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The European Court and National Courts
Doctrine and Jurisprudence:
Legal Change in its Social Context

Report on Luxembourg

HENRI ETIENNE

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The European Court and National Courts Doctrine and Jurisprudence: Legal Change in its Social Context

Report on Luxembourg

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A Working Paper written for the Project *The European Court and National Courts - Doctrine and Jurisprudence: Legal Change in its Social Context*
Directed by Anne-Marie Slaughter, Martin Shapiro, Alec Stone, and Joseph H.H. Weiler

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The context

1.1.

The very special context in which Luxembourg judiciary acts has to be kept in mind. On the one hand, Luxembourg is, more than any other Member State of the European Union, embedded in an international context. This is first a result of its size: some 400.000 inhabitants, of which 25% are non Luxembourgers. Foreign trade represents more than 9O% of its GNP. Though it has existed for more than 1000 years, Luxembourg has always had some sort of relations, mostly of dependency, with monarchs from abroad or with foreign states. It gained its independence through an international treaty - the Treaty of London of April 19, 1839 - and until the end of World War I, its international status has been subject to some form of discussion between the "powers". It has a one and a half century experience of economic integration, having acceeded to the Zollverein (set up in 1834) in 1842. This accession took place against the will of the population. Luxembourg was barred from joining Belgium because of the opposition of the King of the Netherlands who was also Grand Duke of Luxembourg. Napoleon III did not show any interest. The only option left was that of the Zollverein dominated by Prussia. From 1922 through the present day, Luxembourg has been in an economic and monetary union with Belgium (although the Luxembourgers had expressed in a referendum their preference for an economic union with France). Luxembourg never had a currency of its own. After World War II, it gradually took its foreign representation into its own hands. Belgium still holds the right and the duty to represent Luxembourg in the commercial and consular domain, whereas the Netherlands hold the right to represent Luxembourg diplomatically where it is not represented. Both countries have to apply Luxembourg law and to follow the instructions of Luxembourg. After World War II, Luxembourg was an active founding father of the key multilateral treaties on economic cooperation. Entering the Coal and Steel Community in 1952 was a dramatic decision: the steel industry at that moment represented more than 70% of its industry and 90% of its exports. The steel industry which had in mind the cartels of the late twenties and early thirties, strongly opposed its submission to a "High Authority", which was anathema both for being governmentally dirigistic and foreign. Nevertheless, the Conseil d'Etat stronly recommended in 1952 to joining the European Coal and Steel Community (ECSC) because it favoured the international "general good". The Conseil d'Etat held that, in the end, the Constitution had to be changed in order to take into account the new developements. After having quoted from a few authors on the erosion of sovereignty, the Conseil d'Etat made a distinction between international "Rechtsfähigkeit" which cannot be altered, and "Handlungsfähigkeit" which does not impinge on precedent and the exercice of

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which can be modulated.

Luxembourg entered monetary and economic union with Belgium despite the contrary wish of the people, and it joined the ECSC in 1952 despite the opposition of industry. Perhaps Luxembourgers had no choice, but the important point is that they turned necessity into an advantage, as events have since proven. This means that for them "sovereignty" (which is also the foundation of their Constitution [Article 19: "The sovereign power resides in the Nation"] lies very much in the capacity actually to adapt to changing circumstances and to make the best out of them. Théo Lefèvre, a former Belgian Prime Minister, is quoted as saying that "in Europe there are only small countries, the only difference is that some know it, other do not". Luxembourg knows it best and takes the best advantage of this knowledge.

Some major Codes, such as the Code Civil and the Code Pénal which were introduced under Napoleon's occupation, remain the basis of civil and criminal law. Luxembourg even upheld in 1944 the Einkommensteuergesetz introduced by the German occupants. In this field, German court decisions and German doctrine are referred to in Court.

Through the European treaties of integration, Luxembourg had for the first time an effective say in its external environment. This means that the vast majority of Luxembourgers are institutionally attached to the European Communities.

In the last twenty five years, the Luxembourg economy has undergone a dramatic change, shifting from iron production - which still remains the bulk of its industry - to financial, media and communication services. The latter involve a large number of international legal issues.

Luxembourg as a very small country depends fundamentally on a safe legal environment. Hence the importance of strict observation and enforcement of cross border commitments, on both sides of the border.

Luxembourg does not have an university of its own, although a first year of law teaching is provided. (In order to have access to the bar and to government appointment, candidates must pass a bar exam on specific Luxembourg law, which is taught in part time courses). Most Luxembourgers study law in Belgium or in France. Increasingly, lawyers take an UK or US LL.M.degree. The Luxembourg judiciary candidly refers to Belgium and French Court rulings and to French and Belgian legal doctrine, just as the Belgians follow closely what happens in Luxembourg (infra).

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1.2.
The other side of the coin is that Luxembourgers are nationalists on their own :"Mir wölle bleiwe wat mir sin" ("We want to remain what we are") is the favourite expression of Luxembourgers. Confident as they may be (some people say they are arrogant) in their capacity to adapt to a changing international environment and to be smarter in the end, they are very much attached to their Constitution and to their state autonomy. They consider latter as a guarantee of last resort.

1.3. How does the Luxembourg judiciary fit in that environment?

The Luxembourg judiciary is comprised of The Justice, which is overseen by the Cour Supérieure de Justice (High Court) sitting as Cour de Cassation and as Court of Appeal, and of the Litigation Committee of the Conseil d'Etat, which has the supreme juridiction in administrative matters.

The same Conseil d'Etat, in the absence of a second Chamber, is called to express its views on bills of law. The Conseil d'Etat retains as an ultimate power the right to suspend for three month the decision of the Chamber on legislative matters.

According to Article 37 of the Constitution (Revision October 25th, 1956), "The Grand Duke makes the treaties. The treaties shall not come into effect until they have been sactioned by law and published in the manner laid down for the publication of laws." This means that the Council of State is called to express its views also on draft treaties. It is accepted that the views expressed by the Conseil are not confined to the purely legal aspects of a draft. In addition to lawyers, the Conseil d'Etat is composed of personalities belonging to the most representative strata of the country.

1.4.
Luxembourg remains with the Netherlands the only EU Member country having a written constitution which does not have a constitutional court controlling the constitutionality of acts of the legislature. There have been quite a few movements in the past to create such an institution, but they never succeeded. The Luxembourgers felt that they could trust the representatives of the "people". This, the entrenched position of the population, was also shared by the judiciary. The elder generation of the judiciary was inculcated according to traditional Belgian and French doctrine the horror of "forfaiture" and of "Gouvernement des juges". These principles are enshrined in fundamental texts. Article 48 of the Constitution reads: "The interpretation of laws by ways of authority may only

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be effected by law" and Article 5 of the Code Civil provides: "Judges are not allowed to decide by ways of general and rule making dispositions on the cases submitted to them." This basic attitude - which is also a comfortable "no problem attitude" - may explain why the established judiciary never used an open interpretation of the Constitution which might have enabled them to shelve statute contrary to the Constitution. Lower Courts have made tentative steps in this direction. Art.96 of the Constitution stipulates: "Courts and tribunals apply general and local decisions only as far as these comply with the laws." This does not rule out the possibility that the same could be decided for statutes contrary to the Constitution.

1.5.

