

Vienna Online Journal on International Constitutional Law

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■ PREFACE

Jürgen Busch & Harald Eberhard

New issue – new challenges

We are now publishing the second issue of the ICL Journal. This time we once again present very interesting and, in special, recent topics we want to deal with. A few days ago we had finished the section 'Austrian constitutional developments' which focuses on recent decisions of the Austrian Constitutional Court regarding the regulatory framework of entry and residence of aliens in Austria. This framework represents the focus of the development in the fields of right to asylum, right to residence and the procedure of expulsion and administrative detention of illegal immigrants within the last two years. In the last days, this topic has obtained a completely new aspect because of the recent published decisions of the Constitutional Court from October. The fact that we have the modern technical possibilities allowed us to react to this newest development and include the new jurisdiction in this field. Dealing with this very sophisticated and complex topic we want to present a general view over the different problems which appear from the set of laws which entered into force in 2006. The respective legal acts were a significant object not only of the legal, but also of the political discussion in Austria. One of the most relevant points in this way are the rights and guarantees resulting from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) which has constitutional status in Austria. It is remarkable that the Constitutional Court now has specified the relevant issues which are binding for all authorities in this field especially regarding decisions about expulsion orders and therefore – from his point of view – filled a gap of the legal framework. *Barbara Ramberger, Christian Schwabl* and *Valerie Leskovar* present and evaluate these very important decisions of the Constitutional Court.

In the section 'Articles' *Rafael Leal-Arcas* deals with the recent topic in how far the EU Member States will retain legal powers with regard to the WTO if the discussed Reform Treaty will be set into force. He gives us a concise overview about the limits of the Union's powers in matters of trade policy though we face thereby an exclusive power. One of his results is that the Member States will play their role in the same way as up to now. A relevant factor is the democratic deficit of the EU which – regarding this point – has its specific features. The article builds up on a lecture *Rafael Leal-Arcas* held at the NICLAS Summer School 2007 on WTO and EU relations. This summer programme on ICL, coming under the EU's Erasmus Intensive Programme funding scheme and also serving as one main source for the topics discussed in this e-journal, has been prolonged for funding and will consequently be continued in the fall semester and summer of 2008. NICLAS focuses on one of the most dynamic policy fields at the moment, the Area of Freedom, Security and Justice. Whereas NICLAS 2007

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focused on freedom policy, the preparatory and summer course programme in 2008 will be dedicated to security policy. The recent challenges of the EU's and its member states' security policy for the ICL focus areas democracy, human rights and governance range without doubt among the crucial questions of our nowadays' societies and its constitutional frameworks. The preparatory work and the preliminary programme of the ICL project "NICLAS for Security 2008" involving 10 European partner universities and research institutions can be found at <http://www.internationalconstitutionallaw.net> (section "SummerSchool"). Given the link between our ICL activities at the University of Vienna Law School and our partner institutions with this journal, one focus area of the subsequent issues in 2008 will be security law in a global constitutional network. The second article of the recent issue still dates back to NICLAS 2007 as well: *Konrad Lachmayer* presents the theoretical background of the main issue our journal wants to deal with: the International Constitutional Law Approach. He makes clear that we have to face a new perspective on constitutional challenges in a globalizing world which has important consequences for scientific work on constitutional law regarding all relevant levels. All these levels – the national as well as the supranational and international one – are interconnected and influence each other. In this way, we have to replace a state-related understanding of constitutional law by an open one.

Our book review of this issue, composed by *Ulrike Brandl*, deals with a book of *Dan Sarooshi* about the exercise of sovereign powers of International Organizations. Many questions regarding this topic still can be qualified as open points, in special the limits of a conferral of powers touching aspects of traditional state sovereignty in the field of 'legislation'. This conferral of sovereign powers raises theoretical as well as practical questions of accountability and responsibility for acts of such organizations.

Happy reading to all of you!

Jürgen Busch & Harald Eberhard

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Rafael Leal-Arcas

Will EU Member States Play Any Role at the WTO after the EU Reform Treaty?

A. INTRODUCTION

In this paper, I address the issue of European Union (EU) Member States' participation in the World Trade Organization (WTO) after the EU Reform Treaty enters into force. In Giuliano Amato's view, no member of the EU is powerful enough to be taken seriously on its own in the international arena. Thus, in order to play an effective role in the world, the EU must join together. In this sense, coordinating its foreign trade policies and streamlining the process was one of Amato's major ambitions during the Convention on the Future of Europe.¹ If Amato's ambitions were to materialize, it would therefore be correct to interpret that EU Member States will no longer participate in the WTO forum because the EU Constitutional and Reform Treaties give exclusive competence to the EU in all areas of trade policy. However, how do we reconcile the fact that the EC and its Member States are currently members of the WTO, but after the EU Constitutional Treaty or its successor, the Reform Treaty, the EU will have exclusive competence in all trade matters? Aren't EU Member States sovereign states? Once the EU Reform Treaty is in force, how will the current polycephalous physiognomy of the EU in the WTO change? Will it make a difference? Will the EU become monocephalous in international trade negotiations, i.e., a sole trade actor? What will its implications be? Will EU Member States disappear from international trade *fora*? Is the EU becoming a federation of States when it comes to trade policy?

The Brussels European Council of June 2007 on a Reform Treaty addressed some of these issues by confirming what the EU Constitutional Treaty had already guaranteed, i.e., that the EU will never be a centralized all-powerful superstate by laying down:

- (a) The obligation to "respect the national identities of member states, inherent in their fundamental structures, political and constitutional;"²
- (b) The principle of conferred powers (whereby the Union has only those competences bestowed on it by the Member States);³

1 See conversation with Giuliano Amato in the framework of a seminar held at NYU Law School on March 26, 2002 under the title "The Futures of Europe: Ideas, Ideals and Those Who Make Them Happen", available at http://www.jeanmonnetprogram.org/seminar/02/Amato_script.rtf (last visited June 20, 2007).

2 See Presidency Conclusions of the Brussels European Council, 21-22 June 2007, 11177/07, CONCL 2, Annex I, p. 25.

- (c) The principles of subsidiarity and proportionality, limiting EU action to the minimum necessary to achieve the objectives agreed by EU Member States;⁴
- (d) The participation of EU Member States themselves in the decision-taking system of the Union; and
- (e) The principle of "unity in diversity."⁵

This paper is divided into three main sections. The first tackles the issue of the current WTO membership of the European Community (EC) and its Member States. Section two analyzes the Reform Treaty from a trade policy viewpoint and acknowledges that EU trade policy will become federal after the Reform Treaty. The third section before the conclusions provides an assessment of national parliaments' roles in EU trade policy decision-making. The paper concludes that the EU is not yet ready to bypass its Member States in all areas of trade regulation (notably trade issues related to immigration policy) and consequently EU Member States will continue to be present in the WTO after the Reform Treaty enters into force.

B. THE EUROPEAN COMMUNITY AND ITS MEMBER STATES AS MEMBERS OF THE GATT AND WTO

As indicated earlier, both the EC and the EU Member States are members of the WTO. The EC and its 27 Member States in the WTO is the largest and most comprehensive entity in this member-driven organization (i.e., the WTO), with decisions mainly taken on a consensus basis.⁶ While the 27 Member States coordinate their positions in Brussels and Geneva, the European Commission alone speaks for the EC and its Member States at almost all WTO meetings. When looking at the history of the EC external trade relations, one sees that the EC was not a contracting party to the General Agreement on Tariffs and Trade 1947 (GATT),⁷ although it actually participated in the negotiations of the

3 *Id.*, at p. 22.

4 *Id.*, at p. 17.

5 *Id.*, at p. 5.

6 In the WTO, voting consensus is achieved if no Member "present at the meeting when the decision is taken, formally objects." Each WTO Member has one vote, regardless of its economic clout and, among them, developing countries are increasingly making their presence felt. The WTO cannot therefore be hijacked by a group of countries or multinational companies.

7 Although the General Agreement on Tariffs and Trade, signed in 1947, was not formed at the Bretton Woods Conference that took place in Bretton Woods, New Hampshire (U.S.), in 1944, the participants at the conference contemplated the necessity of an international trade organization (ITO). The GATT, which set out a plan for economic recovery after World War II, by encouraging reduction in tariffs and other international trade barriers, is therefore one of the three mechanisms for global economic governance that comprise the Bretton Woods System, being the other two the International Monetary Fund (IMF) and the World Bank. The GATT was a collection of rules applied temporarily, without an institutional basis, unlike the WTO, which is a permanent organization with a permanent framework and its own Secretariat. For almost fifty years, the GATT focused exclusively on trade in goods, leaving tariffs and quotas aside in the various rounds of negotiations of the world trading system. The GATT set

Kennedy Round. European countries such as France, Belgium, Luxembourg, the Netherlands, and the United Kingdom (but not Italy and Germany) were founding contracting parties to GATT 1947. Subsequently, all EC Member States became full members of the GATT 1947. However, accession protocols and trade agreements negotiated in the GATT framework provided in their final provisions that the agreements were open for acceptance by contracting parties to the GATT and by the EC. In addition, the substantive and procedural provisions of these agreements treat the EC like a GATT contracting party.

Furthermore, since 1970, most agreements negotiated in the framework of GATT were accepted by the EC alone, without acceptance by EC Member States. The only exceptions are two agreements at the end of the Tokyo Round of multilateral trade negotiations and the part of the Tariff Protocol relating to European Coal and Steel Community (ECSC) products.⁸ The EC exercised all rights and fulfilled almost all obligations under GATT law in its own name like a GATT contracting party. Since the 1960s all GATT contracting parties had accepted the EC's exercise of rights and fulfillment of obligations and had asserted their own GATT rights, even in dispute settlement proceedings relating to measures of individual EU Member States, almost always against the EC.⁹ The EC had replaced, with the consent of other GATT contracting parties, its Member States as bearers of rights and obligations under the GATT. During the GATT, therefore, the EC was not a member although it acted as if it were one. Since the Uruguay Round, there has been a tendency to give the EC the right to act on behalf of all the Member States.

The Agreement establishing the WTO formally recognized the EC's membership alongside the EU Member States. The precise division of rights and responsibilities between the EC and its Member States was left open in the WTO Agreement, but was a matter of contention during the preparation of the WTO Agreement, and has remained so ever since.

The Diagnosis: Many EU Countries (and Voices?) in the WTO¹⁰

During the Uruguay Round of multilateral trade negotiations, the EC faced the issue of the scope of its authority under the EC Treaty in the field of international

the terms for countries who wanted to trade with each other. The GATT signatories were called "contracting parties." The Uruguay Round, completed in 1994, replaced the GATT with the WTO, a global trade agency with binding enforcements of comprehensive rules expanding beyond trade. The GATT has now become one of the eighteen agreements enforced by the WTO.

- 8 J. H. J. Bourgeois, "The Tokyo Round Agreements on Technical Barriers and on Government Procurement," 19 CML Rev 5, 22 (1982).
- 9 E.U. Petersmann, "The EEC as a GATT Member –Legal Conflicts between GATT law and European Community Law," in THE EUROPEAN COMMUNITY AND GATT 23 at 37-8 (M. Hilf, F.G. Jacobs & E.U. Petersmann, 1986).
- 10 M. Farrell, *EU and WTO Regulatory Frameworks: Complementarity or Competition?*, Kogan Page European Dossier Series, 1999; J. Sack, "The EC's Membership of International Organisations," 32 *Common Market Law Review* 1227 (1995); N. Reich, "Judge-made 'Europe a la carte': some remarks on recent conflicts between European and German constitutional law

economic relations, particularly with respect to trade in services¹¹ and intellectual property rights.¹² Negotiations were conducted according to the normal procedures for GATT negotiations, albeit that the European Commission negotiated on behalf of both the EC and its Member States.¹³ The assumption throughout was that EU Member States would continue to be members of the world trading system (and therefore WTO Members), and would not be completely replaced by the EC. With regard to the latter point, two constraints of a political nature led the European Commission not to stand up and claim exclusive EC membership of the new organization. The first constraint stemmed from a discussion at a meeting of the EU Council in November 1993; this was after the Maastricht Treaty had entered into effect with some difficulty and so it was thought wise not to push this issue at that stage. The second political constraint was that around this time, the Council had not yet approved the Uruguay Round and Sir Leon Brittan (the EU trade commissioner at the time) thought it was preferable not to put another contentious issue on the table.¹⁴ The result was the adoption of Article XI of the Marrakesh Agreement establishing the WTO, which states that the contracting parties to GATT 1947 and the European Communities shall become original Members of the WTO.¹⁵

This dual WTO membership of the EC and its Member States may be a handicap for both the EC and its Member States.¹⁶ The European Court of Justice had stated that the division of powers between the EC and its Member States was a domestic question in which third parties have no need to intervene.¹⁷ In the minutes of the Council meeting of 7-8 March 1994, the Commission relied on this argument by saying that: "The Final Act ... and the Agreements thereto fall

provoked by the bananas litigation", *European Journal of International Law* 103 (1996); P.J. Kuijper, "The Conclusion and Implementation of the Uruguay Round Results by the EC," 6 *European Journal of International Law*, 222 (1995); U. Everling, "Will Europe Slip on Bananas? The Bananas judgments of the ECJ and national courts," 33 *Common Market Law Review* 401 (1996); T. Cottier & K. N. Schefer, "The Relationship Between World Trade Organization Law, National and Regional Law," 1 *Journal of International Economic Law* 83 (1998); P. Pescatore, "Opinion 1/94 on 'Conclusion' of the WTO Agreement: is there an escape from a programmed disaster? 36 *Common Market Law Review* 387 (1999); S. Princen, "EC Compliance with WTO Law: The Interplay of Law and Politics," 15 *European Journal of International Law*, 555-74 (2004).

- 11 P. Mengozzi, "Trade in Services and Commercial Policy," in M. Maresceau (ed.), *The European Community's Commercial Policy after 1992*, pp. 223-47, (1993).
- 12 See I. Govaere, "Intellectual Property Protection and Commercial Policy," in M. Maresceau (ed.) *The European Community's Commercial Policy after 1992*, pp. 197-222, (1993); P. Demiray, "Intellectual Property and the External Power of the European Community: The New Dimension," 16 *Michigan Journal of International Law*, pp. 187-239, (1994).
- 13 P. van den Bossche, "The European Community and the Uruguay Round Agreements," in *IMPLEMENTING THE URUGUAY ROUND*, 23 at 56-7 (J. H. Jackson & A. Sykes eds., Clarendon Press, Oxford, 1997).
- 14 *Id.*, pp. 23-102.
- 15 World Trade Organization, *The Uruguay Round Results. The Legal Texts.* (Geneva, 1995), 6.
- 16 See generally M.E. Footer, "The EU and the WTO Global Trading System," in P.-H. Laurent & M. Maresceau (eds.), *The State of the European Union Vol. 4. Deepening and Widening*, Lynne Rienner Publishers, 1998.
- 17 Ruling 1/78, 1978 E.C.R. 2151, para. 35.

exclusively within the competence of the European Community."¹⁸ This argument does not allow the *a sensu contrario* inference that because the Member States and the EC are formally WTO Members, it is irrelevant for the division of powers within the EC legal system. On the contrary, the Agreement establishing the WTO and the agreements that form part of it were approved by the Council on behalf of the EC expressly "as regards matters within its competence."¹⁹ Therefore, there must be a plausible *raison d'être* for the joint WTO membership of the EC and its Member States also from the point of view of the division of powers within the EC.

