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SUPREME LAW OR BASIC LAW?
THE DECLINE OF THE CONCEPT OF CONSTITUTIONAL SUPREMACY

Rett R. Ludwikowski*

The relationship between international law and domestic law has been widely but still not exhaustively examined in existing American legal writings. The discussion was traditionally focused on the United States doctrine of international law. It centered on the confrontation of monistic and dualistic viewpoints on American soil1 and examined the role of the main components of international law as they relate to domestic statutory construction.2 However, it ought to be clearly recognized that the growing presence of international legal elements in the domestic law also impacts the position of the constitution itself. The extent to which the process of internationalization of domestic law has affected the concept of the constitution as the supreme law warrants examination in the United States and even more so in the countries that have adopted constitutions within the last century.

This article explores the process of the decline of the concept of constitutional supremacy. It highlights that the concept of the constitution as the law highest in rank was historically rooted in the premises of the traditional theory of dualism. This theory assumed that both municipal and international legal systems are separate and as such may have different supreme laws, ultimate and highest in authority. In fact, however, the current fabric of the global legal system is not monistic or dualistic but rather multi-focal.3 The

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3 For an analysis of the confrontation of "internationalist " and traditional "dualist" approach to international law, see Curtis A. Bradley, Breard, Our Dualist Constitution, and
globalization of law mooted the classical dispute between monistic and dualistic schools. The national, supranational, international, and regional legal structures overlap and penetrate each other, leaving no room for the concept of clear-cut supremacy of one single set of legal norms over all others. The death of the doctrine of absolute sovereignty and immunity of a state and the emergence of the supranational organizations guided the states into the web of links and obligations that resulted in a gradual decline of the concept of the constitutional supremacy.

Even in the United States, not the Constitution alone but the Constitution and the other laws, including components of international law, act as the supreme law of the land. The drafters of other recently adopted constitutions display an even more distinct tendency to treat constitutions as basic not supreme law. This article reviews the process of progressive abatement of the once heated dispute between the monists and dualists and examines the evolving position of and the roles played by the recently adopted constitutions. Particular focus is paid to the constitution-making process in Eastern and Central Europe and the relationship of constitutional law of the European Community to national law of its member states. No attempt is made to extend this analysis to the rest of the world.

I. PHILOSOPHICAL FOUNDATIONS OF MONISM AND DUALISM.

Traditional monism maintained that there was only a single legal order in which all norms, municipal and international, existed in harmony. Some representatives of this school claimed that the universal legal system existed as a hierarchy in which the national law derived its validity from the superior international law. Other representatives claimed that the domestic law occupied a higher rank than international law. More moderate proponents of monism emphasized harmony and coherence rather than hierarchy of
the norms and argued that domestic and international elements of this universal order penetrate each other.\(^5\)

The dualists, the school opposing legal monism, maintained that national and municipal law were substantially different and existed separately.\(^6\) The fundamental difference between these two systems stemmed from the fact that the rules and norms of international law grew out of custom while the main components of the municipal law evolved from legislation. Dualists claimed not only that the sources but also the subjects of both legal systems are different: while the municipal law regulates the relationship between the state and individuals and between individuals themselves, international law is limited to the regulation of relations between states. Extreme dualists even argued that international law was not law but only a system of international morality.\(^7\) While the moderate monists believed that rules are transferred from international law to domestic law and *vice versa* through "assimilation" or "transformation," the moderate dualists insisted that the process of incorporation required "recognition" of the validity of international norms. This process transforms the rules of international law into *ipso facto* norms of municipal law.\(^8\) H. Kelsen eloquently expressed this notion:

If it is assumed that international law is valid for a State without any recognition on the part of this State, then the norm in question is but a general transformation of international into national law prescribed by this particular constitution. If, however, it is assumed that international law is valid for a State only if "recognized" by this State, the norm in question is considered to be "recognition" of international by national law.

According to the first theory, international law is a legal order superior to all the national legal orders which, as inferior legal orders, are "delegated" by the international legal order, and form, together with the latter one universal legal order. According to the second theory, the national legal order is superior

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\(^5\) For the comments on so-called "municipal law school of monism" see Borchard, *supra* note 1, at 138.


\(^7\) John Austin, *Jurisprudence* 184 (5th ed. 1885). For further discussion of this position see McDougal, *supra* note 1, at 18.

\(^8\) See Oppenheim, *supra* note 6.
to the international legal order, which received its validity from
the former.\footnote{H. Kelsen, \textit{General Theory of Law and State} 382 (1945).}

The monistic viewpoint had its foundations in the ancient and
medieval philosophical conception of the world's single, harmoni-
ous, and hierarchically organized legal system. In ancient Judaism,
the law directly communicated to the people by Yahweh could be
only one and universal.\footnote{Carl J. Friedrich, \textit{The Philosophy of Law in Historical Perspective} 8-12
(2\textsuperscript{nd} ed. 1963).} The assumption that God was the source
of justice resulted in rejection of the relativistic claim that the same
act may be "just" in one forum and "unjust" in another.