The Luxembourg judiciary has been also conservative insofar as it upholds as belonging to the "Loi" executive rulings made on ground of the annual decision of the Chambre granting the Government - since 1939 - full powers to enact economic legislation (but not fiscal laws). Just to give an exemple, the first specifically Luxembourgish dispositions on "banking secret" has been introduced in 1989 through an "arrêté grand-ducal" taken on ground of these special powers.[1] This type of "legislation" is not challenged by the courts and the Conseil d'Etat as having been made in excess of the powers of the executive. Being very open minded towards the exercice of statutory powers by the executive, the Luxembourg judiciary see no problems when attributions are bestowed to European Institutions.

The intrusion of european law into the Luxembourg legal order has changed the situation fundamentally. It brought the judiciary in the center of an institutional turmoil. The Chamber of Deputies is discussing currently a change of the Constitution in order introduce some form of a constitutional Court. Some argue that the introduction of such a supercourt does not meet an actual need, since the direct application of overriding treaties such as the Strasbourg Convention of Human Rights and the EC Treaty give judicial judicial teeth to existing constitutional rights and moreover specify rights not mentioned as such in the Constitution. The transaction costs for the introduction of a constitutional court would be out of proportion.[2]

1.6.

Luxembourg is a monist country insofar as a Treaty once approved by the Chamber, ratified and published, enters the legal order with "force de loi", but not as a law. The analyse made by Pierre Pescatore in 1962[3] has never been challenged:

- In order to be binding in the domestic legal order, the Treaty must bind the

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country internationally, it must have entered into force internationally and it must exist as such. A Court may monitor if Luxembourg is bound legally. Pescatore cites two cases. The High Court in its ruling of June 21, 1912 denied the application of a clause restricting the use of trademarks included in a Treaty concluded by Prussia, acting on behalf of the Member States of the Zollverein. Indeed Luxdembourg's agreement to the Zollverein did not include a mandate to negociate such agreements on behalf of the Grand Duchy. The High Court on Mai 25, 1925 refused to apply the Versailles Treaty, to which Luxembourg was not a party.

- The Treaty must still be in effect. Pescatore quotes a series of rulings in which a Luxembourg Court held that a Treaty is no longer in effect.

- The Treaty has to be approved in the form of a full law. The Constitution does not make any distinction between different kinds of treaties. Government agreements and "soft law" agreements just do not enter the legal order. They cannot be opposed to citizens nor can citizens rely on them as such.

- The Treaty has to be published.

Hence we must distinguish between the law approving the treaty which as such does not enter the legal order, and the treaty regularely concluded and published which enters as such into the legal order. If Courts use for the binding effects of treaties the language proper to laws, it remains true that a treaty maintains its contractual nature.

Pescatore accepts the full competence of courts to apply and to interpret treaties. In his article written in 1962, he mentions in a footnote that it has to be kept in mind that this competence to interprete has been limited by the effect of some international treaties which attribute to other bodies the interpretation of their provisions. This is the case with arrticles 177 of the EEC Treaty and Art.150 of the Euratom Treaty. An analogous provision is contained in article 41 of the ECSC Treaty, but it applies only to decisions of the High Authority and not to the very dispositions of the Treaty.

After having accepted the principle of the interpretation of treaties by the courts, he adds what he qualifies a "practical observation". The difference in nature between treaties and laws has as consequence that treaties cannot be interpreted in every case in the same way as laws. He notes first that the preparatory works (travaux préparatoires) to a treaty are usually not known. This means that the executive may dispose of elements ignored by a court. (The Ministère Public,

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present when the Court is in session, may be requested by the Court to provide information from the Government on preparatory works). Moreover a treaty, as a contract, contains an element of relativity and its application within the national territory may be influenced by the application of the treaty within the territory of the other contracting parties. This demonstrates that the interpretation of treaties may be influenced by extrinsic factors which national judiciary, as domestic body, does not know. Only the external bodies of the State are in a position to know these elements and to judge these elements.[4]

It is evident that this qualification of a treaty has a bearing on the notion of direct effect: in civil law, the Court would have to decide on all aspects related to the validity of the obligation, inclusively the *exceptio non adimpliti contractus*. If a court gives direct effect to a treaty without any qualification, it would mean that a court acts on its own competence on this matter and that it is confident not to march upon the province of the executive. Hence direct effect precludes a purely conventional character of a treaty.

Interestingly Pescatore addresses next the effects of treaties in case of a conflict with domestic law ("supremacy question"), but he does not address the question of "direct applicability" as such. Latter was addressed as such by the Court in van Gend & Loos which came up a year later.

I. Doctrinal History and Theory Supremacy/Direct Effect

2.1.
The Luxembourg Constitution does not contain any specific provisions on the relationship between international treaty law and domestic law.

2.2.
As treaties have the effects of a statute, the question of supremacy never rose for treaties entered into force after a national law: here the principle "*Lex posterior derogat legi priori* "applies". The question rose only for national statutes passed subsequent to a treaty which were contrary to the treaty.

2.3.
Up to 1950 Luxembourg courts refused as a matter of principle even to consider the compatibility of national law with previous international treaties. Such an investigation was considered inadmissible, being assimilated to a control of the conformity of a law with the Constitution.

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On very rare occasions, Luxembourg Courts have upheld a treaty against a posterior national law, on ground of the intent of the legislature which could not have meant, when approving the law, to introduce a national law contrary to the treaty. Pescatore quotes two cases, among which the most interesting is the following. In a ruling as old as 1890, the Cour Superieure de Justice held that a Luxembourg law introduced in 1860, long after the entry into force of the Zollverein, which had made subject the right for foreign companies to introduce an action before a court to their previous recognition, was a restriction contrary to the rules of the Zollverein. Indeed, latter gives companies the right to introduce legal action in any of the signatory countries. The Cour Supérieure held that "this law (approving law) could not and did not want to change the situation of German limited companies, which are covered by international law; (...) it could not, nor did it want, to prejudice international treaties; (...) it is a matter of principle that the execution of conventions constitutes one of the most important rules of interpretation (...)". Pescatore notes that this jurisprudence is in line with a rule of international law, which seems to be shared by many people. A reference to the doctrine is added in a footnote.

2.4.

Since 1950 Luxembourg courts invalidate national law which is contrary to a previous international treaty. In its judgment of June 8, 1950 the Cour de Cassation held "that in the case of a conflict between provisions of an international treaty and those of subsequent domestic law, the international law must prevail over the domestic law".[5] The Conseil d'Etat followed in 1951.

Strikingly, the court decisions relate to economic integration treaties. Pescatore in a footnote refers to a decision of the Cour superieure de Justice of 1917 in which it attributed preeminence to the customs law, as law proper to the Zollverein, to domestic law. According to the Cour supérieure, customs law "is grounded on international treaties and has the very nature of these." Thus there seems to have been a hard core treaty matter which was no more within the reach of the national legislator. The very notion of "Zollverein" (customs union) may have had an influence: it does not make much sense to share the taxes originating from customs according to the population if any partner can change unilaterally the rules.

The "superiority" decisions of the early 50ties were taken in the very context of "direct effect" situations. For Luxembourg courts "superiority" and "direct effect" are the two facets of the same coin. One does not go without the other. The decision of the Cour supérieure de Justice of July 21, 1951 refers to an in vitro situation proper for a submission to the Europeran Court of Justice: A

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Belgian travelling business agent had been active in Luxembourg without having the authorization by Luxembourg authorities as required of all foreigners by the arrêté-loi of August 14 1934. The Cour Supérieure held that the national disposition ran contrary to the treaty establishing the economic union with Belgium insofar as it does not except Belgian citizens. "(...) in case of a conflict between the provisions of an international treaty and those of a domestic law, even posterior, the international rule is superior to the domestic rule."

