

EUROPEAN
ECONOMIC COMMUNITY

EUROPEAN ATOMIC
ENERGY COMMUNITY

EUROPEAN COAL AND
STEEL COMMUNITY

EUROPEAN PARLIAMENT
WORKING DOCUMENTS

1965-1966

25 MAY 1965

ENGLISH EDITION *

DOCUMENT 43

Report

drawn up on behalf of

the Legal Committee

on

the Paramountcy of Community Law over the Laws
of Member States

Rapporteur : Mr. F. Dehousse

* This translation must not be treated as an official text. Readers are reminded that the official texts exist only in the Dutch, French, German and Italian languages.

At its meeting of 21 December 1964, the Legal Committee decided to tackle the problem of the paramountcy of Community law over the laws of Member States.

On 7 January 1965, the Bureau of the European Parliament authorized the Legal Committee to draw up a report on this subject.

At its meeting of 21 January 1965, the Legal Committee appointed Mr. Dehousse Rapporteur.

The Legal Committee dealt with the problem of the paramountcy of Community law at its meetings of 18 February, 15 March and 20 April 1965.

The report by Mr. Dehousse and the draft resolution appended to it were unanimously passed by the Legal Committee at its meeting of 26 April 1965.

The following were present when the vote was taken : Mr. Weinkamm, Chairman ; Mr. Drouot L'Hermine, Vice-Chairman ; Mr. Dehousse, Rapporteur ; Messrs. De Bosio, Estève, Ferrari, Janssens, Poher, Radoux and Vanrullen (deputy for Mr. Carcassonne).

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REPORT

on the paramountcy of Community law over the laws of Member States

Rapporteur : Mr. Fernand Dehousse

Mr. President,

INTRODUCTION

1. The recent decision to merge the Executives has once again brought to the forefront the need to strengthen the powers of the European Parliament.

It is becoming increasingly apparent that the present system, whereby what is "lost" by the national Parliaments is not "gained" by the European Parliament, is indefensible by democratic standards. It is in the legitimate interest of the Member States that, as the sphere over which the Community has jurisdiction widens its bounds, there should be a proportionate increase in the degree of control to which it is subject and that such control cannot now be other than "European".

2. Until such time as the outlines of this issue become clearer, the European Parliament will of course continue to play what has become its traditional part : that of interpreting and often, too, of rousing public opinion in Europe. Hence it not only has a right to bring to the attention of the public any dangers that it sees as threatening the Communities or their operation : it also has a duty to do so.

3. Against this background, your Committee has sought to determine where Community law stands in relation to national law within the domestic legal systems of the Member States. It has done so because national courts have been taking decisions which, to varying degrees, are such as to call into question the application of Community provisions where they conflict with the domestic law.

If this trend goes unchecked, your Committee considers that it could seriously undermine the effectiveness of the Communities ; it might

even go so far as to reduce to nought their *raison d'être*.

4. It is quite clear that the Communities will be unable to attain the objectives of the Treaties if the legal instruments at their disposal are not enforceable or if the Member States are, to say the least, in a position where they can ignore them. The European legal order would then be liable to disintegrate into a series of incomplete systems, independent and divergent as to content.

5. It would be equally disturbing if the constitutional quality of the treaties were challenged by jurisprudence. The Community legal order would be seriously shaken and untoward repercussions would undoubtedly follow.

6. Your Committee is well aware that it is not for the European Parliament or for any other authority to bring any form of pressure to bear on the courts of the Member States. The latter must remain quite independent in their judgments. Your Committee considers, however, that this does not mean that the Parliament should remain silent. It, too, is independent. It, too, has its duty.

Hence the aim of this report is to fire a "warning shot" to bring home to the general public that there is a Community law which every Member State has undertaken to respect. Its aim is also to provide the national authorities concerned with information likely to ensure the balanced development of the Communities, with due regard for their rights and duties as well as for those of the Member States.

7. From the legal standpoint, the report will be particularly concerned with :

a) the main theories of jurisprudence on where Community law stands in relation to domestic law ;

b) the provisions in the constitutions of the Member States that deal with the application of international treaties within the domestic legal context ;

- c) the main conflicts between national law and Community law that have been referred to national courts and to the Court of Justice of the European Communities.

8. Let it be emphasized that the concern felt by the Legal Committee is shared by Professor Hallstein, President of the EEC Commission, who stated in the European Parliament on 18 June 1964 (1) :

“ ... The legal acts of the Community organs can be defined, examined as to their validity and interpreted only in terms of Community law. Assimilating them to categories of State legal systems involves the danger of misunderstandings and erroneous conclusions. Thus we are obviously led astray if regulations of the Community organs are designated as derived rules of law applied by delegation from the real lawmaker...

The rules of Community law come first irrespective of the level of the two orders at which the conflict occurs. And further, Community law not only invalidates previous national law but also debars subsequent national law. Both rules of conflict are part of that solidly entrenched body of law applied in comparable cases. Without them to acknowledge the supremacy of Community law would be no more than a courteous gesture, carrying no obligations. In reality, the Member States could do with it what they liked...

A unified solution valid for the whole Community must be provided for the order of precedence here mentioned. Any attempt to solve the order of precedence differently to accord with the idiosyncrasies of the Member States, their constitutions and political structure, runs counter to the unifying character of European integration, and thus to the fundamental principles of our Community...”

9. Your Committee fully endorses the view taken by President Hallstein. Indeed, it has found that national legal and administrative bodies still follow their traditional paths in many instances and are rather backward in applying Community law. This is mainly due to ignorance of the Community regulations and the provisions of the European Treaties. More often than not the bodies concerned have as yet failed to grasp the fundamental importance of Community law and its far-reaching implications for the existing legal order ; this is due to lack of information for which they cannot, in every instance, be held responsible.

(1) See European Parliament ; Verbatim Report No. 72 ; 1964-65 Session ; sitting of 18 June 1964.

CHAPTER I

Legal theory

A — *Standard International Law and Community Law*

10. When the Member States ratified the treaties that set up the three European Communities and when the texts giving them effect were drawn up, this raised the whole problem of the co-existence, within the Member States, of two systems of law of differing origins : Community law and domestic law. The problem arises because co-existence naturally means there may be conflict, in which case the relevant solution has political as well as legal implications. It is hardly necessary to repeat that the way in which the responsible national authorities interpret and apply Community law will in fact have a considerable bearing on the mould and the making of Europe.

In this context jurisprudence and legal theory are decisive, in so far as they help to define and clarify a political situation. This point was pressed to your Committee on 18 February 1965 by the representative of the Legal Department of the Communities. Your Rapporteur is of the same opinion.

11. The problem as to where two legal systems of differing origin stand in relation to each other is not a new one. Ever since the time (i.e. the end nineteenth century) when the aims of treaties began increasingly to coincide with those of laws, this problem has arisen in connexion both with the law of nations and domestic law.

This is why it may be pertinent to recapitulate the two main legal theories in this matter.

The first theory is referred to as the dualist theory because its most eminent advocates, such as Triepel or Anzilotti, argued that international law and domestic law constitute two parallel legal systems of differing origin, nature and sphere of application. The dualist regard international law and domestic law as being two independent systems of rules. By this they mean that the rules deriving from each are only enforceable within their own legal order, have parallel validity, neither affecting the enforceability of the other. This parallelism is deemed to derive either from an absolute contradistinction between the law of nations and domestic law with respect both to source, subject and validity, or from the distinction between the fundamental rule of the law of nations — *pacta sunt servanda* — and the fundamental rule of domestic law, to wit, obedience to the edicts of the State. Whatever substantiation is offered for this parallelism, however, the dualists recognize that

international law may impose obligations on a State and limit its powers, without ever becoming a source or domestic law. What is applicable in the domestic order can never become the rule for the law of nations which the State is under an international obligation to apply ; it can, the dualists consider, only affect the measures that the State is required to take to fulfil such an obligation ; such measures, effecting the reception of an international rule into the domestic legal system, "transform" it into a new rule — i.e. domestic rule which is part and parcel of domestic law (1).

One criticism that may be levelled here is that this theory attaches undue weight to what are no more than differences of form or organization. The sources of international law are no doubt technically different from those of domestic law but in actual fact they have one and the same origin.

In opposition to the dualist theory there is the monist theory put forward by Kelsen and the Austrian *jus gentium* school and by such other eminent jurists as Duguit, Scelle and Verdross. The main basis of the monist theory is pure logic. The relationship between international and domestic law cannot but be that of two systems of laws. All laws, however, form a pyramid which expresses the hierarchical relationship between them. This being assumed, it is necessary to pinpoint where the rules of international law fit into this hierarchy and it is here that the notion of the paramountcy of the law of nations comes into its own in the unitary construction of the universal legal order.

The basis of this concept may be found in the international Community whose existence the States must take into account in their relations with each other. The rule *pacta sunt servanda* is therefore primarily a rule at the service of the common good reflecting a sense of law which is integrated in the body of laws.

12. But while the paramountcy of international law over domestic law stems essentially from the reality of the international Community, the question arises whether the law of the European Communities can be considered on the same level and from the same standpoint of the common good. Are there in fact similarities between Community law and international law of the traditional type which would allow of their being assigned the same position in the hierarchy of laws ?

(1) Among the many works on this subject see, inter alia : L. Delbez : *Les principes généraux du droit international public*, Paris 1964. See also : F. Dehousse : *La ratification des traités*. Essay on the relationship between treaties and domestic law. Paris 1935.

The representative of the Legal Department of the Communities put forward to your Committee the theory that Community law was of a specific kind.

Until now certain courts have regarded the conflict between Community law and national law as being one between traditional international law and domestic law. The judges have referred to their national constitutions and the means open to them under these constitutions to resolve any inconsistencies between international treaties and the law. Practical difficulties are, however, liable to result because international treaties are introduced into the domestic order by a normal act of parliament, whence it could be deduced, by virtue of the axiom *lex posterior derogat priori*, that any subsequent law would take precedence. If, furthermore, it were conceded that Community law does not differ from standard international law, there would be a danger of its not being applied in a uniform manner, which would be particularly serious for the Communities. Indeed, as will be seen in the following chapter, certain constitutions include provisions which can be used as a basis for affirming the paramountcy of Community law whereas in others there are no such provisions. To attempt to resolve the problem of conflicts between international and domestic laws is thus same means as those used to solve conflicts between international and domestic laws is thus not what might be described as a perfect solution.

