established for the European Union, and that the assertion of other functions and powers by the European Union and the European Communities is dependent upon amendments and supplements to the Treaty and therefore to the consent of the national parliaments (II.2.). The process of forming political will in the European Union and in the governmental institutions of the European Communities set forth in the Treaty and the scope of the functions and powers granted do not weaken the responsibilities for decision-making and control of the Federal Parliament in such a way that the principle of democracy which is declared inviolable by Art. 79 Para. 3 of the GG is infringed (II.3.).

I.

1. The right granted by Art. 38 of the Basic Law to participate, by means of elections, in the legitimation of State power and to influence the implementation of that power, precludes, within the scope of application of Art. 23 of the GG, such right being weakened by reassignment of the functions and the authority of the Federal Parliament in such a way that the principle of democracy declared inviolable by Art. 79 para. 3 in conjunction with Art. 20 paras. 1 and 2 of the GG is infringed (see B.1.a. above).

2. Pursuant to Art. 79 para. 3 of the GG, it is an inviolable element of the principle of democracy that the performance of State functions and the exercise of State power derive from the people of the State and that they must, in principle, be justified to that people. This sequence of responsibility may be created in various ways, not just in a single specific way. The crucial factor is that a sufficient proportion of democratic legitimation, a specific level of legitimation, is achieved (see BVerfGE 83, 60 <72>).

a) If the Federal Republic of Germany becomes a member of a community of States which is entitled to take sovereign action in its own right, and if that community of States is entrusted with the exercise of independent sovereign power (both of which the GG expressly permits for the realisation of a unified Europe, Art. 23, para. 1 of the GG), then democratic legitimation cannot be effected in the same way as it can within a State regime which is governed uniformly and conclusively by a State constitution. If sovereign rights are granted to supranational organisations, then the representative body elected by the people, i.e., the German Federal Parliament, and with it the enfranchised citizen, necessarily lose some of

their influence upon the processes of decision-making and the formation of political will. Accession to an inter-governmental community has the consequence that any individual member of that community is bound by decisions made by it. Of course, a State, and with it its citizens, which is a member of such a community also gains opportunities to exert influence as a consequence of its participation in the process of forming political will within the community for the purpose of pursuing common (and with those, individual) goals. The fact that the outcome of these goals is binding upon all Member States necessarily assumes that each Member State acknowledges the fact that it is bound.

The willingness to be bound within a community under international law and within the close legal alliance of an inter-governmental community is appropriate for a democratic State which (as the Preamble to the GG assumes and Art. 23 and Art. 24 specifically provide) wishes to participate as an equal member in intergovernmental institutions in general and in the development of the European Union in particular. The Member States participate in the process of forming the political will of the alliance of States, on the basis of the organisational and procedural law of the alliance, but are also bound by the consequences of this process of forming political will, irrespective of whether or not their own participation contributes to such consequences. The fact that sovereign powers are granted to an alliance means that the exercise of such powers is no longer always dependent upon the will of a single Member State. To regard this as a violation of the principle of democracy contained within the Basic Law would not just be in conflict with the openness toward integration which the Basic Law evidences, and which the framers of the Basic Law sought to and succeeded in expressing in 1949, but would also assume a concept of democracy which would render any democratic State unable to become part of an integrated inter-governmental community unless the principle of unanimity were adopted. The imposition of unanimity as a general requirement would, by definition, give the will of the individual State priority over that of the inter-governmental community and would therefore bring into question the very structure of such a community. Such a conclusion is not compatible with the wording or with the sense of Art. 23 or Art. 24 of the GG. Legislation must be enacted before the granting of sovereign rights which the said articles make possible may be implemented; the requirement of legislation (Art. 23 para. 1 sentence 2, Art. 24 para. 1 of the GG) shifts the political responsibility for consent to grant sovereign rights to the Federal Parliament (together with the Federal Council) as the national representative body. The Federal Parliament is required to discuss and to decide upon the far-reaching consequences, not least in relation to the powers of the Federal Parliament itself, associated with consent of this nature. The democratic legitimation of both the existence of the inter-governmental community, and of the powers of that community to enter into majority votes which are binding upon the Member States, is based on Act of Accession to such an inter-governmental community. The majority principle is, however, restricted by the constitutional principles and the fundamental interests of the Member States, which, pursuant to the principle of mutual consideration arising from allegiance to the community, must be respected.

b) The principle of democracy does not, therefore, prevent the Federal Republic of Germany from becoming a member of an inter-governmental community which is organised on a supranational basis. However, it is a precondition of membership that the legitimation and influence which derives from the people will be preserved within an alliance of States.

(1) According to its own definition as a union among the peoples of Europe (Art. A, para. 2), the European Union is an alliance of democratic States which seeks to develop dynamically (see Art. B para. 1 final indent; Art. C para. 1 of the Maastricht Treaty); if it performs sovereign tasks and exercises sovereign powers, it is in the first instance the peoples of the individual States which must, through their national parliaments, provide democratic legitimation for such action.

As the functions and powers of the Community are extended, the need will increase for representation of the peoples of the individual States by a European Parliament that exceeds the democratic legitimation and influence secured via the national parliaments, and which will form the basis for democratic support for the policies of the European Union. The common Union citizenship established by the Maastricht Treaty forms a legal bond between the citizens of the individual Member States which is designed to be lasting; it is not characterised by an intensity comparable to that which follows from common membership in a single State, but it does lend legally binding expression to that level of existential community which

already exists (see in particular Art. 8 b para. 1 and para. 2). The influence which derives from the citizens of the Community may develop into democratic legitimation of European institutions, to the extent that the following conditions for such legitimation are fulfilled by the peoples of the European Union:

If democracy is not to remain a formal principle of accountability, it is dependent upon the existence of specific privileged conditions, such as ongoing free interaction of social forces, interests, and ideas, in the course of which political objectives are also clarified and modified (see BVerfGE 5, 85 <135, 198, 205>; 69, 315 <344 ff.>), and as a result of which public opinion moulds political policy. For this to be achieved, it is essential that both the decision-making process amongst those institutions which implement sovereign power and the political objectives in each case should be clear and comprehensible to all, and also that the enfranchised citizen should be able to use its own language in communicating with the sovereign power to which it is subject.

In cases where they do not already exist, actual conditions of this kind may be developed, in the course of time, within the institutional framework of the European Union. A development of this kind is dependent not least upon the nations concerned being kept informed of the objectives of the Community institutions and of the decisions made by those institutions. Political parties, trade associations, the press, and broadcasting stations are both a medium and a factor in this process of information, in the course of which a European public opinion should develop (see Art. 138 a). The European Council is also endeavouring to achieve more clarity and transparency in the European decision-making process (see Statement of Birmingham: A Citizen's Community, sub-para. 2,3, BullBReg. No. 115 of 23 October, 1992, p. 1058; conclusions drawn by the President of the European Council in Edinburgh <11 and 12 December, 1992>, Part A, Section 7 and Annex 3, BullBReg. No. 140 of 28 December, 1992, p. 1278, 1284 f.).

(2) Within the community of States which is the European Union, democratic legitimation is by necessity effected by the parliaments of the individual Member States receiving information on the activities of the European institutions. To an increasing extent in view of the degree to which the nations of Europe are growing together, the transmission of democratic legitimation within the institutional structure of the European Union by the European Parliament elected by the citizens of the Member States must also be taken into consideration. Even at the present stage of development, legitimation by the European Parliament has a supportive function, which could be strengthened if the European Parliament were elected on the basis of a uniform electoral law in all Member States pursuant to Art. 138, para. 3 of the EC Treaty and if its influence on the policy and law-making of the European Communities were to increase. The important factor is that the democratic foundations upon which the Union is based are extended concurrent with integration, and that a living democracy is maintained in the Member States while integration proceeds. If too many functions and powers were placed in the hands of the European inter-governmental community, democracy on the level of the individual States would be weakened to such an extent that the parliaments of the Member States would no longer be able to convey adequately that legitimation of the sovereign power exercised by the Union.

If the peoples of the individual States (as is true at present) convey democratic legitimation via the national parliaments, then limits are imposed, by the principle of democracy, on an extension of the functions and powers of the European Communities. State power in each of the States emanates from the people of that State. The States require sufficient areas of significant responsibility of their own, areas in which the people of the State concerned may develop and express itself within a process of forming political will which it legitimates and controls, in order to give legal expression to those matters which concern that people on a relatively homogenous basis spiritually, socially, and politically (see H. Heller, Politische Demokratie und soziale Homogenität, Gesammelte Schriften, Vol. 2, 1971, p. 421 <427 ff.>).

All of this leads to the conclusion that the German Federal Parliament must retain functions and powers of substantial import.

c) The exercise of sovereign powers by an inter-governmental community such as the European Union is based upon authorisation by States which retain their sovereignty, and which regularly act through their governments in international affairs and thereby control integration. Therefore, the exercise of sovereign

powers is largely determined by governments. If community powers of this nature are based upon the democratic process of forming political will conveyed by each individual people, they must be exercised by an institution delegated by the governments of the Member States, which are themselves subject to democratic control.

Notwithstanding the requirement for democratic control of the governments, the enactment of European rules of law may also rest with an institution comprised of representatives of the governments of the Member States, i.e. an executive body, to a greater extent than would be acceptable under the constitutional law of the individual States.

3. Since an enfranchised German exercises, by means of elections to the German Federal Parliament, his right to participate in the democratic legitimation of those governmental entities and institutions which are entrusted with the implementation of sovereign powers, the Federal Parliament must also make decisions about Germany's membership in the European Union, and about the continuation and development of such membership.

Art. 38 of the GG is therefore violated if a law which subjects the German legal system to the direct validity and application of the law of the supranational European Communities does not give a sufficiently precise specification of the assigned rights to be exercised by the European Communities and of the proposed program of integration (see BVerfGE 58, 1 <37>). Unless the extent and the scale to which the German legislator has consented to the reassignment of sovereign rights are clear, it would be possible for the European Communities to exercise functions and powers which are not mentioned. This would amount to a general authorisation for the exercise of such functions and powers, and would therefore amount to renunciation of those rights, against which Art. 38 of the GG protects.

However, in view of the fact that the text of a Treaty under international law has to be negotiated between the contracting parties, the demands placed upon the precision and solidity of the Treaty provisions cannot be as great as those which are otherwise prescribed for a law by the parliamentary reservation [Parlamentensvorbehalt] (see BVerfGE 77, 170 <231 f.>). The important factor is that the Federal Republic of Germany's membership and the rights and obligations which arise from it, in particular the legally binding direct activity of the European Communities in the domestic legal territory, have been defined foreseeably for the legislator in the Treaty, and that the legislator has standardised them to a sufficiently definable level in the Act of Accession to the Treaty (see BVerfGE 58, 1 <37>; 68, 1 <98 f.>). This also means that any subsequent substantial amendments to that program of integration provided for by the Maastricht Treaty or to its authorizations to act are no longer covered by the Act of Accession to this Treaty (see BVerfGE 58, 1 <37>; 68, 1 <98 f.>, mentioned above; Mosler, in: Handbuch des Staatsrechts, Vol. VII <1992>, s 175, Annotation 60). If, for example, European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it upon which the German Act of Accession is based, any legal instrument arising from such activity would not be binding within German territory. German State institutions would be prevented by reasons of constitutional law from applying such legal instruments in Germany. Accordingly, the German Federal Constitutional Court must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the bounds of the sovereign rights accorded to them, or whether they may be considered to exceed those bounds (see BVerfGE 58, 1 <30 f.>; 75, 223 <235, 242>).

II.

Those elements of the Maastricht Treaty subject to examination in the present proceedings satisfy these requirements.

As has already been stated, the Maastricht Treaty establishes an inter- governmental community for the creation of an ever closer union among the peoples of Europe, which peoples are organised on a State

level (Art. A), rather than a State which is based upon the people of one State of Europe. In view of these facts, the question raised by Complainant Number One as to whether or not the

GG allows or excludes German membership in a European State does not arise. Only the Act of Accession to Germany's membership in an inter- governmental community need be judged here.

1.

a) The Member States have established the European Union in order to perform some of their duties and to exercise some of their sovereignty jointly. In the resolution which they passed at Edinburgh on 11 and 12 December, 1992 (Part B, Annex 1, BullBReg. No. 140 of 28 December, 1992, p. 1290), the Heads of State or of Government which belong to the European Council stressed that independent and sovereign States have, within the framework of the Maastricht Treaty, resolved, of their own free will and in accordance with existing treaties, to exercise some of their powers jointly. Accordingly, the Maastricht Treaty takes account of the independence and sovereignty of the Member States, in that it imposes an obligation upon the European Union to respect the national identities of its Member States (Art. F, para. 1; see also the conclusions drawn by the President of the European Council in Birmingham on 16 October, 1992, BullBReg. No. 115 of 21 October, 1992, p. 1057), and grants the European Union and the European Communities specific powers and responsibilities only, on the basis of the principle of limited individual powers (Art. E Maastricht Treaty, Art. 3 b para. 1 EC Treaty). By so doing, it has elevated the principle of subsidiarity to the level of a binding legal principle for the European Union (Art. B, para. 2, of the Maastricht Treaty) and the European Community (Art. 3 b, para. 2, EC Treaty).

The term "European Union" may indeed suggest that the direction ultimately to be taken by the process of European integration after further amendments to the Treaty is one which will lead towards further integration, but in fact the actual intention expressed does not confirm this (Delors, *Entwicklungsperspektiven der Europäischen Gemeinschaft*, in: *Aus Politik und Zeitgeschichte* <Annex to "Das Parlament"> 1/93, p. 3 <4>). In any case, there is no intention at the moment to establish a "United States of Europe" comparable in structure to the United States of America (see the speech made by the Chancellor of the Federal Republic of Germany on 6 May, 1993 in Cologne, BullBReg. No. 39 of 17 May, 1993, p. 341 <343 f.>). The new Art. 88-1 inserted into the French constitution to take account of the Maastricht Treaty also makes reference to Member States which will act jointly in the European Union and the European Communities in the fulfilment of their responsibilities.

If they are exercised by the observation of sovereign rights, the responsibilities and powers attributed to the European Union and to the communities associated with it remain essentially the activities of an economic community. The central areas of activity of the European Community are the customs union and free movement of goods (Art. 3, letter a of the EC Treaty), the internal market (Art. 3, letter c of the EC Treaty), the approximation of the laws of the Member States to the extent required for the functioning of the common market (Art. 3, letter h of the EC Treaty), the co-ordination of Member States' economic policies (Art. 3 a, para. 1, of the EC Treaty), and the development of monetary union (Art. 3 a, para. 2, of the EC Treaty). Outside the European Communities, co-operation shall remain inter-governmental, in particular with regard to foreign and security policy as well as justice and home affairs (see B.2.c above).