It is remarkable that Pescatore, like his fellow Luxembourg judges for whom supremacy with legal effects does not raise a special question of "direct effect", has taken a similar position in a lecture given 18 years after his article.[6]

Supremacy and direct effect of a treaty seem considered as features of a treaty which do not merit mention. In its opinion of April 9, 1952 on the proposed ECSC, the Conseil d'Etat does not mention the recent rulings of the Cour de Cassation and of its own Comité du Contentieux. In stead, the Conseil d'Etat refers to the much stronger provision of Art. 21 of the Convention establishing a Belgo-Luxembourg Economic Union, according to which Belgian laws and regulations taken on ground of the Convention - on which Luxembourg has no say - become applicable in the Grand-Duchy up until their publication by the Luxembourg Government.
Luxembourg tribunals assess the "direct effect" according to the very nature of the disposition, and not according to its specific orgin as a statute or as a treaty. Thus Pescatore mentions a decision of the Luxembourg Tribunal d'arrondissement of December 8, 1960 (not published) which denied - rightly - that at the moment of the facts underlying the case, article 86 EEC had no direct effect. In a rather early case[7] the court had grounded the direct effect and the primacy of Community law on its "specificity". One commentator, after having noted that the application of Community law did not raise any problem given the general position of the Luxembourg judiciary, has nevertheless expressed some regrets that it did not refer enough to the "finality" of Community law and that the language of the Luxembourg judiciary remained very much one of traditional international law.[8]

In its landmark ruling of July 1954 (cassation), the Cour supérieure de Justice deepened the motives underlying its jurisprudence:

> "(...) if it is true that the effect of successive laws depends on the date when they enter into force, the provisions contrary to previous law abolishing latter, the same can not be true when two laws are not of an equal value, e.g. when one of the laws is an international treaty incorporated into domestic law by an approval law; **indeed such a treaty is a law of a superior essence having a higher origin than the will of a**

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domestic body; consequently, in case of a conflict between provisions of an international treaty and those of a subsequent domestic law, the international law must prevail over a national law ...". (emphasis added)

2.5.

Pescatore then looks into what may have motivated the judges. He sees two fundamental grounds: the contractual nature of a treaty, and the international character of a treaty.

Here Pescatore should be quoted fully. Without saying it explicetly, the basic argument is that judges whose accepted task is to enforce contracts, can act hardly differently when the State enters into a contract:

> "The preeminence of the contractual level over the statutory level is not specific to international law; this can be found also in domestic law. Actually, it is in the field of international law that the old dictum: *Convenances vaincent loi* finds a new application. If the treaty overrides the law, it is because it has its roots in the combined will of the contracting parties; the treaty indeed has not only a legislative value, it has also, and in the first instance, a mutually obligatory value. Since the national constitution admits the treaty as a legal category, one must assume the compulsory nature of the obligations which it entails and hence exclude any possibility of a unilateral violation; a contrary position would be absurd. In this respect, one can refer to the principle of good faith for the execution of conventions; the Conseil d'Etat has upheld this argument in its opinion of June 23, 1953. Indeed, a State would act in bad faith if it violated, through the means of its domestic legislation, the international obligations it has entered into. In case of a conflict between a treaty and a contrary subsequent domestic law, the courts refuse to give their assistance to a bad faith legislative manoeuvre."

Then Pescatore deals with the other source: the treaty prevails over the law, not only insofar as it is a contractual act, but also as an international act. What is at stake is not only the preeminenece of the treaty over the law, but moreover the preeminence of the international order over the internal order. He adds that serving the finalities of the international order, international law has a greater value than specific legal provisions which preside over any national community. This is the very reason why a treaty is "of a superior essence to that of the law", to use the exact words of the Cour supérieure de Justice."

(If an international treaty may set aside posterior national statute in a conflict of norms situation, Luxembourg judiciary will fully uphold foreign law if it is applicable in a case submitted to it as a matter of fact, included foreign jurisprudence. Thus it has been ruled that a Luxembourg court applying foreign law would apply the foreign jurisprudence even if the text of the foreign statute

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is identical to the Luxembourg statute.[9]

The supporters of the bureaucratic explanation of political developments will notice that at the moment Pescatore wrote these lines he was ministre plénipotentiaire at the Luxembourg Ministery of Foreign Affairs. He was also a scholar (Assistant professor at Liège University). Given his position in government office, it was quite comprehensible that he would protect his work against arbitrary action by the lawmakers; he was perfectly coherent when he claimed the last word for his ministerial department on matters such as the existence of a treaty, its interpretation according to its origins, and the reciprocal application of the treaty. But it was the task of the national judge to set aside a legislation which would be contrary to a treaty.

If in 1958 de Gaulle introduced the superiority clause of international treaties into the Constitution of the Vth Republic. The deep motivation may have been to keep the President of the Republic, who carries out the foreign policy of the Republic, from being challenged by the Chambre. The superiority clause was made conditional on "reciprocity", in which case the executive recovers its say.

2.6.
The Zollverein and the Treaty on the economic and monetary union with Belgium have provided a first, and very important terrain for the breakthrough of treaties in the domestic legal order. Before dealing with supremacy and direct effect of the European Community Treaties, one should keep in mind that Luxembourg Courts do not hesitate to rely as well on other treaties. They may quote the EEC Treaty and other treaties on a same level. Thus the High Court ruled on May 1, 1985 (Pasicrisie 1986, pp. 2-3) that Art. 119 of the Rome Treaty and the Convention n° 100 of ILO (International Labor Organisation) relative to equal pay for men and women for a work of the same nature, are directly applicable in the legal order of the contracting parties. The European Convention on Human rights has been another frontrunner for the introduction, through the juciary, of international law into the realm of the citizen. Luxembourg, one of the original signatories of the Convention, ratified both the Convention and its First Additional Protocol on September 1953. Luxembourg has recognized since 1958 the competency of the Commission of Human Rights to receive individual petitions and the compulsory jurisdiction of the European Court of Human Rights. Luxembourg has ratified most of the Protocols to the Convention. Thus the Convention and its protocols have entered the Luxembourg legal order where they are applied directly, and abundantly.[10]
Insofar as the Convention and its protocols deal with matters covered by the Constitution, the Convention has empowered the judges to invalidate national

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laws contrary to the Constitution. The opinions of the Strasbourg Commission and of the Strasbourg Court are usually cited by the courts. Some rights, conferred by the Convention, may not be mentioned in the Constitution, such as the due process clause (Art.6 (1) of the Convention) and the protection of the private and family life (Art.8 (2)) of the Convention. Hence the parties and the judges refer to the Convention. Much legislation had to be introduced in order to bring Luxembourg in line with the Convention and its Protocols, as interpreted by the Strasbourg Court and the Strasbourg Commission. The fact that the decisions of the Strasbourg Commission and of the Strasbourg Court received a good deal of publicity is due primarely to the fact that the Luxembourg Member of the Commission and the Luxembourg Member of the Court are high ranking magistrates who distinguish themselves from their fellow judges as they go public.[11]

2.7.