It would, moreover, be more correct and, indeed more scientific to seek to justify a given solution by reference to the characteristics of Community law. The salient feature of the Community edifice is that it is not, either in its aims or in its methods, an international edifice of the conventional type. In analyzing Community law and, thence, the relationships between it and national law, lawyers ought not to neglect the implications of its structure in contrast to standard international law. At its origin lie a political resolve and a postulation of ultimate objectives and these are bound up with the paramountcy of Community law ; an adequate solution can only derive from concepts that take this originality to its logical conclusion to justify this paramountcy.

13. This theory was upheld in a resolution passed at the second international colloquy on European law held in The Hague in October 1963 under the auspices of the International Federation for European law ; the resolution reads inter alia :

"The problem of the direct enforceability of Community regulations in internal juridical systems differs from that of the direct

enforceability of provisions contained in international treaties of the traditional type in certain specific respects :

- Community regulations have a much further-reaching effect on relationships of public and private law between persons who come under the jurisdiction of the Member States than do the international treaties so far concluded ;
- the direct enforceability of Community regulations is ensured not only in the national juridical order through its courts but also in the Community as a result of administrative and legal action taken whose effects are felt in the national juridical orders ;
- the treaties endow the Communities with extensive powers to issue regulations, including discretion as to how the general principles they articulate are to be implemented.”

14. Your Committee considers, however, that there is not sufficient justification of the paramountcy of Community law, either in the special nature of the legal structure that it has created or in the political resolve and postulation of ultimate objectives that are at its root. Indeed, the latter obtain at the origin of any rule of law whether of the traditional international, Community or domestic type. To make this the basis for the hierarchy of different rules would therefore enable the courts responsible for interpreting and applying it to evaluate the relevant resolve and finality in the event of any conflict.

It is therefore not irrelevant to regard Community law either as a special law setting up a special legal order applicable in a Community of States or, on the contrary, as an integral part of standard international law writ large.

In support of the latter concept, it can be argued that the differences between standard international law and Community law are not the same as those between international and domestic law. Although Community law has certain definite characteristics of its own, it has features in common with international law. The European Communities were created by an act of international law of the traditional type. Their primary legal basis is an international treaty. They are subject to international law in their relations with third countries and other international organizations, etc.

But while it may readily be conceded that the law on which the European Treaties are based comes under the law of nations, the question arises as to what is the nature of the law elaborated in putting these Treaties into applica-

tion through the agency, for instance, of the Community institutions. This leads one to regard the two laws as forming a whole, in other words a law that might be described as “transnational” (1) to distinguish it from the law of nations as a whole. The law elaborated by the Community institutions stems from the direct application of the law of the treaties and the two categories of rules are ipso facto identical in nature.

If the theory that Community law comes under the standard law of nations is accepted, its paramountcy over domestic law has likewise to be accepted since it is based, like standard international law, on the indisputable concept of the common good.

B — *Theories on the relationship between Community law and domestic law*

15. This brief introduction to the relationship between international law and Community law and its implications with regard to the hierarchy of Community rules and domestic rules, now calls for a survey of some of the theories on the relationship between Community law and national law.

Acknowledgements are due to Professor Ipsen (Western Germany) for having recently made a brilliant synthesis of these theories. At the second colloquy on European law, arranged by the *Wissenschaftliche Gesellschaft für Europarecht* and held in Bensheim in July 1964, Professor Ipsen outlined four main theories (2).

16. The advocates of the first theory argued that the relationship between Community and national law is based on a more or less orthodox dualist concept. According to this, the Communities sprang from the conclusion of treaties of international law and oblige the States to act in a manner consistent with the obligations subscribed to by virtue of these treaties. At the Community level, the States are considered to have a responsibility towards each other and towards the Communities themselves ; domestically, however, there is no automatic paramountcy of Community law over national law for it is argued that the relationship between these rules depends on the principles that govern, in each State, relations between standard international law and domestic law. Yet since international law becomes effective at the domestic level only when it is “received” domes-

(1) See Hans-Jürgen Schlochauer : *Das Verhältnis von europäischem zu nationalem Recht* in *Archiv des Völkerrechts*, July 1963.

(2) See *Neue Juristische Wochenschrift* of 20 February and 27 August 1964 ; *Revue du Marché commun*, November 1964.

tically, it is argued that any subsequent law would derogate from the Treaties setting up the Communities by virtue of the axiom *lex posterior derogat priori*. There would inevitably be divergences between the Member States on the way in which the international law became incorporated in their domestic legal systems. There would thus be a kind of "State by State assimilation" of the Community law with the domestic law and there might also be different hierarchies, depending on whether the assimilation was with this or that category of domestic rules.

17. The second theory, which concerns procedure, is to a large extent based on the meaning and implications of Article 177 of the EEC Treaty. This is in line with the judgment of the Court of Justice of 15 July 1964⁽¹⁾ in the case *Costa versus E.N.E.L.* The basis there is a pragmatic one: the "effect in practice" of the Treaties.

As opposed to other international treaties, the European Treaties and, in this instance, the EEC Treaty, have created a specific judicial order, which was integrated with the national order of the Member States and is binding on their courts. In fact, by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the Member States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and themselves.

The reception, within the laws of each Member State, of provisions having a Community source and, more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the Member State, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity. In truth, the executive strength of Community laws cannot vary from one State to the other in favour of later internal laws without endangering the realization of the aims envisaged by the EEC Treaty in Article 5,2 and giving rise to a discrimination prohibited by Article 7. In any case, the obligations undertaken under the Treaty would not be unconditional, but merely potential if they could be affected by subsequent legislative acts of the signatories to the Treaty.

Furthermore, whenever the right to legislate unilaterally is allowed to the Member States,

it is under a precise and special provision; it is also true that requests for derogation are subject to a special procedure of authorization which would be meaningless if the Member States could exempt themselves from their obligations by means of an ordinary law.

The pre-eminence of Community law is confirmed by Article 189 of the EEC Treaty which prescribes that Community regulations are "binding in every respect and directly applicable in each Member State". Such a provision which, it will be noticed, admits of no reservation, would be wholly ineffective if a Member State could unilaterally nullify its purpose.

It follows from all these observations that the rights created by the Treaty, by virtue of their specific original nature, cannot be judicially contradicted by an internal law, whatever it might be, without losing their Community character and without undermining the legal basis of the Community. The transfer, by Member States, from their national order, in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail. As a consequence, Article 177 should be applied regardless of any national law in those cases where a question of interpretation of the Treaty arises.

18. Professor Ipsen then outlines the third theory, that is the federalist theory, according to which the question of where Community law stands in relation to national law does not arise, because each law covers a different area; they do not overlap. There is the sphere of matters that now come under Community jurisdiction and that of matters remaining under national jurisdiction. According to this theory, there is no possibility of conflict between the two.

This theory could give rise to a debate on the federal nature of the Communities. Your Committee does not consider it advisable to enter into such a debate in this report, interesting though this problem is.

19. There remain, however, the advocates of what is known as the pragmatic theory.

Although they do not deny the fundamental importance of the problem of conflicts between national and Community laws, they endeavour to minimize it. Where cases of conflict arise, it is considered appropriate either to interpret the national law in a Community sense or to apply the principle *in dubio pro Communitate*, thus creating a kind of irrefragable presumption of the superiority of Community law. This is a highly simplified approach to settling disputes.

(1) See *Recueil de jurisprudence de la Cour*, Section 5, Vol X, 1964.

C. The main aspects of the problem

20. While, for the reasons outlined in the first part of this report, your Committee is convinced of the paramountcy of Community law over the domestic laws of the Member States, it has endeavoured to show — without taking sides with any of the theories so far discussed — how this paramountcy finds expression in the legal structure of the Community.

Interpenetration of national and Community legal systems

21. The theory that Community and domestic rules of law become interwoven is, by definition, at the opposite extreme from the dualist theory. It implies that the provisions of the Treaties become directly embodied in the orders of the Member States and that they are thus directly enforceable without there being any need for subsequent "acceptance" provisions in the national order.¹⁾

It is agreed that the Treaties that instituted the Communities are also a fundamental source of law for the Communities and, at the same time, are part of the internal order of the Member States. By virtue of the ratification laws, they were, indeed, incorporated in the internal legal system in the same way as any national law.

This implies :

- a) the absolute identity of the modifications made to the national legal systems of the Member States, given that the same text was incorporated in each of the national orders ;
- b) the effect of repealing pre-existing national laws where these are wholly or partly inconsistent with the terms of the Treaty ;
- c) the power and the duty of the Member States to enact the Treaties without there being any need for the national parliament to intervene.

(1) This is the thesis that Catalano defends in the chapter entitled *Rapports entre les normes communautaires et les ordres juridiques des Etats membres* in his work *Manuel de droit des Communautés européennes* (Gluffré, Milan, 1962). While Catalano acknowledges that the dualist theory is acceptable as regards most international instruments, he stresses that this cannot in any eventuality be regarded as an absolute rule. He refers to the work by Morelli (*Nozioni di diritto internazionale CEDAM*, Padua, 1963) which, while unreservedly accepting the dualist theory, distinguishes between ratification, an act of will whereby the State, being subject to international law, participates in the creation of the treaty and the act of domestic law whereby that law is modified, as required by the new treaty, to conform with the international legal order.

22. The interpenetration theory is also based on the terms of the Treaty provisions and, in particular, on the implications of one of their characteristic features—the transfer of powers. Indeed, it would be impossible to implement the treaties if it were necessary, in order to enforce Community regulations, for the constitutional bodies of the Member States to incorporate these regulations in the national orders. Apart from the time lag in enforcing the regulations that would inevitably result, the need for a reception regulation presupposes that it is within the discretion of national parliaments to evaluate the relevance of the Community regulation.