Therefore, even after the Maastricht Treaty has entered into force, the Federal Republic of Germany remains a member of an inter-governmental community, the authority of which is derived from the Member States and has binding effect in German sovereign territory only if a German order governing application of law [Rechtsanwendungsbefehl] is issued in respect of it. Germany is one of the "High contracting parties" which have given as the reason for their commitment to the Maastricht Treaty, concluded "for an unlimited period" (Art. Q), their desire to be members of the European Union for a lengthy period; such membership may, however, be terminated by means of an appropriate act being passed. The validity and application of European law in Germany derive from the order governing application of law contained in the Act of Accession. Germany is therefore maintaining its status as a sovereign State in its own right as well as the status of sovereign equality with other States in the sense of Art. 2, sub-para. 1 of the UN Charter of 26 June, 1945 (BGBl. 1973 II p. 430).

b) The required influence of the Federal Parliament is guaranteed in the first instance by the fact that Art. 23, para. 1 of the GG makes it necessary for an act to be passed before Germany may become a member of the European Union, or before such membership may develop further by an amendment to the basic treaty instruments or an extension of the European Union's powers; if the conditions shown in sentence 3 are fulfilled, an act of this nature requires the affirmative vote for which Art. 79, para. 2 of the GG provides. Furthermore [...],

2. The Maastricht Treaty satisfies the requirements in terms of precision, because it regulates to a sufficiently foreseeable degree the procedure for future exercise of the sovereign powers granted (see BVerfGE 58, 1 <37>; 68, 1 <98 f.>), based upon the parliamentary accountability provided for by the Act of Accession. The concern expressed by the complainant, i.e. that, in view of its far-reaching aims, the European Community could, unless new parliamentary orders governing application of law are issued, develop into a political union with sovereign rights which cannot be ascertained in advance, is without foundation. The Maastricht Treaty adopts and confirms that principle of limited individual powers which applied previously to the European Communities (a); this principle is not brought into question by Art. F, para. 3 of the Maastricht Treaty, which does not establish any exclusive competence for jurisdictional conflicts (b); the opportunities for the allocation of other duties and powers to the European Union and the European Community are restricted by regulations which are sufficiently precise (c); furthermore, to the extent that development of European Monetary Union is regulated, these regulations are of a sufficiently precise nature (d, e, f).

((a), (b), (c), (d), (e), (f)...))

3. The assignment by the Maastricht Treaty of tasks and powers to European governmental institutions leaves the German Federal Parliament with sufficient tasks and powers of substantial political import. The Treaty provides a sufficiently reliable limit for the impetus towards further integration contained in it; this limit maintains the balance between the structure for governmental decisions within the European inter-governmental community and the rights to reservations on decisions and to participation in decisions held by the German Federal Parliament.

a) The Federal Parliament's, and therefore the electorate's, opportunities for exercising influence on the implementation of sovereign rights by European governmental institutions are, however, almost eliminated to the extent that the European Central Bank is provided with independence from the European Community and the Member States (Art. 107 of the EC Treaty).

[...]

This restriction of the democratic legitimation which derives from the electorate in the Member States does affect the principle of democracy, but should be regarded as one of those modifications of this principle for which Art. 88, sentence 2 of the GG provides and which is therefore compatible with Art. 79, para. 3 of the GG.

[...]

b) Otherwise, the functions and powers of the European Union and of the Communities which belong to it are, as has been shown, described in the Treaty and therefore in the German Act of Accession in terms of specific elements, which means that the far-reaching objectives stated in the Preamble and in Art. B of the Maastricht Treaty do not justify the exercise of sovereign rights, but simply confirm the political objective of realizing an ever closer union among the peoples of Europe. The Maastricht Treaty therefore complies with the principle that arises from the increasing degree of integration, i.e., that the scope to act of European governmental institutions should not only be oriented towards particular objectives, but should also be set down in terms of the actual means available for it. The functions and powers of such institutions should, therefore, be objectively limited.

The Maastricht Treaty and in particular the EC Treaty adhere to the principle of limited individual powers (see 2.a above).

Pursuant to this principle, it is indeed possible for an individual provision which accords functions or powers to be interpreted in the context of the objectives of the Treaty; however, this objective does not by itself constitute sufficient grounds for the establishment or extension of functions or powers (H.P. Ipsen, *Europaisches Gemeinschaftsrecht*, 1972, p. 559). Furthermore, by its express references to the requirements for an amendment to the Treaty (Art. N) or for an extension to the it (Art. K 9), the Maastricht Treaty distinguishes between development of the law contained in the Treaties (see BVerfGE 75, 223 <240 ff.> on judicial development of the law) and law-making which exceeds the limits of the Treaties and is not covered by the present law of treaties.

This is the measure which Art. 23, para. 1 of the GG adopts in its requirement that an Act of Accession be passed with regard both to amendments to the treaty principles upon which the European Union is based and to comparable regulations.

The fact that the Treaties establishing the European Communities on the one hand set down defined factual circumstances under which sovereign rights are assigned, and on the other hand regulate amendments to Treaties under one regular and one simplified procedure, constitutes a distinction which is also important for the interpretation of the individual powers in the future. If to date dynamic expansion of the existing Treaties has been based upon liberal interpretation of Art. 235 of the EEC Treaty in the sense of a "competence which rounds off the Treaty" (Vertragsabrundungskompetenz], upon considerations of the implied powers of the European Communities, and upon interpreting the Treaty in the sense of the maximum possible exploitation of the Community's powers ("effet utile") (see Zuleeg, in: von der Groeben/Thiesing/Ehlermann, *EWG-Vertrag*, 4th Ed. 1991, Art. 2, Annotation 3), when standards of competence are being interpreted by institutions and governmental entities of the Communities in the future, the fact that the Maastricht Treaty draws a basic distinction between the exercise of limited sovereign powers and amendment of the Treaty will have to be taken into consideration. Thus interpretation of such standards may not have an effect equivalent to an extension of the Treaty; indeed, if standards of competence were interpreted in this way, such interpretation would not have any binding effect on Germany.

c) The interpretation of this principle of limited individual powers is clarified and restricted still further by the principle of subsidiarity. The principle of subsidiarity is established for the European Community in Art. 3 b, Para. 2 of the EC Treaty;

[...]

d) The third fundamental principle of the constitution of the Community is the principle of reasonableness, which is governed by Art. 3 b, para. 3 of the EC Treaty.

[...]

4. In conclusion, the Maastricht Treaty regulates the restricted powers to act of the governmental entities and institutions of the three European Communities; the exercise of these powers varies, based on which action may be taken and the intensity of the regulations. The Treaty grants legally-definable sovereign rights, which grant has received parliamentary approval and thus democratic legitimation as well. The development of integration established in the Maastricht Treaty and in the Treaties on the European Communities is derived not from general objectives, but from concrete functions and powers to act.

D.

The Maastricht Treaty grants further substantial functions and powers to European institutions, in particular by extending the powers of the EC and by incorporating the monetary policy. These functions

and powers have not, as yet, been supported at the treaty level by a corresponding intensification and extension of the principles of democracy. The Maastricht Treaty establishes a new level of European unification, the purpose of which, according to the express intention of the contracting parties, is to enhance further the democratic and efficient functioning of the institutions (Preamble, 5th consideration). According to this consideration, democracy and efficiency cannot be separated from one another, and it is anticipated that enhancement of the principle of democracy will improve the functioning of all institutions on a Community level. At the same time, the Union respects, pursuant to Art. F, para. 1 of the Maastricht Treaty, the national identities of its Member States, whose systems of government are founded on the principles of democracy. To this extent the Union protects and builds upon those principles of democracy which already exist in the Member States.

Further development of the European Union cannot be removed from this context. The legislator amending the constitution took this context into account in connection with this treaty by the addition of Art. 23 to the GG, which refers expressly to the development of a European Union committed to the principles of democracy, the rule of law, social principles, federalism, and the principle of subsidiarity. It is therefore crucial, both from the point of view of treaty law and that of constitutional law, that the principles of democracy upon which the Union is based are extended in step with its integration, and that a living democracy is retained in the Member States while the process of integration is proceeding.

[...]

4.2 Decision of the German Constitutional Court (Banana Saga)

(See 2 BvL 1/97; http://www.bverfg.de/entscheidungen/frames/ls20000607_2bv1000197)

This judgment is the most recent one in the German Banana Saga. When ruling on the admissibility of an action brought against the EC Regulation on the market organization for bananas, the German Constitutional Court once again came to pronounce on the competences of ECJ and itself regarding the judicial protection of fundamental rights.

In its decision of June 7th, 2000, the German Constitutional Court ruled on the compatibility of the application of the EC Regulation 404/93 of 13 February 1993, on the common organization of the market in bananas, in Germany with the German Constitution – the *Grundgesetz* (GG).

In the course of the initial proceedings before the Administrative Court Frankfurt (AC), several German importers of bananas brought an action against the limitation of the import of third-country bananas, introduced by EC Regulation 404/93.

In a preliminary ruling referred by the German AC, the ECJ confirmed the conformity of regulation 404/93 with EC law. In the following, the AC referred to the German Constitutional Court the question whether the EC market regulation for bananas was compatible with the GG. According to the AC, regulation 404/93 infringed the importers' rights of property, free professionalism and equality of treatment. As to the admissibility of its reference, the AC observed that it was for the German Constitutional Court (CC) to safeguard the rights guaranteed in the GG if the ECJ cannot warrant these rights.

Referring to its *Solange II*–Judgment, the CC declared the reference to be inadmissible. Accordingly, the CC becomes active only when the ECJ quits the standard of fundamental rights as determined by the CC in the *Solange II*–Judgment.

The reference of the AC does not provide any reasons that the evolution of EC law and ECJ jurisprudence lead to a standard of fundamental rights below the *Solange II*–standard. It is for this reason that a reference has to demonstrate in detail that the protection of the fundamental rights is generally not guaranteed. This necessitates the confrontation of the level of protection of fundamental rights both on national and Community level.

The reasoning of the AC's reference is due to a misunderstanding of the *Maastricht*–Judgment. The AC errs when assuming that, after the *Maastricht*–Judgment, the CC exercises again its competence in safeguarding fundamental rights, even if in cooperation with the ECJ. The *Maastricht*–Judgment did neither reverse nor limit the *Solange II*–Judgment.

Furthermore, having regard to the preliminary ruling of the ECJ in the course of this proceedings, full particulars of a negative evolution in the protection of fundamental rights in the ECJ jurisprudence would have been particularly necessary.

[...]

4.3 Decision of the Belgian “Cour d’arbitrage” (European Schools)

Cour d’Arbitrage

Arrêt n° 12/94

3 February 1994

(Moniteur Belge 1994, p. 6137-6146)

Numéros du rôle : 544-545

En cause: les questions préjudicielles posées par le juge de paix du canton de Mol, par jugements en cause de la Schola *Europea* contre respectivement L. Hermans-M.-L. Van Iersel.

La Cour d’arbitrage,

composée des présidents L. De Grève et M. Melchior, et des juges K. Blanckaert, H. Boel, P. Martens, Y. de Wasseige et G. De Baets, assistée du greffier L. Potoms, Présidée par le président L. De Grève, après en avoir délibéré, rend l’arrêt suivant:

I. Objet de la question préjudicielle

Par deux jugements du 20 avril 1993, le juge de paix du canton de Mol a posé une question préjudicielle identique, libellée comme suit:

« La loi du 28 février 1959 (...) approuvant le Protocole du 12 avril 1957 portant le ‘Statut de l’Ecole européenne’, protocole qui dispose en son article 26 que des contributions scolaires sont mises à la charge des parents d’élèves par décision du Conseil supérieur, viole-t-elle l’article 17, § 3, *in fine*, de la Constitution belge qui prévoit que l’accès à l’enseignement est gratuit jusqu’à la fin de l’obligation scolaire et/ou le même article constitutionnel est-il violé par la loi du 8 novembre 1975 (...) portant approbation:

1. a) du Protocole signé à Luxembourg le 13 avril 1962, concernant la création d’Ecoles européennes, établi par référence au Statut de l’Ecole européenne signé à Luxembourg le 12 avril 1957;

b) du Protocole relatif à l’application provisoire du Protocole concernant la création d’Ecoles européennes, signé à Luxembourg le 13 avril 1962;

2. de l’Accord entre le Gouvernement du Royaume de Belgique et le Conseil supérieur de l’Ecole européenne, signé à Bruxelles le 12 octobre 1962, en ce que l’Ecole européenne de Mol-Geel demande aux parents des élèves belges le paiement d’un minerval pour l’enseignement secondaire?»

II. Les faits et la procédure antérieure

Les époux Hermans-Jacobs et Heuvelmans-Van Iersel ont été assignés par l’Ecole européenne de Mol en vue du paiement d’une contribution scolaire pour leurs enfants au titre de l’année scolaire 1989-1990.

Devant le juge qui a ordonné le renvoi, ils ont allégué pour leur défense qu'en vertu de l'article 17, § 3, de la Constitution et de l'article 2 du Protocole additionnel à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, l'accès à l'enseignement doit être gratuit. Le juge de paix a des lors décidé de poser la question préjudicielle précitée.

III. *La procédure devant la Cour*

[...]

IV. *Les dispositions en cause*

1. L'article unique de la loi du 28 février 1959 «portant approbation du Statut de l'Ecole européenne créée au siège de la Communauté européenne du charbon et de l'acier et du Protocole de signature, signés à Luxembourg le 15 juillet 1957» dispose que les actes internationaux précités qui sont approuvés sortissent «leur plein et entier effet» .

Comme il ressort du préambule du premier acte cité, l'objectif poursuivi était d'accorder un statut définitif et de reconnaître les diplômes et certificats de l'établissement d'enseignement maternel, primaire et secondaire créé à Luxembourg à l'initiative de l'Association des intérêts éducatifs et familiaux des fonctionnaires de la Communauté européenne du charbon et de l'acier, avec l'appui des six membres fondateurs de la Communauté européenne. Ainsi était consolidée cette «expérience d'éducation en commun d'enfants de diverses nationalités, conformément à un programme d'études qui reflète le plus largement possible les aspects communs des traditions éducatives nationales et les diverses cultures qui forment ensemble la civilisation européenne». L'article 6 du Statut dispose que l'Ecole a le statut d'un «établissement public» au regard de la législation de chacune des Parties contractantes.