C. THE REFORM TREATY

The ratification of the EU Constitutional Treaty failed. Although the EU Constitutional Treaty will not enter into force,²⁰ the European Council meeting of June 2007 agreed on a fall-back revision treaty²¹ which confirms much of the substance of the EU Constitutional Treaty,²² including the provisions concerning external trade.²³ Therefore, an examination of these external trade provisions is amply justified, since they are still likely to enter into force, possibly in 2009.²⁴

18 Cited in the ECJ Opinion 1/94, 1994 E.C.R. I-5267, para. 5.

19 Council Decision of 22 December 1998 (OJ 1994 L 336/1).

20 Before the European Council of June 2007, the idea was that when the EU Constitutional Treaty would enter into force, the EC Treaty, the EU Treaty, as well as acts and Treaties which have supplemented or amended them, would have been repealed, as laid down in the general and final provisions in Part IV of the EU Constitutional Treaty. The EU Constitutional Treaty was supposed to enter into force after ratification by all EU Member States. It was also provided for that the Union would succeed to all the rights and obligations, whether internal or resulting from international agreements, which arose before the entry into force of the EU Constitutional Treaty. The case-law of the ECJ would have been maintained as a source of Union law interpretation. As stated in Article I-6 of the EU Constitutional Treaty, the Constitution and law adopted by the Union's institutions in exercising competences conferred on it would have had primacy over the law of the Member States.

21 The Reform Treaty (also known as "future institutional settlement" or "legal basis," among others) is a proposed replacement for the EU Constitutional Treaty, since the latter failed ratification in France and the Netherlands in 2005, despite having been ratified by more than 15 EU Member States. An Intergovernmental Conference with a mandate to draft the treaty commenced work on 23 July 2007, after a political agreement was reached at the European Council meeting of 22-23 June 2007.

22 In sharp contrast to the abandoned EU Constitutional Treaty, which would have replaced all previous Treaties in a single text, there will be yet another layer of Treaty law with the Reform Treaty. The IGC mandate provides in its paragraph 22 that "a Protocol annexed to the Reform Treaty will amend the existing Protocols, as agreed in the 2004 IGC" (including the deletion of 10 of them). It is not clear at this stage to what extent, if at all, obsolete Treaty provisions will be abrogated. See Presidency Conclusions of the Brussels European Council, 21-22 June 2007, 11177/07, CONCL 2, Annex I, para. 22.

23 Presidency Conclusions of the Brussels European Council, 21-22 June 2007, 11177/07, CONCL 2.

24 Early analyses of the EU Constitutional Treaty can be found at M. Cremona, "The Draft Constitutional Treaty: External Relations and External Action," *Common Market Law Review*, 40: 1347-1366, 2003; G. de Búrca, "The EU Constitution: In Search of Europe's International

On 23 July 2007, the Portuguese Presidency launched an intergovernmental conference for the negotiation of a Reform Treaty, embracing a revised Treaty on European Union and a revised European Community Treaty, which will be called a Treaty on the Functioning of the European Union. Much if not all of the content of the new Treaties was agreed at the European Council meeting in Brussels on 21 and 22 June 2007. The Portuguese Presidency produced a draft text of the new Treaties on 23 July 2007, reflecting the agreement at the European Council in June 2007. In theory therefore, this intergovernmental conference should be less controversial than its predecessors which led to the Single European Act and the Maastricht, Amsterdam, and Nice Treaties, as well as the – now abandoned – EU Constitutional Treaty. The European Council decided that the intergovernmental conference would conclude before the end of 2007, so that the Reform Treaty could be ratified by all 27 national parliaments before the European Parliament elections in November 2009.

Unlike the abandoned EU Constitutional Treaty, the Reform Treaty will add to – but not replace or consolidate – the existing TEU and EC Treaty, including the Acts of Accession. On the positive side however, the Reform Treaty will be a substantive legal document, introducing significant legal, procedural, and institutional changes. It will draw heavily on the EU Constitutional Treaty.

Both the Convention on the Future of Europe²⁵ and, consequently, the EU Constitutional Treaty tried to improve the current situation on trade issues created by the Nice Treaty. The common commercial policy was a topic considered by the Convention on the Future of Europe, although it was clearly regarded as being less important than the common foreign and security policy. Article III-217 (1) of the Convention's draft Treaty stipulated that the "common commercial policy shall be conducted in the context of the principles and objectives of the Union's

Identity," Walter van Gerven lecture, Leuven, November 2004, where de Búrca argues that the external relations provisions of the EU Constitutional Treaty are the most innovative and important parts of the constitutional reform; B. de Witte, "The Constitutional Law of External Relations," in I. Pernice, & M. Poiares Maduro (eds.), *A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention*, pp. 95-106, Nomos, 2003, available at <http://www.ecln.net/elements/conferences/booklisbon/dewitte.pdf> (last visited February 26, 2007).

25 The European Convention (also known as the Convention on the Future of Europe) was set up in December 2001. It had 105 members, representing the presidents or prime ministers of the EU Member States and candidate countries, their national parliaments, the European Parliament and the European Commission. Its Chairman was former French President Valéry Giscard d'Estaing. The Convention's job was to draw up a new Treaty that would set out clear rules for running the European Union after enlargement. It was, in effect, to be the Constitution of the EU. The Convention completed its work on 10 July 2003.

In order to reach a compromise for all parties present, the Convention consulted diverse groups of civil society (citizens, social partners, NGOs, economic sectors, *et cetera*) in various ways, of which the Forum on the Future of the Union was one. The Forum on the Future of the Union was created by the Convention Secretariat, with the technical assistance of the Commission, and received contributions from interested national and supranational organizations. Eight contact groups were set up to prepare auditions for the academic world, study groups, the social sector, the environment, human rights, development, regions and local authorities, culture, and citizens and the EU institutions. The Convention also created an online forum on the future of Europe to connect with civil society.

external action."²⁶ The main innovation introduced by the EU Constitutional Treaty was to specify the various types of competence that exist in the EU,²⁷ which has never been done in any of the previous Treaties.²⁸ Thus, the Union's external trade policy will become more federal,²⁹ but not necessarily more democratic, even if the European Parliament will have more powers in relation to the conclusion of international trade agreements. The empowerment of the European Parliament is outweighed by the fact that national parliaments will not take part in the ratification of trade agreements. Therefore, the Constitutional Treaty improved some aspects of the current EC's common commercial policy, but created new (unnecessary) problems.

I. The Union's Exclusive Competence In Trade Policy: Symptoms Of A Federation

Part I, Title III (Articles I-11 to I-18) of the Constitutional Treaty³⁰ dealt with the division of competences between the Union and the Member States.³¹ It presented a threefold classification: exclusive competence, shared competence, and supporting action.³² However, Title III did not seek to allocate competences

26 Draft Treaty establishing a Constitution for Europe, Brussels, 18 July 2003.

27 For an analysis of the division of competences in the EU by the EU Constitutional Treaty, see K. Lenaerts, "The Constitution for Europe: Fiction or Reality?" *Columbia Journal of European Law*, Vol. 11, No. 3, Summer 2005, pp. 465-479.

28 The ECJ, however, had already prefigured such a categorization in that it defines three types of competences: exclusive, shared, and complementary.

29 The general rule laid down in Article I-13 of the Constitutional Treaty is that the Union has exclusive competence for the conclusion of an international agreement in areas defined by European legislative acts, when the competence is necessary to enable the Union to exercise its internal competence, or affects an internal Union act. This praxis gives a federal approach to the Union in trade agreements.

30 Official Journal of the European Union C 310, Volume 47, 16 December 2004, available at <http://europa.eu.int/eur-lex/lex/JOhtml.do?uri=OJ:C:2004:310:SOM:EN:HTML> (last visited June 23, 2007).

31 For an analysis on competence and the EU Constitution, see S. Weatherill, "Competence," in B. de Witte, (ed.), *Ten Reflections on the Constitutional Treaty for Europe*, April 2003, pp. 45-66.

32 In relation to the exclusive competences of the Union, the EU can legislate alone and adopt legally binding acts in areas of exclusive competence (or authorize the Member States to do so). In areas of competences shared between the EU and its Member States, both can intervene. The areas of support, coordination or complimentary action open to the Union's competence are: industry; protection and improvement of human health; education, vocational training, youth and sport; tourism; administrative cooperation; culture; and civil protection. In these areas, the legally binding acts adopted by the Union (law, framework law, regulation and decision) on the basis of provisions specific to these areas, may not entail harmonization of Member States' laws or regulations. The Constitutional Treaty also recognizes the Union's competence for the definition and establishment of a common foreign and security policy, including the progressive definition of a common defense policy. However, the Constitutional Treaty does not give details about Member States' competences, in other words, areas in which the Union cannot intervene. That said, however, it is clear that "the rest" of competences which are omitted is Member States' competences.

in the way that a federal constitution might.³³ In this respect and same line of thought, the European Council of June 2007 proposed that the Reform Treaty add an additional declaration to emphasize the limitations on the EU's competences.³⁴ It is debatable how far Title III fulfils the demands of the Laeken European Council. The basic threefold classification may be controversial.³⁵

The Convention on the Future of Europe gave birth to the Constitutional Treaty.³⁶ The tasks of the Convention were set by the Laeken Declaration,³⁷ which asked the Convention to consider "how the division of competence can be made more transparent,"³⁸ "whether there needs to be any reorganization of competence"³⁹ as well as "how to ensure a redefined division of competence"⁴⁰ and to ensure European dynamism at the same time. As for the right balance between the maintenance of any "redefined division of competence" and ensuring that "the European dynamic does not come to a halt," one has to look at Article I-18 of the Constitutional Treaty, entitled "Flexibility clause."⁴¹

Article I-13 seeks to describe and define those areas where the Union has exclusive competence.⁴² This new Article may be controversial, especially for the relationship between the Union and the Member States, but also for the involvement of national parliaments in the control of Union legislation.⁴³ It deals with internal competence⁴⁴ and external competence.⁴⁵

33 See the German experience of a clear division of competences between the Federal level and the Länder level in Title VII of the Fundamental Law for the Federal Republic of Germany of May 23rd 1949, especially Articles 70-75.

34 Presidency Conclusions of the Brussels European Council, 21-22 June 2007, 11177/07, CONCL 2, Annex I, para. 19b, p. 20.

35 Article I-13 of the Constitutional Treaty.

36 For a chronological overview of the EU constitutional story, see A. Duff, *The Struggle for Europe's Constitution*, Federal Trust, 2006, chapter 1.

37 Laeken Declaration on the Future of the European Union of 15 December 2001, available at <http://european-convention.eu.int/pdf/LKNEN.pdf> (last visited June 30, 2007).

38 *Ibid.* at p. 3.

39 *Ibid.* at p. 4.

40 *Ibid.*

41 Flexibility clause (Article I-18 of the Constitutional Treaty) is the procedure which gives the Union new competences in areas unspecified by the Constitutional Treaty. If the Commission deems it necessary to conduct a new action in order to reach the Union's objectives, it makes a proposal to that effect to the EU Council, which acts unanimously after obtaining the approval of the Parliament. With respect to the control procedure of the subsidiarity principle, the EU Council may assign the necessary competences to the Union. The new competences cannot, however, entail harmonization of Member States' laws or regulations in cases where the EU Constitutional Treaty excludes such harmonization.

42 Cremona, however, has her doubts as to the desirability of the attempt to codify the ECJ's case-law on competence, especially external competence. See M. Cremona, "The Union's External Action: Constitutional Perspectives," in G.. Amato, H .Bribosia & B. de Witte (eds.), *Genèse et destinée de la Constitution européenne – Genesis and Destiny of the European Constitution*, Bruxelles: Bruylant, 2007, pp. 1173-1217, at 1183.

43 In fact, the Protocol on the role of the EU's national parliaments attempts to clarify relations between national representatives and the EU institutions. The protocol states that, when the European Council uses the procedure laid down in Article I-24 (4)(2) – meaning that when a Council Decision opens a new area to vote at qualified majority – the national parliaments

The Union is said to have exclusive competence to establish "the competition rules necessary for the functioning of the internal market," as well as in the areas of customs union, *common commercial policy*, monetary policy for the Member States which have adopted the Euro, and fisheries conservation.⁴⁶ The list in paragraph 1 of the areas of the Constitution in which the Union has exclusive competence goes beyond the present situation, as it includes the entire common commercial policy. Since Article I-13 does not define the scope of the common commercial policy, it is only by reading the relevant Article in Part III of the Constitutional Treaty that one discovers that the EU's exclusive competence is being extended compared to the Nice Treaty. This means that Article 133 (6), subparagraph (2) EC as modified by the Nice Treaty will have to be deleted if the EU Constitutional Treaty's successor enters into force, unless we give a different definition to the common commercial policy, far from the current one. The EU Constitutional Treaty would have repealed the existing treaties entirely, had it entered into force,⁴⁷ and would have therefore dealt with this problem. The implication of the Union's exclusive competence in trade policy is the assurance of the unitary representation of interests within the WTO for the first time in the EU. The proposed changes tend toward greater centralization of trade policy and toward reducing the EU Member States' influence in trade policy. After analyzing the new definition of the scope of EU trade policy by the Constitutional Treaty, more work may be needed to secure an adequate level of transparency required by the Laeken Declaration.

Antoniadis, however, has a more skeptical approach on the Constitutional Convention's proposals in this matter. According to him, the designation of the common commercial policy as an exclusive Union competence does not insulate the system from external threats, and thus perpetuates the constitutional conflicts between the EC and its Member States in trade policy with regard to services trade and the commercial aspects of intellectual property rights.⁴⁸ Why is this the case? Because EU Member States still retain competence to legislate over matters pertaining to the internal market. These measures are destined to

must be notified at least four months prior to the first vote in that area. The Constitutional Treaty also clarifies and organizes the national parliament's information mechanisms, which for a long time were informal or falling under the Amsterdam Protocol. The EU institutions are obliged to forward documents. For example, the Commission sends all its consultation documents, its annual legislative program or legislative proposals. It also contains a constitutional recognition of the Conference of bodies specialized in EC affairs, which is the link between national parliaments and the European Parliament.