One might be tempted of course to justify the intervention of the national parliaments by arguing that when they authorized the ratification of the Treaties, they fully understood its implications and undertook, ipso facto, to pass subsequent adjustment regulations. In this sense, such regulations would simply be the corollary to those in the ratified treaty. Subsequent interventions by the Parliament would follow as the direct result of an undertaking already given and the relevant domestic adjustment regulations would in practice stand in the same relation to the international treaty as implementing regulations in relation to the law.

Yet the practical implications of Community regulations (¹⁾), as laid down in the European Treaties, appears to be quite different. These regulations require that effect be given to the very general principles of the Treaties by recourse to a choice of means and interventions, not determined in a restrictive way, at the discretion of the Community institutions upon whom the power to issue regulations has been conferred. If, under these conditions, the national parliaments had to intervene to receive Community regulations, they could not be denied the discretion to evaluate the choice as to the most adequate means to employ to apply the principles incorporated in the Treaties.

To reject the theory of the interpenetration of Community and domestic laws and of the direct or immediate incorporation of the one in the other would thus be to ignore the implications of one of the fundamental principles of the Treaties and would be tantamount to precluding the enforcement of their main provisions.

The modification of national constitutions as a result of the Treaties

23. Regulations drawn up by the Community institutions to implement the Treaties derive from the exercise of the powers which the

(1) Catalano, op. cit., p. 103 ff.

Treaties derive from the exercise of the powers which the Treaties conferred upon them. In law, the immediate incorporation of these regulations is the corollary of a modification to the national constitutional systems resulting from the Treaties. In this sense, endowing the Community institutions with the power to issue regulations may be regarded as a new source from which regulations may emanate, supplementing the sources for which provision is made in the constitutions of the Member States ⁽¹⁾.

24. *Mutatis mutandis*, the same line of reasoning must be followed with regard to the indirect power to issue regulations conferred on the three Communities. Community recommendations or directives constitute an indirect source of national measures which the Member States are under an obligation to take in order to comply with them.

When powers were conferred on the Communities this involved a substantial transfer of prerogatives from the internal constitutional institutions to the Community bodies. This had its effect on the national orders in that it subordinated them to the Community order.

Non-abrogation of Treaty regulations as a result of subsequent national laws

25. It is along these lines that another problem will have to be solved, that of any inconsistencies that may arise between the terms the European Treaties and new regulations passed by the Member States subsequent to the ratification of the Treaties. Recourse cannot be had to the principle of implicit abrogation in this instance. This is a principle which is valid in relation to regulations enacted prior to the promulgation of the act of ratification but which cannot, by definition, be applied with respect to subsequent regulations.

Can such regulations, passed in the manner required by the constitution, implicitly repeal in the internal order regulations which are contained in the Treaties and which have been incorporated in the internal order as a result of the ratification laws? In other words, does the principle *lex posterior derogat priori* apply both to the provisions of the Treaties in their effect on existing laws and to new regulations in their effect on provisions of the three Treaties?

This solution must be rejected for it is certain that in subscribing to the fundamental provisions of Article 86 of the ECSC Treaty,

Article 5 of the EEC Treaty and Article 192 of the Euratom Treaty ⁽¹⁾, the Member States undertook not only to take all measures, whether general or particular, appropriate to ensure the carrying out of the obligations arising out of the treaties and to provide the Communities with every facility for performing their tasks but also to abstain from any measures which could jeopardize the attainment of the objectives of the treaties. The provisions in the treaties which impose commitments on the Member States or which entail a transfer of powers to the Communities may be regarded as having a similar effect.

Consequently, if any Member State were, after ratifying the three treaties, to take any measure inconsistent with the treaties, this would represent a failure to meet contractual obligations. In that eventuality, the system of guarantees incorporated in the institutional machinery of the Communities would come into force. The matter could be referred to the Court of Justice and the Court's decision, upon finding that an infringement had occurred, would oblige the State concerned to repeal the new measures that were inconsistent with the terms of the treaties.

Non-abrogation, as a result of subsequent national laws, of Community regulations on the implementation of the Treaties

26. It is worth remembering that the provisions of the Treaties setting up the Communities are not the only ones to have a normative effect in the Communities. Regulations issued by the Community institutions have the same normative effect. In the event of a clash between these regulations and those of the internal order, the former take precedence. This is because, on the one hand, Community regulations follow from the exercise of the powers transferred from the Member States to the Community and, on the other, from the terms of Articles 86 of the ECSC Treaty, 5 of the EEC Treaty and 192 of the EAEC Treaty quoted above whereby States undertook to take all measures, whether general or particular appropriate to ensure the carrying out of their obligations... and to assist the Community in the achievement of its tasks.

(1) Catalano defends this thesis; Perassi does also in his work *Lezioni di diritto internazionale* (CEDAM, Padua, 1953). Perassi considers that the rule incorporated in the Treaties that set up the Communities acts as a "ceaseless modifier" of national orders which become either amended or amplified by Community regulations.

(1) Article 86 ECSC: "Member States undertake that they will take all steps, both general or particular, needed to discharge their obligations resulting from decisions and recommendations by the Community's institutions and that they will help the Community to carry out its duties." Article 5 EEC: "Member States shall take all measures, whether general or particular, appropriate to ensure the carrying out of the obligations arising out of this Treaty or resulting from the acts of the institutions of the Community. They shall assist the latter in the achievement of its tasks. They shall abstain from any measures which could jeopardise the attainment of the objectives of this Treaty." (The text of Article 192 of the Euratom Treaty is the same as that of Article 5 of the EEC Treaty).

It must be stressed, however, that the provisions of the Treaties are automatically applicable ; it is only as regards their interpretation that any problem may arise ; regulations issued by the institutions, on the other hand, may be appealed against in the Court of Justice which may quash them. Thus the paramountcy of regulations issued by the institutions over internal regulations is subject either to no appeal being made or the appeal's rejection if it should be made.

27. With regard to domestic regulations and those issued by the Community institutions in discharging their responsibilities, the question of their respective pre-eminence in the event of any conflict has yet to be determined. The regulations issued by the Communities (i.e. general decisions of the High Authority, regulations of the Councils and the Commissions), have the force of law within the Community legal system even though their adoption still fails to comply with the traditional rules of parliamentary legislation. As a result of the transfer of powers that took place when the Communities were created, the Member States may neither legislate nor take implementing measures in a sphere where the Community authorities have sole jurisdiction.

28. Consequently, domestic measures that conflict with the power of the Communities to issue regulations would be deemed to have been passed by authorities that are not competent to do so. Indeed, this incompetence could be the subject of an infringement procedure (Article 169 of the EEC Treaty) following which the Court of Justice might decide that a Member State had failed to fulfil its obligations. Yet the division of competence resulting from the Treaties would become meaningless and would cease, in the majority of cases at least, to have any practical effect if a national judge, in a dispute over conflicting Community and national regulations were neither able nor obliged to recognize the paramountcy of the Community regulations, bearing in mind that the national authority would not be competent in such an instance. This power to sanction the paramountcy of Community law is furthermore expressly assigned to the national courts which retain the right to settle the dispute by referring it to the Court of Justice of the Communities for a preliminary ruling. (Article 177 of the EEC Treaty).

The principles outlined here have been confirmed by the Court of Justice on several occasions, notably in its ruling COSTA/ENEL of 15 July 1964 ⁽¹⁾.

(1) See above, paragraph 17.

Domestic regulations issued by the Member States to fulfil obligations resulting from the treaties or to comply with recommendations, directives or decisions from the three Communities, raise a similar problem : i.e. as regards their compatibility with other domestic regulations. This problem will have to be resolved by reference to the system of guarantees laid down in the treaties. Should the case arise, it will be for the Court to decide whether or not the new domestic regulations constitute a breach of the obligations of the treaties and to give an appropriate ruling.

CHAPTER II

Constitutions of the Member States

29. One conclusion emerges, among many others, from the foregoing : the solution to the problem of the paramountcy of Community law over the laws of the Member States cannot be allowed to vary according to the case or the Member States involved. It must be the same for the whole Community.

30. Hence it would appear pertinent to examine the sections of the constitutions of the Member States that govern the relationships between Community law or international law and domestic law. These relationships are not settled in an identical manner nor even, at times, in a very clear way.

a) *Federal Republic of Germany*

31. Article 25 of the Basic Law for the Federal Republic of Germany reads as follows ⁽¹⁾ :

“The general rules of public international law are 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”.

Similarly, Article 24,1 of the Basic Law reads :

“The Federation may, by legislation, transfer sovereign powers to inter-governmental institutions.”

32. At first sight, these provisions appear to confirm, with abundant clarity, the principle of

(1) Constitutional texts prior to 1951 quoted hereafter are from the work on *Les Constitutions européennes* by Boris Mirkine-Guetzvitich, Paris, 1951. Texts after 1951 were translated by the Secretariat of the European Parliament.

the paramountcy of Community law over the national law in the Federal Republic. Yet the Basic Law provides that in the event of any conflict, the Federal Constitutional Court shall intervene, as laid down in Article 100, 2 :

“ If, in the course of litigation, doubt exists whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual (Article 25), the court shall obtain the decision of the Federal Constitutional Court.”

33. It has been asked whether international treaties such as the Paris and Rome Treaties constitute “ general ” rules of public international law and whether the Constitution ensures the paramountcy of the rules laid down by an international treaty over domestic law through the exercise of judicial control.

As will be seen in Chapter III, the German courts have to date given divergent answers ⁽¹⁾.

34. Certain German courts have expressed doubts as to the paramountcy of Community law, taking as their basis various articles of the Constitution:

Article 80,1, reads :

“ The Federal Government, a Federal Minister or the Land Government may be authorised by a law to issue ordinances having the force of law (Rechtsverordnungen). The content, purpose and scope of the powers conferred must be set forth in the law. The legal basis must be stated in the ordinance. If a law provides that a power may be further delegated, an ordinance having the force of law shall be necessary in order to delegate the power.”

