INTERNATIONAL LAW, EUROPEAN COMMUNITY LAW AND MUNICIPAL LAW OF MEMBER STATES

By

L. ERADES *

INTRODUCTION

THE object of this study is to compare the internal effects of European Community law in the member States with the effects international law in general is considered to have in those States. In order to be able to make this comparison some introductory observations and some definitions must be made.

Each of the three treaties establishing a European Community attributes legislative,[1] administrative [2] and judicial [3] powers to the organs of the Community created by it. Since October 7, 1958, the judicial function has been exercised by the one Court of Justice for the three Communities. Legislative powers have been entrusted to the High Authority of the ECSC and to the Council and Commission of the EEC and Euratom. The executive organs are the High Authority in the ECSC and the Commission in the EEC and Euratom.

The ECSC came into existence on July 23, 1952, and both the EEC and Euratom on January 1, 1958.

Before the treaties entered into force the subject-matters which they regulate and which are now administered by Community organs belonged to the exclusive jurisdiction of each of the member States. The member States could concern themselves with these matters or not, as they deemed fit. Each State could regulate them

* LL.D., Vice-President of the District Court of Rotterdam; holder of the Diploma of the Hague Academy of International Law; Editor-in-Chief of the *Netherlands International Law Review*.

This paper is the text of a talk given by the author at the British Institute of International and Comparative Law on February 23, 1965, at a meeting under the chairmanship of H.E. Dr. E. N. van Kleffens.

1 See, for instance: Arts. 60, 63 (2), 66 (1) (3) (4), 72, ECSC; 43, 79, 87, 91, 94, 127, 209, EEC; 24, 90, 94, 183 and 186, Euratom. English translations may be found (a) of the ECSC Treaty *cum annexis* in Amos J. Peaslee, *International Governmental Organizations*, Vol. I (2nd ed., The Hague, 1962) pp. 459–509; (b) of the EEC Treaty *cum annexis* in Peaslee, *op. cit.*, pp. 519–598, and in (1957) 51 A.J.I.L. 865–954; (c) of the Euratom Treaty *cum annexis* in Peaslee, *op. cit.*, pp. 399–458, and in (1957) 51 A.J.I.L. 955–1004.

2 See, *inter alia*: Arts. 47, 49, 54, 65 (3) (5), 73, ECSC; 54, 89, 93, 102, 108 (3), 115, 213, EEC; 82, 173, 182, 187, 203, Euratom.

3 See, *e.g.*: Arts. 31, 33–43, ECSC; 8 (4), 164, 169–186, EEC; 15, 21, 83, 103, 136, 143–157, Euratom.

or not. By entering into the treaties establishing a European Community they relinquished the jurisdiction they hitherto possessed in this respect and transferred it to the relevant organs of the Communities. These organs have, on the basis of the constituent treaties, taken over the jurisdiction the member States previously exercised. They now exercise their own jurisdiction in their own name, but in the joint interest of the member States. The treaties explicitly lay down that the member States bind themselves to take all general and specific measures which will ensure the execution of their obligations and to facilitate the accomplishment of the purposes of the Communities. The member States have bound themselves to refrain from any measure incompatible with these purposes.[4]

From the moment the organs of the Communities were set up and began to operate, new legal orders came into being. Each Community has its own legal order, distinct from the international legal order as well as from the internal legal order of the six member States. This legal order manifests itself to the Community, while acting through its organs, to the contracting States themselves and to their subjects, individuals and legal entities.

The law of each European Community consists of:

(a) its constituent treaty and the annexes thereto;
(b) the acts of its organs having a legislative character;
(c) the acts of its organs having an administrative character;
(d) the case-law of the Court of Justice.

On various points the law of the three Communities has been connected with the municipal law of the member States.

Regulations implementing the treaties are generally enacted by Community organs, but in some cases the member States are entitled to enact them.[5] According to ECSC Article 43 the municipal law of the member States may, in connection with the object of the Treaty, confer jurisdiction upon the Court of Justice.

It may happen that the Communities are subject to the municipal law of the member States. By virtue of ECSC Article 42, EEC Article 181 and Euratom Article 153 the Court of Justice may derive jurisdiction from arbitration clauses contained " in a contract concluded, under public or private law, by or on behalf of the Community." Article 172 (4) of the Euratom Treaty authorises the Community to raise loans on the capital market of a member State in accordance with the legal provisions applying to internal issues.