44 Article I-13 (1).

45 Article I-13 (2).

46 Article I-13 (1) of the Constitutional Treaty.

47 This idea of repealing the existing EU treaties has been scrapped in favor of an "amending" treaty routine in the same format and style as previous treaties such as Maastricht, Amsterdam, and Nice. See Presidency Conclusions of the Brussels European Council, 21-22 June 2007, 11177/07, CONCL 2, Annex I, para. 1, p. 15.

48 A. Antoniadis, "The Participation of the European Community in the World Trade Organization: An External Look at European Union Constitution-Building," in T. Tridimas, & P. Nebbia (eds.), *European Union Law for the 21st Century: Rethinking the New Legal Order*, Vol. I, Oxford and Portland (Oregon), Hart Publishing, 2004, pp. 321-344, at 337.

have a trade impact and, more importantly, may be incompatible with the WTO Agreements. For example, let us think of a case involving national patent law which offers limited protection, thereby violates the TRIPS Agreement. Or a situation in which the law provides restrictions to the establishment of third country service providers, thereby violates the GATS.

Another reason that explains why the designation of the common commercial policy as an exclusive Union competence will not eliminate the constitutional conflicts between the EC and its Member States in trade policy with regard to services trade and the commercial aspects of intellectual property rights is the fact that EU Member States remain members of the WTO of their own right. This means that any other WTO member may request the establishment of a WTO Panel against any given EU Member State, and not against the EC (despite the exclusivity of the Union in the common commercial policy).⁴⁹ If that particular EU Member State is found in violation of WTO law, it must repeal its legislation. In some cases, it may then not have the competence to do so domestically; in other cases, in doing so, it may violate EC law, and be found between conflicting legal obligations.

II. The Constitutional And Reform Treaties And International Trade

The EU Constitutional Treaty proposes to transfer further competences in trade policy to the supranational level, which causes problems for national governments.⁵⁰ In practice, problems arise because there is no definition or scope of the common commercial policy in the EU Constitutional Treaty, as mentioned before. Therefore, if a given agreement is on a subject of national regulation, then it will have to be signed as a mixed agreement, even under the EU Constitutional Treaty.

Part III of the Constitutional Treaty (The Policies and Functioning of the Union) deals with the common commercial policy in Chapter III of Title V (The Union's External Action). Articles III-314 and 315 of the EU Constitutional Treaty deal with the common commercial policy and state that the common commercial policy includes "the conclusion of tariff and trade agreements *relating to trade in goods*

49 However, dispute settlement body practice in the WTO dictates that WTO Member States tend to bring actions against the EC, not against individual EU countries, even in areas of shared competence.

50 Authors that have previously analyzed the issue of supranationalism are, among others: P. Lindseth, "The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration since the 1950s," *Loyola of Los Angeles Law Review*, Fall 2003, 363; P. Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of The European Community," April 1999, 99 *Colum. L. Rev.* 628; D. Feddersen, "Papers from the Zavikon VI Conference (1994): Between Supranationalism and Regionalism--Economic and Political Trends of Federal Systems in the East and West," 1995 *St. Louis-Warsaw Transatlantic Law Journal* 103; D. Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law," 115 *Yale Law Journal* 1490, May 2006; J. Weiler, "The Community System: The Dual Character of Supranationalism," 1 *Y.B. European L.* 268 (F.G. Jacobs ed., 1981); E. O. Eriksen, "Deliberative Supranationalism in the EU," in *Democracy in the European Union: Integration through Deliberation?* (E. O. Eriksen & J. E. Fossum eds., 2000).

and services and the commercial aspects of intellectual property, foreign direct investment [...]" (paragraph 1).⁵¹ The text in italics was added to the text of the first paragraph of the current version of Article 133 EC as modified by the Nice Treaty. This makes it very clear that goods, services, intellectual property rights and investment would be covered by the common commercial policy and would therefore fall within the exclusive competence of the EU. Compared to the Nice Treaty, the scope would be increased in two respects: Firstly, the exception concerning cultural and audiovisual services, educational services, and social and human health services would be removed; and secondly, investment would be included in the scope of the common commercial policy.

Although the Union will gain a comprehensive external competence, covering thereby all fields of the world trading system, Article III-315 of the Constitutional Treaty does not provide the Union with full internal competence to adopt legislation to implement trade agreements. This might mean that the Union would need to coordinate with EU Member States before trade agreements can be concluded. This deficiency changes with Article 188c, paragraph 2 of the Reform Treaty, which gives the Parliament and Council the power to adopt the measures defining the framework for implementing the common commercial policy. Furthermore, the implementation of an international agreement by the Union will put political pressure on EU Member States to adopt that piece of legislation. Since EU Member States will only have a formal competence to implement international agreements, it will not leave them a large margin of discretion, though. Given that Article III-315 of the Constitution, as it stands, would remove any shared competence in EC trade policy (i.e., services and commercial aspects of intellectual property rights), it would exclude national parliaments from ratifying any future WTO agreements since these would no longer be mixed agreements. Therefore, EU national parliaments would see their influence on trade policy minimized. However, as we will see below, the cultural exception in services trade will remain, but in a different form, giving a veto power to EU Member States in specific circumstances (Article III-315-4(a) of the EU Constitutional Treaty).

In trade policy, the distinction between qualified majority⁵² and unanimity in the Council remains in the Constitutional Treaty, depending on the area of trade policy. The voting requirements of decision-making in the EU Council appear in Article III-315 (4) of the Constitutional Treaty. The idea behind the Convention was to provide for the use of qualified majority voting as a rule. However, the Convention version of Article III-315 did not specifically mention it since it established elsewhere in the EU Constitutional Treaty that qualified-majority voting (QMV) was to be the default rule for EU Council decision-making. This was rectified by adding a subparagraph in Article III-315 (4): "for the negotiation and

51 Article III-315 (1) of the Constitutional Treaty. Emphasis added by the author.

52 Article I-25 (1) of the Constitutional Treaty defines qualified majority:

1. A qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union.

A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.

conclusion of the agreements referred to in paragraph 3, the Council shall act by qualified majority." This seems to suggest that only the negotiation and conclusion of international agreements shall be subject to the majority rule, but not the adoption of unilateral actions and the implementation of agreements. Nevertheless, majority voting is already in the Nice Treaty the general rule for the exercise of powers in the field of commercial policy.⁵³ Thus, the proposed provision should be interpreted in such a way that majority voting applies as a general rule, subject to the exceptions provided for in subparagraphs 2 and 3 of Article III-315 (4). That said, a trade agreement which includes issues that require unanimity and qualified majority will be concluded by unanimous vote in the EU Council according to the *pastis*⁵⁴ principle.⁵⁵

Protection of National Interests?

More competences have been given to the EU in trade matters with the EU Constitutional Treaty. So does the EU Constitutional Treaty provide protection against liberalization when national interests are at stake? This element of the common commercial policy allows the Commission, after a qualified majority vote in the Council of Ministers, to make deals in the General Agreement on Trade in Services (GATS) and the WTO Agreement on what the Commission itself defines as the commercial aspects of these services. The commercial aspects of these services are not defined in the EU Constitutional Treaty or elsewhere. The implication of the fact that the commercial aspects of these services are not defined in the EU Constitutional Treaty or elsewhere is that an EU Member State would have to go to the European Court of Justice to challenge the Commission, arguing a defense that would have to show that the Commission was opening trade in non-commercial aspects of these services. This would be a very difficult legal argument to make, since many parts of these services can be broken into individual functions and contracted out. Examples of this can be seen in Ireland and the UK. In practice, the above-mentioned protection Articles are but a fig-leaf covering the overriding drive toward uniform liberalization of trade in services contained in the common commercial policy. If those who cite these Articles are serious about protecting health, education, and cultural and audiovisual services from commercialization, they should at least press for the

53 Article 133 (4) EC: "in exercising the powers conferred upon it by this Article, the Council shall act by qualified majority."

54 Pastis is an anise-flavored liqueur and aperitif from France, typically containing 40-45% alcohol by volume, although there exist alcohol-free varieties. Pastis is normally diluted with water before drinking (generally 5 volumes of water for 1 volume of pastis). The resulting decrease in alcohol percentage causes some of the constituents to become insoluble, which changes the liqueur's appearance from dark transparent yellow to milky soft yellow.

55 According to Lamy, "... under the Pastis principle, a little drop of unanimity can taint the entire glass of QMV [qualified majority vote] water," argued in a speech given in Brussels, "The Convention and trade policy: concrete steps to enhance the EU's international profile", available at http://europa.eu.int/comm/archives/commission_1999_2004/lamy/speeches_articles/spla146_en.htm (last visited January 8, 2007).

retention of the unanimity requirement in the Council of Ministers on decisions to open trade in these services.

With regard to culture and audiovisual services, Article III-315-4(a) of the EU Constitutional Treaty gives a veto on changes in the common commercial policy only in the "conclusion of agreements in the field of trade in cultural and audiovisual services, where these agreements risk prejudicing the Union's cultural and linguistic diversity." The same veto exception applies in the "conclusion of agreements in the field of trade in social, education and health services, where these agreements risk seriously disturbing the national organisation of such services and prejudicing the responsibility of Member States to deliver them" (Article III-315-4(b) of the EU Constitutional Treaty). How such risk is defined, when it is defined, and by whom it is defined, is open to interpretation. Would a general opening up of the university sector, or of the primary school sector (as is happening in the UK), to unlimited competition pose a threat to the organization of education? For instance, in the case of Ireland, would the same levels of support to linguistically specific radio and TV – like TG4⁵⁶ and projects it supports – also have to be given to private commercial channels like TV3⁵⁷? How would defenders of linguistic diversity establish that certain trade agreements pose risks to culture? Who decides what constitutes a risk is not defined in the EU Constitutional Treaty, so those who might see their culture as being at risk will not have veto powers, although they can ask the European Court of Justice (ECJ) on this or any other point of legal interpretation. Certainly, EU Member States will continue to participate in the EU's trade policy whenever there is a national regulation sector that the European Commission neither controls nor knows about when it comes to national preoccupations. In practice, the European Court of Justice will determine which services should be protected and which should be commercialized.

A final comment can be made in relation to the emphasis made by Article III-292 of the EU Constitutional Treaty, which sets out a series of principles and objectives to guide all Union external action. This Article is reinforced by Article III-315 (1) of the EU Constitutional Treaty, which provides that the Union's common commercial policy shall be conducted in the context of those principles and objectives. This makes clear that the Union not only has a liberalization agenda, but that other objectives must be taken into account when formulating EU trade policy within the multilateral context.⁵⁸ It also makes clear that trade policy can be used in order to attain other non-economic objectives,⁵⁹ that links

56 TG4 is an Irish television channel aimed at Irish language speakers and established as a wholly owned subsidiary by Radio Telefis Eireann on October 31, 1996. It was known as Teilifís na Gaeilge or TnaG before a rebranding campaign in 1999.

57 TV3 Ireland is the sole commercial terrestrial television channel in the Republic of Ireland.

58 M. Cremona, "The Union's External Action: Constitutional Perspectives," in G. Amato, H. Bribosia & B. de Witte (eds.), *Genèse et destinée de la Constitution européenne – Genesis and Destiny of the European Constitution*, Bruxelles: Bruylant, 2007, pp. 1173-1217, at 1213.

59 Case C-62/88 *Greece v. Council* [1990] ECR 1527; Case 45/86 *Commission v. Council* [1987] ECR 1493.

can be made between trade policy and the Union's principles, and it provides a basis for the use of conditionality in trade policy.⁶⁰

D. WHAT ROLE FOR NATIONAL PARLIAMENTS?

Former EU commissioner for trade, Pascal Lamy, emphasized in 2001 the view that "all governments need to assure that transparency also starts, like they used to say about charity, at home. We need a closer involvement of parliaments in WTO matters."⁶¹ The European Parliament (EP) currently has no formal consultation on EC policy for trade agreements. Thus, the only parliamentary input on EC trade policy comes indirectly from EU national parliaments, which remain the sole source of democratic legitimacy. As witnessed from numerous demonstrations at EU summits in recent years, shifting primary rule-making power away from national legislative bodies to supranational institutions remains highly contested. So the Protocol on the role of national parliaments in the EU, which was annexed to the EC and EU Treaties in Amsterdam, has also been adapted to meet the need for greater transparency and more effective document transmission.

Furthermore, I would argue that national parliamentarians are the true democratic representatives of civil society, not unelected leaders of non-governmental organizations. National parliamentarians wish to capture a public space from anti-globalization civil-society activists. In the words of former WTO Director-General Mike Moore, "parliamentarians are the legitimate accountable representatives of civil society."⁶² The elected representatives are "the main expression of civil society"⁶³ and "have a special responsibility to inform their constituents of the benefits a rules-based trading system can offer."⁶⁴ In addition, parliamentary involvement is important to overcome the impression that non-governmental organizations (NGOs) are civil society's representatives. That said, national parliamentary influence and presence is rather weak in the European and international trade policy context. Why is this so? Arguably,

60 M. Cremona, "The Union's External Action: Constitutional Perspectives," in G. Amato, H. Bribosia & B. de Witte (eds.), *Genèse et destinée de la Constitution européenne – Genesis and Destiny of the European Constitution*, Bruxelles: Bruylant, 2007, pp. 1173-1217, at 1213.

61 P. Lamy, Speech at the WTO Symposium on Issues confronting the World Trading System, 6 July 2001, in http://www.wto.org/trade_resources/quotes/mts/transparency.htm (last visited March 11, 2007).

62 M. Moore, *A World Without Walls: Freedom, Development, Free Trade and Global Governance*, p. 121, Cambridge University Press, 2003.

63 M. Moore, *A World Without Walls: Freedom, Development, Free Trade and Global Governance*, p. 121, pp. 235-237, Cambridge University Press, 2003; see also S. Charnovitz, "Trans-Parliamentary Associations in Global Functional Agencies", *Transnational Associations*, May-June 2002.

64 WTO Press Release, "Moore Calls for Closer Parliamentary Involvement in WTO Matters," February 21, 2000, in http://www.wto.org/english/news_e/pres00_e/pr169_e.htm (last visited March 18, 2007).

because of the complexity and technical nature of the international trade agenda.⁶⁵

In this sense, it is fair to argue that, despite the fact that WTO rules and international trade policy have significant implications for domestic regulatory policy and, therefore, there is an increasing need to oversee the WTO, there has been nevertheless little formal involvement of EU national parliaments, with some exceptions such as that of Denmark.⁶⁶ As it is, national parliaments are usually not formally consulted on European policies for international trade agreements. They are merely informed.