Article 129,1 and 3, reads :

“ In so far as legal provisions which continue in force as federal law contain an authorization to issue ordinances having the force of law (Rechtsverordnungen) or general administrative rules or to perform administrative acts, the authorization shall pass to the agencies henceforth competent in the matter. In cases of doubt, the Federal Government shall decide in agreement with the Bundesrat ; the decision must be published.”

“ In so far as legal provisions within the meaning of paragraphs 1 and 2 authorize their amendment or supplementation or the issue of legal provisions instead of laws, these authorizations have expired.”

(1) See below, paragraphs 70 to 80.

35. Other articles also have to be mentioned :

Article 20 reads :

“ The Federal Republic of Germany is a democratic and social federal state.

All state authority emanates from the people. It shall be exercised by the people by means of elections and voting and by separate legislative, executive and judicial organs. Legislation shall be subject to the constitutional order ; the executive and the judiciary shall be bound by the law.”

Article 79,3 reads :

“ Any amendment of this Basic Law affecting the division of the Federation into Laender, the participation in principle of the Laender in legislation, or the basic principles laid down in Articles 1 and 20, shall be inadmissible.”

Article 1 reads :

“ The dignity of man is inviolable. To respect and protect it shall be the duty of all state authority.

” The German people therefore acknowledges inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

” The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.”

36. As will be seen in Chapter III, a number of regulations introducing levies on several agricultural products and the national laws relating thereto are liable, in Germany, to be regarded as incompatible with the financial regulations of the Basic Law and, in particular with Articles 105,1 and 2 ; 106,1 and 108,1 and 2 ⁽¹⁾.

The regulations read as follows :

Article 105,1 and 2 :

“ The Federation shall have the exclusive power to legislate on customs matters and fiscal monopolies.

” The Federation shall have concurrent power to legislate on :

1. excise taxes and taxes on transport, motor-vehicles, and transactions (*Verkehrsteuern*), with the exception of taxes with localized application, in particular of real estate acquisition tax, increment value tax, and fire protection tax ;

(1) See below, paragraphs 70 to 80.

2. taxes on income, on property, on inheritances, and on donations ;

3. taxes on real estate and business (*Realsteuern*), with the exception of the fixing of the tax rates, if it claims the taxes in whole or in part to cover federal expenditure or if the conditions laid down in Article 72, paragraph 2 (1) exist."

Article 106,1 :

"The yield of fiscal monopolies and receipts from the following taxes shall accrue to the Federation :

1. customs duties,
2. such excise taxes as do not accrue to the *Laender* in accordance with paragraph 2,
3. turnover tax,
4. transportation tax,
5. non-recurrent levies on property, and equalization taxes imposed for the purpose of implementing the Equalization of Burdens legislation,
6. Berlin emergency aid tax,
7. income and corporation surtaxes."

Article 108,1 :

"Customs duties, fiscal monopolies, excise taxes subject to concurrent legislative powers, transportation tax, turnover tax, and non-recurrent levies on property shall be administered by federal revenue authorities. The organization of these authorities and the procedure to be applied by them shall be regulated by federal law. The heads of the authorities at intermediate level shall be appointed after consultation of the *Land* Governments. The Federation may transfer the administration of non-recurrent levies on property to the *Land* revenue authorities as its agents."

b) Italy

37. Article 10,1 of the Italian Constitution reads: "The Italian juridical system conforms to

(1) Article 72, 2 lays down that on matters within the concurrent legislative powers: "The Federation shall have the right to legislate on these matters to the extent that a need for regulation by federal law exists because

1. a matter cannot be effectively regulated by the legislation of individual *Laender*, or ...
2. the regulation of a matter by a *Land* law might prejudice the interests of other *Laender* or of the entire community, or
3. the maintenance of legal or economic unity, especially the maintenance of a uniformity of living conditions beyond the territory of a *Land*, necessitates such regulation."

the generally recognized principles of international law."

Article 11 reads :

"Italy renounces war as an instrument of offense to the liberty of other peoples or as a means of settlement of international disputes, and, on conditions of equality with the other states, agrees to the limitations of her sovereignty necessary to an organization which will assure peace and justice among nations, and promotes and encourages international organizations constituted for this purpose."

38. The formulation of this article would appear to be clear. Provision is made for the State to renounce part of its sovereignty in the interests of specific objectives. This is what Italy did in ratifying the European treaties. Indeed, the structure created by the latter involves a whole legal order that transcends the States which form the basis of the Communities, to affirm itself in an original and new context that is very much akin to the structure of a federation.

39. Who will deny, for instance, that the right of the Communities to legislate has been recognized in the same way as that of federal institutions would be? Suffice it to recall the power of the institutions to issue binding regulations that are "fully and directly applicable in each Member State". The Member States, furthermore, undertook to apply certain Community decisions, even against their own will. This is the case for decisions taken by a majority on the Council.

Thus one of the most common expressions of sovereignty, namely the power to legislate within the framework of the provisions of the treaties, is to be found within the communities. Hence the question: does not the legal pattern of the European treaties approximate more closely to that of a constitution than to that of an international treaty? This question arises not only with reference to the Italian Constitution. It was thoroughly dealt with in President Hallstein's speech to the European Parliament on 18 June 1964. His reply, of course, was in the affirmative.

c) France

40. Since the second world war, the principle of the paramountcy of international law over national law has become constitutionally accepted in the French Republic.

Article 26 of the Constitution of 27 October 1946 reads :

"Diplomatic treaties duly ratified and published shall have the force of law even when they are contrary to internal French legislation; they shall require for their application no legislative acts other than those necessary to ensure their ratification."

41. To this was added the first sentence of Article 28 which reads :

"Since diplomatic treaties duly ratified and published have authority superior to that of French internal legislation, their provisions shall not be abrogated, modified, or suspended without previous formal denunciation through diplomatic channels."

42. These texts were replaced by Articles 54 and 55 of the Constitution of 4 October 1958 which reads :

Article 54 :

"If the Constitutional Council declared that an international undertaking, laid before it by the President of the Republic, the Prime Minister or the President of either Assembly, contains a clause that is at variance with the Constitution, its ratification or approval cannot be authorized until the Constitution has been revised."

Article 55 :

"Treaties or agreements that have been duly ratified or approved have, upon publication, a higher authority than ordinary laws subject, in the case of every treaty or agreement, to its being applied by the other party."

43. Despite the apparent clarity of these provisions, a controversy has arisen as to their interpretation. The paramountcy of international treaties over national laws has of course been acknowledged. This paramountcy, no doubt means, that, for as long as a treaty remains in force, any existing laws at variance with the treaty will be null and void, but question arises as to the exact legal status of a subsequent law that runs counter to a treaty in force. The new provision would prohibit the legislator from enacting such a law. Assuming he disregarded this, what sanction would follow? Is the judge empowered to refuse to apply the law? In other words, if one of the requirements of the Constitution is violated, is this followed by a judicial sanction or not?

44. Opinions differ on this point ⁽¹⁾. Certain writers take the view that the texts do not empower the court to censure a legislator enacting a law at variance with a treaty in force. Others, on the other hand, stress that if a judge were obliged to apply a law at variance with a treaty concluded at an earlier date, this would mean disregarding the constitutional provisions concerned or to make them null and void in practice. The courts of appeal have concurred in this interpretation.

d) Belgium

45. The Belgian Constitution contains no provisions on the relationship between international and domestic law. In contrast to previous ones mentioned, the Belgian Constitution is of fairly long standing; it was drawn up at a time when the problem did not arise. It has, however, recently been decided to revise it and this is the direction that will probably be followed when Articles 68 and 107 are re-examined.

46. In the meantime, there are no provisions in the Belgian Constitution which explicitly or implicitly prohibit the legislator from passing a law at variance with an international treaty concluded at an earlier date. The Belgian Constitution does not empower the legislator to interpret an international treaty through the medium of a statutory order. Indeed, Article 68,1 reads :

"The King commands the forces both by land and sea, declares war, makes treaties of peace, of alliance, and of commerce. He shall inform the two Houses of these acts as soon as the interests and safety of the State permit, adding thereto suitable comments."

An international treaty does not therefore fall within the competence of the legislative power; the latter does not conclude treaties and cannot denounce them.

47. This lacuna in the Belgian Constitution has not escaped the attention of Parliament. In 1953, on the occasion of an intended revision of certain articles, the Special Committee of the Chamber was seized of a proposal to supplement Article 107 by a provision stipulating that the courts have no right to apply domestic laws that are at variance with international treaties. This proposal was rejected on the grounds that although

(1) See Hayoit de Termicourt : Speech made on 2 September 1963 at the re-opening of the Supreme Court of Appeal of Belgium (*Journal des tribunaux*, 15 September 1963). Mr. Hayoit de Termicourt quoted the main theses maintained by French lawyers (see below paragraph 90) and in particular Niboyet (*Dalloz — chronique XXIII*, 1946, Donnedieu de Vabres (*Dalloz — chronique II*, 1948), Rousseau (*Droit international public, Précis Dalloz*, 1961).

treaties or agreements, duly approved and published, take precedence over existing national law, the courts have no right to refuse to give effect to a national law subsequent to an international treaty since this would be trespassing on the jurisdiction of the legislative and executive authorities.

48. A similar amendment was submitted in 1959 when a second attempt was made to carry through a revision of the Constitution. This concerned Article 68. The responsible committee rejected this too, but for different reasons. It preferred to rely on the evolution of international public law and jurisprudence for the solution of this problem which it felt had not yet been settled in a uniform manner.

49. In view of the ever-increasing importance in practical terms of the Treaties of Paris and Rome, of developments in the spheres they embrace and the difficulty of the legislator in uncovering inconsistencies between a new law and the treaties in force, it has not taken long for the problem to reappear. It is on the agenda for a forthcoming constituent session of the Chamber (that to be returned on 23 May 1965).

e) *Luxembourg*

50. Article 49 of the Luxembourg Constitution is restricted to the following provision :

“The exercise of powers vested, under the Constitution, in legislative, executive and judicial authorities may temporarily be transferred by treaty to institutions of public international law.”