Sometimes municipal law is referred to in order to give assistance

[4] See Arts. 86 (1) (2), ECSC; 5, EEC; 192, Euratom.
[5] This follows from *inter alia*, Arts. 31, 33, 35, 40 (3), ECSC; 83, Euratom.

to the functioning of Community organs and to the application of Community law.[6]

The Communities enjoy in each of the member States juridical capacity according to their municipal law.[7] The same legal capacity is accorded by Article 49 of the Euratom Treaty to joint enterprises under that Treaty.

Pre-existing municipal law is sometimes relied upon in order to implement the Community law.[8] In some cases municipal law must enable the imposition of penalties in case of infringement of the Treaty.[9] Verifying officials of the High Authority shall enjoy in the territories of the member States " such rights and powers as are granted by the law of such States to officials of its own tax services." [10] Certain decisions of Community organs may be enforced in the territory of the member States through the procedures prescribed by the municipal law.[11]

From some articles it is clear that its drafters considered it quite possible that the law of the European Communities would be invoked before the national courts of the member States. Article 65 (4) of the ECSC Treaty, declaring certain agreements and decisions " automatically void," provides that these agreements and decisions shall not be invoked before any court or tribunal of the member States. Articles 41 of the ECSC Treaty, 177 of the EEC Treaty and 150 of the Euratom Treaty rest on the premise that the law of the European Communities may be a matter of concern to the national courts of the member States.

The basic treaties go even further. They contain articles attributing specific tasks to the national courts of the member States. Among these are Articles 40 of the ECSC Treaty, 183 of the EEC Treaty and 155 of the Euratom Treaty. The identical Articles 192 of the EEC Treaty and 164 of the Euratom Treaty entrust national courts with the judicial control of the execution of Community decisions in the territory of the member State concerned. Articles 41 of the ECSC Treaty, 177 of the EEC Treaty and 150 of the Euratom Treaty create a possibility and, in certain cases, an obligation for the national courts to refer questions of interpretation or validity of the Community law to the Court of Justice at

[6] Arts. 20, 28, Statute ECSC Court; 17, 24, Statute EEC Court; 17, 25, Statute Euratom Court; 2 (2), 47 (5), 49 (6), Rules of Procedure. An English translation of these rules may be found in L. J. Brinkhorst and G. M. Wittenberg, *The Rules of Procedure of the Court of Justice of the European Communities* (Leyden, 1962).

[7] Arts. 6, ECSC; 211, EEC; 185, Euratom.

[8] For instance, Arts. 48 (3) (*c*) 52, EEC; 26 (2), 27, 86, 91, Euratom.

[9] Arts. 145 (1), 194, Euratom.

[10] Art. 86 (4), ECSC.

[11] Arts. 92, ECSC; 192, EEC; 164, Euratom.

Luxembourg. National courts of the member States may be commissioned by the Court of Justice to take evidence from witnesses or experts.[12] Witnesses or experts who are suspected to have committed perjury before the Court of Justice may be tried by the national courts of the member States.[13]

APPLICATION OF TREATIES IN MUNICIPAL LAW

The law of the European Communities in so far as it is laid down in treaties is international law. In so far as it is to be implemented by municipal legislation,[14] it will be municipal law. Between those two types of law there is another body of law, consisting of the legislative and administrative acts of Community organs and the case-law of the Court of Justice. This is law of a hitherto unknown nature. It is neither international law in the traditional sense nor is it municipal law. The term " supranational law " has been coined for it.

Traditionally, there is a relation between international and municipal law. This relation indeed exists between the basic treaties and the municipal law of each of the member States. However, the new phenomenon of supranational law has given rise to two new relationships. One is between international law and supranational law and the other is between supranational law and the municipal law of the member States.

The Court of Justice of the European Communities in its judgment of July 15, 1964, in *Costa* v. *E.N.E.L.* formulated the now existing legal situation as follows:

> Contrary to other international treaties, the Treaty instituting the EEC has created its own legal order which was integrated with the national order of the member States the moment the Treaty came into force and which the domestic courts have to take into account; 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, the right of international representation and, more particularly, real powers resulting from a limitation of competence or a transfer of duties 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.[14a]

[12] See Arts. 24, Statute EEC Court; 27, Statute Euratom Court; 52, 109 rules, 1, 2 and 3 supplementary rules of March 9, 1962 (see Brinkhorst-Wittenberg, *op. cit.*, pp. 56–58).

[13] See Arts. 28 (3), Statute ECSC Court; 27, Statute EEC Court; 28, Statute Euratom Court; 109 rules, 6 and 7 supplementary rules.

[14] *Supra*, note 5.

[14a] English translation in (1964) 2 C.M.L.Rev. 197.

Since a part of the law of the European Communities is embodied in treaties, one should take into consideration the general problems inherent in the position of any treaty in the municipal law of each of the member States.