In the field of Human Rights Luxembourg acts quickly in order to prevent any condemnation. If they act quickly in order to implement Community legislation in the field of financial services, however they are not frontrunners in adjusting their statute to the needs of the internal market. Their Governement and their Chamber feel fairly confident that the way they handle things is correct. They have a tendency "to let it come" and they are fairly reluctant to act preventively in order to avoid some defeat before the Court. They are pretty candid about rulings of a Court condemning them: a condemnation provides the right push to action, and the different administrative bodies have been spared lengthy coordination discussions which would have been required in order to set up preventive statute. In a rather pratical way of thinking, the Luxembourg government appreciates that other people - Brussels; the Court - do the job first. Up to this day Luxembourg has not been condemned by the Strasbourg Court. But Luxembourg has a high record of national laws invalidated by the ECJ.

2.8.

Between 1950, when Luxembourg courts accepted the supremacy of international treaties, and 1962, the year of Pescatore's doctrinal article, important international developments had taken place. These developments triggered intensive discussions in the Conseil d'Etat - acting as the advisory body - and in the Chamber of Deputies about the compatibility of the international commitments Luxembourg took with its then-existing text of the Constitution. Some contamination between the judiciary and the political bodies was hardly avoidable during these crucial years.

The decisive ruling of the Cour de Cassation of June 1950 cannot been

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influenced by the Schuman declaration of May 9, 1950 launching the process for the negociation of the ECSC. But it cannot be challenged that the Zeitgeist was propitious for important multilateral treaties the ambition of which was nothing less than to anchor Europe into the Western world. On January 1, 1948 the Benelux Treaty entered into force, which had its own Court in which the Luxembourg judiciary was represented. On March 17, 1948 Luxembourg became a founder of the Union of Western Europe. The OEEC was signed on April 16, 1948. NATO was signed on April 4, 1949. The Statute of the Council of Europe was signed on May 5, 1949. The European Payments Union was signed on September 19, 1949.

Judges could not fail to think that if governments and parliaments took seriously all to which they subscribed, then the consequence would be that no government, and foremost Luxembourg - the smallest of all - could set aside on its own such multilateral treaties. If Governement and lawmakers did not take contracts seriously, one could not expect from judges that they should be accomplices covering the bad faith of partners to a treaty. By instinct the Luxembourg judiciary felt that it was in the interest of its country that treaties should be enforced. Luxembourg judges may have taken some satisfaction, tiny as was their country, to act as the forceps in delivering a decision to which the european legal community was increasingly ready to give birth. (Germany had set the standard in its Constitution of 1949, Article 25 of which enshrines the principle of supremacy of international law). Their gesture, daring as it was, remained within the limits of an accepted advance by the judiciary ("savoir jusqu'où aller trop loin" to quote Jean Cocteau). Remarkably enough, the "steps further" within reach of the courts were steps which enhanced some form of personal freedom against old fashioned constraints. This is particularely true for the Luxembourg cases in which the indivudual fought usually for his rights against corporative and protectionist measures backed by obsolete statute. David is in a legitimacy position towards Goliath (or, in this case Leviathan).[12]

Thus the decision of the Cour de Cassation may have been encouraged by the general climate prevailing at that moment. The position of the courts was certainly not fought by the executive which saw its authority strengthened as a negociator, mainly in the Council of the Communities. A problem remained with the Chamber which was not ready to acknowledge in a formal text that the final authority would remain with a treaty.

It must be assumed that the landmark ruling of the Cour de Cassation of July 14, 1954, in which the Court specified its double tier motivation, must have taken into account the findings of the Conseil d'Etat and of the Chambre des

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Députés: the higher position of treaties in the hierachy of norms applied by the judiciary applied has to be seen against the position taken by the Conseil d'Etat and by the Chambre on the final authority of the Constitution and the limits within which powers could be transferred. In other words, the position of the Cour de Cassation was not one of total abandonment. Some form of a final safety net remained. The Conseil d'Etat (Comité du Contentieux) held in its ruling of Dec.7, 1978 that "an international treaty incorporated into national law through an approbation law, is a law of a superior essence having a higher authority than the will of a domestic organ". Yet the same Conseil d'Etat acting in its advisory function had specified the limitations under which powers could be transferred to international institutions.

Remarkably enough, the discussions leading to the approbation of the ECSC did not raise discussions about its conformity with the Constitution. An important factor for this quiet acceptance may have been the fact (see infra) that the ECSC Treaty is concluded for a limited duration.

2.9.
The problems came with other Treaties. Here I quote Ernest Arendt, former Member of the Conseil d'Etat[13]: "This (the treaties are contrary to the Constitution which has to be changed) was (...) the position of the Conseil d'Etat which in two opinions given in 1953, one on the EDC (Opinion of July 30 1953), the other on the statutory situation of the Forces of the States Member of NATO (Opinion of November 3, 1953) has expressed the firm opinion that these two treaties are contrary to our Constitution. Nevertheless the Conseil d'Etat did not go as far as to oppose its suspensive constitutional veto and to express its formal opposition, but it restrained itself on the following conclusions:

> "Consequently, a revision of the Constitution allowing to adjust the law to situations for which it does not contain and could not contain a provision, becomes unescapable. One cannot leave unsolved an ambiguity which divides "la Doctrine" and which troubles the minds. It is true indeed that an international treaty, approved and ratified, is legally perfect according to the principles of international public law, **even if it hurts substantial dispositions of the Constitution**. But are we allowed to persist in a way which commits to such an extend the responsability of the State autorities? Mainly can one accept that the checking of the right to conclude and to make binding Treaties should be at the end the only province of the legislature, subject itself to the constitutional norm? Raising the question is enough to demonstrate the risks and dangers of a situation requesting a positive and neat solution."
>
> "The constitutional preoccupations are not specific to the Grand Duchy. Constitutional reforms have been made in neighboring countries; Belgium, the constitutional system of which is close to ours, is on the point to do so.

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> If the Chambre des Députés, in accordance with the Government, would, for reasons the urgency and constraint of which are recognized by the Conseil d'Etat, approve the present Treaty, then the Conseil d'Etat urges that the change of the Constitution should be made timely."

The Conseil d'Etat accepted that a treaty contrary to the Constitution was binding according to international law, but did not yet go as far as to say that it would overstep in such a situation the Constitution, nor of course to say that in such a situation a judge would be obliged to set aside the Constitution.

The European Defence Community Treaty and and the Convention on stationing of troops belonging to NATO countries were approved by the Chambre des Députés with the majority required for a change of the Constitution (presence of three quarts and backing two thirds of the votes cast), but without a change of the Constitution (which according to the Luxembourg Constitution can take place only when a previous Chamber has declared provisions open for a change, which means that the Chamber will have to be dissolved first if the change has not been announced before previous elections).

3.1.

Finally the Constitution was changed in 1956, at the eve of the approval of the Rome Treaties. A new Article 49bis was added:

> "The exercice of the powers reserved by the Constitution to the legislative, executive and judiciary powers may be temporarely vested by Treaty in institutions governed by international law."[14]

Article 37 of the Constitution was complemented with the following provisions:

> "The Grand Duke enacts the regulations and orders necessary for carrying the treaties into effect, in accordance with the procedure governing measures for the execution of laws and with the effects attached to such measures, without prejudice to matters reserved to the law by the Constitution."

This text confirms that the treaty enters into the legal order as a law. It does not mean that Luxembourg has abandoned its monist position. The direct effect of the Treaty depends on its content. The fact that in some situation executive measures may be required confirms *par a contrario* that a treaty has direct effect when such measures are not required.

3.2.

It should be noted first that the Chamber refused to add an article, as proposed by the Government, endorsing the jurisprudence of the courts and of the Conseil d'Etat on the superiority of treaties to national law.

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3.3.