There are no other texts by reference to which the problem under discussion may be solved.

51. In a judgment delivered in 1954, however, (see Chapter III) ⁽¹⁾, the Higher Court of Justice of the Grand Duchy decided that a judge must apply an international treaty in force even if it is at variance with a subsequent law.

f) *Netherlands*

52. The Netherlands is the only Member State to have resolved in a satisfactory manner the problem of the legal implications of an international treaty in relation to national law ; it did this by amending the Constitution in 1953 and 1956.

⁽¹⁾ See below, paragraphs 91 and 92.

53. Article 60,3 reads :

“The judge shall not be competent to judge of the constitutionality of international treaties.”

Similarly, Article 131,2 lays down that :

“The laws are inviolable.”

In other words, it is not within the competence of a Dutch judge to give a ruling on the constitutionality of international treaties or laws.

These Articles have, however, to be read in conjunction with Articles 65,1, 66 and 67,2.

Article 65,1 reads :

“Rules with regard to the publication of agreements shall be laid down in the law. Agreements shall be binding on any one in so far as they will have been published.”

Article 66 reads :

“The legal provisions in force within the Kingdom shall not apply if the application should be incompatible with agreements which have been published, either before or after the enactment of the provisions.”

Article 67,2 reads :

“By or in virtue of an agreement, certain powers with respect to legislation, administration and jurisdiction may be conferred on organisations based on international law.”

54. The principle of the paramountcy of treaties over laws is thus guaranteed by the Dutch Constitution.

This also provides for the contingency of inconsistencies between a treaty and the Constitution itself. Indeed, Article 63 reads :

“If the development of the international legal order required this, the contents of an agreement may deviate from certain provisions of the Constitution. In such cases the approval of the agreement shall not be given by the States-General but with a two-thirds majority of the votes cast in each of the two Chambers.”

55. This review of the relevant provisions in the Constitutions of the Member States shows that the extension to Community law of the traditional rules relating to the reception of international law would be at variance with the purpose and objectives of the Communities. If any Member State were able itself to decide as to the effect of Community law within its territory, the legal order in the making would disintegrate ;

it would give way, as in the past, to as many legal systems as there were Member States. This is already generally recognized as being true ; it is none the less worth repeating.

56. There would similarly be no legal foundation for applying the rules of reception of international law to Community law for the latter does not spring from international public law ; it is composed of provisions which, in the relevant spheres, give the Community its own special character.

Community law, furthermore, constitutes an independent and exclusive legal order having its own institutions. The law of the European Communities is, therefore, the independent law of three Communities of States until such time as it becomes the law of an integrated Community.

57. No State can alter the specific nature of Community law which lies in the fact that it is applied fully and uniformly throughout the Communities. Any unilateral amendment of Community law by a Member State would violate the general principle of equality and be a negation of the system.

The principle *lex posterior derogat priori* can not be applied to relationships between Community and national law but only to provisions of the same order having the same origin. Hence Community law derogates not only from earlier national laws ; it also precludes subsequent laws.

58. Seen in this light, Community law differs from international law.

This does not mean — and we wish to make it quite clear — that your Committee connects the former with a dualist construction of its relations with domestic law, and that it accepts for domestic law that which it rejects for Community law i. e. the corollary of reception with all its legal implications. A development is undoubtedly in progress which will in turn lead to the complete paramountcy of international law and there are very good reasons for this. One of these is that international law is not fully self-executing and ceases to obtain once the validity of a subsequent law is acknowledged. What purpose, indeed, would it serve to conclude treaties which could *validly* be derogated from in the internal order. Naturally, the international responsibilities of the State are involved in such instances but the end in view in contemporaneous treaties is different again ; it is, in most instances, to make them applicable within the territory of the contracting parties.

However, it has to be recognized that the dualist theory remains a strong one, stronger in

fact than was thought when opposition to this theory first arose... It continues to win substantial support. It is above all rooted in the ideas and traditions of national jurisprudence. The ever-increasing number of treaty-laws is causing it to lose ground and it will continue to do so to an increasing extent. It is clear, however, that the imperatives of the Communities are even more pressing, and it is much harder for the States to evade them if they do not wish to ruin their work. Thus, dualism is not simply a kind of growing pain ; it is a deadly danger.

This is all that this chapter set out to demonstrate.

CHAPTER III

The main disputes at law

59. It has been primarily in Italy and in Germany that disputes at law have occurred with reference to the application of Community law.

Italy

60. The most notable dispute to arise in Italy concerned the nationalization of electricity.

The Constitutional Court was seized of a dispute as to whether the law creating the ENEL (Ente Nazionale Energia Elettrica) was consistent with the EEC Treaty. The Court recognized that the conclusion of Treaties limiting sovereignty was lawful and that it was permissible to apply them on the basis of a normal law provided certain conditions were fulfilled. It did, however, express the opinion that Article 11 of the Constitution did not confer any special or privileged status upon the law ratifying the Treaty.

It is to be noted, however, that the Court expressed this opinion only in its statement of reasons for its conclusions ; it did not pronounce on the paramountcy of Community law.

61. The interpretation of the Court would appear to be open to discussion. Indeed, the law ratifying the European Treaties is based on the Constitution itself. Without a constitutional authorization, the Parliament would have been unable to pass such laws. These, therefore, are not ordinary laws, subject to repeal by subsequent acts.

62. It follows that the Treaties ratified under Article 11 of the Constitution restrict the powers of the Parliament itself and that if the Parliament passes laws at variance with the Treaties,

it is usurping the legislative power. Such laws, indeed, go against Article 11.

63. The Court of Justice of the European Communities adopted the same line of reasoning in its judgment of 15 July 1964.¹⁾

This judgment was delivered at the request of the "Giudice Conciliatore" of Milan which had, on the basis of Article 177 of the EEC treaty, referred the question to the Court of Justice for a preliminary ruling.

64. The Italian Government, which appeared before the Court as defendant, alleged the absolute inadmissibility of the request for a preliminary ruling since national courts had to apply domestic law and could not, for that reason, have recourse to Article 177.

The Court of Justice rejected the plea of inadmissibility. The reasons why this plea was rejected are worth quoting in full, given their implications and the importance of the principles involved:²⁾

"As opposed to other international treaties, the Treaty instituting the EEC has created its own order which was integrated with the national order of the Member States when the Treaty came into force; as such, it is binding upon them.

In fact, by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the Member States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves.

The reception, within the laws of each Member State, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the Member State, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity.

In truth, the executive strength of Community laws cannot vary from one State to the other as a result of later internal laws without endangering the realization of the aims envisaged

by the Treaty in Article 5(2) and giving rise to a discrimination prohibited by Article 7.

In any case, the obligations entered into under the Treaty creating the European Community would not be unconditional, but merely potential if they could be affected by subsequent legislative acts of the signatories to the Treaty.

Furthermore, whenever the right to legislate unilaterally is allowed to the Member States, it is under a precise and special provision (see, for instance, Article 15, 93 (3), 223, 224 to 225).

It is also true that requests for derogation by Member States are subject to a special procedure of authorization (Article 8 (4), 17 (4), 25, 26, 73, 93 (3) and 226) which would be meaningless if the Member States could evade their obligations by means of an ordinary Law.

The pre-eminence of Community law is confirmed by Article 189 which lays down that Community regulations are binding and "directly applicable within each Member State". Such a provision which admits of no reservation, would be wholly ineffective if a Member State could unilaterally nullify its purpose by means of a law contrary to Community law. It follows from all these observations that the law created by the Treaty, by virtue of its independent source and its specific original nature, cannot be judicially contradicted by an internal law, whatever it might be, without losing its Community character and without undermining the legal basis of the Community.

The transfer by Member States from their national order to the Community order, of rights and obligations arising from the Treaty, entails a definite limitation of their sovereign rights, upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail.

"As consequence, Article 177 should be applied regardless of any national law in those cases where a question of interpretation of the Treaty arises."

65. In June 1964 the Courts of Naples, Rome, Milan and Mondovi⁽¹⁾ took a slightly different attitude from that of the Italian Constitutional Court.

These courts had been seised by several enterprises of an appeal for stay of execution of a High Authority decision that the Court of Justice, in its judgment of 17 December 1963⁽²⁾ had recognized as legal. The plaintiffs submitted in particular that the procedure followed with

(1) See above, paragraphs 17 and 28.

(2) *Recueil de la jurisprudence de la Cour*, fascicule No. 5, Vol. X, 1964.

(1) *Rivista di Diritto internazionale privato e processuale*. CEDAM — March 1965, pp. 110-125.

(2) *Recueil de la jurisprudence de la Cour, affaires jointes*, Nos. 2 to 10-63 — Vol. IX, 1963.

regard to the law ratifying the Treaty should have been that laid down for giving effect to constitutional laws and not that for passing ordinary laws. The courts replied that provision was made in Article 11 of the Italian Constitution for Parliament to pass an ordinary law to ratify a treaty that limited the sovereignty of the Italian Republic. None the less, they recognized that, as a result of this procedure, the treaty had become an ordinary law within the Italian domestic legal system.

These judgments follow the same lines as the arguments developed above in regarding Article 11 of the Italian Constitution as the basis for the Parliament's authority to ratify the European Treaties; where they differ from them is in conceding that the law ratifying the European Treaties should be regarded as an ordinary law.

66. The judgment of the Court of Turin of 11 December 1964 is also relevant here ⁽¹⁾.

The problems are more or less the same. The plaintiff — the Italian steel company Acciaierie San Michele — appealed against a fine imposed by the High Authority because it had refused to comply with a request to forward the invoices relating to its electricity consumption during the period 1 April 1954 to 10 November 1958. *Inter alia*, the plaintiff asked that the matter be referred to the Constitutional Court. It submitted that the ECSC Treaty had become incorporated in the Italian legal system as a result of an ordinary law and not in compliance with the special procedure laid down in Article 138 of the Constitution. Was this not a breach of the latter ?