If one wants to study the internal effects of treaties in general, it is necessary to bear in mind in the first place that there are countries admitting judicial cognisance of treaties as rules of international law and countries excluding treaties from judicial cognisance before they have been transformed into municipal law. As will be seen later, Belgium, France, Luxembourg and the Netherlands are countries of the first category, whereas Germany and Italy belong to the countries of the second type.

When an executive or a judicial organ of a State is confronted with a treaty, it must, in the first place, distinguish two kinds of internal effects of that treaty: (a) it may, if certain requirements are satisfied, itself apply the rule of law embodied in the treaty, and (b) it may, in some cases, recognise a legal situation created by the treaty without applying the rule of law it lays down. In the latter cases the State organ recognises certain effects of the treaty in the internal legal order, though it does not apply it.

In connection with the kind of internal effects defined *sub* (a) the doctrine of the so-called " self-executing " treaties is important. It would take me too far to enter into the multifarious details of this doctrine. For the time being, it is submitted that its purpose is to indicate which treaties can and which treaties cannot be applied as embodying rules of law by executive or judicial organs of the contracting States. In earlier studies [15] I have suggested the solution of this problem in the following way. In the first place one should accept the idea that even a " non-self-executing " treaty may have some internal effects, *i.e.*, those mentioned above *sub* (b). A treaty provision—irrespective of the question to whom it may address itself—is directly applicable (" self-executing ") when it contains a rule of law susceptible of being enforced by national agencies without any previous legislative or administrative action by another organ being required. To my satisfaction I discovered that this definition coincides with the formula the Court of Justice at Luxembourg developed in its above-mentioned judgment in *Costa* v. *E.N.E.L.*

[15] L. Erades, *Rapport général 2me Colloque international de droit européen* (held at The Hague, October 24–26, 1963) (hereinafter: *C.I.D.E.*) p. 23; " Poging tot ontwarring van de *self-executing* knoop " (1963) *Nederlands Juristenblad* 853; (1964) 10 Neth.Int.L.Rev. 88 and " De verhouding van de rechtspraak van het Hof der Europese Gemeenschappen tot die van de nationale rechters in de lid-Staten," *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* (February 1964) No. 49, p. 5.

Another internal effect of a treaty is the extent to which it is able to modify pre-existing municipal law or to prevent the latter's subsequent modification.

Whether a national organ is entitled to attribute all these kinds of internal effects is a question which is solely dependent upon the constitutional law of the country concerned.

A treaty may have internal effects in its capacity either as international law or as municipal law. The choice to be made is again determined by the constitutional law in question. Such law may prescribe that a treaty has no internal effects at all as long as it has not been transformed into municipal law, or it may, on the other hand, admit a treaty to have internal effects in its capacity as a rule of international law.

The interest to be attached to this question is obvious. In the international legal order a treaty is subject to the law of treaties. If a treaty has internal effects as a rule of international law and if the constitutional law concerned authorises application by national agencies of customary international law as such, the law of treaties shall also be enforced within the internal legal order. If, on the contrary, a treaty only possesses internal effects as part of municipal law, the law of treaties does not affect it. Consequently, a treaty then leads a double life, one in the international and one in the internal sphere, each independent, the one of the other. The termination of a treaty in the international sphere does not then entail its termination in the municipal sphere.

In Belgium,[16] France,[17] Luxembourg [18] and the Netherlands [19] treaties possess internal effects as rules of international law without any previous transformation into municipal law.

In Germany, however, the doctrine of transformation was adopted officially after Triepel, in 1899, published his well-known book *Völkerrecht und Landesrecht*. A treaty is held to address itself exclusively to States and never to individuals. For this reason it has to be transformed into German law. Thereafter, the courts are entitled to take judicial notice of the transformed treaty. According to the constitutional practice of the Federal Republic the internal Act, attributing *Gesetzeskraft* (force of statute) to the treaty, stated expressly: " Der Vertrag wird nachstehend mit Gesetzeskraft veröffentlicht " (the treaty will hereafter be published

16 F. Rigaux, *Report C.I.D.E.*, pp. 10–11.
17 H. Batiffol, *Traité élémentaire de droit international privé* (3rd ed., Paris, 1959) p. 38.
18 P. Pescatore, " L'autorité en droit interne des traités internationaux selon la jurisprudence luxembourgeoise " (1962) *Pasicrisie luxembourgeoise* 4.
19 L. Erades and Wesley L. Gould, *The Relation between International Law and Municipal Law in the Netherlands and in the United States* (Leyden—New York, 1961) pp. 307–325.

with force of statute). By this practice the German courts were no longer left in doubt as to whether they were authorised to apply a certain treaty. In recent years some authoritative German international lawyers like Erich Kaufmann [20] and Hermann Mosler [21] have raised severe criticisms of the doctrine of transformation. This action led to the provisional result that, in order not to prejudice future developments, German legislative organs recently abandoned the above constitutional practice.[22] The German Society of International Law in a meeting of 1963 discussed the subject and adopted a resolution to the effect that it deems the adoption theory to be more in accordance with the requirements of present-day international legal order than the transformation doctrine.[23] Whether German practice will shortly abandon the old views seems to be dubious. Dualist international law theories and the doctrine of transformation are deeply rooted in German legal thinking.