The opinion that the law, being rooted in the concept of jus-
tice, had to both one and universal, was also overwhelmingly pre-
sent in the ancient Greek and Roman philosophy. For Plato and
his followers, the law was a reproduction of the idea of justice; for
Cicero and the stoics, the law represented precepts of reason em-
bedded in nature.\footnote{Id. at 28-29.} Nature was created by God and organized har-
moniously accordingly to laws that had universal validity. In the
area of human law, both the rules regulating the activities within
the communities and between communities themselves were ex-
pressions of God's will.\footnote{See Kelsen, supra note 9, at 8.} The states (\textit{civitates}) were implementing
the principles of the law in the norms of \textit{jus gentium}, common to all
political entities.\footnote{Friedrich, supra note 10, at 34.} As Roman jurist Gaius wrote in his "Institutes":

All nations, which are governed by statutes and customs,
make use partly of law, which is peculiar to the respective na-
tions, and partly of such as is common to mankind. Whatever
law any nation has established for itself is peculiar to the partic-
ular state (\textit{civitas}), and is called civil law (\textit{jus civile}), as being the
peculiar law of that state, but law which natural reason has laid
down for mankind in general is maintained equally by all men,
and is called \textit{jus gentium}, as being the law which all nations
use.\footnote{Gaius, \textit{Institutes}, in James L. Wiser, \textit{Political Philosophy: A History of
Search for Order} 79-80 (1983).}

The process of Christianization of the Roman Empire and the
development of the doctrine of caesaropapism\footnote{According to the doctrine of caesaropapism, developed in the Byzantine Empire in
the last centuries of the first Christian millennium, the emperors were deemed to have
concept of legal universalism. The emperors’ ecclesiastical func-
tions seemed to emphasize the harmony between earthly and spiri-
tual powers and legitimized the emperors’ functions as single
lawmakers.16

At the time of fragmentation of medieval Christianity, the
concept of the hierarchically organized universal legal order got its
strongest support in Thomas Aquinas’s doctrine. His legal uni-
verse with lex aeterna, understood as God’s original creative plan,
with lex naturalis as the imprint of eternal God’s intention in
human minds, and lex humana (man-made law) as the implementa-
tion of the general principles of natural God’s wisdom, created an
intellectual framework for future development of monism.17

Since the inception of the Holy Roman Empire, the doctrine
of the legal order, embedded in the naturalistic philosophy, pre-
vailed but the concept of its uniformly pyramidal structure faced
some challenges. Developed in the Western (Latin) Roman Em-
pire as an alternative to Byzantine caesaropapism, the doctrine of
“the two swords” claimed that Christ himself divided power be-
tween political and spiritual rulers. Left to politics were the dis-
tinctive functions in the area of purely human affairs; left to the
spiritual rulers was the authority to interpret the laws protecting
eternal values.18 Spiritual and political leaders of the world supple-
mented each other’s visions but their domains were separate and
their orders were arranged in two different pyramids.

The next breach in the religiously oriented philosophy of natu-
ral law was the Humanist jurisprudence of the fifteenth and six-
teenth Centuries.19 Without challenging the naturalistic fabric of
the law, the Humanist jurists placed emphasis on man-made law.
The legal order was natural for them not because it was the reflec-
tion of God’s intentions but because it was suitable for all men. As

assumed roles of God’s regents and as such had both spiritual and political powers. See
HARRY MAGOULIAS, BYZANTINE CHRISTIANITY: EMPEROR, CHURCH AND THE WEST 8

16 See Id. at 105-106.

17 See JAMES L. WISER, POLITICAL PHILOSOPHY: A HISTORY OF SEARCH FOR ORDER
122-23 (1983); see also ANTHONY J. LICKA, AQUINA'S THEORY OF NATURAL LAW 82-115
(1996).

18 Id. at 106-107; see also FRANCIS DVORKIN, EARLY CHRISTIANS AND BYZANTINE PO-

19 Leading scholars of this movement are usually recognized to be: Guillaume Bude
(1468-1540), Andrea Alciati (1492-1550), Ulrich Zasi (1461-1535), Jackues Cujas (1522-
90). See FRIEDRICH, supra note 10, at 51-56.
Carl Friedrich wrote, “the older Christian natural law was about to be replaced by a secular and philosophical natural law.”20

The gradual laicization of the theory of law laid the foundations for the development of legal dualism. In the sixteenth century, this process became most visible in the political philosophy of Jean Bodin (1530-96). Famed as the founding father of the doctrine of sovereignty, Bodin retained in his political writings a naturalistic rhetoric typical of medieval political philosophy. Accordingly to Bodin, the government of a republic ought to be based on the laws of nature and the sovereign was not expected to violate any of these natural laws.21 However, statutory law, not natural law is at the center of Bodin’s legal system. Bodin wrote, “[s]overeignty is the absolute and perpetual power of a republic”22 and the most important function of the sovereign was to legislate. The sovereign had the right to decide what was the highest law for his subjects and if the sovereignty was to signify absolute power this right could not be conditional. Bodin concludes, “[h]e who contemns his sovereign prince, contemns God whose image he is.”23