En vertu de l'article 2 du Statut de l'Ecole européenne, celle-ci est «ouverte aux enfants des ressortissants des Parties contractantes. Les enfants des autres nationalités peuvent y être admis selon les règles définies par le Conseil supérieur prévu à l'article 8». Ce Conseil supérieur est constitué par les ministres de l'Education et/ou des Relations culturelles des Parties contractantes.

[...]

L'article 26 du Statut, le plus important pour l'affaire présente, dispose:

«Le budget des recettes et des dépenses de l'Ecole est alimenté par:

- 1) les contributions versées par les Parties contractantes sur la base de la répartition des charges effectuée par le Conseil supérieur;
- 2) les subventions des Institutions avec lesquelles l'Ecole a conclu des accords;
- 3) les dons et legs acceptés par le Conseil supérieur;
- 4) les contributions scolaires mises à la charge des parents d'élèves par décision du Conseil supérieur.»

Sur la base de l'article 28, le Conseil supérieur de l'Ecole européenne peut négocier avec le Gouvernement du pays du siège de l'Ecole tout accord complémentaire afin d'assurer à celle-ci les meilleures conditions matérielles et morales de fonctionnement. Aux termes de l'article 30, toute Partie contractante pourra dénoncer le Statut par notification écrite adressée au Gouvernement luxembourgeois.

2. Considérant qu'il était souhaitable de renouveler en d'autres lieux l'expérience de l'Ecole européenne de Luxembourg, les six Parties contractantes ont signé le 13 avril 1962 un Protocole concernant la création d'autres Ecoles européennes. Conformément à son article 1er, alinéa 1er, des établissements peuvent être créés sur le territoire des Parties contractantes «pour l'éducation et l'enseignement en

commun d'enfants du personnel des Communautés européennes». Le deuxième alinéa du même article dispose que d'autres enfants, quelle que soit leur nationalité, peuvent également y être admis. En vertu du troisième alinéa de cet article, ces établissements sont régis par les dispositions du Statut de l'Ecole européenne, sous réserve des règles particulières contenues dans le Protocole du 13 avril 1962.

L'article 8 de ce Protocole autorise les Gouvernements des pays où une Ecole a son siège à faire usage de la possibilité d formuler des réserves. Lors du dépôt de son instrument de ratification le 30 décembre 1975, la Belgique a formulé la réserve suivante: «L'application du deuxième alinéa de l'article 1er ne porte pas atteinte à la législation belge concernant les conditions d'accès au établissements d'enseignement».

[...]

Les arguments des parties

[...]

- B -

Quant à l'objet de la question préjudicielle

B.1. La question préjudicielle porte sur la compatibilité de:

- la loi du 28 février 1959 approuvant l'article 26, 4), du Protocole du 12 avril 1957 portant le Statut de l'Ecole européenne, en vertu duquel le Conseil supérieur des Ecoles européennes peut exiger une contribution scolaire

- la loi du 8 novembre 1975 approuvant des dispositions sur la base desquelles l'Ecole européenne de Mol réclame aux parents d'élèves belges le paiement d'un minerval pour l'enseignement secondaire

avec l'article 17, § 3, *in fine* de la Constitution.

Compte tenu de la motivation de la décision posant la question préjudicielle, c'est exclusivement l'article 17, § 3, alinéa 1er, deuxième phrase, de la Constitution qui est visé.

Quant à la compétence de la Cour

B.2. L'article 107ter, § 2 alinéa 2, 2^o, de la Constitution dispose que la Cour d'arbitrage statue, par voie d'arrêt, sur la violation par une loi, un décret ou une règle visée à l'article 26bis, des article 6, 6bis et 17 de la Constitution.

Le troisième alinéa du même paragraphe prévoit que la Cour peut être saisie par toute autorité que la loi désigne, par toute personne justifiant d'un intérêt ou, à titre préjudicielle, par toute juridiction.

Ce texte n'établit aucune distinction quant à l'étendue du contrôle de constitutionnalité selon que la Cour est saisie par une autorité, par une personne justifiant d'un intérêt ou par une juridiction.

B.3. L'article 107ter, § 2, alinéa 1er de la Constitution dispose que la composition, la compétence et le fonctionnement de la Cour d'arbitrage sont déterminés par la loi. Cette disposition a été exécutée par la loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage. Dans le titre 1er de la loi, qui concerne la compétence de la Cour, le chapitre 1er traite des recours en annulation (articles 1er à 25), le chapitre II des questions préjudicielles (articles 26 à 30). Ces dispositions n'établissent pas davantage de distinction, dans la compétence attribuée à la Cour de contrôler la conformité des normes législatives aux articles 6, 6bis et

17 de la Constitution, selon que la Cour est saisie par un recours en annulation ou par une question préjudicielle.

L'article 3, § 2, de la loi spéciale du 6 janvier 1989 reconnaît expressément la compétence de la Cour pour statuer sur le recours en annulation dirigés contre une loi, un décret ou une règle visée à l'article 26bis de la Constitution par lesquels un traité reçoit l'assentiment.

Aux termes de l'article 26 de la loi spéciale du 6 janvier 1989, la Cour d'arbitrage statue, à titre préjudiciel, par voie d'arrêt, sur les recours en annulation dirigés contre une loi, un décret ou une règle visée à l'article 26bis de la Constitution par lesquels un traité reçoit l'assentiment.

Cette disposition n'exclut nullement les lois, décrets ou ordonnances par lesquels un traité reçoit l'assentiment.

B.4. Au demeurant, le Constituant, qui interdit que le législateur adopte des normes législatives internes contraires aux normes visées par l'article 107ter de la Constitution, ne peut être censé autoriser ce législateur à le faire indirectement par le biais de l'assentiment donné à un traité international.

Par ailleurs, aucune norme du droit international - lequel est une création des Etats -, même pas l'article 27 de la Convention de Vienne de 1969 sur le droit des traités, ne donne aux Etats le pouvoir de faire des traités contraires à leur Constitution.

B.5. La Cour est donc compétente pour répondre à la question posée.

Quant à la question préjudicielle

B.6. Les lois d'assentiment du 28 février 1959 et du 8 novembre 1975 énoncent que les actes internationaux visés «sortiront leur pleine et entier effet».

Le contrôle de la Cour implique l'examen du contenu des dispositions des actes internationaux pertinentes pour la présente affaire. La Cour devra toutefois exécuter son contrôle en tenant compte de ce qu'en l'espèce, il s'agit non d'un acte de souveraineté unilatérale mais d'une norme conventionnelle produisant également des effets de droit en dehors de l'ordre juridique interne.

Au fond

B.7.1. L'article 17, § 3, de la Constitution dispose:

«Chacun a droit à l'enseignement dans le respect des libertés et droits fondamentaux. L'accès à l'enseignement est gratuit jusqu'à la fin de l'obligation scolaire.

Toutes les élèves soumis à l'obligation scolaire ont droit, à charge de la Communauté, à une éducation morale ou religieuse.»

B.7.2 Dans la note explicative accompagnant la proposition du Gouvernement de révision de l'article 17 de la Constitution, la proposition d'insérer un nouveau paragraphe 3, alinéa 1er, deuxième phrase, est commentée comme suit:

«L'obligation scolaire implique le droit à l'enseignement et, partant, également sa gratuité tant qu'il est obligatoire.

Le pacte scolaire et la loi sur le pacte scolaire prévoient la gratuité de l'enseignement fondamental et secondaire organisé ou subventionné par l'Etat. Il ne peut être perçu aucun minerval direct ou indirect.»

[...]

Le Constituant de 1988 a érigé en une garantie constitutionnelle dont le respect est assuré par la Cour le principe, déjà consacré par la législation du pacte scolaire, selon lequel l'accès à l'enseignement est gratuit jusqu'au terme de l'obligation scolaire dans les écoles organisées ou subventionnées par le pouvoirs publics.

B.7.3 La Belgique compte trois Ecoles européennes. [...] En vertu de l'article 26, 4), du Statut, le Conseil supérieur des Ecoles européennes a imposé une contribution scolaire.

[...]

Une exonération de la contribution est cependant accordée pour les enfants de certaines personnes, telles que le personnel des Communautés [...].

Conformément à la possibilité prévue à l'article 1er, alinéa 2, du Protocole du 13 janvier 1962, d'autres enfants sont en principe également admis à l'Ecole européenne - et donc aussi à celle de Mol - moyennant toutefois le respect de priorités et d'un certain nombre d'autres conditions relatives à la connaissance des langues et au nombre maximum d'élèves par classe, et moyennant le paiement de la contribution scolaire.

La Cour n'est interrogée qu'au sujet d'élèves belges relevant de cette catégorie. Elle limitera donc sa réponse à la situation de ces élèves.

B.7.4. Les Ecoles européennes sont organisées par ou en vertu d'accords de droit international et sont administrées par un organe supranational agissant en tant que pouvoir organisateur.

Ces Ecoles sont principalement financées par le biais des contributions versées par les Parties contractantes sur la base de la répartition des charges effectuée par le Conseil supérieur, conformément à l'article 26, 1), du Statut de l'Ecole européenne. Le fait que l'Etat belge soit tenu, en vertu de l'accord conclu le 12 octobre 1962 avec le Conseil supérieur de l'Ecole européenne conformément à l'article 28 du Statut, de mettre à disposition des bâtiments scolaires, de les entretenir, de les assurer et de les équiper en mobilier et matériel didactique ne permet pas de conclure qu'il s'agit en l'espèce d'un établissement subventionné par le pouvoirs publics et auquel la garantie de l'article 17, § 3 de la Constitution serait applicable.

En raison de leur statut particulier, les Ecoles européennes ne peuvent donc être considérées comme dispensant un enseignement dont l'accès doit être gratuit conformément à l'article 17, § 3 de la Constitution.

L'article 17, § 3 de la Constitution n'empêche aucunement que le Conseil supérieur des Ecoles européennes fixe une contribution scolaire et que l'Ecole européenne de Mol exige des parents d'élèves belges le paiement d'un minerval.

[...]

4.4 Decision of the Italian Constitutional Court on Art. 234 (ex 177)

With this decision, the Italian Constitutional Court decided that it itself does not fall in the category of “court or tribunal” of Article 234 (ex 177) TEC. The Court reached this conclusion on the basis of a “funcionalist” argument. According to the Constitutional Court, its function is to ensure the respect for the Constitution by the constitutional organs and therefore differs substantially from the function of the judicial organs. In the Constitutional Court’s view, when the need to clarify a question on the interpretation of Community law arises, it is up to the judicial organs to make a reference to the ECJ under Art. 234 (ex 177) TEC. The Constitutional Court also added that it is only after such a question of Community law has been clarified by the ECJ that the judicial organs may - if the need arises - raise before the Constitutional Court a question of constitutionality regarding Community law.

Italian Constitutional Court

15 December 1995

n. 536

Decisioni della Corte Costituzionale 1995, p. 4459-4463

ORDINANZA - (15 dicembre) 29 dicembre 1995 n. 536 - Pres. Ferri - Red. Granata - S.r.l. Messaggero Servizi - Ufficio del Registro di Padova - Pres. Cons. Ministri (Avv. gen. Stato).

[12064/96] Corte costituzionale - Costituzionalità (questione di) - In genere - Norma comunitaria presupposto della censura ad una disposizione interna - Riforma del sistema tributario - Legge di delega - Adeguamento della discipline ad una direttiva comunitaria - Legislatore delegato - Omessa attuazione della direttiva - Asserito vizio di eccesso di delega - Interpretazione certa ed affidabile della norma comunitaria - Necessità - Restituzione degli atti.

(Cost., art. 76; d.P.R. 26 aprile 1986 n. 131, tariffa all., art. 4 comma 1 lett. e punto 2, d.lgs. 31 ottobre 1990 n. 347, artt. 2 e 10, nonché tariffa allegata, art. 1; d.P.R. 26 ottobre 1972 n. 643, art. 2 comma 2).

Vanno restituiti al giudice remittente gli atti relativi alla questione sollevata, in quanto viene allegata a presupposto della censura di costituzionalità una norma comunitaria sulla cui effettiva portata mancano precedenti puntuali, perché esso giudice adisca la Corte di giustizia delle Comunità europee - alla quale sola è demandata l'interpretazione con forza vincolante per tutti gli Stati membri di quella normativa -, affinché individui in modo compiuto e definitivo, e con carattere di certezza ed affidabilità, il contenuto delle norme espresse dalle disposizioni comunitarie. Alla Corte costituzionale, infatti - ferma la possibilità del controllo di costituzionalità per violazione dei principi fondamentali e dei diritti inviolabili della persona -, non compete fornire l'interpretazione della normativa comunitaria che non risulti di per sé di «chiara evidenza», né di adire il giudice comunitario, non potendosi assimilare alla «giurisdizione nazionale», cui si riferisce l'art. 177 del trattato istitutivo della CEE, il giudice delle leggi, che, per la funzione di suprema garanzia dell'osservanza della Costituzione della Repubblica, non è incluso fra gli organi giudiziari, ordinari o speciali che siano (1).

Nel giudizio di legittimità costituzionale art. 4, comma 1, lett. a), punto 2) della tariffa, parte prima, allegata al d.P.R. 26 aprile 1986 n. 131 (Approvazione del testo unico delle disposizioni concernenti l'imposta di registro); artt. 2 e 10 d.lgs. 31 ottobre 1990 n. 347 (Approvazione del testo unico delle disposizioni concernenti le imposte ipotecaria e catastale) e 1 della tariffa allegata; art. 2, comma 2, d. P. R 26 ottobre 1972 n. 643 (Istituzione dell'imposta comunale sull'incremento di valore degli immobili) promosso con ordinanza emessa il 12 dicembre 1994 dalla Commissione tributaria di secondo grado di Padova sui ricorsi riuniti proposti da s.r.l. Messaggero Servizi ed altri contro Ufficio del Registro di Padova, iscritta al n. 252 del registro ordinanze 1995 e pubblicata nella *Gazzetta Ufficiale* della Repubblica n. 19, 1^a serie spec., dell'anno 1995.

Visti gli atti di costituzione dell'Istituto Teologico Missioni Estere dei Frati Minori Conventuali S. Antonio Dottore, nonché l'atto di intervento del Presidente del Consiglio dei Ministri;

udito nella udienza pubblica del 21 novembre 1995 il Giudice relatore Renato Granata;

uditi l'avv. Enrico De Mita per l'Istituto Teologico Missioni Estere dei Frati Minori Conventuali S. Antonio Dottore e l'Avvocato dello Stato Franco Favara per il Presidente del Consiglio dei Ministri.