What Triepel's theories meant to Germany, the dualist theory of Anzilotti means to Italy. In the internal legal order of Italy the principle of separation of the international and the municipal legal orders is unanimously accepted. Therefore, treaties must, as in Germany, be transformed into municipal law before they can be enforced by Italian courts. The usual method of transforming a treaty into Italian law is that of the " order of execution " to be included in the statute authorising the ratification of the treaty.[24]

It has been submitted that within the internal legal order of some countries the law of treaties should govern a treaty having internal effects. In order to achieve this result, it is indispensable that customary international law itself shall have internal effects in the countries concerned. The different kinds of internal effects mentioned above with respect to treaties are also conceivable in connection with customary international law. One might even ask whether the latter law should be transformed into municipal law before it can have any internal effect at all.

In the Netherlands the courts have always recognised internal effects of customary international law, without sufficient basis in the written law, without demanding antecedent transformation and without making any distinction as to categories of internal effects.[25]

[20] E. Kaufmann, " Traité international et loi interne," *Der Staat in der Rechtsgemeinschaft der Völker*, Vol. II (Göttingen, 1960) p. 473 *et seq.*

[21] H. Mosler, " L'application du droit international par les tribunaux nationaux " (1957) 91 Red. des Cours 689 *et seq.*

[22] These details concerning the situation in Germany are described by C. F. Ophüls, *Report C.I.D.E.*, pp. 8–12.

[23] " Die Anwendung des Völkerrechts im innerstaatlichen Recht—Überprüfung der Transformationslehre," *Berichte der deutschen Gesellschaft für Völkerrecht*, Vol. 6 (Karlsruhe, 1964).

[24] N. Catalano and R. Monaco, *Italian Report to C.I.D.E.*, pp. 1–4.

[25] For more details, see Erades-Gould, *op. cit.*, pp. 270–272.

Practice in Belgium,[26] France [27] and Luxembourg is to the same effect.

Article 4 of the Weimar Constitution of Germany and Article 25 of the now obtaining Basic Law declare general rules of international law to be part of the federal law. These provisions were and are interpreted as having the effect of transforming international law into German law.[28] This interpretation is challenged by some German authors.[29] The opinion is generally shared in Italy that customary international law is considered to be transformed into parallel municipal customary law. It is this parallel law that is enforced internally in Italy.[30]

Conflicts between international law—written or unwritten—and municipal law may arise. European Community law has but little to do with customary international law. We must, for the sake of brevity, omit here the conflicts that may exist between the latter law and municipal law and give attention only to conflicts between treaties and municipal law.

In the countries of the European Communities it is generally accepted that a posterior treaty supersedes pre-existing statutes by virtue of the principle *lex posterior derogat lege priori.*[31]

Controversy is great in respect to supremacy when a treaty is of an earlier date than a conflicting statute. Must the treaty then give way to later municipal law? Or does some element other than the time of enactment enter into the picture and decide the issue?

In Belgium a treaty is deemed to have the same rank as a statute, or in the words of the Prosecutor General of the Court of Cassation a treaty is " équipollent à la loi." This phrase was always regarded to mean that anterior legislation must cede to a posterior treaty, but that posterior legislation may modify an anterior treaty.[32] There are, however, weighty indications that this will not be the definitive position of the highest Belgian court. On

26 Comp. F. Rigaux, " Les problèmes de validité soulevés devant les tribunaux nationaux par les rapports juridiques existant entre la constitution de l'état d'une part, et les traités et les principes généraux de droit international d'autre part " (hereinafter: Rigaux, *Problèmes*) Vol. I (Tokyo, 1962) p. 207.

27 See I. Seidl-Hohenveldern, " Transformation or Adoption of International Law into Municipal Law " (1963) 12 I.C.L.Q. 92.

28 See H. von Mangoldt, " Das Völkerrecht in den neuen Staatsverfassungen " (1954) III *Jahrbuch für internationales Recht* 13.