In Denmark's case – probably the most transparent country in the decision-making process within the EU countries – there is a system of wider consultation of civil society and national parliament with respect to trade matters, whereby various committees on multiple aspects of trade policy are set up and open to civil society for debates. The Danish Folketing (Danish parliament) though, has a constitutional consultation right on all EU policies, including international trade agreements. The Folketing approves a specific negotiating mandate for the Danish parliamentarians in international trade negotiations. This has led to a wider public debate through committees at national level on international trade issues. Thus, Danish trade officials participate in these committees and provide information to interested stakeholders, thereby offering much needed transparency for public debate in international trade issues.⁶⁷

Tensions and differences of opinion between the EP and national parliaments in relation to trade policy are likely to arise. In this sense, the House of Lords fears the possibility of increasing the formal powers of the EP, on the grounds that it would risk slowing down and politicizing the negotiating process in the Doha Round.⁶⁸ In addition, there is the potential danger that the EP will become a lobby for protectionist interests, and thus for anti-liberalization voices. Therefore, the House of Lords believes that there should be strong continuing dialogue between the EU Council, the Commission and the EP on trade policy, yet without increasing the formal powers of the European Parliament.⁶⁹

With the implementation of the Reform Treaty, EU national parliaments will no longer ratify trade agreements. However, trade is, more than ever, in the

65 On a less hopeful perception of the role of national parliaments in EU policy-making, see M. Wagner, "National Parliaments and Democratic Control in the EU," *The Federal Trust for Education and Research*, European Policy Brief, Issue 29, July 2006, available at <http://www.fedtrust.co.uk/admin/uploads/PolicyBrief29.pdf>.

66 This little participation of national parliamentarians in WTO matters is slowly being rectified, given the continued and growing interest of parliamentarians in the WTO. Their presence in the 6th WTO Ministerial Conference in Hong Kong certainly brought greater democracy and accountability to the WTO as an institution.

67 WWF-UK, "A League of Gentlemen. Who really runs EU Trade Decision-Making?" November 2003, p. 16.

68 House of Lords, "The World Trade Organization: the role of the EU post-Cancun," 16th Report of Session 2003-04, European Union Committee, Chapter 4, available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcucom/104/10406.htm#n13>.

69 House of Lords, "The World Trade Organization: the role of the EU post-Cancun," 16th Report of Session 2003-04, European Union Committee, p. 34, available at <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldcucom/104/10406.htm#a43> (last visited March 19, 2007).

domestic domain. So national leaders wish to know what is going on when it comes to issues such as food, the environment or immigration. It is therefore quite ironic that the main purpose of the Convention on the Future of Europe (and therefore of the EU Constitutional Treaty) was to make policies more democratic and closer to EU citizens, and yet national parliaments will not ratify trade agreements in an era where international trade has a great incidence in domestic politics.

E. CONCLUSIONS

If the Reform Treaty is ratified, efficiency in EU trade policy will improve radically. A few questions arise: will EU Member States disappear from the international trade *forum*? How to reconcile the trend of a lesser role for EU Member States in the international trading system (with the entry into force of the Reform Treaty), with the fact that they are sovereign States according to public international law? Will the EU remain as a sole actor in trade policy after the Reform Treaty? Most likely EU Member States will not disappear from the international scene, since the European Commission is not fully aware of the Member States' needs when acting on their behalf.

In politically sensitive issues (such as agriculture, education, health, or immigration, to mention a few), EU Member States do not seem to fully trust the EC in trade matters. An example is the Doha Round, where France is in constant tension with the European Commission over agricultural negotiations, or Mode 4 in the GATS, where EU Member States are very cautious about a misunderstanding with immigration. Therefore, it would not seem plausible to exclude EU Member States from ratifying future trade agreements. Hence, I conclude that the EU is not yet ready to bypass its Member States in all areas of trade regulation (notably trade issues related to immigration policy) and consequently EU Member States will continue to be present in the WTO after the Reform Treaty enters into force.

In terms of accountability, the role of the Member States' national parliaments and the European Parliament should grow to minimize the democratic deficit in the EU trade policy making: they need to be consulted, given that there continues to be a democratic deficit in the negotiation and conclusion of EC international trade agreements.

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Konrad Lachmayer

The International Constitutional Law Approach

An introduction to a new perspective on
constitutional challenges in a globalizing world

"In the increasingly integrated international legal order there is a co-existence of national, regional, and sectoral (functional) constitutional orders that complement one another in order to constitute an embryonic international constitutional order. This constitutional co-existence (Verfassungskonglomerat) has consequences for the relationship between international and national law".¹

1. INTERNATIONAL CONSTITUTIONAL LAW (ICL) APPROACH AS NEW PERSPECTIVE

What is International Constitutional Law? There are various aspects one might associate with this term. These include: public international law, discussion about the constitutionalisation of international law² or comparative constitutional law.³ The approach proposed in this paper integrates all of these perspectives and puts them together in one system of international constitutional law. From a European perspective, the developments regarding a European constitution also play a considerable role within this concept. In this way, the paper proposes a new perspective understood as an "International Constitutional Law (ICL) approach", describing the necessity and advantages of this concept in a changing legal world.

Presenting the results at the beginning, the International Constitutional Law (ICL) approach is about linking different systems of constitutional law regarding substantive and formal contemporary constitutional challenges within a network of constitutional law. The aim is to conduct an analysis of these legal interrelations in the constitutional network as well as to develop constitutional solutions in order to deal with constitutional challenges. To understand these linkages the pre-conditions of the ICL approach require further explanation.

1 Erika de Wet, 'International Constitutional Law' (2006) 55 ICLQ 51, 76.

2 Robert Uerpmann, 'Internationales Verfassungsrecht', (2001) 56 Juristenzeitung 565ss.

3 See Axel Tschentscher, 'International Constitutional Law' <<http://servat.unibe.ch/icl/index.html>> accessed 30 November 2007.

2. THE INTERRELATIONS BETWEEN DOMESTIC CONSTITUTIONAL LAW, INTERNATIONAL LAW AND EUROPEAN LAW

Two steps (preconditions) are necessary to understand the proposed approach. The first step within the ICL perspective, is to focus on the interrelations of domestic constitutional law, international law and European law.

From a formal perspective the interrelations between domestic constitutional law, international law and European law are an issue of specific legal clauses which regulate the options of a legal transformation of legal provisions from (other) legal systems (orders).⁴ National Constitutional Law provisions regularly have specific clauses in which they determine how to deal with international legal norms within the domestic legal system.⁵ From the opposite perspective, international law also refers to national constitutional law.⁶ One of the most prominent examples is the European Convention on Human Rights.⁷ As there are legal relations between national constitutional law and international law, there is also a relationship between national and international institutions.⁸

A special position in these interrelations is given to European Union Law.⁹ National Constitutional Law refers to European Union Law within special opening clauses.¹⁰ These constitutional provisions enable European Union Law to establish its special effects on national law. On the other hand, European Union

4 Regarding the monism/dualism debate see Malcolm Shaw, *International Law* (5th edn CUP, Cambridge 2003) 120ss; Robert Jennings and Arthur Watts (eds), *Oppenheim's International law. vol I. Peace* (9th edn, Longman, New York 1992) 52 et seq.

5 See e.g. Art. 25 Bonner Grundgesetz (German Constitution), Art. 15 Russian Constitution, Sec. 231 ss. Constitution of South Africa or Sec. 31 Argentinean Constitution. See Antonio Cassese, *International Law* (2nd edn, OUP, Oxford 2005) 217ss.

6 The legal order of international law is closely connected to national legal systems. See Rainer Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (Suhrkamp, Frankfurt a.M. 2003) 58; Juliane Kokott, 'Die Staatslehre und die Veränderung ihres Gegenstandes', (2003) 63 VVDStRL (Proceedings of the Annual Meeting of German Constitutional Lawyers) 34s.

7 See FC Jacobs, RCAWhite, *The European Convention on Human Rights* (4th edn, OUP, Oxford 2006).

8 The national representatives in international organizations are typically presidents or members of national governments. The regulation of the representation in international organizations is also sometimes an issue of national constitutional law. Moreover, international organizations are institutionalized in specific nation-states. Thus, particular treaties are organizing the relationship between the international organization and its member states. Regarding privileges and immunities see Malcolm Shaw, *International Law* (5th edn CUP, Cambridge 2003) 1205ss.

9 The specialty and exceptionality of the case of the European Union is the degree of intensity and the higher level of development of the constitutional interaction. The broad field of cooperation within the member states of the European Union has an extraordinary impact on the various constitutions. The foundation of this constitutional interaction can be found in European Constitutional Law. The concept of German Constitutional Court understanding the interaction of European Law and Domestic Constitutional Law as "Verfassungsverbund" (Constitutional Network) is part of the perspective of International Constitutional Law. See Pernice, 'Europäisches und nationales Verfassungsrecht', (2004) 60 VVDStRL (Proceedings of the Annual Meeting of German Constitutional Lawyers) 163ss; see also Christoph Grabenwarter, 'National Constitutional Law: Relating to the European Union', in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, Oxford 2006) 95ss.

10 See e.g. Art 117 Italian Constitution, Art 88 French Constitution, Art 23 German Basic Law.

Law refers to national constitutional law, most prominently in Art 6 Treaty of the European Union.¹¹ With regard to international law, the Law of the European Union provides the possibility of integrating international law into European Union Law.¹² Again, not only legal but also institutional relations exist at the European level. Constitutional authorities like governments or parliaments are participating in the institutional design of the European Union and European institutions like the European Commission are representing the European Union in the member states. The European Community itself is a member of International Organisations and various International Organisations are cooperating with the European Union.¹³ The particular institutional design of the European Union is shown in the possibility that the majority rules and that not every member state has to agree on each legal act.¹⁴

Besides these direct relations between domestic constitutional law, European law and international law, there are also relations between International Law and National Law mediated by European Law. This is exemplified in the way that the international obligations of European Union Law are affecting the EU member states.¹⁵ Thus, between all three legal areas, direct and indirect legal influences exist, regulated by one or more of the different legal systems.

The formal interrelations between the different legal systems have important implications, given that they open up each of the different legal systems to substantive influences. Although these influences can be formed in different ways (e.g. transformation of acts, direct effects, soft law, binding law, informal influences), each legal system is affected by other legal systems.¹⁶ Constitutional

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- 11 Art 6 TEU: "1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. 2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."
 - 12 See e.g. Art 310 EC, Art 24, 38 TEU. See also Robert Uerpmann-Witzack, 'The Constitutional Role of Multilateral Treaty Systems', in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing, Oxford 2006) 145ss.
 - 13 E.g. WTO or FAO, See Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, Oxford 2004) 199ss.
 - 14 See e.g. TC Hartley, *The Foundations of European Community Law* (6th edn, OUP, Oxford 2007) 41s.
 - 15 See regarding the effects of international law on European Union Law Piet Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (OUP, Oxford 2004) 274ss, 342.
 - 16 In particular, international human rights protection shows the interdependence between national constitutional law and international human rights law. See Robert Uerpmann, 'Internationales Verfassungsrecht', (2001) 56 *Juristenzeitung* 570. International human rights law, especially the European Convention on Human Rights, is setting standards and influencing the decisions of national constitutional courts. Brun-Otto Bryde, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts', (2003) 42 *Der Staat* 61, 68s; Thomas Fleiner and Lidija Basta-Fleiner, *Allgemeine Staatslehre* (3rd edn Springer, Berlin 2004) 198ss. The constitutional developments in Europe show a rising willingness to take the European Convention on Human Rights seriously, not obligatory with regards to its contents but with its formal importance at a domestic constitutional level. See also the discussion about the Human Rights

values are adapted to European or international standards.¹⁷ The developments of international and European constitutional standards are primarily influenced by domestic constitutional law of European states. The formal interrelations lead to a substantive (although in most of the cases indirect) influence between the different systems.

The reason for focussing on this development is due to the observable growth of these interrelations within the last 20 years. The quantity and quality of international co-operation is increasing tremendously all over the world. Integration within the European Union is still going further. Technical and economic globalisation together with the end of the Cold War had an important effect on legal developments in international law, European law, and national constitutional law.¹⁸ Thus, the interrelations described above spread in an impressive way and lead to remarkable influences in all areas of constitutional law.

3. WHAT IS A CONSTITUTION? FROM A STATE-RELATED TO AN OPEN CONSTITUTIONAL UNDERSTANDING

In a second step towards an ICL approach, the interpretation of the term constitution will change from a state-related definition towards a more open understanding of constitutional law.¹⁹

In this context, the meaning and relevance of constitutional law shall be reconsidered. In the traditional perspective, constitutional law is related to the development of the nation state. A formal and general understanding of constitutional law is that it is the highest legal level in a state. Constitutional law

Act in the UK (AW Bradley and KD Ewing, *Constitutional and Administrative Law* [14th edn, Pearson, Harlow 2007] 425, 432ss.

- 17 The relevance of international law for national constitutions is also rising in an economic context. See Daniel Thürer, *Kosmopolitisches Staatsrecht: Grundidee Gerechtigkeit* (Vol. I, Berliner Wissenschaftsverlag, Berlin 2005) 7, 35ss. International Organizations, like the World Trade Organization, (Thomas Fleiner and Lidija Basta-Fleiner, *Allgemeine Staatslehre* [3rd edn Springer, Berlin 2004] 309.) the International Currency Fund, The World Bank, are establishing legal guidelines e.g. on good governance, which are adopted by the States (See Ernst-Ulrich Petersmann, 'Theories of Justice, Human Rights, and the Constitution of International Markets', [2003] 37 *Loy. L.A. Law Rev.* 407, 425, 437, 456; Thomas Fleiner, 'Comparative Constitutional and Administrative Law', [2001] 75 *Tul. Law Rev.* 938s.) The transformation of international democratic standards is much more progressive nowadays. The democracy-related aspects of interventions from international organizations or communities of states (like in Afghanistan or Iraq) show the influence on national constitutions and strengthen the influence of globalization of international constitutional law (See Michael Schoiswohl, 'Wo Theorie zur Praxis wird: Internationales (Verfassungs-)Recht und das Entstehen einer Verfassung für das Nachkriegs-Afghanistan', in Harald Eberhard, Konrad Lachmayer, Gerhard Thallinger [eds], *Reflexionen zum Internationalen Verfassungsrecht* [facultas.wuv, Vienna 2005] 21-47).
- 18 The impact of these developments is certainly even stronger in other fields of law. Nevertheless, it is possible to observe the impact on constitutional law too. Constitutional Law as a framework of a legal systems is also effected by contemporary challenges to legal systems.
- 19 See Christoph Möllers, *Staat als Argument* (C. H. Beck Verlag, München 1999) 257-271, comes to the result that a state is not necessarily a precondition of a constitution.

determines the way of producing legal acts within a state. In the Pure Theory of Law, the state and the Law were equalized and, thus, constitutional law was considered the highest normative level in the legal system.²⁰ Nevertheless, the understanding of constitutional law in a historical perspective also requires the consideration of the substantive aim of constitutionalism. That is, it aims to limit the power of a sovereign leader (e.g. a monarch) by guaranteeing fundamental rights to, and democratic participation of citizens. In this historical perspective, a constitution is the result of the constituting process to establish democratic states in the United States and Europe considering the rule of law and civil liberties of their citizens.