Ritenuto che con ordinanza del 12 dicembre 1994 la Commissione tributaria di secondo grado di Padova - nel corso del giudizio promosso dalla S.r.l. Messaggero Servizi ed altri, avente oggetto l'impugnativa dell'atto con cui l'Ufficio del registro aveva liquidato le imposte di registro, ipotecaria e catastale, nonché l'INVIM, riferite ad una delibera di aumento di capitale della società suddetta mediante conferimento (anche) di immobili - ha sollevato questione incidentale di legittimità costituzionale dell'art. 4, comma 1, lettera a), punto 2) della tariffa, parte prima, allegata al d.P.R. 26 aprile 1986 n. 131, degli artt. 2 e 10 d.lgs. 31 ottobre 1990 n. 347, dell'art. 1 della tariffa allegata al medesimo decreto legislativo, nonché dell'art. 2, comma 2, d. P. R. 26 ottobre 1972 n. 643, in riferimento all'art. 76 Cost., nella parte in cui non prevedono che i conferimenti a società di capitali vengano assoggettati ad aliquota unica non superiore all'1%, così come stabilito dalla direttiva del Consiglio delle Comunità europee del 17 luglio 1969 n. 335 concernente le imposte indirette sulla raccolta dei capitali, e siano parimenti esenti dalle imposte catastale ed ipotecaria e dall'INVIM;

- che - ad avviso della Commissione rimettente - la menzionata normativa comunitaria *in parte qua* deve essere interpretata nel senso che non è suscettibile di diretta applicabilità nell'ordinamento giuridico nazionale;
- che però - ritiene ancora la Commissione rimettente - il contenuto precettivo (ancorché non autoapplicativo) della direttiva rileva sotto altro profilo perché la legge di delega ad emanare le disposizioni di riforma del sistema tributario (legge 9 ottobre 1971 n. 825) prevedeva (all'art. 7) che la disciplina dell'imposta di registro, ipotecaria e catastale, dovesse adeguarsi alla citata direttiva comunitaria n. 335 del 1969, onde, non avendo il legislatore delegato dato attuazione alla direttiva, le norme censurate sarebbero affette da vizio di eccesso di delega;
- che è intervenuto il Presidente del Consiglio dei Ministri rappresentato e difeso dall'Avvocatura generale dello Stato chiedendo che la questione sollevata sia dichiarata inammissibile o infondata;
- che si è costituita una delle parti conferenti, la quale ha chiesto in via principale la dichiarazione di inammissibilità della questione di costituzionalità in ragione della ritenuta efficacia diretta della direttiva CEE n. 335 del 1969 (contrastando in tal modo l'opposta interpretazione offerta dalla Commissione rimettente ed aderendo all'interpretazione accolta da altra - e a suo dire prevalente - giurisprudenza) ed in via subordinata la dichiarazione di incostituzionalità delle disposizioni censurate;

Considerato che l'esame della prospettata questione di costituzionalità - essendo questa fondata sull'interpretazione della citata direttiva - esige che il contenuto delle norme espresse dalle disposizioni comunitarie sia compiutamente e definitivamente individuato secondo le regole all'uopo dettate da quell'ordinamento, in guisa che tale contenuto si presenti connotato dai caratteri della certezza ed affidabilità necessitati dall'irreversibilità degli effetti che nell'ordinamento nazionale conseguirebbero ad

una eventuale pronuncia di incostituzionalità, quale quella ipotizzata dalla Commissione rimettente per emendare il denunciato vizio delle disposizioni censurate;

- che - ferma per un verso la possibilità del controllo di costituzionalità per violazione dei principi fondamentali e dei diritti inviolabili della persona (cfr. da ultima sent. n. 509 del 1995) - non compete per altro verso a questa Corte fornire l'interpretazione della normativa comunitaria che non risulti di per sé di «chiara evidenza» (sent. n. 168 del 1991), né tanto meno le spetta risolvere i contrasti interpretativi insorti (come nella fattispecie) in ordine a tale normativa, essendone demandata alla Corte di giustizia delle Comunità europee la interpretazione con forza vincolante per tutti gli Stati membri;
- che detto giudice comunitario non può essere adito - come pur ipotizzato in una precedente pronuncia (sent. n. 168 del 1991, cit.) - dalla Corte costituzionale, la quale «esercita essenzialmente una funzione di controllo costituzionale, di suprema garanzia della osservanza della Costituzione della Repubblica da parte degli organi costituzionali dello Stato e di quelli delle Regioni» (sent. n. 13 del 1960);
- che pertanto nella Corte costituzionale non è ravvisabile quella «giurisdizione nazionale» alla quale fa riferimento l'art. 177 del trattato istitutivo della Comunità Economica Europea, poiché la Corte non può «essere inclusa fra gli organi giudiziari, ordinari o speciali che siano, tante sono, e profonde, le differenze tra il compito affidato alla prima, senza precedenti nell'ordinamento italiano, e quelli ben noti e storicamente consolidati propri degli organi giurisdizionali» (sent. n. 13 del 1960, cit.);
- che è invece il giudice rimettente, il quale allegghi, come nella specie, la norma comunitaria a presupposto della censura di costituzionalità, a doversi far carico - in mancanza di precedenti puntuali pronunce della Corte di giustizia - di adire quest'ultima per provocare quell'interpretazione certa ed affidabile che assicuri l'effettiva (e non già ipotetica e comunque precaria) rilevanza e non manifesta infondatezza del dubbio di legittimità costituzionale circa una disposizione interna che nel raffronto con un parametro di costituzionalità risenta, direttamente o indirettamente, della portata della disposizione comunitaria;
- che quindi gli atti vanno restituiti al giudice rimettente, come già ritenuto da questa Corte in analoga fattispecie (ord. n. 200 del 1976).

P. Q. M. LA CORTE COSTITUZIONALE

Ordina la restituzione degli atti al giudice rimettente.

L'ordinanza che ha sollevato la questione è pubblicata in G.U. n. 19 del 10 maggio 1995, 1^a serie spec.

(1) Sui rapporti) fra normative comunitaria e normative interna v. indicazioni nella nota redaz. alla sent. n. 94 del 1995, in questa *Rivista* 1995, 803-806. V. anche sent. n. 458 del 1995 e relativa nota redaz., in questa *Rivista* 1995, 3560 ss.; ed in seguito, sentt. nn. 461, 509 del 1995.

La Corte esclude possa rimettere gli atti alla Corte di giustizia CEE e li restituisce al giudice *a quo* (perché proceda, eventualmente, in questo senso): v., in senso conforme, ord. n. 206 del 1976 ed, in senso dubitativo sul punto, sent. n. 168 del 1991. La Corte richiama, altresì, a sostegno di detta impossibilità, una risalente giurisprudenza che ne sottolineava il ruolo peculiare e non assimilabile, *sic et simpliciter*, a quello della giurisdizione: cfr., oltre alla richiamata sent. n. 13 del 1960, anche sent. n. 38 del 1957. Sulla Corte costituzionale come giudice *a quo* v., peraltro, note redaz. alla sent. n. 4 - del 1995, in questa *Rivista* 1995, 3576 ss.

[...]

4.5 Decision of the Spanish Constitutional Court on Maastricht (Municipal Electoral Rights)

(See [1994] 3 Common Market Law Reports 101)

[...]

1. By an application registered at this Court on 13 May 1992, the State Attorney, acting in his lawful capacity and by virtue of the resolution adopted by the State Government at the meeting of the Council of Ministers held on 24 April 1992, adopted under the provisions of Article 95.2 of the Constitution and under section 78(1) of the Organic Law on the Constitutional Court, has asked this Court to deliver its judgment on the existence or not of a contradiction between Article 13.2 of the Constitution and Article 8b(1) E.C., in the wording that results from Article G(B)(10) of the Treaty of European Union (hereinafter E.U.), signed at Maastricht on 7 February 19-92, and to issue a declaration on the matters referred to in the resolution.

In the resolution of the Council of Ministers of 24 April 1992, it was in effect decided to begin the consultation procedure provided for in Article 95.2 of the Constitution, with the object of obtaining the opinion of this Court on a possible contradiction between the Constitution and Article 8b(1) E.C., in the wording given to it by Article G(B)(10) E.U., the text of which is as follows.

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 to be adopted before 31 December 1994 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.

[...]

JUDGMENT

1

[1] This application which has been brought by the Government is the first that has been submitted by the means provided for in Article 95.2 of the Constitution read together with, in its turn, section 78 of the Organic Law on the Supreme Court. Therefore and also in order the better to clarify the terms of this question, it is necessary at this stage to give some initial consideration to the procedure laid down in those provisions and to the scope of the question that has been submitted for examination by this Court.

[2] By way of the route provided for in Article 95.2 of the Constitution, this Court is given the twofold task of preserving the Constitution and at the same time of ensuring the safety and stability of the commitments to be entered into by Spain at the international level. As supreme interpreter of the Constitution, the Court is called upon to rule on the possible contradiction between it and a Treaty, the text of which, already finally fixed, has not yet received the consent of the State (section 78.1 of the Organic Law on the Supreme Court). Should the doubt as to constitutionality be confirmed, the Treaty will not be able to be ratified without a prior constitutional amendment (Article 95.1 of the Constitution). In this way the primacy of the Constitution is guaranteed through the procedure provided for in its Part X, and at the same time the Treaty acquires, as regards that part of it undergoing examination, full legal status by reason of the binding nature of the declaration of the Court (section 78.2 of the Organic Law on the Supreme Court), which is the reason for this precautionary examination.

- [3] Although such supremacy is in any event ensured by the opportunity to dispute (sections 27.2(c), 31 and 32.1 of the Organic Law on the Supreme Court) or question (section 35 of the Organic Law on the Supreme Court) the constitutionality of treaties once they form part of the internal legal order (Article 96.1 of the Constitution), the disturbance that would be involved for foreign policy and the international relations of the State in a possible declaration of lack of constitutionality of a treaty entered into is obvious. The purpose of examining such matters in advance, as is provided for in the Constitution, is to avoid any disturbance of that kind. In consequence this twofold purpose has to be borne in mind in interpreting Article 95 of the Constitution and section 78 of the Organic Law on the Supreme Court in order to ascertain the proper subject-matter of our decision, the scope of that decision, and the function in its adoption performed by this Court and by the organs lawfully entitled to submit applications to the Court and to be heard in applications brought before us by others.
- [4] As regards this latter point, one must start by saying that what we can be asked to deliver is a declaration, not a judgment; a decision, not a mere opinion based on the law. This Court does not cease to be a court by reason of the fact that it occasionally transforms itself, in response to the application before it, into a consultative body. The application, in addition to containing questions concerning unconstitutionality, expresses a reasonable doubt, but what is required of us is not a set of reasons resolving the question, but a binding decision.
- [5] Therefore, and although this procedure is not necessarily contentious in nature, such a state of affairs does not alter the position of the Court as supreme interpreter of the Constitution. Just as in any other action, the Court acts here as the jurisdictional organ that it is, and its declaration, therefore, can only be based on arguments of a juridical and constitutional nature, whether such arguments have or have not been submitted by the applicant or by any other entity having lawfully submitted observations. Having regard to the foregoing, the examination of the Court should be limited to making a comparison between the Constitution, as regards any of its provisions, and the provision or provisions of the Treaty submitted to precautionary examination. For Article 95.1 of the Constitution has reserved exclusively to the Government and to each of the Chambers the power of submitting any doubt as to constitutionality. Therefore the Court cannot ask the question and answer it of its own motion. As in other proceedings, the Court cannot take the initiative and is bound by the constitutional principle of congruence. Such is the position without prejudice to the fact that the Court can request further information or clarifications or further particulars pursuant to section 78.3 of the Organic Law on the Supreme Court.
- [6] However and in any event, either the decision adopted by this Court confirms the constitutionality of the legal provision the object of the examination, or it may declare, on the contrary, that it is not compatible with our fundamental law. This decision carries with it the Spanish practical effects of *res judicata*. Although the form of such a declaration does not merit the legal description of "judgment" (cf. section 86.2 of the Organic Law on the Supreme Court), it is a judicial decision of a binding nature (section 78.2 of the Law) and, as such, produces *erga omnes* all the effects of *res judicata* (Article 164.1 at end of the Constitution). This applies both as regards the negative or exclusionary effects, which would hamper the bringing before this Court of the matter to which the declaration relates, by means of proceedings with a view to a declaration of unconstitutionality. It also applies to the positive effects or effects in the nature of a preliminary ruling that require all public authorities to respect and comply with our declaration. In particular, if the declaration were to say that a given provision is contrary to the Constitution, the immediate and directly enforceable effect is that the Constitution must be amended before the Treaty concerned is ratified.

2

- [7] In the light of the foregoing, it is now possible precisely to identify what it is that is to be the object of our examination and declaration in these proceedings. The doubt as to the constitutionality submitted by the Government affects the future Article 8b(1) of the Treaty establishing the European Community (of which Spain became a member under the authority of Organic Law 10/1985) in its new wording introduced by Article G of the Treaty of European Union.

[...]