29 Mosler, *loc. cit.* and Kaufmann, *loc. cit.*

30 Comp. Seidl-Hohenveldern, *op. cit.*, pp. 92–93.

31 Thus for Belgium, Rigaux, *Problèmes*, pp. 209–211; for France, Batiffol, *op. cit.*, pp. 43–44; for Germany, F. Münch, " Die Abgrenzung des Rechtsbereichs der supranationalen Gemeinschaft gegenüber dem innerstaatlichen Recht," *Berichte der deutschen Gesellschaft für Völkerrecht*, Vol. II (1957) p. 90; for Italy, Seidl-Hohenveldern, *op. cit.*, p. 114; for Luxembourg, Pescatore, *op. cit.*, p. 17, and for the Netherlands, Erades-Gould, *op. cit.*, p. 371.

32 F. Rigaux, *Report to C.I.D.E.*, pp. 13–14.

September 2, 1963, the Prosecutor General, Mr. Hayoit de Termicourt, at the occasion of opening the judicial year, delivered a speech in which he demonstrated some juridical possibilities that may lead to the adoption of priority of an anterior treaty over a posterior statute. The learned speaker considered this adoption as a requirement of recent developments in international law and, especially, as a demand of the law of the European Communities.[33]

Since 1946 the Constitution of France has contained a clause laying down the supremacy of treaties within the French legal order. This principle is at the basis of Article 28 of the Constitution of October 27, 1946, and of Article 55 of the Constitution of October 4, 1958.[34]

In this respect the situation in Germany is widely different. If a German statute is found to be in conflict with an antecedent treaty entered into by the Federal Republic, its courts shall give priority to the statute.[35] This same situation exists in Italy.

The Superior Court of Justice as well as the *Conseil d'Etat* of Luxembourg has recognised priority of older treaties over newer Luxembourg legislation.[36]

Since 1953 the Constitution of the Netherlands expressly lays down supremacy of all categories of published international agreements over all types of Netherlands legislation. The revision of the Constitution that took place in 1956 limits this supremacy to provisions of international agreements which, according to their terms, can be binding upon everyone. For the time being the precise meaning of this phrase is still unsettled. Article 66 shares this fate.[37]

As to conflicts between a treaty and the Constitution, supremacy of the international agreement over substantial as well as over formal provisions of the Constitution is accepted in the Netherlands.[38] Luxembourg and France accept the priority of the treaty over substantial provisions of the Constitution.[39] In Belgium a

33 This very important speech, " Le conflit ' Traité-Loi interne ',' " was published in (1963) *Journal des tribunaux* 481–486.

34 A.-C. Kiss, *Répertoire de la pratique française en matière du droit international public*, Vol. I (Paris, 1962) p. 98, No. 184, and p. 121, No. 222.

35 Ophüls, *op. cit.*, p. 25.

36 Pescatore, *op. cit.*, p. 16 *et seq.*

37 For more details about Art. 66 and its history, comp. Erades-Gould, *op. cit.*, pp. 393–412, and H. F. van Panhuys, " The Netherlands Constitution and International Law " (1953) 47 A.J.I.L. 537–538 and 1964, pp. 88–108. A satisfactory interpretation of Arts. 65 and 66 of the Constitution has been proposed in the papers mentioned in note 15.

38 Erades-Gould, *op. cit.*, pp. 371, 466–468.

39 For Luxembourg, comp. *Luxembourg Report for 3rd Meeting of the Commission to Study Questions of International Law of the Union internationale des magistrats* (hereinafter: Commission U.I.M.) (1964) p. 5, and for France comp. Batiffol, *op. cit.*, p. 38.

treaty may modify the Constitution materially.[40] In Germany and Italy the Constitution in its relation to treaties is paramount.[41]

The treaties which established the European Communities are in the first place like all other treaties. They are subject to the same rules of customary international law and they will have the same internal effects as other treaties. This thesis is undoubtedly correct as far as Belgium, France, Luxembourg and the Netherlands are concerned. For Germany and Italy the situation may be different. Authoritative lawyers from these countries have developed theories according to which these treaties possess in Germany and Italy a legal status completely different from that of every other treaty. It is very interesting to learn how one of the Founding Fathers of the European Communities, Professor Ophüls, constructed such a theory which he called a strong theory of direct applicability. In the first place he asks whether it is possible that a treaty be applied by piercing the sovereignty of the State. This may be the case, he answers, if the contracting States limited their sovereignty by entering into a treaty and, by this process, rendered possible a penetration of international rules in favour of organs to which they transferred their sovereign rights. This is exactly what has been realised by the treaties establishing a European Community. They attributed to community law a direct applicability exceding that of what Professor Ophüls calls the feeble theory, *i.e.*, the American doctrine of " self-executing " treaties (feeble, since an anterior treaty must give way to a posterior federal statute in the United States). The Community treaties have created something that is completely new, since they do not envisage a common exercise, but a transfer of such rights to a new and independent institution. In so far as the member States transferred certain sovereign rights to the Community, they no longer possess this sovereignty in order to make community law binding upon their subjects. The legislative powers of the member States can no longer be exercised either by means of the theory of transformation or by the feeble theory of direct applicability. The directly applicable community law is exclusively based upon sovereignty transferred to the Community. The sovereignty of the member States was required in order to effectuate this transfer by means of entering into a treaty, but after this transfer took place, the sovereignty of the member States in the matters concerned disappeared substantially as well as territorially. The direct applicability of the treaties establishing a European Community and of other community law is different from that of other " self-executing " treaties.