67. The Court agreed to refer the case to the Constitutional Court. It considered that the submission as to unconstitutionality was clearly not without grounds, because as a result of the ECSC Treaty, the judicial function was no longer exercised by ordinary judges in accordance with Article 102 of the Constitution, but by the Court of Justice of the European Communities.

The Turin Court also accepted that the question of unconstitutionality was not wholly unfounded with respect to the provisions of Article 113 of the Constitution which provides for "judicial protection... against acts of the public administration... before the organs of ordinary and administrative jurisdiction."

(1) Court of Turin, 21 December 1964: *Ordinanza in Foro Padano*, January 1965, fourth part.
In a judgment of the Court of Turin on 10 May 1963 furthermore (see *Giurisprudenza italiana* 1964 — I, Part I, section two) we read:
"that the ECSC once constituted through a ratification of the Treaty became sovereign and independent in accordance with that Treaty. It has therefore exercised a legislative executive and judicial activity in its own right quite independently of those that the Member States are empowered to exercise within their territories in pursuance of their various constitutions."

Yet under Article 33,2 of the ECSC Treaty, the competence of the Court of Justice only covers cases of misuse of powers. There is thus no protection in the event of any other act.

68. The doubt expressed by the Court of Turin would appear to be unacceptable. A cession of sovereignty, such as provided for under Article 11 of the Constitution, must necessarily entail a change in the constitutional structure of the State. Had the cession of sovereignty not been expressly permitted, recourse should have been had to the procedure laid down in Article 138. But since the Constitution did this, it was clearly implied that any legal order had automatically to be modified when Article 11 was put into application.

The Italian legal system, including Article 102 and 113 of the Constitution, will in future have to be considered in the light of this reality.

Federal Republic of Germany

69. As stated in Chapter II ⁽¹⁾, Article 24 of the Basic Law for the Federal Republic of Germany lays down that the Federation may, by legislation, transfer sovereign powers to inter-governmental institutions. This definition is quite clear as regards the transfer of sovereign powers, less so as regards the phrase "to inter-governmental institutions". What kind of institutions are involved: federal, Community or international institutions proper ?

In any event, the Basic Law accepts the principle of a limitation of sovereignty; consequently, the Parliament was not acting *ultra vires* in ratifying the European Treaties.

70. This opinion was shared by the Administrative Court of Frankfurt in its judgment of 17 December 1963, although the Financial Court of Rhineland-Palatinate gave a different ruling ⁽²⁾.

The Financial Court of Rhineland-Palatinate, considering a dispute about levies, referred the matter to the Federal Constitutional Court for a preliminary ruling and expressed its opinion as follows:

"The EEC Treaty clearly states that the legislative capacity of the EEC Council is not that of an originator—the function of the Executive—but is derived from the powers transferred to the Executive. The EEC Treaty further states that both the EEC Council and the EEC Commission are executive authorities. Citizens of the Federal

(1) See paragraph 31.

(2) See Judgment of the Administrative Court of Frankfurt of 17 December 1963 in *Aussenwirtschaftsdienst Betriebsberater*, 1964, p. 60.

Republic can therefore not regard "regulations" passed by the EEC Council otherwise than as regulations passed in compliance with the Basic Law."

71. Under the Basic Law, ordinances may be issued as follows: Article 80 lays down that the Federal Government, a Federal Minister or the Land Governments may be authorized by a law to issue ordinances having the force of law (*Rechtsverordnungen*). But the content, purpose and scope of the powers conferred must be set forth in the law and the legal basis must be stated in the ordinance ⁽¹⁾.

72. In compliance with Article 129 of the Basic Law, in so far as legal provisions, which continue in force as Federal law, contain an authorization to issue ordinances having the force of law or general administrative rules, or to perform administrative acts, the authorization shall pass to the agencies henceforth competent in the matter. In cases of doubt, the Federal Government shall decide in agreement with the Bundesrat.

73. The Financial Court of Rhineland-Palatinate further declared in the reasons it adduced:

"Whereas the Federation may certainly transfer sovereign rights to international institutions by passing a law, and accordingly transfer the right to issue, by means of ordinances, judicial regulations binding on all concerned throughout the Federation; whereas in doing so, however, it must consider that the Basic Law prohibits any prejudice to the principle of the division of competence; whereas the transfer of sovereign rights must not lead to the abrogation from without of the division of competence which is carefully balanced and safeguarded by the Basic Law in order to preserve a free social order;

Whereas the Basic Law is against authorizing executive institutions to issue regulations amending the laws, and whereas the authorization given under the law ratifying the EEC Treaty embodies regulations amending the laws ..." ⁽²⁾.

74. The Financial Court is here referring to Article 20,2 of the Basic Law which stipulates that "All State authority emanates from the people. It shall be exercised by the people by means of elections and voting and by separate

legislative, executive and judicial organs." The Court also refers to Article 129,3 whereby all authorizations to amend or supplement legal provisions, or to issue legal provisions instead of laws, have expired.

75. The Financial Court declared that the division of competence was the most important constitutional principle.

"Even if it is submitted that the EEC Council creates a body of laws rather than a series of ordinances, the conclusion remains that the law ratifying the Community Treaties ⁽¹⁾ violates the Basic Law and is thence unconstitutional.

The principle of the division of competence, which is essential to ensure the free legal order established by the Basic Law, admits of exceptions in the Basic Law itself. In the sphere of legislation with which we are dealing here, the Basic Law allows the executive bodies to issue legal provisions that have a general binding power. But this can only be done if the legislature grants the necessary authorization, whose substance, purpose and scope it must determine, and in the form of regulations. The Basic Law expressly deprecates any neglect by the legislature of its responsibility to enact laws, by undue recourse to the delegation of authority and allowing the executive bodies for example to amend or supplement laws by means of ordinances (*Rechtsverordnungen*) or to issue such ordinances instead of laws.

The authors (of the Basic Law) thus made clear their intention as far as possible to restrict the legislative power vested in the Executive for practical reasons. What is more, they prohibited any prejudice to the principle of the division of competence. There is thus no doubt that the Federal legislature would be violating the Basic Law if it allowed an executive authority to promulgate laws. The right of the Federal legislature to be a party to international organizations finds an insurmountable limitation in the breach of a constitutional principle of cardinal importance."

76. The violation of the Basic Law resulted, in the opinion of the Financial Court of Rhineland-Palatinate, from an infringement of the provisions of Article 79,3 of the Basic Law, whereby any amendment to the Law affecting the principles laid down in Articles 1 ("The basic rights shall bind the legislature, the executive and the

(1) Decision of the Financial Court of Rhineland-Palatinate at Neustadt on 14.11.1963, ref. III/77/63: *Entscheidung der Finanzgerichte elfter Jahrgang 1963 — Heft 9 — Urteil 598, p. 444.*

See above, paragraph 34.

(2) See above, paragraph 70.

(1) See the Law of 27 July 1957 relating to the treaties of 25 March 1957 creating the EEC and the EAEC — BGBl II, 1957, p. 753.

judiciary as directly enforceable law") and 20 ("Legislation shall be subject to the constitutional order ; the executive and judiciary shall be bound by the law") is deemed inadmissible.

77. The Financial Court further held that constitutional principles also applied to international treaties and indicated the consequences of failure to adhere to these principles :

"The EEC Treaty does not recognize any separation of the legislative from the executive powers. In so far as the law ratifying the EEC Treaty authorizes the Council as an Executive body to pass laws directly enforceable in the Federal Republic, it violates the Basic Law). That which the authors (of the Basic Law) refused to concede to the executive of their own country cannot be conceded to a supranational executive by a legislator who is bound by the Basic Law. In the Federal Republic, the exercise of State authority is subject to the Basic Law. Hence the Basic Law may not be violated when international treaties are concluded. Lastly, one cannot consider as a general rule of public international law either that a State should be bound by undertakings stipulated in a treaty where these are at variance with the principle of the division of competence, which is a primary principle embodied in the Constitution as a special safeguard provision.

Vesting both legislative and executive authority in the EEC Council has, of course, not yet seriously affected the legal order of the Federal Republic. But the arguments advanced to justify the fusion of authority to the effect that the transfer of legislative power to supranational communities is not bound by constitutional limitations, holds out the danger that this interpretation may some day offer a welcome pretext to the forces rejecting the State-at-Law for transferring executive authority to the executive bodies of a supranational Community dominated by authoritarian States and, through this ostensibly legal way, overthrow from without the national legal order of the Federal Republic."

78. The Court drew from these arguments the conclusion that the powers of the European Parliament, at present of little moment, should be increased so that there might no longer be any constitutional objections to the ratification law of 27 July 1957.

"The Federal Republic will, despite the shortcomings of the ratification law, be able to fulfil the other obligations to which it duly subscribed in the EEC Treaty. To do

so, it could itself enact, through its constitutional legislative bodies, the necessary internal ordinances or, alternatively, induce the other Member States to revise the Treaty and transform the EEC "Assembly" into a genuine parliamentary institution and vest it with the right to enact laws that are essential to the execution of the Treaty."

79. On the basis of these considerations, the Financial Court of Rhineland-Palatinate decided, on 14 November 1963 to refer the case to the Federal Constitutional Court and request it adjudicate on the compatibility of the law on charging levies with the Basic Law, and on the compatibility of the law giving effect to EEC Regulation 19 of 26 July 1962 on cereals with the principle of the division of competence and the principle of German law that the citizen must be able to understand what is required of him under a taxation law.

80. The Administrative Court of Frankfurt, for its part, took a different view (1):

"The Administrative Court does not agree with the opinion of the Financial Court of Rhineland-Palatinate that Article 1 of the law ratifying the EEC Treaty is unconstitutional because, under Article 189 of the EEC Treaty the EEC Council is empowered to issue regulations that are, for the Federal Republic also, binding in every respect and directly applicable.