- [7] As has been stated in the background information above, the pleadings of the State Attorney, whereby this application has been submitted, ask whether that provision is compatible with the provisions of Article 13.2 of the Constitution. This comparison is in effect sought - and indeed made - in the application submitted by way of a resolution adopted by the Council of Ministers. Both in the introductory pleadings and in the text of the application itself the request for a declaration, which takes the form of proposed rulings, is set out by means of three questions (paragraph 4 of the facts) the order and wording of which now, however, require some clarification in a systematic manner.
- [8] The applicant body first asks us to pronounce on the constitutionality of relying on the means provided for in Article 93 of the Constitution and on whether such reliance is adequate and sufficient, from the constitutional point of view, for the purpose of approving the Maastricht Treaty, and then requests the Court to examine "where applicable", and in the second place, the existence or otherwise of a contradiction between the future Article 8b(1) E.C. and Article 13.2 of the Constitution, and as to the lawfulness of the interpretation of Article 11 of the Constitution that the Government, in its application, puts forward, and by virtue of which, should that interpretation be accepted by the Court, it would still not be necessary to amend the Constitution.
- [9] The above exposition of successive and subsidiary requests cannot be accepted. In accordance with the provisions of Article 95.1 of the Constitution, which, by reason of its generality, is applicable to every sort of treaty, including those signed under the ambit of Article 93, "the making of an international treaty that contains provisions contrary to the Constitution shall require the prior amendment of the Constitution". From the wording of that provision, it is sufficiently clear that the first, decisive and central question to be considered in this declaration is that whether, as between the provision the object of our examination and Article 13.2 and other provisions of the Constitution, there is or is not such a contradiction. For only if a contradiction of that sort does exist it become necessary to indicate whether the State can, under Article 93 or by way of interpretation of Article 11, give its consent to the Treaty of Maastricht without going through the procedures for the amendment of the Constitution.
- [10] Therefore, and reversing the order of exposition of the questions posed by the Government, we must first analyse the possible incompatibility of the future Article 8b(1) E.C. with the Constitution, and not only with its Article 13.2 (the only individual provision contained in the request for rulings submitted in the Government's application) because, as has been said, it is the Constitution as a whole, and not merely some of its provisions that have to be taken into account by this Court.
- [11] There are three constitutional provisions that can have an effect as regards the extension of the right to stand as a candidate at municipal elections to non-Spaniards: Article 13.2, which limits the right of political involvement to Spaniards, Article 23, which provides that the "citizens" have that right, and Article 1.2, under which national sovereignty resides in the Spanish people."
- [12] (A) Under Article 8b(1) which is to be included in the Treaty establishing the European Community, it is acknowledged that "every citizen of the Union" shall have the right to vote and to stand as a candidate at municipal elections in the Member State of which he is not a national and in which he resides "under the same conditions" - adds the provision - "as nationals of that State". This provision which, together with all the other provisions contained in the various paragraphs of Article 8 gives practical effect to a European citizenship in the course of its creation, without abolishing the distinct nationalities of the citizens of the States signatory to the E.U. Treaty (as is confirmed in the "Declaration on Nationality of a Member State" included in the "Final Act" of that Treaty), presupposes a partial overcoming of the traditional national/foreigner dichotomy by the creation of a third common status.

- [13] From all of this it is, however, clear that this limited extension of the right to vote in and stand as a candidate at elections, to persons who, without being Spanish nationals, are citizens of the Union, only partially accords with the provisions of Article 13 of our Constitution, paragraph 2 of which says that only Spaniards are entitled to the rights recognised by Article 23 of the Constitution "save that, having regard to criteria of reciprocity, the right to vote in municipal elections may be established by treaty or by law". That constitutional limitation has already been noted by this Court in its judgment 112/1991, in which it was expressly stated that "this possible exercise of the right is limited to voting in elections [sufragio activo] but does not extend to the right to stand as a candidate at elections [sufragio pasivo]". Therefore, without prejudice to the exception contained in Article 13.2 concerning the right to vote in municipal elections, the right to stand as a candidate at elections cannot, whether by treaty or by Act, under the abovementioned provisions of the Constitution, be extended to non-Spaniards in any elections for membership of organs of the Spanish Public Authorities.
- [14] The partial contradiction that can thus be seen between Article 13.2 of the Constitution and the text submitted for our examination must therefore lead to the conclusion that the provision in question contains, as regards such matter, a provision which, since it is contrary to the Constitution, cannot be ratified without the Constitution first being amended, as is required by Article 95.1 of the Constitution.
- [15] (B) The second of the provisions referred to in respect of which there could perhaps be seen a collision with the future Article 8b(1) E.C. is Article 23, and more particularly its second paragraph which, by an elipsis, gives to "citizens" the right to attain public office, under conditions of equality, in accordance with the requirements of the laws.
- [16] Nevertheless the wording of that provision, in referring to the laws, constitutes evidence that the Constitution is not here granting a right to occupy public offices and posts, but is merely prohibiting the legislature from regulating access to such offices and posts on discriminatory terms. For, as we have repeatedly said, the provision in question is a concrete instance of the general principle of equality.
- [17] In so far as the prohibition against discrimination refers, according to the letter of the Article, only to citizens, it is obvious that it does not impose any prohibition preventing the right granted by the laws from also being extended to persons who are not citizens, and that it does not prohibit different conditions being laid down concerning the manner of access to specific public offices or posts as between citizens and those who are not.
- [18] Therefore as regards the right to stand as a candidate at elections, Article 23.2 does not contain any provision that excludes foreigners from access to public offices and posts. In fact, it is not Article 23 of our Constitution that lays down decisive subjective limits concerning the extension of entitlement to fundamental rights to non-nationals. In our Constitution, the relevant provision appertaining to this requirement as to capacity is not Article 23 but Article 13, the first paragraph of which extends to foreigners the exercise of all the public freedoms recognised in Part I of the Constitution the terms laid down by treaties and by law. An exception to this extension is made by Article 13.2 which excludes from such extension certain rights recognised in Article 23, which rights are in consequence restricted exclusively to Spaniards. However, this restriction does not derive, as such, from the provisions of Article 23 which does not of itself prevent the rights there acknowledged from being extended by law or by treaty to citizens of the European Union. Therefore there is no room for holding that the provisions of the future Article 8b(1) E.C. contradict Article 23 of the Constitution, thus rendering necessary recourse to the procedure laid down in Article 168 of the Constitution.
- [19] (C) Nor is the assertion inscribed in Article 1.2 of the Constitution contracted or affected by the grant of the right to stand as a candidate at municipal elections to a specified circle or category of foreigners. Without entering into other considerations, here superfluous, it is sufficient to note, as the basis of what has been said, that the granting of the right to stand as a candidate at elections to representative bodies to persons who are not Spaniards could only be contradicted in the light of the

abovementioned constitutional provision if those organs were among those that exercise powers directly allocated by the Constitution and by the Statutes of Autonomy, being powers connected with the possession of sovereignty by the Spanish people. There would be no point, as is obvious, in here making hypothetical judgments, and therefore it is sufficient to note that such is not the case with municipal elections so as to remove all doubt as to the constitutionality of the matter under discussion in this case.

- [20] In view of what has been said and having ascertained the existence of a clash between the future Article 8b(1) E.C. and Article 13.2 of the Constitution, read together with its Article 95. 1, our declaration could end here. However in view of the fact that the Government has put forward other interpretations, which in its opinion override the opinion expressed above, it is necessary for us to deliver an adequate reply on them.

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- [21] In the facts there is stated the first of the arguments which the Government puts forward so as to propose, without amending the Constitution, a possible reconciliation of the existing clash between Article 13.2 of the Constitution and Article 8b(1) of the Treaty establishing the European Community in the version given to it by the Treaty on European Union. Without reproducing that line of argument here, what we must now do is consider whether, by virtue of the provisions of Article 93 of the Constitution, it is possible to ratify that provision of the Treaty of the European Union without first amending the Constitution, or, in other words, we have to consider whether the above constitutional provision dissipates or eliminates the incompatibility which is to be found on this point between the Treaty and the Constitution.
- [22] In particular, Article 93 of the Constitution provides that "the making of treaties whereby the exercise of powers arising under the Constitution can be granted to an international organisation or institution may be authorised by an Organic Law". As is well known, this provision enabled Spain to join the European Communities (Organic Laws 10/1995 and 4/1996). It follows that the complexity involved in this "organic-procedural" provision (judgment of the Constitutional Court 28/1991, point 4) is no light matter. However, that provision has here to be considered only in connection with the provisions of Article 95.1 of the Constitution for the purpose of determining whether the Organic Law to which it refers is a suitable instrument for making an exception, as would the text submitted to our examination, to the limit that Article 13.2 lays down as regards the extension to foreigners by treaty or by law of the right to stand as a candidate at elections.
- [23] The answer to this question can only be in the negative.
- [24] Article 93 permits allocations or grants of "the exercise of powers derived from the Constitution" and their grant will involve - has already involved - a specific limitation or constriction, for certain purposes, of the duties and powers of the Spanish Public Authorities (limitation as to 'sovereign rights' in the expression of the European Court of Justice in *COSTA v. ENEL* [footnote omitted]). In order for this limitation to operate, it is nevertheless indispensable for there effectively to exist a grant of the exercise of powers (not of their ownership) to international organisations or institutions, which is not the case with the provision the object of our declaration because that provision does not grant or transfer powers but simply extends to persons who are not nationals certain rights which, according to Article 13.2, cannot be granted to them.
- [25] This last point makes it clear that the contents of the provision here examined do not correspond with what is contemplated in Article 93 of the Constitution. Such is the position notwithstanding the fact Spanish that Article 93 is the appropriate article to use, having regard to other matters contained in the E.U. Treaty, in order to authorise ratification by the State of the Treaty, after the Constitution has been amended as regards Article 13.2. It is sufficient to note, about what matters here, that the text submitted for our examination does not involve a grant of the exercise of powers

but a direct commitment by the Kingdom of Spain to incorporate into its own electoral system an allocation of subjective rights, operated by the Treaty, which allocation is irreconcilable with the provisions of Article 13.2 of the Constitution.

- [26] Moreover it is also not the case that Article 93 of the Constitution is apt to be used as an instrument so as to get round or rectify requirements or prohibitions contained in the Constitution. The reason Article 93 is not suitable for that purpose is that it is not a legitimate route for the "implicit or tacit reform" of the Constitution. Nor can such a contradiction, through the Treaty, with the requirements of the Constitution be called a grant of the exercise of powers under Article 93.
- [27] As has already been indicated, not much more need be said about the above because the literal wording and the meaning of Article 95. 1, applicable to treaties of all types, clearly prevent any treaties from being set up as contradictions or exceptions to the constitutional provisions that very properly limit the exercise of all the powers that the Constitution confers, although the exercise of some of them may be allocated under the provisions of its Article 93. The Spanish public authorities are no less subject to the Constitution when they act in international or supranational relations than when they exercise their powers within Spain, and there is nothing to prevent Article 95 from taking effect. The safeguarding function of Article 95 must not be countered or diminished by the provisions of Article 93 of the Constitution. An interpretation needs to be sought that reconciles troth these constitutional provisions. Therefore it is necessary to state on the one hand that the provisions of the Constitution cannot be contradicted save by an express amendment to it (through the means laid down in Part X) and also to acknowledge, on the other hand, that it is possible to authorise, by means of an Organic Law, the ratification of treaties which, as has been said, transfer or grant to international organisations the exercise of powers arising under the Constitution. Thus the scope of the applicability, not the content, of the provisions that have established and provided for such powers is determined. This is, no doubt, an effect envisaged by the Constitution and, as such, is lawful, but it does not bear any relation to providing for a textual and direct clash between the Constitution and one or more provisions of a treaty. Such a concept - that of a treaty contrary to the Constitution - has indeed been definitively excluded by Article 95.
- [28] To summarise, by virtue of Article 93, the Cortes may grant or Rights allocate the exercise of "powers deriving from the Constitution", but Spanish cannot dispose of the Constitution itself, contradicting or permitting the contradiction of its provisions. For the power of constitutional amendment is not a "power" the exercise of which is capable of being granted. Moreover the Constitution itself cannot be amended save by the means provided for in its Part X, that is to say by means of the procedures and the guarantees there laid down, and by means of an express amendment to its own text. This is the conclusion that the wording of Article 95.1 requires. Here it is relevant to note that the operation consisting of making exceptions to constitutional provisions by means of a treaty, thus waiving the generality of the provisions of the Constitution, was considered, and was not adopted, during the process of drawing up the Constitution (Article 55.3 of the Draft Constitution and, to a different effect, Amendment 343 of the Amendments submitted in the Senate concerning the Draft Constitution).
- [29] It is therefore sufficient to observe from the foregoing that the contradiction that exists between Article 13.2 of the Constitution and Article 8b(1) of the Treaty establishing the European Community, as amended, cannot be circumvented through the mere expedient of authorising the ratification of the Treaty of European Union under the provisions of Article 93. It is obvious that that provision, in so far as it directly grants a right to stand as a candidate at elections, does not grant powers of any kind, but grants subjective rights, and that in order to do this, in view of the wording of Article 13.2 of the Constitution, it will in any event first be necessary to amend the Constitution.

5

- [30] The contradiction between the provision submitted for examination as to its constitutionality and Article 13.2 of the Constitution cannot therefore be sidestepped by means of the provisions of Article

93 of the Constitution. On other matters it is also necessary to say something about a suggestion contained in the application, it having been made for the purpose of overcoming or once again circumventing the limit laid down in the Constitution and hence avoiding amending the Constitution. That suggestion consists of conceivable legislation treating citizens of the European Union for the purposes of the right to stand as a candidate at municipal elections as if they were Spanish nationals.

[31] It is indeed the case that the Constitution does not define who are Spaniards (a task which it leaves to the legislature in its Article 11.1). It is also indisputable that there is no uniform set of legal provisions governing all nationals and that the set of rules applicable to them can be different as compared with certain foreigners and with others. Nevertheless it is obvious that the Constitution, in its Article 13, has introduced binding and insuperable provisions appertaining to all Spanish public authorities (Article 9.1 of the Constitution) concerning the recognition of constitutional rights in favour of non-Spaniards. Those provisions include, as we have stated above, the Spanish provision that reserves to Spaniards the possession and exercise of very Constitutional concrete fundamental rights. These rights - including the right to stand for election with which we are here concerned - cannot be granted, either by law or by treaty, to persons who do not fulfil that condition. This means that such rights can only be conferred on foreigners by means of the reform of the Constitution. For this constitutional limit would disappear - and with it the binding force of the Constitution itself - if the interpretation put forward by the Government were to take legal form and be accepted, that is to say the interpretation according to which the legislature could mint or diecast nationalities on an ad hoc basis for the sole and exclusive purpose of avoiding the applicability of the limitation contained in Article 13.2 of the Constitution. The Spanish legislature must, as is obvious, define who are Spaniards, that is to say must define who are those who potentially have the capacity to be holders of any posts provided for by law in the legal order, and on this subject the Constitution does not lay down any relevant guidelines. However the legislature cannot, without acting unconstitutionally, divide into fragments, parcel out or manipulate Spanish nationality, acknowledging it only in certain respects for the sole purpose of granting to persons who are not nationals a fundamental right which, as is the case with the right to stand as a candidate at elections, is expressly withheld from them by Article 13.2 of the Constitution.

[32] It is clearly not possible to wriggle out of what has been said above by the allusion that is made in the application to the expedient of legal fictions. A legal fiction is nothing other than a legal construction which has as its purpose, contrary to the reality, the introduction into the scope of the applicability of a previous legal provision a matter of fact which otherwise would be excluded from that provision. One of the essential characteristics of such a fiction is that it must not consist of a convenient device for achieving the legally impossible, as is the case with the reform of the Constitution otherwise than by the procedures expressly laid down for that purpose in Articles 167 and 168 of the Constitution. The legislature, since it is subject to the principle of the supremacy of the Constitution, cannot avoid those procedures either directly or by means of the indirect, exceptional and supplementary technique consisting of a legal fiction.