[40] Rigaux, *Problèmes*, pp. 189–190, 199–201.
[41] Seidl-Hohenveldern, *op. cit.*, p. 94.

They are in force *independently* of and *in addition to*, whereas any other " self-executing " treaty has its effects *within*, the internal legal order.[42]

In Italy the legal situation in this respect is comparable to that in Germany. According to Messrs. Catalano and Monaco the notion of " self-executing " treaties is insufficient to define and to classify the complex phenomenon of the incorporation of the whole body of Community law in the internal legal order. The Community treaties distinguish themselves from all other international instruments by the following aspects:

(1) The transfer of powers of the member States to the Communities and, particularly, the attribution to them of new powers;
(2) The direct effect in their internal order with regard to the nationals of the member States not only of the treaty provisions but also of Community acts.[43]

CASE-LAW

The case-law of the Court of Justice of the European Communities certainly has effects in the internal legal order of the member States. Much attention has already been given to the study of these effects.[44] I shall therefore leave them outside the present paper.

APPLICATION OF LEGISLATIVE AND ADMINISTRATIVE ACTS

The European Communities possess, it is well known, certain legislative and administrative powers. Consequently, there have been Community acts of a legislative and of an administrative character ever since the Communities began to operate. The acts of a legislative character are regulations (EEC and Euratom) and general decisions (ECSC).

Whenever one desires the realisation of the aims of the Communities, it is indispensable to recognise certain internal effects of their legislative and administrative acts in the legal order of their member States. In so far as administrative acts are concerned, it is hardly conceivable that they may be " applied." They can only be recognised by the national authorities of the member States, their courts included.

Inasmuch as legislative acts emanating from a European Community are intended to have effects in the internal legal order of

[42] Ophüls, *op. cit.*, p. 14 *et seq.*
[43] Catalano and Monaco, *op. cit.*, p. 9 *et seq.*
[44] *e.g.*, comp. G. Bebr, *Judicial Control of the European Communities* (London, 1962).

the member States and their enforcement does not exclusively depend on the action of Community organs, they shall either have internal effects in the broad sense or be directly applicable in the internal legal order of the member States.

As far as internal effects in the broad sense are concerned, Community legislative acts may have created a legal situation that shall be recognised by national organs. The legal norm laid down by the Community act concerned will not in that case call for direct enforcement by, *e.g.*, the courts. Such a direct enforcement has been expressly stipulated by Articles 189 of the EEC Treaty and 161 of the Euratom Treaty, which provisions will be discussed later.

The internal effects of Community legislative acts in Germany are, according to Professor Ophüls, identical with those of the treaties establishing a European Community.[45] Messrs. Catalano and Monaco [46] deem it essential that the will of the Communities originates in their organs. It is the function of these organs to give expression to that will and to take the place of an assembly of organs of the member States. The characteristic feature of a Community organ is the production and the existence of a Community will directed at the realisation of the Community aims. A Community act, being the product of Community deliberations, is directly enforceable in the internal legal order of the member States. In regard to legislative acts there is no question of rules of law which are to be transformed and which, after having been international law, become municipal law. With respect to Community legislative acts there is no room for a dualism of international and municipal law. The only possibility is that of the unity of the Community legal order.

It is conceivable that Community legislative acts possess internal effects in the member States either as Community law or as municipal law. If these acts are part of municipal law, a transformation into municipal law must be required before they can be enforced by the authorities of the member States.

In the Benelux countries and France EEC and Euratom regulations and ECSC general decisions do not need any conversion.

Professor Ophüls,[47] who deals with legislative acts on the same footing as the basic treaties, applies his strong theory of direct applicability to them with regard to their effects within the German legal order.