The developments of the 20th century tell a story of failure but also of success of the constitutional idea. On the one hand, the worst regimes were established in the 20th century partly within the concept of constitutional law. They denied the initial meaning of ideas of constitutionalism in all ways but (partly) worked under formal constitutional law. On the other hand, constitutional ideas, like democracy, rule of law and human rights, spread all over the world.²¹ Nearly every country currently has a written constitution,²² guaranteeing in many cases fundamental rights and democratic participation. This argument is made with full recognition of the neglect of democracy and human rights faced by citizens of many countries.²³

Even within the context of these historical and contemporary developments, the constitutional order is associated with the sovereign national state. The state is established by the national constitutional law. Why then is it necessary to change the perspective on constitutional law? Two reasons shall be proposed in this article: a formal perspective and a substantive argument.

20 Kelsen, *Allgemeine Staatslehre* (Verlag Julius Springer, Berlin 1925) 47-94; Kelsen, *Reine Rechtslehre* (2nd ed, Verlag Deuticke Wien 1960) 289-320.

21 The end of the Cold War in the late 1980s enabled transitions in Eastern Europe from a communist regime to a democratic order including fundamental modifications of economic concepts (Ioannis Kyvelidis, 'State Isomorphism in the Post-Socialist Transition', [2000] 4 European Integration online Papers [EIoP] 2 <<http://eiop.or.at/eiop/texte/2000-002a.htm>> accessed 30 November 2007), but also promoted to a certain extent the resignation of the apartheid regime in South Africa resulting in the adoption of a new constitution; at the same time the democratization in several South American countries also had important constitutional implications. Thus, the 1990s formed a "decade of constitution-making around the world". (See the aspects of the IACL/AIDC Roundtable "Constitutionalism after Transition", 9-11 April 2006, Cape Town <<http://web.uct.ac.za/depts/pbl/iacl.htm>> accessed 30 November 2007). In the last few years the wars in Afghanistan and Iraq brought along complete constitutional reforms with entirely new constitutions. In all these constitution-making processes there is not only an involvement of international law (See Harald Eberhard, Konrad Lachmayer and Gerhard Thallinger, 'Approaching Transitional Constitutionalism' in H Eberhard, K Lachmayer and G Thallinger (eds), *Transitional Constitutionalism* [facultas.wuv and Nomos Pub, Vienna 2007] 9ss; Michaela Salamun, *Democratic Governance in International Territorial Administration* [Nomos Pub, Baden-Baden, 2005] 13ss) but also an important influence of traditions and concepts of domestic constitutional law.

22 As an exemption see the concept of constitutional law in the United Kingdom; see AW Bradley and KD Ewing, *Constitutional and Administrative Law* (14th edn, Pearson, Harlow 2007) 12ss.

23 See e.g. the recent developments in Burma, Thailand, Malaysia, Russia or South America (Venezuela and Bolivia) and the permanent situations in China, Iran and the Arabic countries.

From a formal perspective, constitutional law is not necessarily connected to a state. Constitutional law only refers to the highest legal hierarchies²⁴ in a legal system which determines the way of producing legal acts and the organisation of the legal entity. Thus, different legal systems can have their own constitution. The European Union has a legal system of its own and its own hierarchy, in which for example some parts of the basic treaties (EU-Treaty and EC-Treaty) can be seen as constitution in this formal sense.²⁵ The treaties build the highest legal level which provides the set up of institutions as well as procedures of how to establish legal acts in this legal system. As far as international or supranational organizations can be considered legal systems of their own, it is possible to identify a constitution in this formal sense.²⁶

The substantive argument is related to the development of the nation state. It is about the legal transformation of the constitutional aspects.²⁷ As presented in the first step, the interrelations between domestic constitutional law, European law, and international law are steadily increasing. These legal developments lead to a transfer of powers from the national constitutional level to both supra- and international level. Thus, the traditional elements of constitutional law as seen in constitutions all over the world are also influenced and changed by the interrelations of the various legal systems.²⁸ These constitutional elements are not only the rule of law, fundamental and human rights, or democracy, but also the institutional framework and the separation of powers. Moreover, European and international organisations today are facing similar questions of democratic legitimation, the consideration of human rights or the necessity of legality, judicial review and limitation of discretionary power (as aspects of the rule of law).²⁹ The transfer of powers from the nation state to international organizations created the demand of substantive constitutional provisions within these legal systems.³⁰ Furthermore, the substantive influence of European and international organisations on domestic constitutional law, shows the constitutional relevance of these legal systems.

On the basis of these two arguments the ICL approach integrates as a second step a broader (scientific) perspective of constitutional law. In a functional understanding of constitutional law the concept of "constitutional law" is used by different legal systems to describe basic legal provisions of the structure, the

24 Constitutional law itself may consist of different legal hierarchies. See for example Art 44 of the Austrian constitution.

25 See Otto Pfersmann, The new revision of the old constitution (2005) 3 I.CON, 383ss.

26 E.g. the United Nations, the World Trade Organization or the Council of Europe.

27 See Stefan Leibfried and Michael Zürn, Transformations of the State? (CUP, Cambridge 2005).

28 E.g. Human Rights Regimes all over the World, Malcolm Shaw, *International Law* (5th edn CUP, Cambridge 2003) 257-366.

29 The realization of basic legal principles like democracy, rule of law, human rights and the separation of powers are not special questions of states any more but general constitutional challenges in a globalizing world. See Michel Rosenfeld, 'Constitutional Migration and the bounds of comparative analysis', 58 N.Y.U Ann. Surv. Am. L. 82, 83 (2001).

30 It is mentioned as the internationalization of constitutionalism see Robert Uerpmann, 'Internationales Verfassungsrecht', (2001) 56 *Juristenzeitung* 565-616; Bardo Fassbender, 'The United Nations Charter As Constitution of The International Community', (1998) 39 *Colum. J. Transnat'l L.* 529-619.

principles and the values of a given entity. Thus, constitutional law refers to basic legal provisions understood to be fundamental for the legal system in a formal and substantive way. This also considers the hierarchic dimension of legal systems, leading to a fundamental legal act and providing legality for the entire system of norms.

The perspective is not restricted to formal aspects as it includes a substantive dimension, like the fundamental principles or values, but still in an abstract manner. The proposed understanding of constitutional law does not limit constitutional law to democratic or human rights based systems.³¹ The idea of constitutionalism, as described above and with regard to the limitation of sovereign power and the democratic participation of the people concerned can be qualified as a central problem for all constitutions, but is not a limitative criterion for constitutional law itself.³²

4. PERSPECTIVE ON A NETWORK OF INTERNATIONAL CONSTITUTIONAL LAW

After broadening the perspective of constitutional law by analyzing the increasing interrelations between domestic constitutional law, international law and European law, the main aspects of the ICL perspective are already developed. Thus, what does the new constitutional picture look like when seen from this different point of view? First of all, there are many constitutions. There are still domestic constitutions but also a European constitution and various constitutions on an international level, like the constitution of the United Nations or the constitutions of the WTO, the constitution of the Council of Europe etc. The field of constitutional law is thus broadened in a significant way.

Furthermore, the unveiled constitutional law itself is not standing alone. There are still multiple interrelations between the different legal systems and certainly also between different constitutional law systems. Thus, a legal network of constitutions is visible in this broader perspective.³³ The interaction between the different systems cannot be explained by one hierarchic system anymore. The different constitutions are related to some extent (e.g. EU law supremacy, rule of primacy in Art 103 UN charter) in a kind of hierarchic dimension but there

31 See as a different opinion Soria Martinez who thinks that it does not make sense to consider constitutional orders without a minimum standard of democracy. See Jose Soria Martinez, *Die Bedeutung der (Verfassungs-)Rechtsvergleichung für den europäischen Staaten- und Verfassungsverbund: Die Methode der Rechtsvergleichung im Öffentlichen Recht* (2006) 48 Göttingen e-Working Papers on European Law 6s <<http://www.europarecht.uni-goettingen.de/Paper48.pdf>> accessed 30 November 2007.

32 Thus, authoritarian and dictatorial regimes are not excluded from the constitutional perspective. The broad scientific approach shall not exclude the problematic constitutions by changing the constitutional perspective.

33 This constitutional network is a legal one with regard to the reciprocal interdependencies of the different legal systems. It does not only refer to informal networks of persons as Anne-Marie Slaughter is suggesting; see AM Slaughter, 'AALS Annual Convention Plenary Panel: Impact of Globalization on Human Rights', (2003) 4 *GermanLawJournal* 391–394.

is no legal pyramid, in which every constitutional act would fit into.³⁴ There are both hierarchic and non-hierarchic relations³⁵, and some constitutional systems are not related at all. Thus, describing these interrelations as a constitutional network is more appropriate than trying to establish one singular hierarchic system.³⁶

International Constitutional Law means all these different constitutional systems and their interdependences. It is constitutional law not only at the national level, but also includes transnational, supranational and international constitutional law. International constitutional law is in this perspective the umbrella under which all the various forms of constitutional law are grouped together. The ICL perspective is the broader look at these various forms of constitutional law, especially in their interrelations, thus a perspective on a network of International Constitutional Law.

Again, the question shall be raised: which perspective can be useful? In many cases, domestic constitutional law, European law and international law are examined without considering their interrelated position within the international constitutional network. This limited view reduces the possibilities of understanding how each of these constitutional systems has been developed and is working. Often, important implications of other legal systems are not sufficiently considered. In other cases, the application of different terminologies at the different levels of law leads to a too narrow analysis.

The aim of an ICL perspective is to develop a general perspective on constitutions – considering the different aspects of different constitutions, but within one constitutional framework. The ICL perspective can accomplish a more suitable approach to common challenges which have to be faced on an international level in a globalizing world. Understanding how constitutional law today can deal with the challenges of information society, the fight against terrorism, biotechnological limits to research, environmental issues, constitutional limits to

34 Its function is to regulate basic principles and primary values. They cannot be understood only as the vertex of a pyramid in a hierarchic sense, but also as one of different legal center of reference. See Mark van Hoecke, *Law as Communication* (Hart Pub, Oxford 2002) 113; Francois Ost / Michel van de Kerchove, *De la pyramide au réseau?* (Publications des FUSL, Bruxelles 2002) 23, 69; Fleiner and Basta Fleiner say that the conception of the world ("Weltbild") has changed, Thomas Fleiner and Lidija Basta-Fleiner, *Allgemeine Staatslehre* (3rd edn Springer, Berlin 2004) 16. Constitutions do not only determine other laws and legal relevant acts, but are also influenced by them. Therefore, a theory on international constitutional law also has to consider influences from other legal acts in a complex multi-level legal network

35 For example the particular (hierarchic) role of the UN within international law, especially regarding the use of force, see Christine Gray, *International Law and the Use of Force* (2nd edn, OUP, Oxford 2004) 204ss; Erika de Wet, 'International Constitutional Law' (2006) 55 ICLQ 64 ss.

36 See Francois Ost / Michel van de Kerchove, *De la pyramide au réseau?* (Publications des FUSL, Bruxelles 2002). The problem of a multi-level approach is the indication of some kind of hierarchy between the levels. Furthermore, there is not only one single international level. Thus, there are different legal arrangements in international organization. This is not a homogeneous level on its own in the same way there exists no homogeneous national level, but national legal order in each state. As a consequence of Europeanisation a competition between the national legal systems develops without hierarchic relations between them. See Rainer Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (Suhrkamp Verlag, Frankfurt am Main 2003) 431.

economy, the establishment of democracy and rule of law etc, the ICL perspective offers a more complete approach. It can deal with constitutional questions in a way that allows problems to be solved, not only on a national level, but within an ICL network. Traditional research would make a difference between national levels, the European level or at the level of international law. The ICL approach proposes to integrate constitutional problems in a network perspective on constitutional law. The specific relation between the different constitutions (whatever level is concerned) within the particular constitutional challenge is under consideration. The development of constitutional solutions requires the integration of all levels of constitutional law and this is only possible because of a broader understanding of constitutional law. Thus, as the understanding of constitutional law has to be broadened, the constitutional terminology and perspective have to be reconstructed within the perspective of International Constitutional Law-leaving the state-focused perspective behind.

5. CONCLUSION

Finally, it is necessary to come back to the result of the ICL approach presented at the beginning: the International Constitutional Law (ICL) Approach is about linking different systems of constitutional law regarding substantive and formal contemporary constitutional challenges within the network of constitutional law. The aim is to reach an analysis of these legal interrelations in the constitutional network (description) as well as to develop constitutional solutions to approaching constitutional challenges (prescription). This paper tries to explain this shift of perspective and provided justifications of the usefulness of it.

Understanding and analyzing different constitutional legal systems and their interrelations requires comparisons of these systems. Thus, the most important method within this International Constitutional Law approach is the comparison of various constitutional laws. It is not the task of this article to answer the questions of the purpose and the method of comparing constitutional law. Nevertheless it is a crucial aspect in dealing with the ICL approach. The establishment and the understanding of this ICL Approach itself are permanently in discussion.

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■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Claudia Fuchs & Claudia Marik

FOCUS: Austrian regulations concerning the rights and status of aliens – entry, asylum, residence and expulsion under constitutional scrutiny

In the current issue, the "Austrian constitutional developments" Section focuses on recent decisions from the Austrian Constitutional Court related to the entry and residence of aliens in Austria. The relevant national laws include the Federal Laws concerning the Grant of Asylum (Asylum Act, *Asylgesetz*), Settlement and Residence in Austria (Settlement and Residence Act, *Niederlassungs- und Aufenthaltsgesetz*) and the Exercise of Aliens' Police, the Issue of Documents for Aliens and the Granting of Entry Permits (Aliens' Police Act, *Fremdenpolizeigesetz*), all of them enacted in 2005 as part of a legal initiative on the law in regard to aliens.