The Chamber refused to make a further step according to which a treaty, approved under the quorum and majority requirements required for a change of the Constitution (but without the requirement of a previous dissolution of the Chamber) could contain provisions amending the Constitution. The Special Committee for the amendment of the Constitution of the Chamber ruled in 1956 "against the introduction in the Luxembourg Constitution of a text allowing the derogation to constitutional norms by international treaties; be it even that latter would have be to be approved by a special majority of the Chamber. Such a procedure could lead, in fine, to overt changes of the Constitution without respecting the formal requirements of Article 114 of the Constitution". The Conseil d'Etat added that, "put at an extreme" ("réduite à l'absurde"), the proposed provision becomes equal to a suspension of the Constitution and hence to a total abandonment of the Constitution".

3.4.

Indeed the new Article 49bis does not go as far. We refer here to the analysis made by Marc Thewes.[15]

a) The Constitution vests ("délègue" in French) only the exercice of constitutional powers, but not the powers themselves. According to the Luxembourg interpretation, such a delegation does not restrict national sovereignty of Luxembourg, insofar as it is limited to the bestowment on international bodies of the partial exercice of powers deriving from the Constitution. This takes place at a level inferior to the level of the Constitution and can be considered in short as a pratical exercice of the powers. According to the Conseil d'Etat, "it is important to stress that the Constitution distinguishes clearly between the origin and the exercice of sovereignty. The powers (exercice of sovereignty) originate in the Nation (which holds sovereignty). The latter remains one and indivisible, whatever the number, the quality and the range of the powers carried out in its name. It is not changed in its essence, when the exercice of powers is attributed freely either to national bodies, or to international bodies. At the end, the habilitation of international bodies does not challenge sovereignty, but the exercice of sovereignty by national powers." (Report 1955/66, p. CCIII)

3.5.

The Constitution provides that the powers can be vested "temporarely" in institutions governed by international law. This has been never an obstacle to the conclusion of Treaties of an unlimited duration. Marc Thewes feels that the Chamber, acting as a constituant body, wanted to make sure that delegations

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of powers keep a "temporary" character; that is, they should be reversible. The Special Commission has stressed indeed that the text of Article 49bis specifies "that the delegation of powers refers only to the exercice of powers and not to the very foundation of Sovereign Power (in majuscule!) and that it is conceded, if not in a precarious way, at least in a temporary way". (Report 1955/56 p. CXC) It cannot be a final abandonment of competency. Marc Thewes notes that this interpretation has been supported by the Conseil d'Etat in its opinion on the approval of the Maastricht Treaty. He is of the opinion that the Maastricht Treaty meets the conditions of a temporary delegation, because (according to him) "denunciation of treaties concluded for an illimited duration is accepted law." (Opinion of May 26 1992)

Marc Thewes questions whether such a somewhat legalistic interpretation of the Maastricht Treaty reflects fully the will of the authors of the amendment of 1956 to the Constitution. The Conseil d'Etat indeed admits that the "process in motion is considered by its authors as being irreversible, for the very purpose of its success".

3.6.

Thewes notes futher that only specific rights can be transferred. He deduces this correctly from the text, which excludes that the attributions of a power can be transferred "en bloc". He refers also to the opinion of the Special Commission of the Chamber, which said "the delegation is also of a restrictive nature and remains limited in so far as all that would not be expressly included remains with the National Sovereignty without any restriction ". (Majuscules in the text).

3.7.

The Conseil d'Etat and the Chamber were faced again with the question of the compatibility with the Constitution of a draft treaty, this time in the very tricky matter of voting rights of EU citizens in local elections, as provided for in Article 8B of the EC Treaty as introduced by the Treaty on European Union. There was a quasi unanimity in the Chamber regarding the necessity and the urgency of approving the Treaty, the bulk of which had been negociated under the auspices of the Luxembourg presidency. The Maastricht might relieve Luxembourg of the headache of its dependency on the monetary union with Belgium and, among other interesting features of the Maastricht Treaty, might maintain unanimity in fiscal matters. There was no discussion about the fact that Art.8B EC conflicts with articles 52 and 107 of the Constitution which reserve the right to vote and the right to be elected for Luxembourg citizens. (Some argue that Article 9 of the Constitution which reserves the political rights to Luxembourg citizens is also involved). Article 49bis of the Constitution did not

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constitute a possible basis for the approval, since the attribution of voting rights to citizens does not constitute an attribution of entitlements of one of the three powers to an institution, but encroaches directly on the rights of Luxembourg citizens. It shoul be kept in mind that 30% of the Luxembourg population are non-nationals (mostly EU citizens). Hence the Constitution had to be changed before the ratification of the Maastricht Treaty. (The other provisions of the Maastricht Treaty were covered by Article 49 bis of the Constitution). Such changes were to be undertaken by the other Member States which had similar problems, notably neigboring Belgium, France and Germany. As Articles 52 and 107 of the Constitution had not been declared open for constitutional revision by the preceding Chamber, the Chamber would have to be dissolved in order to allow the newly elected Chamber to change the relevant articles of the Constitution. This was not convenient, to say the least, for the Chamber and for the Government.

The Belgian Conseil d'Etat held that the Constitution had to be changed before the Treaty could be approved and ratified. Then Community and national application measures would have to be decided.

The Luxembourg Conseil d'Etat did not object to a ratification of the Maastricht Treaty without a previous change of the Constitution. The Conseil d'Etat held that according to Art. 8b (1) EC, the exercice of voting rights is subject to detailed arrangements to be adopted by the EU Council. This transfer (to an Institution) could be achieved through approval in accordance with the procedure laid down by Article 49 bis of the Constitution. According to this view, the text of Article 8b (1) EC is not contrary to Articles 52 and 107 of the Constitution. Of course the Constitution would need to be changed before the application of the Council decision in the Luxembourg legal order. Hence the Council, deciding unanimously (e.g. Luxembourg consent will be required), would have to set a time limit for the entry into force of these provisions in order to give Luxembourg the opportunity to proceed to the required change of its Constitution.

The Conseil d'Etat did not feel comfortable because its strategy contained assumptions about future behaviour of the Luxembourg electorate. There were reasons for doubt, indeed, given the subject matter of the vote. The Conseil d'Etat dismissed these doubts with the following observation which accepts the supremacy of a Treaty (binding legally Luxembourg) over the Constitution:

> "By the way one has to keep in mind that according to the hierarchy of legal norms, international law trumps national law and that, in case of a conflict, courts invalidate domestic law in favor of the treaty. In order to avoid a contradiction between our

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national law and the international law, the Conseil d'Etat insists vigorously that the relevant change of the Constitution will intervene in time so as to avoid such a situation of incompatibility."

The Conseil d'Etat did not urge the Luxembourg Government to enter the Council decision only after the change of the Constitution would have taken place. This had been recommended by Ernest Arendt (see supra 2.9.). Arendt cited the Conseil Constitutionnel of France which held that the French Constitution was affected only insofar as the Treaty permits majority voting on a matter covered by the Constitution.
Most commentators held that the Constitution should have been changed prior to the ratification of the Maastricht Treaty. They found that the subject matter - voting rights to EU citizens - was not the empowerment of the EU Council to lay down application rules, but the rights of the citizens. But nobody challenged the view that the Treaty supersedes the Constitution.