The legislator was empowered to transfer to the EEC sovereign rights relating to the direction and control of the national economy. He was empowered by the Basic Law to ratify the EEC Treaty and in particular Article 189. Article 24 of the Basic Law authorizes the Federation to transfer sovereign powers and to consent to limitations of sovereignty, the former being further-reaching in its implications than the latter. The cession of sovereign powers through a treaty would be conceivable only as a due act of deposition, whereby the Federation, vested with these powers, once and for all transferred its entitlement as a legal subject to the exercise thereof and was then unable either in law or in fact to retract from such a transfer or if the Federation, remaining as a legal subject vested with these powers, transferred the right to their exercise, and because the authors of the constitution provided for two forms of transfer between which it deliberately made a distinction, it follows that the authorization provided for in Article 24 also

(1) See above paragraph 70.

applies to a permanent cession of sovereign powers.

The EEC Treaty is, according to Article 240, "concluded for an unlimited period" and cannot be denounced. The legislator thus exercised the powers conferred in Article 24,1 of the Basic Law when it ratified the EEC Treaty. The Member States duly and finally transferred the sovereign powers required by the Treaty with respect to the direction and control of their national economies.

In Article 24,1, the authors of the Basic Law also anticipated constitutional amendments implied by the transfer of sovereign powers and authorized the legislator to effect such a transfer.

The EEC exercises the sovereign powers transferred to it in its own right over a limited area in the same way as a national authority. The act of renunciation by the Member States did not of course create any new "state" power because there is no legal declaration of its establishment, provided the State be not considered solely as a legal institution. The act of renunciation did, however, allow of its creation within precisely that framework where the renunciation took place.

The EEC Council and Commission make the EEC law within the framework of Article 189 of the EEC Treaty.

The law of ratification is likewise not unconstitutional because Article 189 provides that it is the Council, among the EEC bodies, which shall issue regulations.

It is immaterial, in this connexion, whether the authorization in Article 24,1 of the Basic Law is limited directly or only in the corresponding application of its provisions, by Article 79,3 of the Basic Law. It is likewise immaterial whether the EEC Council be regarded, among the EEC bodies, as an executive body (in the sense applicable in the internal theory of the division of competence) or if it is primarily a legislative body and if its legislation approximates to what is referred to as a "simplified" legislative procedure which proved its worth in Germany prior to the first World War and in the period up to 1923. Even if Article 79,3 of the Basic Law directly limits the authorization of Article 24,1 and even if the EEC Council were an executive body, the legislator would not have violated Article 79,3, read in conjunction with Article 20 of the Basic Law, in passing the law of ratification. For international practice almost invariably recognizes the legitimacy of the transfer of legislative powers to the Executives. The German constitutional law recognizes that authorizations, limited both as to their purpose

and substance, given to the executive, are not incompatible with the principles of the division of competence and of the State at law.

We have to agree with the Financial Court of Rhineland-Palatinate that the authorization of Article 24 of the Basic Law is limited by the absolute guarantees of Article 79,3. Thus the danger alluded to by that Court, that Article 24 might one day give a welcome pretext to forces rejecting the State at law to transfer the legislative powers to the executive bodies of a supra-national Community dominated by authoritarian States and, in this way, overthrow from without the regime of the State at law of the Federal Republic, does not arise. This danger can be dismissed for another reason: the relevant sovereign powers are, by definition, limited by the very purpose of the Community; in other words, sovereign rights may only be transferred to a body thus endowed with these powers which acknowledges the same basic principles as those professed by the Federal Republic in its Basic Law. The cession of sovereign powers to any body unable or unwilling to guarantee fundamental rights to the same extent as the Federation would be tantamount to a denial of those basic rights; it would thus be impossible for the Federation to do this. Sovereign powers can therefore only be transferred to bodies vested with powers that recognize fundamental and human rights and are ready to protect the freedom of the individual, the family and property.

81. Let us now survey the situation in the other countries of the Communities: France, Belgium, Luxembourg and the Netherlands.

France

82. With regard to France, it is of interest to consider a judgment delivered by the Council of State on 19 June 1964 ⁽¹⁾.

Five companies importing oil (Shell-Berre, Garages de France, Esso Standard, Mobiloil, BP) appealed to the highest civil court in France to annul a decree and an order (arrêté) of 3 January 1959 on the grounds of action ultra vires. These texts, which were designed to regulate the obligations of oil importers and laid down conditions for setting up and developing plant for supplying oil products, led, in fact, to the plaintiff companies being deprived of the right to create new service stations; at the same time, in their submission, companies importing oil from the Sahara—the Total Company in particular—continued to expand their distribution network.

(1) See *Actualité juridique, "Droit administratif"*, No. 7-8, July-August 1964, p. 438 ff.

83. The plaintiff companies' submission was that the ministerial *arrêté* of 3 January 1959 was at variance with Articles 3, 7, 30 to 35, 62, 69 et sequ., 85, 90, 92 and 96 of the Treaty of Rome. Indeed, in their submission, the *arrêté* was liable to restrict imports of products from the Member States and, consequently, violated a whole series of provisions laid down in the above-mentioned articles. In pursuance of Article 177 of the EEC Treaty, the plaintiffs therefore called upon the Council of State to refer the matter to the Court of Justice of the European Communities with a view to obtaining a preliminary ruling on the interpretation of the relevant articles of the Treaty.

84. They further submitted that the *arrêté* of 3 January 1959 was incompatible with Article 37 of the Treaty, in so far as it consolidated the monopoly of companies holding special authorizations to import oil products. This article of course provides for the gradual adjustment of any State trading monopolies.

85. The Council of State, whilst recognizing that the European Treaties introduced a new legal order, rejected the request to refer the matter to the Court of Justice of the European Communities on the following grounds :

“Whereas Article 177 of the Treaty instituting the European Economic Community stipulates that the Court of Justice of the European Economic Community shall be “competent to give preliminary rulings” concerning, in particular, “the interpretation of this treaty” and lays down for this purpose a reference procedure, from national courts to the Court of Justice, it follows from the very terms of this Article that a national court from whose decisions there is no possibility of appeal under domestic law, such as the Conseil d'Etat acting in its judicial capacity, is only required to stay proceedings in a case pending before it and to seise the Court of Justice of the EEC if a “question” relating to the interpretation of the Treaty is “raised” in that case. This could only arise where there is uncertainty as to the meaning or scope of one or several clauses of the Treaty applicable to the main action and if the issue of the action depends on the settlement of this difficulty.

Whereas under paragraph 1 of the aforementioned Article 37 : “Member States shall gradually adjust any State trading monopolies so as to ensure that when the transitional period expires no discrimination exists between the nationals of Member States as regards the supply or marketing of goods. The provisions of this article shall likewise

apply to any organization through which a Member State, *de jure* or *de facto*, either directly or indirectly controls, supervises or appreciably influences imports or exports as between Member States. These provisions shall likewise apply to monopolies delegated by the State to other legal entities”;

Whereas, on the one hand, it clearly emerges from this clause that its field of application includes systems such as that to which companies holding special import authorizations for oil products are subject ;

Whereas, on the other hand, the same clause lays down that any State trading monopolies and similar systems should gradually be adjusted so as to ensure that when the transitional period expires no discrimination exists between the nationals of Member States, paragraphs 2 to 5 of Article 37 lay down the rules which shall obtain during the transitional period ; whereas, lastly, subsection 6 empowers the EEC Commission to make recommendation to the Member States as to the manner of effecting the adjustment of the State trading monopolies and similar systems and the timetable which shall govern it, during the transitional period, under a special statute which departs from the rules of common law laid down in various other articles of the Treaty and whose adjustment to the said rules must be carried out in gradual stages by the Member States, taking account of the recommendations of the EEC Commission ;

Whereas paragraph 2 of Article 37 specifies that “Member States shall abstain from introducing any new measure which is contrary to the principles laid down in paragraph 1 of this Article or which restricts the scope of the Articles dealing with the abolition of customs duties and quantitative restrictions between Member States; whereas it is clear that the purpose of this clause is to prohibit any new measure liable to create discriminations between nationals of Member States or to aggravate existing discriminations ; whereas it does not emerge from the study of evidence that the *arrêté* appealed against, which solely concerns the distribution of oil products and, in particular, the creation and installation of service stations by French companies holding special import authorizations for oil products has the effect of creating discrimination between nationals of Member States or of aggravating existing discriminations ;

Whereas it emerges from the foregoing that the plaintiff companies cannot validly claim in support of their subsidiary conclusions here analyzed that the *arrêté* in dispute

could conflict either with certain clauses of the EEC Treaty relating to the system under common law or with the clauses of Article 37 relating to State trading monopolies or monopolies delegated by the State to other legal entities ; whereas under these conditions the settlement of the action is not subject to any question of interpretation of the Treaty ; that therefore the claim analyzed above that the Council of State should seise the Court of Justice of the European Economic Community cannot be accepted.”

86. This judgment would appear to be subject to criticism. The interpretation of the Treaty can only be within the competence of the Court of Justice of the European Communities. The Council of State alleges that when the rule is clear there is no cause to seise the Court for a preliminary ruling. This would appear to be a dangerous assertion for that which may be clear to the French Council of State could also be clear to another national court in the Community which might, however, interpret it differently and the result could only be legal chaos.

It is essential therefore that the Court of Justice of the Communities should have sole responsibility for the interpretation of the European Treaties.

Belgium

87. It has been stated that the Belgian Constitution contains no provisions on where the national law stands in relation to international treaties (among which the European Treaties may be included for purposes of simplification, although this is not strictly accurate.)

88. The Belgian courts have, however, dealt with this problem. The Supreme Court of Appeal (*Court de cassation*) decided that an international treaty approved by the legislative assembly and entering into force after an internal law “arrests the effects of the law” (1).

Other courts have rendered similar judgments which demonstrates consistency in this jurisprudence.

89. To date, the question as to whether a law should cease to have effect if it is at variance with an international treaty concluded *prior* to

it, has not been clarified. All that is certain is that in compliance with an equally consistent jurisprudence the Belgian courts are not empowered to decide as to the constitutionality of laws enacted after the entry into force of the Constitution.