6

[33] It follows that the inevitable conclusion is that there is a contradiction, which no amount of interpretation can overcome, between Article 8b(1) of the Treaty establishing the European Community, as it would be worded under the Treaty on European Union, on the one hand, and Article 13.2 of our Constitution, on the other hand. The contradiction affects that part of Article 8b(1) that gives the right to stand as a candidate at municipal elections to a generic group of persons (nationals of other Member States of the Community) who are not Spaniards. The only means available in law for overcoming that contradiction and therefore ratifying or signing the Treaty is, therefore, the means provided for in its Article 95.1, namely the prior amendment of that part of the Constitution that now requires the conclusion contained in this declaration. Such an amendment to the Constitution will have to remove the obstacle contained in Article 13.2 which prohibits the right to stand as a candidate at municipal elections from being extended to non-Spaniards.

[34] From all the matters set out above, there is to be deduced the conclusion that, since the provision examined does not contradict any provision of the Constitution other than its Article 13.2, the procedure for constitutional amendment, provided for in Article 95.1, must be the general and ordinary procedure contemplated in Article 167 of the Constitution. With this final statement we answer the last of the questions submitted by the Government.

[...]

4.6 Decision of the French “Conseil Constitutionnel” on Amsterdam

Conseil Constitutionnel

Decision n. 97-394 DC

31 December 1997

<http://www.conseil-constitutionnel.fr/decision/1997/97394/index.htm>

[...]

Le Conseil constitutionnel a été saisi, le 4 décembre 1997, par le Président de la République et le Premier Ministre, conformément à l'article 54 de la Constitution, de la question de savoir si, compte tenu des engagements souscrits par la France et des modalités de leur entrée en vigueur, l'autorisation de ratifier le traité d'Amsterdam modifiant le traité sur l'Union européenne, les traités instituant les communautés européennes et certains actes connexes, signé le 2 octobre 1997, doit être précédée d'une révision de la Constitution ;

LE CONSEIL CONSTITUTIONNEL,

Vu la Constitution du 4 octobre 1958, notamment son titre XV: "Des communautés européennes et de l'Union européenne";

Vu le Préambule de la Constitution du 27 octobre 1946;

Vu l'ordonnance n° 58-1067 du 7 novembre 1958 modifiée portant loi organique sur le Conseil constitutionnel, notamment ses articles 18, alinéa 2, 19 et 20;

Vu la loi n° 52-387 du 10 avril 1952 autorisant à ratifier le traité signé à Paris le 18 avril 1951 et instituant une Communauté européenne du charbon et de l'acier, ensemble le décret n° 52-993 du 20 août 1952 portant publication de ce traité;

Vu la loi n° 57-880 du 2 août 1957 autorisant à ratifier : 1° le traité instituant une Communauté économique européenne et ses annexes ; 2° le traité instituant la Communauté européenne de l'énergie atomique ; 3° la convention relative à certaines institutions communes aux communautés européennes, signés à Rome le 25 mars 1957, ensemble le décret n° 58-84 du 28 janvier 1958 portant publication de ces engagements internationaux;

Vu la loi n° 65-506 du 30 juin 1965 autorisant la ratification du traité instituant un conseil unique et une commission unique des communautés européennes et du protocole sur les privilèges et immunités des communautés européennes, ensemble le décret n° 67-606 du 28 juillet 1967 portant publication de ces engagements internationaux;

Vu la loi n° 70-583 du 8 juillet 1970 autorisant l'approbation de la décision du Conseil des communautés européennes, du 21 avril 1970, relative au remplacement des contributions financières des Etats membres par des ressources propres aux communautés, ensemble le décret n° 71-168 du 26 février 1971 portant publication de cette décision;

Vu la loi n° 70-584 du 8 juillet 1970 autorisant la ratification du traité portant modification de certaines dispositions budgétaires des traités instituant les communautés européennes et du traité instituant un conseil unique et une commission unique des communautés européennes, signé à Luxembourg le 22 avril 1970, ensemble le décret n° 71-169 du 26 février 1971 portant publication de ce traité;

Vu la loi n° 72-339 du 3 mai 1972 autorisant la ratification du traité relatif à l'adhésion à la Communauté économique européenne et à la Communauté européenne de l'énergie atomique du Royaume de Danemark, le l'Irlande, du Royaume de Norvège et du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, signé à Bruxelles le 22 janvier 1972, ensemble le décret du 5 avril 1972 décidant de soumettre ce projet de loi au référendum;

Vu la loi n° 76-1196 du 24 décembre 1976 autorisant la ratification du traité portant modification de certaines dispositions financières des traités instituant les communautés européennes et du traité instituant un conseil unique et une commission unique des communautés européennes;

Vu la loi n° 77-680 du 30 juin 1977 autorisant l'approbation des dispositions annexées à la décision du Conseil des communautés européennes du 20 septembre 1976 et relatives à l'élection des représentants à l'Assemblée des communautés européennes au suffrage universel direct, ensemble le décret n° 79-92 du 30 janvier 1979 portant publication;

Vu la loi n° 77-710 du 5 juillet 1977 autorisant la ratification du traité portant modification de certaines dispositions du protocole sur les statuts de la Banque européenne d'investissement, signé à Bruxelles le 10 juillet 1975;

Vu la loi n° 79-1112 du 22 décembre 1979 autorisant la ratification du traité d'adhésion de la République hellénique à la Communauté économique européenne et à la Communauté européenne de l'énergie atomique, ensemble le décret n° 81-35 du 2 janvier 1981 portant publication de ce traité;

Vu la loi n° 85-1 du 2 janvier 1985 autorisant l'approbation de l'accord intervenu, au sein du Conseil des communautés européennes les 2 et 3 octobre 1984, entre les représentants des gouvernements des Etats membres et portant sur le financement du budget rectificatif et supplémentaire n° 1 des communautés;

Vu la loi n° 85-1334 du 18 décembre 1985 autorisant la ratification du traité entre le Royaume de Belgique, le Royaume de Danemark, la République fédérale d'Allemagne, la République hellénique, la République française, l'Irlande, la République italienne, le Grand-Duché de Luxembourg, le Royaume des Pays-Bas, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Etats membres des Communautés européennes, et le Royaume d'Espagne et la République du Portugal, relatif à l'adhésion à la Communauté économique européenne et à la Communauté européenne de l'énergie atomique du Royaume d'Espagne et de la République du Portugal, ensemble le décret n° 86-415 du 11 mars 1986 portant publication de ce traité;

Vu la loi n° 85-1335 du 18 décembre 1985 autorisant l'approbation de la décision du Conseil des communautés européennes du 7 mai 1985 relative au système des ressources propres des communautés;

Vu la loi n° 86-1275 du 16 décembre 1986 autorisant la ratification de l'Acte unique européen, ensemble le décret n° 87-990 du 4 décembre 1987 portant publication de ce traité;

Vu la loi n° 88-1253 du 30 décembre 1988 autorisant l'approbation d'une décision du Conseil des communautés européennes relative au système des ressources propres des communautés;

Vu la loi n° 91-642 du 10 juillet 1991 autorisant l'approbation de l'accord d'adhésion de la République italienne à la convention d'application de l'accord de Schengen du 14 juin 1985 entre les gouvernements des Etats de l'Union économique Benelux, de la République fédérale d'Allemagne et de la République française relatif à la suppression graduelle des contrôles aux frontières communes, signée à Schengen le 19 juin 1990, ensemble le décret n° 97-970 du 15 octobre 1997 portant publication de cet accord;

Vu la loi n° 91-737 du 30 juillet 1991 autorisant l'approbation de la convention d'application de l'accord de Schengen du 14 juin 1985 entre les gouvernements des Etats de l'Union économique Benelux, de la République fédérale d'Allemagne et de la République française relatif à la suppression graduelle des contrôles aux frontières communes, ensemble les décrets n° 86-907 du 30 juillet 1986 portant publication de l'accord et n° 95-304 du 21 mars 1995 portant publication de la convention;

Vu la loi n° 92-1017 du 24 septembre 1992 autorisant la ratification du traité sur l'Union européenne, ensemble le décret n° 94-80 du 18 janvier 1994 portant publication de ce traité;

Vu la loi n° 93-1421 du 31 décembre 1993 autorisant l'approbation de l'accord d'adhésion du Royaume d'Espagne à la convention d'application de l'accord de Schengen du 14 juin 1985 entre les Gouvernements des Etats de l'Union économique Benelux, de la République fédérale d'Allemagne et de la République française relatif à la suppression graduelle des contrôles aux frontières communes signée à Schengen le 19 juin 1990, à laquelle a adhéré la République italienne par l'accord signé à Paris le 27 novembre 1990, ensemble le décret n° 95-305 du 21 mars 1995 portant publication de cet accord;

Vu la loi n° 93-1422 du 31 décembre 1993 autorisant l'approbation de l'accord d'adhésion de la République portugaise à la convention d'application de l'accord de Schengen du 14 juin 1985 entre les Gouvernements des Etats de l'Union économique Benelux, de la République fédérale d'Allemagne et de la République française relatif à la suppression graduelle des contrôles aux frontières communes, signée à Schengen le 19 juin 1990, à laquelle a adhéré la République italienne par l'accord signé à Paris le 27 novembre 1990, ensemble le décret n° 95-306 du 21 mars 1995 portant publication de cet accord;

Vu la loi n° 94-1099 du 19 décembre 1994 autorisant la ratification du traité entre le Royaume de Belgique, le Royaume de Danemark, la République fédérale d'Allemagne, la République hellénique, le Royaume d'Espagne, la République française, l'Irlande, la République italienne, le Grand-Duché de Luxembourg, le Royaume des Pays-Bas, la République portugaise, le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord (Etats membres de l'Union européenne) et le Royaume de Norvège, la République d'Autriche, la République de Finlande, le Royaume de Suède, relatif à l'adhésion du Royaume de Norvège, de la République d'Autriche, de la République de Finlande et du Royaume de Suède à l'Union européenne, ensemble le décret n° 95-224 du 21 février 1995 portant publication de ce traité;

Vu la loi n° 94-1205 du 30 décembre 1994 autorisant l'approbation de la décision du Conseil de l'Union européenne relative au système de ressources propres des Communautés européennes, adoptée à Luxembourg le 31 octobre 1994;

Vu la loi n° 97-966 du 21 octobre 1997 autorisant l'approbation de l'accord d'adhésion de la République d'Autriche à la convention de l'accord de Schengen du 14 juin 1985 entre les gouvernements des Etats de l'Union économique Benelux, de la République fédérale d'Allemagne et de la République française relatif à la suppression graduelle des contrôles aux frontières communes, signée à Schengen le 19 juin 1990, à laquelle ont adhéré la République italienne, le Royaume d'Espagne et la République portugaise et la République hellénique par les accords signés respectivement le 27 novembre 1990, le 25 juin 1991 et le 6 novembre 1992;

Vu la loi n° 97-967 du 21 octobre 1997 autorisant l'approbation de l'accord d'adhésion de la République hellénique à la convention de l'accord de Schengen du 14 juin 1985 entre les gouvernements des Etats de l'Union économique Benelux, de la République fédérale d'Allemagne et de la République française relatif à la suppression graduelle des contrôles aux frontières communes, signée à Schengen le 19 juin 1990, à

laquelle ont adhéré la République italienne par l'accord signé à Paris le 27 novembre 1990 et le Royaume d'Espagne et la République portugaise par les accords signés à Bonn le 25 juin 1991;

Vu le décret n° 53-192 du 14 mars 1953 relatif à la ratification et à la publication des engagements internationaux souscrits par la France modifié par le décret n° 86-707 du 11 avril 1986, notamment son article 3;

Le rapporteur ayant été entendu;

SUR LES NORMES DE REFERENCE APPLICABLES:

1. Considérant que le peuple français a, par le préambule de la Constitution de 1958, proclamé solennellement " son attachement aux droits de l'homme et aux principes de la souveraineté nationale tels qu'ils ont été définis par la Déclaration de 1789, confirmée et complétée par le préambule de la Constitution de 1946";
2. Considérant que, dans son article 3, la Déclaration des droits de l'homme et du citoyen énonce que " le principe de toute souveraineté réside essentiellement dans la nation " ; que l'article 3 de la Constitution de 1958 dispose, dans son premier alinéa, que " la souveraineté nationale appartient au peuple qui l'exerce par ses représentants et par la voie du référendum";
3. Considérant que le préambule de la Constitution de 1946 proclame, dans son quatorzième alinéa, que la République française se " conforme aux règles du droit public international " et, dans son quinzième alinéa, que " sous réserve de réciprocité, la France consent aux limitations de souveraineté nécessaires à l'organisation et à la défense de la paix";
4. Considérant que, dans son article 53, la Constitution de 1958 consacre, comme le faisait l'article 27 de la Constitution de 1946, l'existence de " traités ou accords relatifs à l'organisation internationale"; que ces traités ou accords ne peuvent être ratifiés ou approuvés par le Président de la République qu'en vertu d'une loi ;
5. Considérant qu'aux termes de l'article 88-1, résultant de la loi constitutionnelle du 25 juin 1992 : "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 instaurées, d'exercer en commun certaines de leurs compétences";
6. Considérant qu'il résulte de ces textes de valeur constitutionnelle que le respect de la souveraineté nationale ne fait pas obstacle à ce que, sur le fondement des dispositions précitées du préambule de la Constitution de 1946, la France puisse conclure , sous réserve de réciprocité, des engagements internationaux en vue de participer à la création ou au développement d'une organisation internationale permanente, dotée de la personnalité juridique et investie de pouvoirs de décision par l'effet de transferts de compétences consentis par les Etats membres;
7. Considérant, toutefois, qu'au cas où des engagements internationaux souscrits à cette fin contiennent une clause contraire à la Constitution ou portent atteinte aux conditions essentielles d'exercice de la souveraineté nationale, l'autorisation de les ratifier appelle une révision constitutionnelle;
8. Considérant que c'est au regard de ces principes qu'il revient au Conseil constitutionnel de procéder à l'examen du traité signé à Amsterdam le 2 octobre 1997;

SUR LES MESURES RELATIVES AUX VISAS, A L'ASILE ET A LA LIBRE CIRCULATION DES PERSONNES:

9. Considérant qu'aux termes de l'article 88-2, ajouté à la Constitution par la loi constitutionnelle du 25 juin 1992 : "Sous réserve de réciprocité et selon les modalités prévues par le Traité sur l'Union européenne signé le 7 février 1992, la France consent aux transferts de compétences nécessaires à l'établissement de l'union économique et monétaire européenne ainsi qu'à la détermination des règles relatives au franchissement des frontières extérieures des Etats membres de la Communauté européenne " ; qu'il résulte de cette disposition qu'appellent une nouvelle révision constitutionnelle les clauses du traité d'Amsterdam qui opèrent, au profit de la Communauté européenne, des transferts de compétences qui mettent en cause les conditions essentielles d'exercice de la souveraineté nationale, soit que ces transferts interviennent dans un domaine autre que l'établissement de l'union économique et monétaire européenne ou que le franchissement des frontières extérieures communes, soit que ces clauses fixent d'autres modalités que celles prévues par le traité sur l'Union européenne signé le 7 février 1992 pour l'exercice des compétences dont le transfert a été autorisé par l'article 88-2 précité;
10. Considérant que l'article 2 du traité d'Amsterdam insère dans le traité instituant la Communauté européenne un titre III A intitulé : " Visas, asile, immigration et autres politiques liées à la libre circulation des personnes";
11. Considérant que, s'agissant de la libre circulation des personnes, le nouveau titre comprend un article 73 J qui autorise le Conseil, statuant conformément à la procédure prévue à l'article 73 O du même titre, à prendre, dans les cinq ans qui suivent l'entrée en vigueur du traité d'Amsterdam, un certain nombre de mesures, qu'il énumère, relatives au franchissement des frontières intérieures et extérieures des Etats membres, ainsi qu'à la circulation des ressortissants des pays tiers sur leur territoire ;
12. Considérant que les mesures relatives au franchissement des frontières intérieures comprennent des " mesures visant, conformément à l'article 7 A, à assurer l'absence de tout contrôle des personnes, qu'il s'agisse de citoyens de l'Union ou de ressortissants des pays tiers, lorsqu'elles franchissent les frontières intérieures";
13. Considérant que les mesures relatives au franchissement des frontières extérieures des Etats membres fixent " les normes et les modalités auxquelles doivent se conformer les Etats membres pour effectuer les contrôles des personnes aux frontières extérieures " et " les règles relatives aux visas pour les séjours prévus d'une durée maximale de trois mois " ; que ces dernières règles comprennent, notamment, " la liste des pays tiers dont les ressortissants sont soumis à l'obligation de visa...", les " procédures et conditions de délivrance des visas par les Etats membres ", la définition d'un " modèle type de visa ", ainsi que les règles applicables " en matière de visa uniforme ";
14. Considérant, enfin, que les mesures relatives à la circulation des ressortissants des pays tiers fixent les conditions dans lesquelles ces ressortissants peuvent circuler librement sur le territoire des Etats membres pendant une durée maximale de trois mois ;
15. Considérant que, s'agissant des politiques de l'asile et de l'immigration, le nouveau titre III A comprend en outre un article 73 K énonçant que le Conseil, statuant conformément à la procédure prévue à l'article 73 O, peut également prendre, dans les cinq ans qui suivent l'entrée en vigueur du traité d'Amsterdam, un certain nombre de mesures relatives à l'asile, aux réfugiés et à l'immigration;
16. Considérant que les mesures relatives à l'asile portent sur les " critères et mécanismes de détermination de l'Etat membre responsable de l'examen d'une demande d'asile présentée dans l'un des Etats membres par un ressortissant d'un pays tiers ", sur les " normes minimales régissant

l'accueil des demandeurs d'asile dans les Etats membres ", sur les " normes minimales concernant les conditions que doivent remplir les ressortissants des pays tiers pour pouvoir prétendre au statut de réfugié " ou encore sur les " normes minimales concernant la procédure d'octroi ou de retrait du statut de réfugié dans les Etats membres " ;

17. Considérant que les mesures relatives aux réfugiés et aux personnes déplacées auront trait aux " normes minimales relatives à l'octroi d'une protection temporaire " de ces personnes et aux " mesures tendant à assurer un équilibre entre les efforts consentis par les Etats membres " pour les accueillir et " supporter les conséquences de cet accueil " ;
18. Considérant que les mesures relatives à la politique d'immigration porteront sur " les conditions d'entrée et de séjour ", sur les " normes concernant les procédures de délivrance par les Etats membres de visas et de titres de séjour de longue durée, y compris aux fins de regroupement familial ", ainsi que sur " l'immigration clandestine " et le " séjour irrégulier, y compris le rapatriement des personnes en séjour irrégulier " ;
19. Considérant, enfin, que sont également envisagées " des mesures définissant les droits des ressortissants des pays tiers en situation régulière de séjour dans un Etat membre de séjourner dans les autres Etats membres et les conditions dans lesquelles ils peuvent le faire " ; qu'il est par ailleurs précisé à l'avant-dernier alinéa de l'article 73 K que les mesures adoptées par le Conseil en matière d'immigration et de droit de séjour dans les Etats membres " n'empêchent pas un Etat membre de maintenir ou d'introduire, dans les domaines concernés, des dispositions nationales compatibles avec le présent traité et avec les accords internationaux " ;
20. Considérant que l'article 73 O prévoit les modalités d'adoption, par le Conseil, des décisions qui font l'objet du titre III A; qu'il est stipulé, en son premier paragraphe, que " pendant une période transitoire de cinq ans après l'entrée en vigueur du traité d'Amsterdam, le Conseil statue à l'unanimité sur proposition de la Commission ou à l'initiative d'un Etat membre et après consultation du Parlement européen " ; qu'il est ajouté, au deuxième paragraphe, qu'après cette période de cinq ans, le Conseil statue sur des propositions de la Commission ", celle-ci étant toutefois tenue d'examiner " toute demande d'un Etat membre visant à ce qu'elle soumette une proposition au Conseil ", et que " le Conseil, statuant à l'unanimité après consultation du Parlement européen, prend une décision en vue de rendre la procédure visée à l'article 189 B applicable à tous les domaines couverts par le présent titre ou à certains d'entre eux et d'adapter les dispositions relatives à la compétence de la Cour de justice " ; qu'il est précisé, au troisième paragraphe, que, par dérogation aux règles prévues aux deux premiers, les règles relatives à la liste des pays tiers dont les ressortissants sont soumis à l'obligation de visa de court séjour et concernant le modèle type de visa seront, dès l'entrée en vigueur du traité d'Amsterdam, " arrêtées par le Conseil, statuant à la majorité qualifiée sur proposition de la Commission et après consultation du Parlement européen " ; qu'il est enfin prévu au quatrième paragraphe que, par dérogation au deuxième, les mesures concernant les procédures et conditions de délivrance de ces mêmes visas, ainsi que les règles en matière de visa uniforme, seront, au terme d'une période de cinq ans suivant l'entrée en vigueur du traité, " arrêtées par le Conseil, statuant conformément à la procédure visée à l'article 189 B " ;

En ce qui concerne les mesures relatives à l'asile, à l'immigration et au franchissement des frontières intérieures des Etats membres:

21. Considérant que les premier et troisième paragraphes de l'article 73 J et l'article 73 K prévoient, ainsi qu'il a été dit ci-dessus, des transferts de compétences au profit de la Communauté dans les domaines de l'asile, de l'immigration et du franchissement des frontières intérieures qui intéressent l'exercice de la souveraineté nationale et n'entrent pas dans le champ de l'habilitation prévue par l'article 88-2 de la Constitution;

22. Considérant, il est vrai, que, s'agissant de domaines ne relevant pas de la compétence exclusive de la Communauté, le respect du principe de subsidiarité, énoncé par l'article 3 B du traité instituant la Communauté européenne et dont les conditions de mise en oeuvre sont précisées par un protocole annexé au traité d'Amsterdam, implique que la Communauté n'intervient que si, et dans la mesure où, les objectifs de l'action envisagée ne peuvent pas être réalisés de manière suffisante par les Etats membres ; que, toutefois, la seule mise en oeuvre de ce principe pourrait ne pas faire obstacle à ce que les transferts de compétence autorisés par le traité soumis à l'examen du Conseil constitutionnel revêtent une ampleur et interviennent selon des modalités telles que puissent être affectées les conditions essentielles d'exercice de la souveraineté nationale;
23. Considérant que les conditions essentielles d'exercice de la souveraineté nationale ne seront pas affectées pendant la période transitoire de cinq ans à compter de l'entrée en vigueur du traité, au cours de laquelle, en application du premier paragraphe de l'article 73 O, les décisions du Conseil seront prises à l'unanimité et où les Etats membres conserveront le pouvoir d'initiative;
24. Considérant, en revanche, qu'au terme de cette période transitoire, en vertu du deuxième paragraphe de l'article 73 O, le Conseil statue sur proposition de la seule Commission, les Etats membres perdant ainsi le pouvoir d'initiative ; que, surtout, sur simple décision du Conseil prise à l'unanimité, l'ensemble des mesures intervenant dans les domaines précités, ou certaines d'entre elles, pourront être prises à la majorité qualifiée selon la procédure dite de " codécision " prévue par l'article 189 B du traité instituant la Communauté européenne ; qu'un tel passage de la règle de l'unanimité à celle de la majorité qualifiée et à la procédure de " codécision " ne nécessitera, le moment venu, aucun acte de ratification ou d'approbation nationale, et ne pourra ainsi pas faire l'objet d'un contrôle de constitutionnalité sur le fondement de l'article 54 ou de l'article 61, alinéa 2, de la Constitution;
25. Considérant que, dans ces conditions, et nonobstant les dispositions de l'avant-dernier alinéa de l'article 73 K, l'application des dispositions du deuxième paragraphe de l'article 73 O pourrait conduire à ce que se trouvent affectées les conditions essentielles d'exercice de la souveraineté nationale;
26. Considérant qu'il suit de là que doivent être déclarées contraires à la Constitution les dispositions du deuxième paragraphe de l'article 73 O, ajouté au traité instituant la Communauté européenne par l'article 2 du traité d'Amsterdam, en tant qu'elles s'appliquent aux mesures prévues par les premier et troisième paragraphes de l'article 73 J et par l'article 73 K du traité instituant la Communauté européenne;

En ce qui concerne les mesures relatives au franchissement des frontières extérieures des Etats membres:

27. Considérant que, dans sa décision du 2 septembre 1992, le Conseil constitutionnel a déclaré conformes à la Constitution, et notamment à son article 88-2, les stipulations de l'article 100 C du traité instituant la Communauté européenne relatives à la liste des pays tiers dont les ressortissants sont soumis à obligation de visa et relatives à l'instauration d'un modèle type de visa ; que l'autorité qui s'attache à la chose jugée par le Conseil constitutionnel s'oppose à ce que soient remises en cause les dispositions du troisième paragraphe de l'article 73 O qui se bornent à reprendre les règles de décision prévues par l'article 100 C précité;
28. Considérant, en revanche, que le passage automatique à la règle de la majorité qualifiée et à la procédure de " codécision ", au terme d'une période de cinq ans après l'entrée en vigueur du traité d'Amsterdam, pour la détermination des procédures et conditions de délivrance des visas de court séjour par les Etats membres et des règles applicables en matière de visa uniforme, prévu par le quatrième paragraphe de l'article 73 O, constitue, au regard du traité sur l'Union européenne, une modalité nouvelle de transfert de compétences dans des domaines où est en cause la souveraineté

nationale ; que le passage de la règle de l'unanimité à celle de la majorité qualifiée et à la procédure de " codécision ", dans de telles matières, pourrait conduire à ce que se trouvent affectées les conditions essentielles d'exercice de la souveraineté nationale;

29. Considérant qu'il résulte de ce qui précède que le quatrième paragraphe de l'article 73 O, ajouté au traité instituant la Communauté européenne par l'article 2 du traité d'Amsterdam, doit être déclaré contraire à la Constitution;
30. Considérant, enfin, que le passage à la majorité qualifiée et à la procédure de " codécision ", sur simple décision du Conseil, selon la procédure prévue au deuxième paragraphe de l'article 73 O, s'agissant des mesures visées au a) du deuxième paragraphe de l'article 73 J, qui fixent les " normes et modalités auxquelles doivent se conformer les Etats membres pour effectuer les contrôles des personnes aux frontières extérieures ", porte atteinte, pour les motifs ci-dessus énoncés, aux conditions essentielles d'exercice de la souveraineté nationale ; qu'il y a lieu, dès lors, de déclarer contraires à la Constitution les dispositions du deuxième paragraphe de l'article 73 O en tant qu'elles s'appliquent aux mesures prévues par le a) du deuxième paragraphe de l'article 73 J;

SUR L'ENSEMBLE DE L'ENGAGEMENT INTERNATIONAL SOUMIS A L'EXAMEN DU CONSEIL CONSTITUTIONNEL:

31. Considérant qu'aucune des autres dispositions de l'engagement international soumis au Conseil constitutionnel au titre de l'article 54 de la Constitution n'est contraire à celle-ci;

Considérant que, pour les motifs ci-dessus énoncés, l'autorisation de ratifier, en vertu d'une loi, le traité d'Amsterdam exige une révision de la Constitution ;

DECIDE:

Article premier.- L'autorisation de ratifier en vertu d'une loi le traité d'Amsterdam ne peut intervenir qu'après révision de la Constitution.

Article 2.- La présente décision sera notifiée au Président de la République, ainsi qu'au Premier ministre, et publiée au Journal officiel de la République française.

Délibéré par le Conseil constitutionnel dans sa séance du 31 décembre 1997, où siégeaient : MM. Roland DUMAS, Président, Georges ABADIE, Michel AMELLER, Jean CABANNES, Maurice FAURE, Yves GUENA, Alain LANCELOT, Mme Noëlle LENOIR et M. Jacques ROBERT.

4.7 Decision of the Danish Supreme Court on Maastricht

The Danish Supreme Court

Case No. I 361/1997

6 April 1998

(Unofficial translation)

[1999] 3 CMLR p.854-862

- 1) Hanne Norup Carlsen
- 2) Ingeborg Fangel
- 3) Nicolas Fischer
- 4) Jørgen Erik Hansen
- 5) Marianne Henriksen
- 6) Ole Donbæk Jensen
- 7) Yvonne Petersen
- 8) Iver Reedtz-Thott
- 9) Lars Ringholm
- 10) Arne Würgler

(represented by Attorneys-at-Law Ms. Karen Dyekjær-Hansen and Mr. Christian Harlang)

v e r s u s

Prime Minister Poul Nyrup Rasmussen

(Attorney to the Danish Government, Mr. Gregers Larsen, attorney-at-law, and Mr. Karsten Hagel-Sørensen, attorney-at-law).