Further it should be noted that the Conseil did not refer to an abstract superiority of international law, but to concrete decisions by judges. One can imagine a scenario in which, after the EU Council has laid down the "detailed arrangements", the Luxembourg Chamber would not gather the required majority for a change of the Constitution. A Portuguese/EU citizen would be denied by the Luxembourg Administration the right to have his or her name placed on the list of voters, on the grounds that he or she would not meet the conditions of Articles 52 and 107 of the Constitution. This EU citizen would have a direct right to be put on the list: indeed the suppression of the condition of nationality is a simple right requiring no complementary measures. Thus the Conseil d'Etat has not uttered a mere *obiter dictum*, but its observation touches on the core of the problem and of the situation. Luxembourg has experienced a similar situation in the "Asti" case.[16] In that case, EU workers obliged to pay their contribution to a Chambre Professionnelle were granted the right to vote, the requirement to be a Luxembourg national being contrary to the Treaty.

The Conseil d'Etat in the Annex to its "Note de Réflexion sur une Réforme du Conseil d'Etat" (April 20 1993) insists that any contradiction between a treaty and the Constitution should be avoided, and that "the ratification of an international act would lead in fact to a modification of the Constitution".[17] The Conseil d'Etat confirms that a judge could not invalidate an approbation law introducing dispositions contrary to the Constitution "because of the principle of the superiority of the international norm to the national norm (**Constitution included**)".(Emphases added) The Conseil d'Etat adds that it does not matter very much if a contracting party adds reservations to its acceptance. But this is not possible in case of multilateral treaties which include a transfert of

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sovereignty and which do not allow reservations.

> "If such a norm is contrary to the Constitution, the situation becomes unhealthy. It is all the more so, since the country often does not have the possibility to exit, with relegation to the margin of the international community as sanction ."

Taking as a starting point the national judge's ability to set aside national law which is contrary to a treaty, the Conseil d'Etat reaches the conclusion that the national judge may also monitor the conformity of the law to another higher norm, namely the Constitution. The Conseil d'Etat recalls that the Constitution does not forbid a control over the constitutionality of laws, just as it does not prohibit the control over the compatibility of domestic norms with supranational law. The Conseil d'Etat recalls that the Tribunal Civil of Luxembourg (July 11, 1984) upheld the right of the judiciary to check the constitutionality of the statute on which the parties relied. Later, the Conseil d'Etat wonders if the necessity of introducing a constitutional court might be justified less for reasons of legal coherence, but would rather derive "from the traditional weakness and timidity of the continental type judge, which explains itself by his or her status as a career magistrate".[18]

In the Addendum to the Annex dealing with the hierarchy of norms applicable in the Luxembourg legal order, the Conseil d'Etat confirms the preeminence of international law which is derived as well from the international law applicable in Luxembourg as from Luxembourg doctrine and jurisprudence. However, the Conseil qualifies its position:

> "Thus the fact that the agreement of a State to be bound by a treaty has been expressed in violation of a disposition of its domestic law related to its competency to conclude treaties cannot be upheld by this State as invalidating its consent, **safe in case this violation was manifest and touched on a disposition of its internal law of fundamental importance**." (Emphases added)

It is striking that the Conseil d'Etat does not mention the ECJ specifically, nor does it use words such as the "new legal order" proper to the ECJ in order to protect the EC from this restriction. Treaties are put into the same pot by the Conseil d'Etat which does not make the reservation that multilateral treaties usually do not permit reservations.

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II. Kompetenz-Kompetenz: Member State practice and Doctrine

4.1.

Luxembourgers genuinely feel that they have a culture of their own. Just by framing the question "Kompetenz-Kompetenz" they would say that this is a "question d'Allemands", and this would suffice to stop the argument. They are primarely law abiding people, and, having accepted international law as *jus cogens*, they would be extremely reluctant to speculate on the more or less "cogens" nature of that law, which becomes more and more "cogens" if it is not questioned. Indeed, it is the proper state of living together - especially between people and between nations - that some final questions should be left open as long as there is not an actual need to face them. (This was very much the attitude of the Framers of the American Constitution who left open quite a bit of questions which the First Congress was more apt to resolve). Giving procedural content to speculative discussions on such final issues may keep scholars busy, but it can be dangerous if persons in charge of responsabilities - such as members of a supreme court - give the unthinkable a procedural edge and hence some reality. Luxembourgers assign great importance to common practice in the interpretation and application of international law. Thus adjudications made by the European Court of Justice in Strasbourg or by the ECJ, even if they may produce some initial astonishment, would be accepted as orignating from an accepted international judiciary.

4.2. Kompetenz-Kompetenz has a procedural side - who decides finally?

The Bundesverfassungsgericht in its Ruling of October 12 1993 was outspoken on the final competency. For Luxembourg Courts, we can make only assumptions. We should not expect any Luxembourg instance to make a statement in the ungoing european political environment.

4.3.

We must first keep in mind that a final competency of the founding States persists in a latent form, even if it is very dormant in the Luxembourg situation. Reluctant as Luxembourgers may be to initiate political discussions on some fundamental questions, one cannot deny that the questions exist:

- Can powers be transferred to an international organization which go beyond the limits within which the Constitution allows the transfer of sovereign powers to an international organization?
- Is the international institution entitled to act beyond the powers actually transferred and to encroach on the competency of the Member State?
- Is the international organization, ruling within the limits of its competency,

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entitled to act outside its own fundamental rules under which powers have been transferred?
- Is the international institution, ruling within the limits of its competency, entitled to endanger the very existence of the Country or encroach on inalienable rights of its citizens?[19]
The answer would be each time "no", but Luxembourgers would add that this "no" is without any significance because international law is the *jus cogens* and there is no reason to doubt of the soundness of the institutions. Raising such questions in operational terms would kill the very phenomen (the supremacy of international law) on which the system is based. In other words, the international order as *jus cogens* is binding on Luxembourg, even on its Constitution, as long as this same international order exists. Luxembourgers will be all the more comfortable taking such a position since a really hard case of a conflict between a treaty and the Constitution has not yet been tried before a Court.

4.4.
In the absence of a constitutional Court, a Luxembourg Court is not allowed to rule that the approval law of a Treaty oversteps the limits within which the Constitution allows powers to be transferred.

4.5.
The situation is similar if the Community has overstepped the competencies transferred to it. Some argue that the ruling of the Bundesverfassungsgericht of October 12, 1993, which gave teeth to the Kompetenz/Kompetenz claim, would put a Member State of the Europen Community in a position of inferiority if the Member State did not have such a constitutional court.[20] The other argument is that the question is of a theoretical nature because in the eventuality of a Member State's constitutional Court deciding on an almost going concern bases the limits of the Communuty's competency, the very existence of the Community would be in jeopardy. Luxembourg for sure would stick to the interpretations by the ECJ, and would join the camp of those Member States which would put pressure on the laggard to come back to accepted practice. In case of proliferation of such a behaviour by other supreme courts the Luxembourg judiciary would be the very last to follow. It would would shift from the Court only if the european legal order actually would no more exist.

4.6.
Should a punctual jurisprudence of the ECJ not pass a test of reasonableness, this might induce Luxembourg courts not to submit a case. Then they would resolve the issue by themselves in their own manner, without making out of it an institutional affair. There has been at least one case in which the Conseil

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d'Etat has not submitted a case to the ECJ and has interpreted Community law in its own way, seeking inspiration in the international or national instances the decisions of which were known.[21] The Pasicrisie (1976 - 3e et 4e Livraison, p. 261) published the Rutili ruling of the Court given six month later, together with a strong criticism of the ruling of the Conseil d'Etat. Shortly afterwards Luxembourg changed its statute in accordance with Community law.

4.7.