90. Nonetheless, it should be remembered that in his address on 2 September 1963 at the re-opening of the Supreme Court of Appeal (Court de Cassation) (1), the Attorney-General (Procureur Général) declared that the Treaties instituting the European Communities were designed, with respect to certain matters, to substitute for the individual interests of the State the common interest of the Member States and that it was not within the discretion either of the courts or of Parliament to pronounce judgment on this interest. This contrasts with the thesis defended by the French Council of State in maintaining that the national courts are empowered to give rulings on the basis of the European Treaties without first to seise the Court of Justice where, in the opinion of the court, the rule is clear.

Luxembourg

91. We have already mentioned (2), the judgment delivered in 1954 by the Higher Court of Justice of the Grand Duchy. In this judgment, it was stated that a judge must apply an international treaty even if it is incompatible with a law subsequently enacted.

92. In giving the reasons for its decision, the Court stated that an international treaty that is confirmed by law is a law on a higher level than an ordinary law. Such a treaty, therefore, ranks above the national law and must always have paramouncy over the latter. Luxembourg jurisprudence is very precise on this point.

Netherlands

93. In the Netherlands, as has been seen, there can be no doubt as to the absolute paramouncy of international or Community law over domestic law as a result of amendments to the Constitution made in 1953 and 1956 (3).

In this connexion it is worth mentioning that in May 1962, the Court of Justice of the Communities was seised of a request under Article 177 of the EEC Treaty by the Tarief-

(1) Supreme Court of Appeal, 8 January 1925 ; dispute as between the *arrêté-loi* of 10 November 1918 and Article 306 of the Treaty signed at Versailles on 28 June 1919 and approved by the Act of 15 September 1919.

(1) *Journal des tribunaux* — 15 September 1963.

(2) See above, paragraph 51.

(3) See above, paragraphs 52 to 54.

commissie of Amsterdam, a civil court dealing with appeals as a last resort relating to contested taxation. In a dispute pending before it, the Tariefcommissie sought a preliminary ruling, in particular concerning the domestic implications of Article 12 of the EEC Treaty.

Before the Court of Justice, the Dutch and Belgian Governments challenged the competence of the Court ; their submission was that the point at issue was a request relating not to the interpretation but to the application of the Treaty within the framework of the constitutional law of the Netherlands. More particularly, they submitted that the Court was not competent to pronounce on the pre-eminence to be accorded, if need be, to the provisions of the EEC Treaty either in so far as Dutch legislation was concerned or as far as other agreements passed by the Netherlands and incorporated in her national law were concerned.

The Court considered ⁽¹⁾ that the Community constituted a new legal order in public international law for whose benefit the States had

limited their sovereign rights, albeit in limited spheres, and whose subjects were not only the Member States but also their nationals. It considered that it was not called upon to judge of its application according to principles of Dutch internal law (which remain the province of the national courts) but that it was asked solely to interpret the scope of an article in the Treaty within the framework of Community law with regard to its effect on individuals (which was within its competence).

With regard to the immediate effect of the provisions of the Treaty in domestic law, the Court recalled that Community law was independent of the legislation of the Member States, and that it created obligations for individuals and was intended to engender rights which came within their jurisdiction. The latter sprang not only from an express assignment under the Treaty but also from obligations imposed quite clearly by the Treaty both on individual Member States and Community institutions.

94. In conclusion to the present report, your Committee proposes that the following draft resolution be adopted :

(1) *Recueil de jurisprudence de la Cour*, Part. 1. Vol. IX — 1963.



Draft Resolution

relating to the paramountcy of Community law over the laws of the Members States

The European Parliament,

- Aware of its duty to attend to the correct application of the treaties, with a view to achieving all their aims and allowing of the gradual development of the Communities ;
- Concerned at the trends that have appeared in the case of certain national judicial authorities and which are liable to call into question the actual application of the Community provisions ;
- Convinced, however, of the need to respect the independence of the judicial authority in the Member States, which constitutes one of the pillars of the democratic order ;

Endorses the conclusions in the report of its Legal Committee (Doc. No. 43) signifying support for the principle of the paramountcy of Community law over the laws of the Member States :

- Considering that this matter is not yet sufficiently known, even in spheres directly concerned,

Requests its President to circulate this report as widely as possible among the responsible national authorities.

The Bruges colloquy
(8, 9 and 10 April 1965)

The Colloquy organized in Bruges by the Collège d'Europe bore mainly on "Community law and national law."

The Rapporteurs were :

- Mr. Maurice Lagrange : "*La primauté du droit communautaire sur le droit national.*"
- Mr. Nicola Catalano : "*La position du droit communautaire sur le droit national.*"
- Mr. Marc Sohier and Mrs. Colette Megret : "*Le rôle de l'exécutif national et du législateur national dans la mise en œuvre du droit communautaire.*"
- Mr. Fritz Münch : "*Le rôle des juridictions nationales. I. Compétences des juridictions nationales.*"
- Mr. Frédéric Dumon : "*Le rôle des juridictions nationales. II. Le renvoi préjudiciel (Article 41 CECA, 177 CEE et 150 CEEA).*"

There were other items on the Colloquy's agenda, but that on relationships between Community law and domestic law attracted the greatest attention in the debates. No conclusion was reached and no resolution was passed but certain main guiding principles may be drawn from all the speeches made and views exchanged.

Those taking part found no difficulty in agreeing on the need to ensure the paramountcy of Community law over national law in each of the Member States, that is to ensure that it was in fact applied, notwithstanding any earlier or subsequent national regulation at variance with it. In this connexion, there was a majority that considered the relationship between Community and national law as a transfer and hence as a sharing of powers rather than as a hierarchy of laws. There was, however, no agreement on the justification and legal form that might be given to this solution.

Moreover, the general feeling was that while the Treaties of Paris and Rome were not treaties "like the others" in regard to their content, they had, however, the form of treaties. The domestic laws of certain countries (Germany and Italy in particular) raised a problem of constitutional law that was still unsolved, as some of those taking part in the Colloquy were at pains to point out.

With regard to the part that the executive and national legislator were to play in implementing Community provisions that were not directly

enforceable, it was agreed that the legislative procedure was hardly fitted for this part ; but there were many objections to a solution that would consist in entrusting to the national executive the task of giving effect to Community directives. In view of the political options that such directives might involve, it was thought advisable for some part to be played by the parliamentary assemblies while, at the same time, endeavouring to find a more efficient procedure. In this connexion, several proposals were made for endowing the executive power with certain legislative responsibilities.

While discussions on the rôle of the national courts, particularly concerning interlocutory applications for rulings, did not give rise to any disagreement on the fundamental problems, they did reveal the fact that such interlocutory applications for rulings raise a considerable number of special issues which are often of capital importance from the standpoint of a uniform interpretation of Community law.

The following remarks were made at the close of the colloquy by Professor De Vreese, who directed the colloquy :

"When, in some of our countries, constitutional objections are raised against the exercise of powers that are materially legislative by a Community body that is formally executive ;

when it is seen that the national legislative power is reluctant to entrust the execution of Community law to a national executive authority ;

when our national courts are somewhat non-plussed when asked to give pre-eminence over the national law to a Community regulation emanating from a Community executive, can this not be traced back in every case to the lack—within the Community order—of any real democratic control on the part of a legislative Assembly ?

You may perhaps be surprised to find a judge venturing into this field. In reality, I am not doing so for I know that it is not within our discretion to advocate a solution which is primarily political. It is, however, quite within our discretion to analyze these difficulties while our discretion to analyze these difficulties while endeavouring to find the best solution *de lege lata* and to diagnose the reasons underlying such difficulties.

EUROPEAN PARLIAMENT

1965-1966 Session

Extract

from the Minutes of the Session of 22 October 1965

In the Chair : Mr. Paul J. Kapteyn

Vice-President

The paramountcy of Community law

The President reminded the Parliament that it had, at its session in June 1965, held a general debate on the report by Mr. Dehousse, submitted on behalf of the Legal Committee, on the paramountcy of Community law over the laws of the Member States (Doc. 43).

The President further recalled that the Parliament had decided, at its session of 18 June 1965, to defer voting on the draft resolution in

order to enable the Legal Committee to examine the amendments to the text that had been tabled. The Legal Committee had subsequently submitted a supplementary report in conclusion to which an amended resolution was proposed.

On behalf of the Legal Committee, Mr. Weinkamm submitted the supplementary report on the paramountcy of Community law over the laws of the Member States (Doc. 95).

Mr. Vermeylen, for the Socialist Group, Mr. Santero and Mr. Scelba took the floor.

In the Chair : Mr. Victor Leemans

President

When the debate was resumed Mr. Poher, Mr. Weinkamm, Rapporteur, Mr. Colonna di Paliano, a member of the EEC Commission, and Mr. Scelba took the floor.

The Parliament adopted the following resolution :

Resolution

relating to the paramountcy of Community law over the laws of the Member States

The European Parliament,

- Aware of its duty to attend to the correct application of the treaties, with a view to achieving all their aims and allowing of the gradual development of the Communities ;
- Concerned at the trends that have appeared in the case of certain national judicial authorities and which are liable to call into question the actual application of the Community provisions ;
- Convinced, however, of the need to respect the independence of the judicial authority in the Member States, which constitutes one of the pillars of the democratic order ;

Endorses the conclusions of the Report of its Legal Committee (Doc. No 43) and affirms the principle and the need to recognize the paramountcy of Community law over the laws of the Member States ;

— Considering that this matter is not yet sufficiently known, even in spheres directly concerned, trusts that the national governments will publish, under the appropriate heading in their official gazettes, the binding measures taken by the Communities, whether these be immediately applicable or to be applied subsequently — in order to stress their importance, at the national level.

Requests its President to circulate the Report by Mr. Dehousse (Doc. 43) and the present resolution as widely as possible among the responsible national authorities.

H.R. NORD,
Secretary-General

Victor LEEMANS,
President