According to the view of Messrs. Catalano and Monaco Community acts have, as we have already noticed, effects in the

[45] *Op. cit.*, p. 19.
[46] *Op. cit.*, p. 4 *et seq.*
[47] *Op. cit.*, pp. 15–29.

Italian legal order in their capacity as Community law without any previous transformation.

Articles 189 (2) of the EEC Treaty and 161 (2) of the Euratom Treaty provide: " Regulations shall have a general application. They shall be binding in every respect and directly applicable in each member State."

With regard to general decisions Article 14 (2) of the ECSC Treaty says that they " shall be binding in all their details."

One may derive from these articles that the drafters of the treaties in each case intended to accord internal effects in the broad sense to Community legislative acts. As far as regulations are concerned, they apparently desired them to be directly applicable in the internal order of the member States. Though the ECSC Treaty does not explicitly say so, it may be assumed that its drafters had the same intention with respect to general decisions.[48]

Each of these treaty provisions modify the constitutional régime of legislative powers of the member States. In all of them the question may, therefore, arise whether such a modification can be lawfully effectuated by the simple entry into force of a treaty clause.

This question actually arose in Germany. The Financial Tribunal of Rheinland-Pfalz in its judgment of November 14, 1963, requested a decision of the Federal Constitutional Court on the question as to whether the German statute approving the EEC Treaty is in conformity with the Basic Law, since legislative powers have been conferred upon an executive organ, the Council of Ministers.[49] Apparently, this is a dubious question in the eyes of that tribunal. At the time of preparing this paper the Federal Constitutional Court was not yet known to have decided the case. Another German court, the Administrative Tribunal at Frankfurt, some weeks later decided in its judgment of December 17, 1963,[50] that the transfer of legislative powers to the EEC Council of Ministers is in accordance with the Basic Law. It based this ruling on Article 24 of that Law, providing: " The Federation may by means of a statute transfer sovereign rights to intergovernmental organisations."

The Netherlands Constitution contains a provision of a comparable nature. Its Article 67 runs:

> With due observance, if necessary, of Article 63, legislative, administrative and judicial powers may be delegated to international organisations by, or in virtue of, an agreement.

[48] This opinion is shared by Rigaux, *Report C.I.D.E.*, pp. 32–33.

[49] *Aussenwirtschaftsdienst des Betriebsberaters* (1964) pp. 26–28; digested in English in (1963–64) 1 C.M.L.Rev. 463. On this judgment, comp. H. van den Heuvel (1964) *Nederlands Juristenblad* 289–293.

[50] *Aussenwirtschaftsdienst des Betriebsberaters* (1964) p. 60; digested in English in (1964) 2 C.M.L.Rev. 102.

> Articles 65 and 66 shall apply, *mutatis mutandis*, to decisions of international organisations.

This article removes any doubt that there might be with regard to the legality of provisions like Articles 189 of the EEC Treaty, 161 of the Euratom Treaty and 14 of the ECSC Treaty. Moreover, Article 60 (3) of the Constitution prohibits judicial review of the constitutionality of treaties.

No indications are available to the effect that the constitutionality of the transfer of legislative powers to Community organs can be challenged in other member States.

In case of conflict between a treaty establishing a European Community and municipal law the same rule which in Belgium,[51] France,[52] Luxembourg [53] and the Netherlands governs the relation between every other treaty and municipal law shall apply. The legal position in Germany and Italy will be presently studied.

However, conflicts may also arise between a Community legislative act and municipal law of a member State.

In Belgium it must, for the time being, be assumed that such a conflict will be solved in favour of subsequent Belgian legislation and, therefore, to the detriment of antecedent Community legislative acts.[54]

The latter have priority over conflicting French legislation.[55]

Professor Ophüls describes the legal situation in Germany as follows: Community law—including the treaties as well as Community legislative acts—has no rank in the German internal order since it is outside that order. If a State enacts legislation contrary to pre-existing Community law, it acts unlawfully. Such an enactment would be performed without sovereignty. The member State and the Community both are the highest authority when exercising their own jurisdiction. The relations between Community law and municipal law are comparable to those between the law of a federation and the law of the members of that federation. Pre-existing municipal law has been replaced by Community law which will forthwith regulate the matters belonging to the jurisdiction of a Community.[56]

For Italy the following structure was made by Messrs. Catalano and Monaco. The transfer of sovereign rights to the Communities which simultaneously entails loss of sovereignty by the member

[51] Rigaux, *Report C.I.D.E.*, p. 39.
[52] J.-L. Ropers, *French Report 3rd Meeting Commission U.I.M.*, p. 6.
[53] *Luxembourg Report to 3rd Meeting Commission U.I.M.*, p. 6.
[54] See Rigaux, *Report C.I.D.E.*, pp. 38–41.
[55] Ropers, *op. cit.*, p. 6.
[56] *Op. cit.*, pp. 19–23.