In another case, the Luxembourg judiciary has applied at its highest level the theory of the "acte clair" in a contentious environment. This decision met support on some sides, serious criticism on other sides.[22] The case related to the interpretation of the Protocole annexed to the European Convention on Jurisdiction and Judgments in civil and commercial matters of September 27, 1968 (the "Brussels Convention"). Article 1 of the Protocole provides that any person having his or her domicile in Luxembourg, summoned - in contractual matters - before a judge of the country in which the obligation is or is called to be performed, may refuse that competency, and if the defendant is domiciled in Luxembourrg, the foreign judge has to declare that he is not competent. Some foreign judges seem to have ignored this disposition. Hence a problem for the Luxembourg judge who was requested to give the exequatur for a decision apparently not in line with the Protocole. At the beginning, the Luxembourg judge would refuse the exequatur, arguing that the Protocole has been violated.[23] On appeal, the Cour Supérieure granted the exequatur, arguing that according to the spirit of the Convention the application made by a judge of the normal competency in contractual matters could no more be challenged by the judge asked to give the exequatur. According to the Cour supérieure, the Protocole did not contain a derogation to the application of such a decision once it has been taken by the foreign judge. This decision, taken without submitting the case to the ECJ, was welcomed by part of the doctrine.[24] Droz hails "the exemplary rigor of the jurisprudence of the Cour supérieure de justice de Luxembourg" et gives praise to the "clarity and strength of the Court's motivation". Other commentators felt that it was hardly conceivable that a judge could grant the exequatur to a decision taken without any consideration of Article 1 of the Protocole.[25] This doctrinal dispute could have been avoided, had the Cour supérieure submitted the case to the ECJ for interpretation. The Cour supérieure applied the "acte clair" theory in a "reverse" situation. Indeed, the interpretation given by the Court favoured the application of the general principle underlying the Convention, against a derogation benefiting to Luxembourg alone. This may underline the general trend of the Cour to privilege international law whenever it is appropriate, but it does not exclude that the same Cour might one day apply the "acte clair" theory in a case of

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extreme clarity in which Luxembourg interests would be protected against a Community decision.

4.8.

After all the Community survives despite the fact that the French Conseil d'Etat does not follow the jurisprudence of the Court, according to which non-enacted directives may not have direct effects. Luxembourg Courts and the Luxembourg Conseil d'Etat would be more reluctant to disregard the Court, but they have an eye on the Conseil d'Etat of France. One cannot rule out the possibility that in an extreme case they would go their own way. Such a localized cancer does not necessarely develop metastases. The judiciary would have enough courage to take its own stand if their deepest convictions were challenged. Let us suppose the Court would uphold its "Vittorio Paletta"[26] jurisprudence: the Luxembourg judiciary might feel - with the support of the entire Luxembourg population - that such a situation would be unbearable. The legal device used in order to get around the problem would be probably the application of the "abus de droit" instrument which is within the authority of the judge who is competent to determine the facts. Luxembourg judiciary would shelve what seems openly unreasonable and undefendable, but as to the modalities they would privilege a form with the least conflictual edge. Politically important as they might have been, the rulings of Luxembourg Courts striking down, following the interpretation given by the ECJ, whole panels of national statute protecting national vested interest groups against intrusion of the foreigners, were the contribution of the judiciary for a world with less discrmination and with more freedom. Since the Community is now part of the established powers and overt discriminations do no longer exist, and since its decisions reach the fields of competitive position of people and of transfert of revenu, the national judge applying Community law is no more in the position of the white knight. David has become King David. Also the judiciary cannot fail to see the shepherd David differently from King David.

4.9.

Let us now imagine the unthinkable: a split arises in the EU between "us" and "them" generating mistrust, doubtful application of the Treaty and methods of governance which would be widely challenged. As a consequence, the Treaty would no more be equally applied within the Member States. This would pervade the general climate. That would raise the traditional question of the interpretation of international law by courts: what is the common correct interpretation of the Treaty in the given international context? The justification for the supremacy - the international order - would vanish. At the end there would be no international law or international order. The other pillar on which

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supremacy rests - the contractual nature of a treaty - would be shaky as well under such circumstances. In that eventuality the Luxembourg judiciary would reserve the last word for themselves if they were compelled to such an extremity. It would be the last to disregard the Court. It would, if compelled to act, find in "la doctrine", in the rules of international law or in adjudications made by courts of other Member States enough legal argumentation for doing so.
The judiciary would have enough courage to take this stand, just as in 1950 it reversed the then existing order.

4.10.
A much more complicated situation is that envisaged by the Bundesverfassungsgericht in its ruling of October 12, 1993. The Bundesverfassungsgericht has given its position about the different circumstances under which the German Constitution must necessarely supersede EC law, and it clearly has stated that it was within its province to make it prevail in Germany. Luxembourg Courts would be among the very last to challenge the competence of the European Court of Justice to decide on the limits of the Community's own competence. But Luxembourg courts, as any court, would have to draw the consequences of the new situation arising from the fact that there is no more a commun interpretation of the Treaty in the Community. In such a situation, there is always an answer available in international law, the first being that international law is not applicable in the territory of other Member States. International law as the highest norm exists only as long as it is the law, in other words, as long as it is applied equally. The Community would implose if its law were not generally applied: the Luxembourg courts as any court would have to take account of the fact that the Community no longer exists. Here we can quote Couve de Murville, who reacted in the following way to a German minister in the EC Council wondering what the situation would be if a ruling of the ECJ were not followed in a Member State: "Then there would be no more Community".[27]

4.11.
Within the Community, as within any institution, in the end competencies are earned and merited, and not bestowed for ever. New sources of legitimacy may emerge which may be checked and balanced by the latent persistence of the original legitimacy. The fact that the latter persists as a check gives more leverage for the other, the emerging competency, to expand. Kompetenz/Kompetenz has much in common with the life of a couple: the activity of the couple is not a zero game insofar as they have pooled their resources and act as a couple; there is no prisoners dilemma because each knows

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how the partner will act. Yet the partners have agreed to be a couple, because in an extreme case they could separte. Without the basic agreement that at the end the right to separate is not excluded, they would not have pooled their resources. Checks and balances may exist between existing powers, but in an integration system such as the EU "le pouvoir arrête le pouvoir" works also in more subtle relations between actual and dormant powers. Not unlike atomic weapon, the function of the latent powers is to work as a dissuasive against the unbearable, and not to be an instrument available whenever required. Mentioning and discussing this issue would be lethal to the very purpose of the couple. It does not make any more sense to discuss the issue of collapse à propos the relations Community/Member States than it would be to discuss it à propos the relations between the Bundesrepublik and its citizens: if the Bundesrepublik were not able to enforce the inalialienable rights of its citizens on which it is grounded, there would be no more Bundesrepublik. The citizen of the Bundersrepublik has inalienable and "eternal" rights: if ever the Bundesverfassungsgericht were not be able to enforce them, the individual would recover his or her rights. The same would be true for the ECJ if it failed to ensure the interpretation and the application of the law of the Community. Fundamental rights of the citizen and the respect of the identity are part of that law.

In short, it does not make much sense to claim "Kompetenz". Any competency has to be deserved and merited.

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Endnotes

1. Mémorial A n° 15 March 28, 1989, p. 181.

2. Henri ETIENNE, "Le problème du contrôle de la constitutionnalité des lois au Grand-Duché de Luxembourg", 1993, Luxembourg, Institut Grand-ducal Section des Sciences Morales et Politiques.