The Asylum Act draws the legal conditions for asylum seekers, the status of refugees, residence during the proceeding and procedural law. In general, rejected asylum seekers are not entitled to any kind of residence permit and may be expelled and deported from Austria. The Settlement and Residence Act regulates the grant of residence permits if the stay in Austria exceeds six months; it also provides rules regarding EU-entry and residence standards. In general, applications for residence permits under this Act have to be admitted from abroad. This does not apply for the status of "residence on humanitarian grounds", which is granted at the discretion of the Austrian government, usually to those who are already somewhat integrated into Austrian society. The Aliens' Police Act provides rules regarding the issue of documents to aliens, the grant of entry permits, expulsion order, residence prohibition, deportation and detention pending deportation (*Schubhaft*) of aliens. Furthermore it contains provisions for citizens of the EEA, Switzerland and Austria as related to their families along with procedural law and sanctions. Under the Aliens' Police Act and under the Asylum Act, illegal immigrants or rejected asylum seekers may be arrested and held in custody to ensure expulsion or forcible return to their country of origin.

Finally, it has to be pointed out that the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) does have constitutional rank in Austria. The rights and guarantees, conveyed under ECHR, are equally binding on Austrian legislation, administration and jurisdiction as are legal requirements and fundamental rights regulated by Austrian federal constitutional law. Hence the understanding and interpretation of the ECHR's fundamental rights and freedoms play a major role in the jurisdiction of the Austrian Constitutional

Court, also as regards to the Austrian regulations concerning the rights and status of aliens.

The following decisions outline the recent constitutional developments in the fields of asylum and migration law.

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■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Valerie Leskovar, Armin Schwabl

Right to liberty and security and Detention pending deportation

Austrian Constitutional Court
Judgement 15th June 2007
(B1330/06-13 and B 1331/06-14)

The Circumstances of the case

The first applicant, a citizen of Serbia and Montenegro, entered Austria illegally together with his common-law wife and their underage daughter on 27th April 2007 and filed an application for asylum on the same day. On 3rd May 2006 the Federal Asylum Agency (*Bundesasylamt*) notified the applicant that it was intended to reject his application for international protection. Pursuant to article 27 paragraph (1) subparagraph 1 Asylum Act 2005 an expulsion procedure is deemed to be initiated, if during the admission procedure a notification in accordance with subparagraph 4 or 5 of article 29, paragraph (3) Asylum Act 2005 occurred. This letter was received by the applicant on 12th May 2006.

By administrative decision of 12th May 2006 the District Administration Authority (*Bezirkshauptmannschaft*) imposed orders for detention pending deportation (*Schubhaft*) on the applicant according to article 76 paragraph (2) subparagraph 2 Aliens' Police 2005 Act as a procedural security measure in connection with the imposition of an expulsion order pursuant to article 10 Asylum Act 2005. The applicant has been in detention pending deportation from 12th May 2006 to 20th July 2006.

By administrative decision of 28th June 2006 the Federal Asylum Agency dismissed the application for asylum according to article 3 and 8 Asylum Act 2005, both concerning the granting of asylum status and granting of subsidiary protection. With this decision the expulsion order was connected, according to article 10 paragraph (1) subparagraph 2 2005 Asylum Act. The appeal against the expulsion order was not disallowed to have suspensory effect (article 36 paragraph (2) Asylum Act 2005). On 4th July 2006 the Federal Asylum Agency informed the District Administration Authority that an appeal against the administrative asylum decision (*Asylbescheid*) was lodged on 3rd July 2006 and that according to article 51 Asylum Act 2005 a residence entitlement card was issued for the detained applicant on 4th July 2006.

The second applicant, as well a citizen of Serbia and Montenegro, entered Austria illegally on 16th April 2006 and filed an application for asylum on 17th April 2006. On 25th April 2006 the Federal Asylum Agency notified the applicant that it was intended to reject his application for international protection.

By administrative decision of 26th April 2006 the District Administration Authority imposed orders for detention pending deportation on the applicant according to article 76 paragraph (2) subparagraph 2 Aliens' Police Act 2005 as a procedural security measure in connection with the imposition of an expulsion order pursuant to article 10 2005 Asylum Act. The applicant has been in detention pending deportation from 26th April 2006 to 24th July 2006.

After negative consultations according the Dublin convention the Federal Asylum Agency dismissed the application for asylum by administrative decision of 20th June 2006 pursuant to article 3 and 8 Asylum Act 2005, both concerning the granting of asylum status and granting of subsidiary protection. With this decision the expulsion order was connected; according to article 10 paragraph (1) subparagraph 2 Asylum Act 2005. The appeal against the expulsion order was not disallowed to have suspensory effect (article 36 paragraph (2) Asylum Act 2005). On 29th June 2006 the Federal Asylum Agency informed the District Administration Authority that an appeal against the administrative asylum decision was lodged on 28th June 2006 and that according to article 51 Asylum Act 2005 a residence entitlement card was issued for the detained applicant on 4th July 2006.

Relevant Austrian Law

Federal Constitutional Law of 29 November 1988 on the Protection of Personal Freedom

Article 1

- (1) Everyone shall have the right to liberty and security (personal freedom).
- (2) No one may be arrested or detained on grounds other than as stated herein or in a manner other than as prescribed by law.
- (3) Deprivation of personal freedom may be provided for by law only if it is necessary in accordance with the purpose of the measure; any deprivation of personal freedom shall in all cases be permissible only if and insofar as it is not disproportionate to the purpose of the measure.
- (4) Anyone who is arrested or detained shall be treated with respect for his human dignity and with the greatest possible consideration and he shall be subject to only such restrictions as are reasonable for the purpose of the arrest or are necessary for maintaining safety and good order at the place of his arrest.

Article 2

- (1) A person may be deprived of personal freedom in the manner prescribed by law in the following cases:

1. to 6. ...
7. If required in order to guarantee an intended deportation or extradition.
(2) ...

Federal Law concerning the Granting of Asylum
(Asylum Act 2005 – AsylG 2005)

Article 27 – Initiation of expulsion procedures

(1) An expulsion procedure pursuant to the present federal law shall be deemed to be initiated:

1. if during the admission procedure, notification is effected in accordance with subparagraph 4 or 5 of article 29, paragraph (3), and
2. if the procedure before the independent Federal Asylum Review Board was to be discontinued (article 24, paragraph [2]) and the decision of the Federal Asylum Agency in that procedure has been issued in conjunction with an expulsion order (article 10).

(2) The authority shall also initiate an expulsion procedure if the inquiries to date justify the assumption that the application for international protection is to be dismissed or rejected in regard to the granting of both asylum status and subsidiary protection status and if there is a specific public interest in the accelerated conduct of the procedure. The initiation of the expulsion procedure shall be documented by means of a file note.

(3) A specific public interest in the accelerated conduct of the procedure shall exist in particular in the case of an alien:

1. who has been convicted, by final judgment, of an offence punishable by the courts which is prosecutable ex officio and was committed wilfully;
2. against whom charges have been brought by the Department of Public Prosecution by reason of an offence punishable by the courts which comes under lower-court jurisdiction and which has to be committed wilfully or
3. who has been caught in the act of committing an offence (article 17 of the Penal Code).

(4) An expulsion procedure initiated pursuant to subparagraph 1 of paragraph (1) above shall be discontinued if the procedure is admitted. An expulsion procedure initiated pursuant to subparagraph 2 of paragraph (1) above shall be discontinued if the inquiries to date justify the assumption that the application for international protection is not to be dismissed or rejected in regard to the granting of either asylum status or subsidiary protection status or if the asylum-seeker voluntarily notifies the independent Federal Asylum Review Board of his place of residence and it may not be assumed, on the basis of certain facts, that he will again evade the procedure.

(5) An expulsion procedure initiated by the authority pursuant to paragraph (2) above shall be discontinued if the conditions required for its initiation no longer exist.

(6) The discontinuation of any expulsion procedure shall not preclude its subsequent re-initiation.

(7) The initiation and discontinuation of any expulsion procedure shall be reported to the competent aliens' police authority.

(8) A procedure in which an expulsion procedure has been initiated shall be ruled on as quickly as possible and at the latest within three months from initiation of the expulsion procedure or from the lodging of an appeal which has suspensory effect.

Article 36 – Effect of appeals

(1) ...

(2) An appeal against other decisions and the expulsion order issued in conjunction therewith shall have suspensory effect unless it is disallowed.

(3) ...

(4) If an appeal against an expulsion order does not have suspensory effect, the expulsion order shall be enforceable. Execution of the deportation or return in implementation of such expulsion order shall be postponed until expiry of the time-limit for lodging appeals or, if an appeal is lodged, until midnight on the seventh day from submission of the appeal. The independent Federal Asylum Review Board shall notify the Federal Asylum Agency without delay of the receipt of the appeal submission and of the granting of suspensory effect.

(5) ...

Federal law concerning the execution of aliens' police operations,
the issue of documents to aliens and the granting of entry authorization
(Aliens' Police Act 2005 – "Fremdenpolizeigesetz" FPG)

Article 76 – Detention pending deportation

(1) ...

(2) In the case of an asylum-seeker or alien who has filed an application for international protection, the aliens' police authority having territorial jurisdiction may issue an order for that person to be detained pending deportation as a procedural security measure in connection with the imposition of an expulsion order pursuant to article 10 of the Asylum Act 2005 or as a deportation security measure:

1. If an enforceable expulsion order has been issued against him (article 10 of the Asylum Act 2005), even if that order is not final;
2. If an expulsion procedure has been initiated against him in accordance with the provisions of the Asylum Act 2005;
3. If an enforceable expulsion order (articles 53 or 54) or an enforceable residence ban (article 60) was imposed on him prior to the filing of the application for international protection or
4. If it may be assumed, on the basis of the outcome of the interrogation, search and photographing and fingerprinting procedures, that the alien's application for international protection will be rejected owing to the absence of responsibility of Austria for examining the application.

(3) – (7) ...

Article 80 – Duration of detention pending deportation

(1) The authority shall endeavour to ensure that the period of any detention pending deportation is as short as possible.

(2) A detention order shall be maintained in force until the reason for its imposition ceases to exist or until its objective can no longer be achieved. Except in the cases referred to in paragraphs (3) and (4) below, detention pending deportation shall be for a period not exceeding two months in all.

(3) If it is not permissible to deport an alien because a final decision has not yet been pronounced concerning an application filed pursuant to article 51, the detention order may be maintained in force until the expiry of the fourth week following pronouncement of the final decision but for a period not exceeding six months in all.

(4) If it is not possible or permissible to deport an alien because:

1. The establishment of his identity and nationality is not possible or
2. The necessary entry permit or transit permit from another State is not present or
3. He frustrates the deportation measure by resisting a measure of constraint (article 13),

the detention order may be maintained in force for not more than six months within a two-year period by reason of the same facts unless the non-execution of the deportation measure is attributable to the alien's conduct. In such cases, the alien may not be held in detention pending deportation for more than ten months within a two-year period by reason of the same facts. A detention order imposed pursuant to article 76, paragraph (2), may be maintained in force for more than six months within a two-year period but for not more than ten months within a two-year period.

(5) In cases where a detention order has been imposed pursuant to article 76, paragraph (2), such order may be maintained in force up to the expiry of the fourth week following pronouncement of a final negative decision on the application for international protection unless a situation as referred to in subparagraphs 1 to 3 of paragraph (4) above exists. If, in accordance with article 37 of the Asylum Act 2005, the suspensory effect of an appeal against an expulsion order issued in conjunction with a rejection ruling is allowed, the detention order may be maintained in force until a decision is pronounced by the Independent Federal Asylum Review Board. Furthermore, the detention order may be maintained in force only if the Independent Federal Asylum Review Board issues a rejection or dismissal ruling.

(6) – (7) ...

All Austrian law and rulings of all major Austrian courts can be viewed at <http://www.ris.bka.gv.at/auswahl/>, especially the decisions of the Austrian Constitutional Court: <http://www.ris.bka.gv.at/vfgh> (only available in German).

The Court's Assessment

Article 76 paragraph (2) Aliens' Police Act 2005 defines the requirements to issue an order for a person to be detained pending deportation and according to

article 80 paragraph (2) Aliens' Police Act 2005 a detention order shall be maintained in force until the reason for its imposition ceases to exist or until its objective can no longer be achieved.

In the recent cases the first applicant was notified by the Federal Asylum Agency on 3rd May 2006, the second applicant on 25th April 2006 that it was intended that the application for international protection is rejected. As an expulsion procedure is deemed to be initiated, if during the admission procedure a notification in accordance with subparagraph 4 or 5 of article 29, paragraph (3) AsylG occurred, the requirements of article 76 paragraph (2) subparagraph 2 Aliens' Police Act 2005 were fulfilled at the time of imposed detention pending deportation (*Schubhaftverhängung*), on 12th May 2006 and 26th April 2006.

Due to the fact that the appeal against the expulsion order had suspensory effect, the asylum procedure was regarded as admitted. The explanations to article 27 Asylum Act 2005 (RV 952 BlgNR 22. GP, 49)¹ accomplished that:

If an expulsion proceeding is stopped, a possible detention pending deportation is to be ended, as the premises are ceased to exist.

As a result the premises of article 76 paragraph (2) subparagraph 2 Aliens' Police Act 2005 are ceased to exist if an asylum proceeding is admitted. But the prosecuted authority assumed wrongly that article 76 paragraph (2) subparagraph 1 Aliens' Police Act 2005 is applicable while maintaining detention pending deportation. The reason for detention of article 76 paragraph (2) subparagraph 1 Aliens' Police Act 2005 is only applicable as legal basis for detention, if the expulsion order of the applicant is enforceable, even though not legally binding. But this does not apply in the recent cases, since the appeal against the expulsion order had suspensory effect. According to article 36 paragraph (4) Asylum Act 2005 an expulsion order is enforceable, if the suspensory effect is dismissed.

The authority – among mere advice, that the detention primarily was lawfully imposed – assumed a mistaken legal opinion, that in any case the maintaining detention is admissible for the specified period pursuant to article 80 paragraph (5) Asylum Act 2005. Thereby the right to liberty and security (personal freedom) has been violated and the administrative decisions were to be abolished.

Opinion

The authority has at any rate to interpret the provisions of the Aliens' Police Act 2005 in respect of detention pending deportation in a constitutionally compliant manner and therefore to balance the public interest of securing the proceedings on the one hand and the personal liberty of the asylum seeker on the other hand.