Interveners:

- 1) Professor Ole Krarup, Doctor of Laws (in person)
- 2) The Association Constitution Committee 93 (Foreningen Grundlovskomit  93) acting for Allan S. Aabech et al.

(Mr. Christian Harlang, attorney-at-law)

[...]

In the lower instance, judgment was delivered by the 3rd Court of the Eastern Division of the Danish High Court on 27th June 1997.

Eleven Supreme Court Judges have participated in the adjudication: Hornslet, Hermann, Marie-Louise Andreassen, Wendler Pedersen, Poul Sørensen, Melchior, Blok, Jørgen Nørgaard, Lorenzen, Børge Dahl, and Lene Pagter Kristensen.

The Appellants, Hanne Norup Carlsen et al., have made a claim that the Respondent Prime Minister Poul Nyrup Rasmusen be ordered to recognise that the transfer of the powers of Danish authorities which is a consequence of Section 2, cf. Section 4, of Danish Act no. 447 of 11th October 1972 on Denmark's Accession to the European Communities, with the overall contents of the Act after the entry into force of Act no. 281 of 28th April 1993, is in contravention of the Danish Constitutional Act of 5th June 1953. The Appellants have withdrawn claims 2 and 3 made before the High Court.

The Prime Minister has moved for dismissal of the Appellants' claim.

The interveners Professor Ole Krarup, Doctor of Laws, and the Association Constitution Committee 93 (Foreningen Grundlovskomite 93) acting for Allan S. Aabech et al., have made statements in support of the Appellants' claim.

For the purpose of the Supreme Court additional information has been provided, i.a. as a consequence of an Order of 3rd November 1997 made by the Supreme Court according to which the Respondent was ordered to produce a substantial number of documents. Furthermore, in accordance with the Supreme Court's Order of 13th January 1998, evidence has been given by the Minister for Foreign Affairs, Mr. Niels Helveg Petersen, former Minister Mr. Ivar Nørgaard and former Ambassador and Secretary General Mr. Niels Ersbøll.

[...]

The full text of the Supreme Court's *ratio decidendi* is:

"9.1. What the Supreme Court is considering in this case is whether the implementation in Denmark of the Treaty Establishing the European Community ("the EC Treaty") as framed in the Treaty Establishing the European Union ("the Union Treaty") was lawfully made in pursuance of sect. 20 of the Danish Constitution or, alternatively, such implementation required an amendment of the Constitution pursuant to sect. 88 thereof.

Primarily, the appellants have pleaded that sect. 20 (1) of the Danish Constitution grants authority for the transfer of sovereignty only "to such extent as shall be provided by statute"¹, and that this condition has not been met. In this connection they have referred, in particular, to the powers vested in the Council under Article 235 of the EC Treaty, and to the law-making activities of the EC Court of Justice. Secondly, the appellants have pleaded that the delegation of sovereignty is on such a scale and of such a nature that it is inconsistent with the Constitution's premise of a democratic form of government.

The appellants' representations concern the EC Treaty and, in other words, neither involve pillar 2 of the Union Treaty on the common foreign & security policy, nor pillar 3 concerning cooperation regarding justice and home affairs. The representations about the EC Treaty have no bearing on the third phase of the Economic and Monetary Union, in that Denmark is not participating therein, cf. sect. 4, 12., item a., of the Act of Accession.

9.2. Sect. 20 of the Danish Constitution is framed as follows:

"20. (1) Powers vested in the authorities of the Realm under this Constitutional Act may, to such extent as shall be provided by statute², be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation.

¹ See footnote 2.

² In the unofficial translation of the judgment of 12th August 1996 from the Danish Supreme Court this part of sect. 20 of the Danish constitution was translated "to a more specified extent".

(2) For the enactment of a Bill dealing with the above, a majority of five-sixths of the members of the Folketing (Parliament) shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the electorate for approval or rejection in accordance with the rules for referenda laid down in sect. 42.”

Sect. 20 was included in the 1953 Constitutional Act to enable Denmark to participate - without amending the Constitution by virtue of its sect. 88 - in international cooperation implying that the exercise of legislative, administrative or judicial authority is entrusted to an international organisation with direct effect in this Kingdom. Because it was impossible to predict with any degree of certainty what forms the international cooperation would assume in the future, no detailed specification was made as to what powers the provision covers. Thus, the aim was to grant wide limits for the access to transfer sovereignty. However, it was emphasised in the provision that the delegation of powers can occur only “to such extent as shall be provided by statute”. Furthermore, it was considered important that the more stringent demands for the adoption of bills under the provision offer a far-reaching guarantee.

The application of the qualified procedure in sect. 20 of the Constitution is required to the extent that an international organisation is entrusted with the exercise of legislative, administrative or judicial authority with direct effect in this Kingdom, or the exercise of other powers which, according to the Constitution, are vested in the authorities of the Realm, including the power to enter into treaties with other states.

Sect. 20 does not permit that an international organisation is entrusted with the issuance of acts of law or the making of decisions that are contrary to provisions in the Constitution, including its rights of freedom. Indeed, the authorities of the Realm have themselves no such power.

The term “to such extent as shall be provided by statute” must be interpreted to the effect that a positive delimitation must be made of the powers delegated, *partly* as regards the fields of responsibility and *partly* as regards the nature of the powers. The delimitation must enable an assessment to be made of the extent of the delegation of sovereignty. The fields of responsibility may be described in broad categories, and there is no requirement for the extent of the delegation of sovereignty to be stated so precisely that there is no room left for discretion or interpretation. The powers delegated may be indicated by means of reference to a treaty.

The demand for specification in sect. 20 (1) precludes that it can be left to the international organisation to make its own specification of its powers.

The term “to such extent as shall be provided by statute” cannot be interpreted to the effect that powers which are vested in the authorities of the Realm can be entrusted to an international organisation only to a limited - i.e., minor - extent.

- 9.3. The Act of Accession delegates powers to the EC to the extent laid down in the EC Treaty. The compatibility of the Act of Accession with sect. 20 of the Constitution therefore presupposes that the Treaty meets the requirement that powers have been delegated only “to such extent as shall be provided by statute”.

The EC Treaty is based on a principle of conferred powers, cf. Article 3b (1) and Article 4 (1) of the Treaty. The institutions of the Community may act only within such limits for the operation of the Community as appear from the provisions of the Treaty, and within these limits the institutions may only exercise such powers as have been conferred upon them by or pursuant to the Treaty.

The principle of conferred powers thus implies a restriction on the powers of the institutions which is in keeping with the demand for specification in sect. 20 of the Constitution. The Supreme Court finds that the specific rules of authority in the EC Treaty meet this demand.

- 9.4. However, as stated above, the appellants specifically claimed that the general provision of authority in Article 235 of the EC Treaty enables the incorporation of new areas of responsibility under the powers of the EC to an extent which implies that the demand for specification in sect. 20 of the Danish Constitution has not been observed. They have stated that this appears from the way in which Article 235 has been applied prior to the implementation of the Union Treaty. In this connection they have referred, inter alia, to the material which was produced in accordance with the order by the Supreme Court of 3rd November 1997 (excerpts of which are included in paragraph 5 above). Furthermore, they have stated that the amendments to the EC Treaty which were made by the Union Treaty imply an expansion of the scope of Article 235.

In this connection it should be noted that, as already mentioned, the case concerns the question whether the adoption of the Act on Denmark's Accession to the EC Treaty with the content given to that Treaty through the Union Treaty was constitutional. The issue, therefore, is not whether any transgression of the limits to the powers conferred may have taken place during the time prior to the amendment of the Treaty through certain legislative acts, etc., adopted in pursuance of Article 235.

At the amendment of the Treaty the fields of cooperation stated in Article 3 have been expanded and new articles have been added in Part Three of the Treaty on "Policy of the Community". A number of the fields where Article 235 was previously referred to as authority for drawing up legislative acts, etc., has now been adjusted or is even mentioned in the Treaty. Pillars 2 and 3 of the Union Treaty also comprise regulations on international cooperation in a number of other fields. The field of application of Article 235 must be evaluated on this background.

The wording of Article 235 of the EC Treaty is as follows:

"If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures."

It appears from the wording of Article 235 that the fact that action by the Community is considered necessary in order to attain one of the objectives of the Community does not in itself constitute sufficient background for applying the provision. It is a further condition that the intended action is "in the course of the operation of the common market". This - compared with Article 2 under which the tasks of the Community shall be promoted "by establishing a common market and an economic and monetary union and through implementation of common policies or action as stated in articles 3 and 3a" - is to be understood so that the intended action shall lie within the scope of the operation of the common market that appears from the other provisions of the Treaty, including in particular Part Three on the policy of the Community and the listing in Articles 3 and 3a of the individual fields of operation. This interpretation is in accordance with the Government's memo of 21st January 1997, to the Parliament's European Committee (mentioned above in paragraph 4) and is confirmed by opinion 2/94 of 28th March 1996 of the EC Court of Justice in plenary session, (mentioned above in the same paragraph) where it is stated in paragraphs 29 and 30 (E.C.R. 1996-I, page 1788):-

"29. Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.

30. That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose."

The stated interpretation of Article 235 must be taken as the basis even though, prior to the amendment of the Treaty, the provision may have been applied on the basis of a wider interpretation.

A legislative act which does not go any further than to confer powers to issue legislative acts or decide upon other measures in accordance with the interpretation of Article 235 stated above, does not constitute a violation of the demand for specification in sect. 20 of the Constitution.

Any adoption pursuant to Article 235 must be unanimous. Therefore the Government may prevent the provision from being applied to any adoption which is beyond the stated scope for Denmark's delegation of powers to the EC. The Government cannot assist in the adoption of bills which fall outside this scope and therefore presuppose additional transfer of sovereignty. On the background of the objective which Article 235 is intended to support it is unavoidable that the precise delimitation of the scope of application of the provision may give rise to doubts. In view thereof it is considered that the Act of Accession grants the Government a not insignificant margin.

- 9.5. In pursuance of Article 164 of the Treaty, the European Court of Justice shall ensure that in the interpretation and application of the Treaty the law is observed, and under Article 173 of the Treaty the Court of Justice shall review the legality of acts of the institutions of the Community. Under Article 177 the Court of Justice shall have jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and on the validity and interpretation of acts of the institutions of the Community.

Any question on the validity of an act of law or another action passed in pursuance of Article 235 may therefore be brought before the EC Court of Justice, and in that event the Court of Justice shall ensure that the scope of the operation of the Community is observed.

The fact that the detailed determination of the powers vested in the institutions of the Community may give rise to doubts, and that the jurisdiction to give rulings concerning the interpretation of such questions is transferred to the EC Court of Justice cannot in itself be regarded as incompatible with the requirement for specification in sect. 20 of the Constitution.

The fact that the EC Court of Justice in its interpretation of the Treaty also attaches importance to factors of interpretation other than the wording of the provisions, including the objectives of the Treaty, is not in violation of the assumptions on which the Act of Accession was based, nor is it in itself incompatible with the demand for specification in sect. 20 (1) of the Constitution. The same applies to the law-making activities of the EC Court of Justice within the scope of the Treaty.

- 9.6. The appellants have pleaded that the jurisdiction of the EC Court of Justice under the Treaty, held against the principle of precedence for EC law, implies that Danish courts of law are prevented from enforcing the limits for the transfer of sovereignty which has taken place by the Act of Accession and that this must be taken into consideration when assessing if the demand for specification in sect. 20 (1) of the Constitution has been observed.

By adopting the Act of Accession it has been recognised that the power to test the validity and legality of EC acts of law lies with the EC Court of Justice. This implies that Danish courts of law cannot hold that an EC act is inapplicable in Denmark without the question of its compatibility with

the Treaty having been tried by the EC Court of Justice, and that Danish courts of law can generally base their decision on decisions by the Court of Justice on such questions being within the limits of the transfer of sovereignty. However, the Supreme Court finds that it follows from the demand for specification in sect. 20 (1) of the Constitution, held against the Danish courts' access to test the constitutionality of acts, that the courts of law cannot be deprived of their right to try questions as to whether an EC act of law exceeds the limits for the transfer of sovereignty made by the Act of Accession. Therefore, Danish courts must rule that an EC act is inapplicable in Denmark if the extraordinary situation should arise that with the required certainty it can be established that an EC act which has been upheld by the EC Court of Justice is based on an application of the Treaty which lies beyond the transfer of sovereignty according to the Act of Accession. Similar interpretations apply with regard to community-law rules and legal principles which are based on the practice of the EC Court of Justice.

- 9.7. On the background mentioned, the Supreme Court finds that neither the additional powers that have been delegated to the Council in pursuance of Article 235 of the EC Treaty, nor the law-making activities the Court of Justice can be regarded as incompatible with the demand for specification in sect. 20 (1) of the Constitution.
- 9.8. Under sect. 20 of the Constitution any delegation of powers can take place only to "international authorities" established by "mutual agreement" with "other states" for the promotion of "international rules of law and cooperation". It must be considered to be assumed in the Constitution that no transfer of powers can take place to such an extent that Denmark can no longer be considered an independent state. The determination of the limits to this must rely almost exclusively on considerations of a political nature. The Supreme Court finds it beyond any doubt that by the Act of Accession no sovereignty has been transferred to the Community to such an extent that it is in violation of the said assumption in the Constitution.
- 9.9. With regard to the question whether transfer of sovereignty in accordance with the Act of Accession is of such a nature that it is in violation of the assumption of the Constitution of a democratic system of government, it is noted that any delegation of part of the Parliament's legislative powers to an international organisation will involve a certain encroachment on the Danish democratic system of government. This has been taken into consideration when drawing up the rigorous requirements for adoption under sect. 20 (2). In so far as concerns the EC Treaty, legislative powers have been transferred primarily to the Council, in which the Danish Government – answering to the Parliament - can exercise its influence. It is reasonable to assume that the Parliament has been entrusted to consider whether participation by the Government in the EC cooperation should be conditional upon any additional democratic control. Nor does the Supreme Court in this respect find any basis for holding the Act of Accession unconstitutional.
- 9.10. In view of the above and in view of the fact that the appellants have made no further statements that may lead to a different outcome the Supreme Court hereby affirms the judgment and dismisses the appeal."

H E L D:

The judgment of the High Court of Justice shall be affirmed.

5. FURTHER READING

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