3. "L'autorité, en droit interne, des traités internationaux", Pasicrisie luxembourgeoise, Vol. XVIII, pp. 99-115.

4. When the Community as such enters into Treaties, the contractual nature of a treaty reappears, be it that the Community statute is gauged against a treaty to which it is a party (most recently the German banana case...), or that a Treaty entered in by the Community is gauged against national law. The Court would be reluctant to assess by itself - here it relies very much on the Commission - that a treaty is applied fully "within the territory" of third countries so that it can invalidate (even posterior) Community Law. This idea underlies the Polydor decision of the Çourt (Case 270/80, ECR 82 p.0329) in which it held that even a same wording as that contained in the EC Treaty which is contained in a Treaty between the Community and a third country may not have the same meaning as in the EC Treaty. The Court has given direct effect only to dispositions leaving no room for interpretation in Treaties monitored by common bodies such as they exist in association treaties.

5. Cour supérieure de Justice (Cass.crim.), June 6 1950, Huberty c.MP, Pasicrisie lux., Tome XV, p.41

6. In an address to the annual meeting of the Society of Public Teachers of Law at Leicester University, on September 17, 1982, Pescatore holds essentially that law is only law insofar as it can be enforced by a judge. Hence it has direct effect by nature. For Pescatore, Van Gend & Loos was triggered because the Dutch Constitution provides that international commitments overrule national if they are "binding on anyone". The problem for the Tarifcommissie was that according to its wording Article 30 EEC is binding on States.

7. Tribunal correctionnel de Luxembourg, February 20, 1970, M.P./Muller, not reported.

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8. Jacques Neuen, "Jurisprudence sur les problèmes généraux de l'intégration, Rapport présenté au VIe Congrès international de droit européen de la Fédérération internationale pour le droit européen", p.40. Mentioned by Numa Wagner. Cf endnote 12.

9. Tribunal d'Arrondissement de Luxembourg, June 28 1967 ;CECA/Le Foyer; (non reported); Tribunal d'Arrondissement de Luxembourg, November 22 1972, Muller/Hummer, (non reported).

10. Dean SPIELMANN, "Human Rights and Freedom of Expression in Luxembourg, Annales du Droit Luxembourgeois, 1992, Brussels, Bruylant.

11. Alphonse Spielmann and Albert Weitzel, "La Convention européenne des droits de l'homme et le droit luxembourgeois", Bruxelles, Nemesis, 1991; Alphonse Spielmann,"Liberté d'expression ou censure?", 1982, Luxembourg, Imprimerie Centrale.

12. Alphonse SPIELMANN, "D"un certain conformisme à un libre examen certain. (De quelques aspects de la vie juridique)", in Les Publications Mosellanes, Mémorial 1989. La société luxembourgeoise de 1839 à 1889, pp.93-104; Numa WAGNER, "Les réactions de la doctrine à la création du droit par les juges en droit international privé et public", in Travaux de l'Association Henri Capitant et des amis de la culture juridique française, Tome XXXI, 1980, esp. 441 and 442.

13. "Le Traité de l'Union Européenne et la Constitution du G.D. de Luxembourg". 1993. Luxembourg. Institut Grand-Ducal des Sciences Morales et Politiques.

14. This is the English translation provided by the Luxembourg Government. It does not seem fully accurate. The original text reads: "L'exercice d'attributions réservées par la Constitution aux pouvoirs législatif, exécutif et judiciaire peut être temporairement dévolu par le traité à des institutions de droit international." The French text does not use the déterminate article "les" attributions, but the indeterminate article "d'attributions". It is further doubtful that "attributions" means "powers". A more accurate translation would be: "The exercice of entitlements reserved by the Constition......". Such Treaties have to be approved according to the quorum and majority rules required for a change of the Constitution.

15. Marc Thewes. "La Constitution Luxembourgeoise et l'Europe". Ann.Dr.Lux. 1992. Brussels. Bruylant.

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16. C-213/90, Chambre des Employés Privés/Association de Soutien aux Travailleurs Immigrés, ECJ July 4, 1991, ECR I 3507.

17. The Conseil d'Etat refers to J. Velu : "Contrôle de constitutionnalité et contrôle de compatibilité avec les traités", *Journal des Tribunaux*, n° 5649 of November 7, 1992, p. 740.

18. Favoreu, *Les cours constitutionnelles*, Paris, 1986 p. 9, quoted by J. Velu (supra).

19. This does not mean that what has been said when the Constitution was changed in 1956 is obsolete. The Conseil acting as an advisory body and the Chambre as well as the judiciary would be reluctant to repeat such statements which would harm the very purpose of a further step of integration. Scholars are less inhibited. Thus Ernest Arendt (cf end note 8) draws the attention to the fact that the Conseil d'Etat in its opinion on the Rome Treaties which are concluded for an unlimited duration does not even mention the point that according to the Constitution attributions can be transferred only temporarely. Arendt then argues that that does not matter as such a transfer is by its very nature temporary by essence. He refers then to the opinion of the Conseil d'Etat of Septtember 10, 1956 on the approbation of the EC and Euratom Treaties which indicated the limits under which powers may be transmitted. Arendt contiues: "It is not possible to conceive a treaty of a perpetual nature, entailing a final partial or total abandonment of sovereignty, which is forbidden by Article 1 of the Constitution. Any treaty concluded without limitation of duration may be denounced by the contracting parties. Hence the transfer of the exercice of attributions proper to the legislative, executive and judicial powers is temporary by essence."

20. Henri ETIENNE, "L'arrêt du Bundesverfassungsgericht sur le Traité de Maastricht et le Grand Duché de Luxembourg", 1994, Luxembourg, Institut Grand-Ducal, Section Sciences Morales et Politiques.

21. April 23, 1975, Mohammad Alimuddin Subhani/ Ministre de la Justice. Pasicrisie 1976, p. 155.

22. Numa Wagner. "Les réactions de la Doctrine à la Création du Droit par les Juges en Droit International Public et Privé". Travaux de l'Association Henri Capitant et des amis de la culture jridique française. Paris. Tome XXXII, 1980, pp.446-447.

23. e.g. Luxembourg, November 11, 1974, Revue critique de droit international privé, 1975, 660.

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24. Droz in Dalloz, 1976, p. 386.

25. Burnonville in Journaux des Tribunaux, 1977, p. 249 and p. 402.

26. The Four Members of the Paletta family were finally fired by a Bavarian SMB (Small and Medium Business) Company after having presented, for a fifth time, a medical attestation at the end of their four weeks of annual leave in Sicily. The Court found that the Company had failed to make use of the right it has according to the relevant EC Regulation to nominate its own medical controller. The Bundesarbeitsgericht has submitted the matter again to the Court. (Paletta, C-45/90, NJWZ 1992, 2687 - Paletta; NJWZ 1994, 2527).

27. Henri ETIENNE who at that time took note for the EC Commission at the EEC Council remembers Couve de Murville giving this answer at the end of one of the long marathon sessions of the EC Council of the early sixties, in the following context. Very late in the night, the German minister insisted on having some detail settled in the regulation. Couve, somewhat exasperated, said: "This can be settled by the Court". The German minister replied (he was probably not a person trained as an attorney): "But what happens if the Court's ruling is not observed"? Then Couve gave the quoted answer. Henri ETIENNE has written to Couve on the subject. Couve has answered (letter May 23, 1995) that he did not remember having given that answer 33 years ago. But he added that the answer is fully consistent with his own convictions and he authorized Henri ETIENNE to refer to his souvenir.

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