In the light of that the Court clarifies that article 80 paragraph (5) Aliens' Police Act 2005 allows the detention's maintenance provided that a reason for it subsists. Article 80 paragraph (5) Aliens' Police Act 2005 does not make up an

1 This is the general citation and abbreviation for explanations of government bills. Government bills are legislation drafts which are presented by the government.

independent provision laying down an additional reason for detention pending deportation. Instead it refers only to the duration of detention whilst its grounds continue to be assessed exclusively under article 76 paragraph (2) Aliens' Police Act 2005.

In the present cases, however, the reasons for detention pending deportation pursuant to article 76 paragraph (2) Aliens' Police Act 2005 were not met as from the lodging of the appeal against the negative asylum decision.

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■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Valerie Leskovar

Expulsion orders and suspensory effect

Austrian Constitutional Court
Judgement of 27th June 2007 (B 1655, 1656/06)
and
Judgement of 1st October 2007 (G 179, 180/07)

In the judgement of 27th June 2007 the Constitutional Court made a decision to review the word orders "and such reasons are not long-lasting" and "simultaneously with the issue of the expulsion order" in article 10 paragraph (3) 2005 Asylum Act ex officio.

The judgement of 1st October is the adjudication of the law review process, in which the Constitutional Court decided to abolish the word order "simultaneously with the issue of the expulsion order" in article 10 paragraph (3) 2005 Asylum Act.

The Circumstances of the case

The first applicant, a Russian citizen who belongs to the ethnic group of Chechnya, filed an application for international protection on 22nd February 2006 after illegal entry to Austria together with his underage son, the second applicant, at the Federal Asylum Agency (*Bundesasylamt*). Together with the application a short psychotherapeutic report of the Association to support survivors of torture and war Hemayat was enclosed with the diagnosis that the first applicant suffers from a "serious post-traumatic stress disorder together with a serious continuous change in personality after extreme stress" and is without family members not viable.

By administrative decision in first instance of 29th June 2006 the Federal Asylum Agency rejected the applications pursuant article 5 paragraph (1) 2005 Asylum Act and expressed that Poland was responsible to consider the application for international protection according to article 16 paragraph (1) litera c Council Regulation (EC) Nr. 343/2003 (Dublin II Regulation); further the applicants were expelled pursuant article 10 paragraph (1) subparagraph 1 2005 Asylum Act from Austria to Poland, "as a result" the rejection or deportation to Poland according to article 10 paragraph (4) 2005 Asylum Act was admissible. The execution of deportation was suspended according to article 10 paragraph (3) 2005 Asylum Act until 2nd October 2006.

From a medical examination by a general practitioner, which took place before 29th June 2006, has resulted that a transfer to Poland opposes serious mental disorder of the first applicant, because a transfer would cause unreasonable deterioration in his state of health. The opinion announced improvement of the situation with appropriate therapy and recommended a new examination for ability to a transfer to Poland after a few months.

The appeal against the administrative decision in first instance was dismissed according to article 5 and 10 2005 Asylum Act. The independent Federal Asylum Review Board (*Unabhängiger Bundesasylsenat*) negated the requirements, which would led to responsibility of Austria to examine the application for asylum.

Against the decision of the independent Federal Asylum Review Board the constitutional complaint of the applicants was made, because the basic right of equal treatment and article 3 and 8 ECHR are violated.

In the administrative file (*Verwaltungsakt*) a medical statement of 26th September 2006 assumed that still serious mental disorder of the first applicant opposes a transfer to Poland and that improvement is not to be expected. Further in the administrative file a letter of the Federal Asylum Agency of 27th September 2006 was included in which the responsibility of Austria to examine the application for Asylum is avowed ("Asylum procedure will be carried out in our own responsibility"). The independent Federal Asylum Review Board informed the Constitutional Court that neither competence nor responsibility is given if the Federal Asylum Agency decides to examine the applications for asylum after valid closing of the asylum proceeding.

Relevant Austrian Law

Federal Law concerning the Granting of Asylum (2005 Asylum Act – AsylG 2005)

Article 10

(1) A ruling pursuant to the present federal law shall be issued in conjunction with an expulsion order if:

1. an application for international protection is rejected;
2. an application for international protection is dismissed in regard to the granting of both asylum status and subsidiary protection status;
3. an alien's asylum status is withdrawn and the subsidiary protection status is not conferred or
4. an alien's subsidiary protection status is withdrawn.

(2) Expulsion as referred to in paragraph (1) above shall be inadmissible if:

1. in individual cases an alien is holding a right of residence that is not based on the present federal law or
2. expulsion would constitute a violation of article 8 of the European Convention on Human Rights.

(3) If execution of an expulsion order would constitute a violation of article 3 of the European Convention on Human Rights for reasons relating to the person

of the asylum-seeker *and such reasons are not long-lasting*, a pronouncement shall be made *simultaneously with the issue of the expulsion order* that the execution thereof shall be postponed for the necessary period.

(4) ...

Dublin II Council Regulation (EC) No 343/2003 of 18 February 2003

Article 3

1. Member States shall examine the application of any thirdcountry national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.

3. Any Member State shall retain the right, pursuant to its national laws, to send an asylum-seeker to a third country, in compliance with the provisions of the Geneva Convention.

4. The asylum-seeker shall be informed in writing in a language that he or she may reasonably be expected to understand regarding the application of this Regulation, its time limits and its effects.

All Austrian law and rulings of all major Austrian courts can be viewed at <http://www.ris.bka.gv.at/auswahl/>, especially the decisions of the Austrian Constitutional Court: <http://www.ris.bka.gv.at/vfgh> (only available in German).

The Court's Assessment

Article 3 paragraph (2) Dublin II Council Regulation provides that each Member State may examine an application for asylum whereby this State becomes responsible, even if such examination is not its responsibility (*Selbsteintrittsrecht*). The Constitutional Court assumed interim that pursuant to article 10 paragraph (3) 2005 Asylum Act expulsion orders (pursuant article 10 paragraph (1) 2005 Asylum Act) may be postponed simultaneously with the expulsion order, if the expulsion order would constitute a violation of article 3 of the European Convention on Human Rights and such reasons are not long-lasting. According to the jurisdiction of the Constitutional Court (eg. VfSlg. 17.586/2005) also merely temporarily deportation barriers must be considered.

Out of article 10 paragraph (3) 2005 Asylum Act arises as well that in case of a long-lasting impediment no postponed execution can be considered. In such cases the expulsion order itself is improper and in these proceedings the right to examine the application for asylum is to be administrated pursuant to article 3 paragraph (2) Dublin II Council Regulation.

If the asylum agency (*Asylbehörde*) presumes – as in the present case – that no long-lasting impediment exists and suspends the expulsion execution for the necessary period, the deportation is admissible at the end of the period. However there is no regulation what happens if the duration of the impediment is disproved: An extension of time seems to be excluded by law, as the postponement of the execution shall be made "simultaneously with the expulsion order". Further there is no regulation if the impediment (eg. a sudden contracted disease) incidences between the pronouncement and the execution of the expulsion order. From this it follows that if an expulsion order is pronounced and legally binding, no further examination according to the state of health while a therapy can be done and an expulsion consistent with the European Convention on Human Rights cannot be assured. Especially in cases of postponement of expulsions, because of therapy measures where healing is only estimated not guaranteed, an execution of the expulsion order is disturbing.

The Constitutional Court had the compunction that a regulation which avoids only temporary a violation of article 3 ECHR and no extension is intended, that a violation of article 3 ECHR cannot be asserted past expiry. Same reservations exist in cases when an impediment incidences after pronouncement of the expulsion order.

The Court considered interim that the word order in article 10 paragraph (3) 2005 Asylum Act which shall be reviewed by the Constitutional Court violates furthermore the commandment of effective legal protection, because after expiration of the time limit of the postponement of the execution there are no adequate legal remedies.

In the law review process the government suggested that the expulsion order may not be executed if the applicant applies for a postponement of the deportation (*Abschiebungsaufschub*) pursuant to article 46 paragraph (3) 2005 Aliens' Police Act or if the applicant applies for reopening of the case (*Wiederaufnahme*).

The Constitutional Court assumed that both suggestions cannot avoid a violation of article 3 ECHR. On the one hand while the application of the postponement of the deportation is not passed the expulsion order can be executed. On the other hand the application for reopening the case has no suspensory effect, so that until the reopening of the case is approved the execution of the deportation is admissible. Therefore the expulsion order can be executed in the period of time until the decision of the reopening of the case.

However the government and the Constitutional Court estimated if a long-lasting impediment exists an expulsion is inadmissible, because the applicant will be granted subsidiary protection pursuant to article 8 2005 Asylum Act. In such cases the impediment poses a violation of article 3 ECHR, which is not temporary. The impediment is at any rate long-lasting if it is conceivable at the time of decision that the impediment will not cease to exist within six months (article 19 and 20 Dublin II Council Regulation). If another Member state is responsible to examine the application for asylum the asylum procedure will be admitted

therefore, after the right to examine the application oneself (*Selbsteintrittsrecht*) was administrated.

Taking this as a basis the word order "and such reasons are not long-lasting" is not to be abolished to establish a condition according to the constitution. This word order distinguishes between deportation impediments depending on whether the impediment is long-lasting or not, whereby the expulsion order is not to be enacted or is postponed.

In the appeal procedure as it is expected the administrative decision of the independent Federal Asylum Review Board will be abolished by reason that the administrative decision is based upon an unconstitutional law (article 10 2005 Asylum Act).

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■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Barbara Ramberger

Violation of equality rights by failing to conduct preliminary proceedings

Austrian Constitutional Court
Judgment of February 26th, 2007 (B1802/06 et al.)

Circumstances of the case

Coming through Italy, the two applicants, both Iranian nationals, entered Austria without a permit and filed applications for international protection. The Federal Asylum Agency (*Bundesasylamt*) rejected these applications subsequent the terms of Article 5, para (1) of the 1997 Asylum Act (*Asylgesetz 1997*) and stated that Italy was responsible for examining the claimants' application according to Article 6 of the Dublin Convention (*Dubliner Übereinkommen*).

The claimants subsequently appealed the rejection of their applications to the Independent Federal Asylum Review Board (*Unabhängiger Bundesasylsenat*) who dismissed the appeal.

Next, the claimants filed complaints against the decision of the Federal Asylum Review Board with the Austrian Constitutional Court, which finally repealed the contested rulings by pronouncing a violation of the claimants' right to the equal treatment of all people (see judgment of 26th November, 2001, B 902/01 et al.). In referring to an earlier judgment from 8th March, 2001 (G117/00 et al.) the Court observed, that an interpretation of Article 5, para (1) of the 1997 Asylum Act, which is in conformity to the Austrian Constitution, requires the consideration of Article 3, para (4) of the Dublin Convention. (Note: Article 3, para (4) the 1st sentence of the said convention provides that each Member State has the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in the Convention, provided that the applicant for asylum agrees thereto).

Consequently, the jurisdiction of a State according to Article 6 of the Dublin Convention does not *automatically* hinder another State to decide the merits of an application for international protection. On the contrary, under certain conditions, the right to examine an application according to Article 3, para (4) of the Dublin Convention may require the State to examine a claim for international protection, especially when the applicant alleges an infringement of the *prohibition of refoulement* (Note: *Non-refoulement* is a principle in international law, provided by Article 33, para (1) of the Refugee Convention, which is aimed at protecting

refugees from being deported to places where they might be subjected to persecution again).

The case was remanded to the Independent Federal Asylum Review Board, which had to decide again the applicants' appeals. On the 29th of September, 2006, the Review Board dismissed the appeals once again. The Review Board held that the expulsion of the claimants to Italy would not expose them to the risk of being tried contrary to the requirements of Article 13 of the European Convention on Human Rights (ECHR), which provides the right to an effective remedy before a national authority. Neither would they face a "real risk" of being subjected to treatment beyond the threshold set by Article 3 of the ECHR, which comprises the freedom from torture and other inhuman or degrading treatment or punishment. The Review Board did not find the existence of any personal ties of the applicants with Austria that are relevant under the terms of Article 8 of the ECHR (Right to respect for private and family life).

Eventually, the applicants lodged a complaint with the Austrian Constitutional Court. Once more, they relied on the constitutionally guaranteed right not to be discriminated among foreigners, emphasizing that they were completely integrated in the Austrian society.

Relevant Austrian Law

- Federal Act concerning the Granting of Asylum (1997 Asylum Act, Asylgesetz 1997)
Federal Law Gazette¹ (FLG) I No. 76/1997 as amended by FLG I No. 129/2004 (On January 1st 2006, the 1997 Asylum Act was displaced by the 2005 Asylum Act [FLG I No. 100/2005]. Yet, the transitional provisions of the latter provide that all procedures that were pending on December 31st 2005 should be completed in accordance with the provisions of the 1997 Asylum Act).

Inadmissibility of asylum applications by reason of absence of responsibility under treaty provisions or pursuant to a directly applicable act of the European Union

Article 5. (1) An application for asylum which has not been ruled on in accordance with article 4 shall be rejected as being inadmissible if, under treaty provisions or pursuant to Council Regulation (EC) No. 343/2003 of 18 February 2003, another country is responsible for examining the asylum application. When rendering the administrative decision rejecting the application, the asylum authority shall also specify which country is responsible.

(2) The procedure set out in paragraph (1) above shall also be followed if, under treaty provisions or pursuant to Council Regulation (EC) No. 343/2003 of 18 February 2003, another country is responsible for determining which country is responsible for examining the asylum application.

1 The Austrian Legal Information System (RIS, www.ris.bka.gv.at) comprises all issues of the Federal Law Gazette published from 1945.

- Federal Constitutional Act for the implementation of the International Convention on the Abolishment of all forms of racial Discrimination (*Bundesverfassungsgesetz betreffend das Verbot rassischer Diskriminierung*)
FLG No. 390/1973

The Austrian Federal Constitution comprises several regulations guaranteeing equality of treatment. Apart from the "general equal protection clause" (*allgemeiner Gleichheitssatz*, provided by article 7 para (1) of the Federal Constitution) whose scope is limited to Austrian nationals, the court has adopted the same level of protection of foreigners among themselves by implementing the International Covenant on the Abolishment of all forms of racial Discrimination:

Article I para. (1) provides as follows:

Any form of racial discrimination – also to the extent not already in contradiction with Article 7 of the Federal Constitutional Act as amended 1929 and Article 14 of the Convention for the Protection of Human Rights and Fundamental Liberties, Federal Law Gazette no. 210/1958 – is forbidden. Legislation and execution shall refrain from any discrimination for the sole reason of race, colour of skin, descent or national or ethnic origin.

- Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (*Dublin Convention*)
FLG III, No. 165/1997

The Dublin Convention was aimed at establishing a system that determines which Member State of the European Communities was responsible for examining an application for asylum lodged in one of the contracting States. It was signed in Dublin on 15th June, 1990 and entered into force on the 1st of September in 1997 (for Austria on the 1st of October, 1997). In 2003 the Dublin Convention was replaced by the Council Regulation (EC) No. 343/2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National (the "Dublin-II-Regulation").

Article 3 No. 4 of the Convention states as follows:

Each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided that the applicant for asylum agrees thereto.

The Member State responsible under the above criteria is then relieved of its obligations, which are transferred to the Member State which expressed the wish to examine the application. The latter State shall inform the Member State responsible under the said criteria if the application has been referred to it.

Article 6 1st sentence:

When it can be proved that an applicant for asylum has irregularly crossed the border into a Member State by land, sea or air, having come from a non-member State of the European Communities, the Member State this entered shall be responsible for examining the application for asylum.

- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
FLG No. 210/1958 as amended by FLG III No. 30/1998

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court's Assessment

According to the permanent jurisdiction of the Austrian Constitutional Court, an administrative authority violates the right to equal treatment of all people in terms of the Federal Constitutional Law on the abolishment of all forms of racial discrimination, when it acts arbitrarily. This may be the case, for instance, if the authority severely misjudges the legal position or issues a ruling without reason. Furthermore, an administrative authority acts arbitrarily, if it refrains from carrying out preliminary proceedings concerning an issue that is of importance for its ruling, or if the authority completely fails to conduct proper preliminary proceedings.

In the present case, the Constitutional Court observes, that the Independent Federal Asylum Review Board has not been dealing with the applicants' appeals for about five years.

Nor could the Court find any statement of the Review Board referring to the claimants' present living conditions.

In the Court's view, due to the mentioned omission concerning the preliminary proceedings, it was not possible for the Independent Federal Asylum Review Board to establish a just equilibrium between the applicants' interest in respecting their right to private and family life under terms of Article 8 of the ECHR, which might have been affected by the deportation of the claimants to Italy on one hand, and the interest of public order on the other hand.

In conclusion, the Court holds that the contested ruling of the Review Board can be regarded to have violated the applicants' right to equal treatment

according to the Federal Constitutional Law for the implementation of the International Convention on the Abolishment of all forms of racial Discrimination and, therefore, rescinded the decision.

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■ CONSTITUTIONAL DEVELOPMENTS IN AUSTRIA

Barbara Ramberger

Implementation of a Residence Prohibition on the ground of criminal behaviour

Austrian Constitutional Court
Judgement of June 12th, 2007 (B 2126/06)

The Circumstances of the Case

The applicant, who was born in 1975, is a Polish citizen. At the age of 4, he moved to Austria with his parents, where he received his schooling (elementary and grammar school) as well as his professional education. He completed a University degree in Applied Sciences (*Fachhochschule*). At the date of the judgment the applicant has lived in Austria for more than 27 years, just like his mother and his siblings who are also Austrian citizens.

On 21st of December, 2004 the applicant was found guilty by the Vienna Regional Criminal Court (*Landesgericht für Strafsachen Wien*) for having committed the criminal offence of robbery according to Article 142 of the Austrian Criminal Code (*Strafgesetzbuch, StGB*) and was sentenced to four years of imprisonment. As a consequence of the conviction, the magistrate (the magistrate [*Magistrat*] being the district administrative authority [*Bezirksverwaltungsbehörde*] in towns, with a legal charter) of Krems (which is a city in Lower Austria) imposed a residence prohibition on the applicant for an unlimited period according to Article 60 of the 2005 Aliens' Police Act (*Fremdenpolizeigesetz 2005, FPG 2005*).

The applicant appealed the ruling of the magistrate of Krems, whereupon the Independent Administrative Tribunal of Lower Austria (*Unabhängiger Verwaltungssenat des Landes Niederösterreich*) decided to limit the residence prohibition to ten years. (Note: In general the Security Directorates [*Sicherheitsdirektionen*] decide appeals of decisions under the Aliens' Police Act 2005. The jurisdiction in the present case is due to the applicant's citizenship of the European Economic Area [EEA] and results from Article 9, para (1), no 1 of the Aliens' Police Act 2005, which has the rank of a federal constitutional law.)

Eventually, the claimant filed a complaint against the administrative decision of the Independent Administrative Tribunal with the Austrian Constitutional Court. He primarily alleged an infringement on "his right to respect for private and family life" as guaranteed by Article 8 of the European Convention on Human Rights (ECHR) and applied for repealing the ruling.

Relevant Austrian Law

- Federal Act on the Exercise of Aliens' Police, the Issue of Documents for Aliens and the Granting of Entry Permits (Aliens' Police Act – Fremdenpolizeigesetz 2005, FPG)
Federal Law Gazette (FLG)¹ I No. 100/2005 as Amended by FLG I No. 157/2005
(Note: The 2005 Aliens' Police Act 2005 entered into force on the 1st of January, 2006.)

Section 3

Residence Prohibition and Prohibition to Return Requirements for Imposing a Residence Prohibition

Article 60. (1) A residence Prohibition may be imposed on an alien if, on the basis of certain facts, the assumption is justified that his residence

1. constitutes a threat to public order and security or
2. is in conflict with other public interests as stated in art. 8 para (2) of the ECHR.

(2) Certain facts within the meaning of para (1) above shall be deemed to include, in particular, cases where an alien

1. has been sentenced, by a final judgement of an Austrian court, to unconditional imprisonment of more than three months, partially suspended imprisonment, suspended imprisonment of more than six months, or on more than one occasion for criminal offences based on the same malicious inclination;
2. – 14.

(3) – (5)

(6) Art 66 shall apply.

Section 4

Common Procedural Provisions Protection of Privacy and Family life

Article 66. (1) If expulsion were to invade the alien's privacy or family life, it shall be admissible where it is urgently required to achieve the objectives specified in art. 8 para (2) of the ECHR.

(2) In any case, an expulsion order under art. 54 para (1), (3) and (4) may not be imposed where its effects on the life of the alien and his family would outweigh the adverse consequences of refraining from its imposition. In such process, due consideration shall be given, in particular, to the following factors:

1. duration of residence and extent of integration of the alien or his family members;
2. intensity of family or other ties.

1 The Austrian Legal Information System (RIS, www.ris.bka.gv.at) comprises all issues of the Federal Law Gazette published from 1945.

- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
Federal Law Gazette (FLG) No. 210/1958 as Amended by FLG III No. 30/1998
The ECHR was adopted at the rank of constitutional law and is directly applicable.

Article 8 provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Court's Assessment

The Austrian Constitutional Court assessed at the outset that by enacting the residence permission, the Independent Administrative Authority of Lower Austria interferes with the applicant's "right to respect for his private and family life" in terms of Article 8 of the ECHR. The administrative ruling, therefore, constitutes an interference with a constitutionally guaranteed right.

Still, not every interference with the said provision is to be regarded as a violation. (Note: According to its second para, the rights arising from Article 8 of the ECHR are subject to a limitation clause [*Eingriffsvorbehalt*], which means that they may be restricted by law or on the basis of law.)

It requires further examination to determine whether such interference can be justified.

According to the standing jurisdiction of the Austrian Constitutional Court (see e.g. VfSlg. 11.638/1988, 15.051/1997) a decision of an authority violates the fundamental right concerned if:

- there is no law that the ruling could be based on,
- the ruling is based on law that contradicts article 8 of ECHR,
- the authority gives the law an interpretation that does not conform to Article 8 of the ECHR, or
- the authority applies a law – that actually complies with the Austrian Constitution – in an inconceivable way (*denk unmögliche Gesetzesanwendung*)

(Note: This demands an error, which is of such a severity, that "it borders on lawlessness").

The contested interference has a basis in domestic law, namely in Article 60 of the Aliens' Police Act 2005. This norm refers to Article 66 of the 2005 Aliens' Police Act, which explicitly defers to Article 8, para (2) of the ECHR. The Austrian Constitutional Court observes that the constitutionality of the provision concerned is undisputed.

Regarding the purpose of interference, the authority invokes the legitimate aim of public safety laid down in Article 60, para (1), no 1 of the 2005 Aliens' Police Act and also described in Article 8, para (2) of the ECHR.

Furthermore, for an interference with Article 8 of the ECHR to be justified, the interference has to be *urgently required* to achieve the objectives specified in Article 8, para (2) of the ECHR. This requirement demands the competent authority to strike a proper balance (*Interessenabwägung*) between the competing public and private interests.

As in the present case the expulsion of the applicant interferes with his rights guaranteed by Article 8 of the ECHR, the Independent Administrative Tribunal had the duty to consider the criteria that the European Court of Human Rights has developed in its well-established case law and to give reason for its decision. (Note: Such criteria are for instance: the nature and gravity of the offences committed by the applicant, the length of his/her stay in the host country or the period which elapsed between the commission of the offences and the impugned measure and the applicant's conduct during that period; see ECHR, judgment of 2nd August 2001, *Boultif*, Appl. 54.273/00 and ECHR, judgment of 18th October 2006, *Üner*, Appl. 46.410/99).

However, the Constitutional Court held that the Independent Administrative Tribunal failed to balance between the public interest in imposing the residence prohibition on the applicant and the applicant's individual interest in staying in Austria.

The Authority did not consider the applicants' exclusive family ties in Austria; instead the Authority only observed that the claimant entered Austria at a very young age and has received his schooling in Austria.

In the Court's view, the Independent Administrative Tribunal of Lower Austria failed to conduct a fair balance of interests under the terms of Article 8 of ECHR. The Authority's decision, therefore, violates the applicant's right to respect for his private and family life and eventually had to be repealed.

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■ BOOK REVIEW

Ulrike Brandl

Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers*, Oxford University Press, 2005, paperback 2007, p. 151.

This publication deals with a highly important topic of public international law, which is discussed controversially in theory and shows its crucial importance in practice. It is the conferral of sovereign powers to international organizations and their exercise of these powers. This question has been an issue in certain fields since the first establishment of organizations. The incremental need for international cooperation in heterogeneous fields has resulted in a greater activism of organizations. With the increasing importance of organizations as actors in the international community the conferral of powers considerably increased. These powers fall among the core of what is generally called sovereignty. It is commonly accepted that states as original subjects of public international law do have the full range of sovereign rights. These functions include legislative, executive and partly also judicial functions. As a consequence of such a conferral also international organizations exercise sovereign powers. It is however contested which powers exactly may be conferred and where the limits are. Moreover, the conferral of sovereign powers raises theoretical and practical questions of accountability and responsibility for acts of organizations and also enforceability of claims against organizations and against member states implementing obligations resulting from the (legislative) functions of organizations.

Chapter I starts with a discussion of the concept of sovereignty, one of the most unclear and controversial concepts of public international law, whose exact content cannot be precisely defined. According to the author's accentuated wording the concept is "being inherently unstable". The main example of an actor having original sovereignty is the nation state, whereas sovereignty of organizations derives from states. The author clearly illustrates the danger of undermining the separation of state powers going hand in hand with the conferral of powers to international organizations. Ontological functions of sovereignty are an explanatory element of the evolution of sovereignty of the constitution of communities. This highly theoretical discussion is accompanied by examples and gains practical importance through the description of activities of organizations. Chapter I ends with the question of *prima facie* application of domestic public law principles to organizations exercising sovereign powers. According to the author, sub-delegation of powers in cases where powers have been delegated to the organization serves as an example. An analogy between domestic and international law may help to clarify some issues but is as such not a generally appropriate concept.

The process by which states confer powers to international organizations is dealt with in Chapter II. These conferrals may happen by the founding treaty or on an *ad hoc* basis. The author concludes that the organization has to give its

consent to the conferral of powers as this would follow *mutatis mutandis* from the Vienna Convention on the Law of Treaties. Whereas one could question the basis of the conclusion, the result is convincing regarding the stage when the organization has already been created but does not seem to be fully clear for the founding stage, which is the concluding phase of the founding treaty.

Chapter III is meant to introduce the reader to different types of conferrals of sovereign powers. It starts with a discussion of the terminology and highlights that there is still a lack of clarity for labels describing the types of power conferrals. The author introduces a three column taxonomy of power conferrals namely agency relationship, delegation of powers and transfer of powers.

The first distinctive feature is that delegation as such is revocable where a transfer conceptually is not revocable (with exceptions). Second, the amount of powers conferred to organizations can be measured by the power of control the state retains or gains over the organization. The greater the degree of conferring of powers, the less is the degree of direct control. Whether the organization has exclusive or concurrent competence in conferred powers is the third characteristic element describing the conferral of powers between international legal actors.

The following chapters are devoted to an analysis of the types of conferral of powers and the consequences thereof.

The agency relationship construction (a special form of empowerment, a relation between principal = state and agent = organization) should be reserved to international organizations and non member states as membership of the organization itself would contradict using the organization as an agency.

Responsibility of international organizations for wrongful acts of the organization is supposed to be a clear issue. The responsibility of states for internationally wrongful acts committed by the organization to which they have delegated or transferred powers is however a complex and not yet clarified question. The author distinguishes between primary and secondary responsibility when powers are delegated. Also secondary responsibility, that is the responsibility for acts of the organization, is according to the author's opinion necessary "to ensure the systemic integrity of international law" (p. 64). States are responsible when they domestically implement internationally wrongful acts. States must aim at preventing organizations from committing internationally wrongful acts, e.g. by voting against the adoption of a legal act. Otherwise states could establish organizations, confer powers on them and thus be absolved from fulfilling their legal obligations.

In a previous review the lack of examples in some fields was seen as a minor point of criticism whereas in general the work was described as well documented (*Jean d'Aspremont*, <http://www.globallawbooks.org/reviews/getFile.asp?id=362>). As to the opinion of the present author examples, citations of cases and academic opinion are well balanced. However, such a controversial topic like the present discussion would require a more theoretical analysis of related underlying concepts, such as the definition of the legal personality of organizations as a derived "personality".

As a German speaking writer of this book review I certainly miss the debate on ideas expressed in academic literature published in German. The main example is Griller, St. "Die Übertragung von Hoheitsrechten auf zwischenstaatliche Einrichtungen: Eine Untersuchung zu Artikel 9 Absatz 2 des Bundes-Verfassungsgesetzes" (Forschungen aus Staat und Recht, Vol. 88, 1989).

Saroshi's book in general focuses brilliantly on the essential relations in the exercise of sovereign powers by various actors in international law, mainly but not necessarily subjects of international law. It avoids lengthy descriptions, but analyses clearly, sticks to the topic and impresses by its conceptual thinking (see Rosalyn Higgins in the foreword).

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