States characterises the supremacy of the Community legal order, including treaties and regulations alike, over the internal legal order of the member States. The entry into force of the treaty provisions automatically produced the implicit abrogation of pre-existing incompatible municipal law. Apart from any constitutional law the member States have accepted the obligations arising out of Articles 86 of the ECSC Treaty, 5 of the EEC Treaty and 192 of the Euratom Treaty to abstain from any measure likely to jeopardise the attainment of the objectives of the treaties. The enactment of whatever municipal legislation contrary to the conferment of sovereign rights upon the Community would constitute a manifest violation that might be considered as a failure in the sense of Articles 88 of the ECSC Treaty, 169 and 170 of the EEC Treaty and 141 and 142 of the Euratom Treaty.[57]

It is rather disappointing to learn that the Constitutional Court of Italy in its judgment of February 24/March 7, 1964, decided that Article 11 of the Italian Constitution did not attribute to the Italian statute approving the EEC Treaty a legal force superior to any other statute, in other words the court did not recognise the supremacy of the EEC Treaty over a subsequent Italian statute.[58]

According to Luxembourg law conflicts between Community legislative acts and Luxembourg legislation shall be solved in the same manner as conflicts between treaties and that law, *i.e.*, in favour of Community law.[59]

Article 67 of the Netherlands Constitution, by referring to its Article 66, accords supremacy to Community legislative acts over all Netherlands legislation. The Court of Justice of the European Communities very clearly revealed its position in this matter. Should there have been any doubt as to what this position would be after the preliminary rulings of March 19, 1964,[60] and of June 9, 1964,[61] in the case of *Costa* v. *E.N.E.L.* it proclaimed in the most emphatic terms the supremacy of Community law over municipal law of the member States. After the passage I have already quoted from its judgment the court said:

> The integration, with the laws of each member State, of provisions having a Community source, and more particularly the terms and spirit of the Treaty, have as a corollary the impossibility, for the member States, to give precedence to a

57 *Op. cit.*, pp. 12–14.
58 Digest in English and annotation by N. Catalano in (1964–65) 2 C.M.L.Rev. 224 *et seq.*
59 See Luxembourg report mentioned in note 53.
60 Preliminary ruling in case No. 75/63 of *Mrs. Hoekstra-Unger* v. *Organisation of Retail Trade and Crafts*, X *Jurisprudentie van het Hof van Justitie* 369.
61 Preliminary ruling in case No. 92/63 of *Mrs. Moebs-Nonnenmacher* v. *Board of the Netherlands Bank for Social Insurances*, not yet published.

> unilateral and subsequent measure, which is inconsistent with it against a legal order accepted by them upon a basis of reciprocity. . . .
>
> The transfer, by member States, from their national order, in favour of the Community order and the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign rights, upon which a subsequent unilateral law, incompatible with the concept of the Community, cannot prevail.[62]

This preliminary ruling and the judgment of the Italian Constitutional Court both deal with the same conflict that may eventually exist between the anterior EEC Treaty and the posterior Italian statute concerning nationalisation of electricity production and distribution. Everyone interested in Community law will be waiting attentively for what is going to happen in Italy after the ruling of the court at Luxembourg.

CONCLUSION

Having come to the end of this study, I venture to submit the following conclusions. There is no doubt whatever that the impact of Community law as a whole upon the municipal law of the member States is considerably greater than that of international law and of other treaties in general. As far as Community law is laid down in treaties, the internal legal effects in the Benelux countries and France are—subject to the limitations on the freedom of interpretation contained in Articles 41 of the ECSC Treaty, 177 of the EEC Treaty and 150 of the Euratom Treaty—substantially identical with those of any other treaty. In Germany and Italy the Community treaties are considered as having internal effects *sui generis*. The position of Community legislative acts in the legal order of the member States is novel. The legal problems involved seem to be solved in the Benelux countries and France. Supremacy of the whole body of Community law is warranted in France, Luxembourg and the Netherlands and will perhaps be recognised in Belgium in future. Whether this supremacy will be accepted in Germany and Italy is, for the moment, doubtful. Developments are just now in a critical phase in these countries.

The situation clearly demonstrates that the lawyers who earnestly desire to achieve the juridical construction of European integration need better tools to make the European legal order effective than dualist concepts of international law and doctrines of transformation.

[62] English translation and commentary of I. Samkalden in (1964–65) 2 C.M.L.Rev. 197 *et seq.*