Bodin’s world became strikingly bipolar. The relationships of the sovereign with God were detached from the relationships with his subjects. The sovereign was responsible for violations of natural law, beyond this his domestic orders could not be evaluated or questioned. The republic was building its own pyramid of legal norms, closed and impenetrable from the outside. Bodin did not come to any fully expressed dualistic or pluralistic conclusions but his doctrine of sovereignty included some future components of dualism. As Hans Kelsen wrote,

The most important consequence of the theory, which proceeds from the primacy of national law, is that the State whose legal order is the starting point of the whole construction can be considered to be sovereign. For the legal order of this State is presupposed to be supreme order, above which no other legal order exists. This is also a consequence of the pluralistic theory.24

20 Id. at 56.
21 Id. at 57.
22 Id.
24 KELSEN, supra note 9, at 383. Kelsen uses interchangeably terms dualism and pluralism to emphasize that besides the international legal system a large number of domestic systems is involved.
It was Thomas Hobbes (1588-1679) who, in the seventeenth century, supplemented Bodin’s theory with several arguments serving to establish the legitimacy of the sovereigns’ rule. He started with the examination of unique features of passionate human nature and concluded that chaotic and clashing human desires cannot be organized, channeled and controlled without the peoples’ consent to give absolute power to the ruler. Although the foundation of the sovereign authority was consented to, the social contract elevated the sovereign above the law and made him independent of any external authorities.\footnote{Wiser, supra note 17, at 194.}

Describing the scope of the power of the sovereign, Hobbes wrote:

\begin{quote}
   it is annexed to the sovereignty, to be judge of what opinions and doctrines are averse, ... the whole power of prescribing the rules ... the right of making war and peace with other nations, and commonwealths ... the choosing of all counselors, ministers, magistrates, and officers, both in peace and war ... the power of rewarding with riches, or honors; and of punishing with corporal, or pecuniary punishment\footnote{Leviathan, Ch. 18 in Michael L. Morton, Classics of Moral and Political Theory 642-45 (1992).}
\end{quote}

The emergence of the theory of sovereignty inevitably had to raise an issue of mutual relations between the sovereign states. The most systematic presentation of the rules governing the foreign relations of the nations, offered by Dutch jurist Grotius (Hugo de Groot, 1583-1645), provided the spark that facilitated the process of growth of the body of international law. Grotius’ philosophy, strongly influenced by stoicism, was not yet dualistic. Recognizing the rights of newly emerging national states, Grotius warned that sovereignty couldn’t result in international anarchy. He claimed that before the political entities emerged, existing laws of reason and nature, being the foundation of international law, would be binding on all sovereigns.\footnote{Friedrich, supra note 10, at 66.}

As Hans Kelsen correctly observed, Grotius’ naturalistic concepts of international conflicts, legitimized only by just causes (\textit{bellum justum})\footnote{See Grotius, De Jure Belli ac Pacis (1625).} remained predominant until the end of the eighteenth century.\footnote{Kelsen, supra note 6, at 336} Gradually the political writers became more focused on human legislative activities and the rights of the states.
than on the restraints imposed on the sovereigns by international morality. At the end of the eighteenth century, the rules of nature were criticized as being vague, a notion most eloquently expressed by David Hume (1711-1776). As J.L. Wiser wrote, “According to Hume, inasmuch as the mind cannot know nature, it is at the same time incapable of knowing what is naturally right or what is naturally just.”

The concept of states’ equality, developed by Emer Vatell (1714-67) in The Law of Nations, (published in 1758), was the logical conclusion drawn from the initial assumption that states, similarly as people in the state of nature, are free and have the same rights; absolute and sovereign power of the most powerful political entity was to be equal to that of a small republic. Vattel maintained that no state has right to impose any pressure or meddle with the internal affairs of another state. Along that same line Christian Wolff (1679-1754) wrote that “to interfere in the government of another, in whatever way indeed that may be done, is opposed to the natural liberty of nations, by virtue of which one is altogether independent of the will of other nations in its action.”

In the nineteenth century, the theory fundamental for fostering dualism claimed that the domestic law of a sovereign state is an impenetrable domain. This theory has received strong political support in the emergence of the tightly organized and centralized nation-state and philosophical enhancement from the legal positivism and the analytical philosophy of law. Positivism, as contrasted with natural-law theory, renounced absolute justification of law as flowing from nature, God, reason or the possibility of satisfying common human needs. The rules of positive law were derived from the arbitrary will of political authorities. The law was understood as an order, an expression of the will of the legislator or the ruler. As John Austin (1790-1859) wrote, “[e]very law or

30 Wiser, supra note 17, at 290.
32 Vatell (Droit des Gens, ou Principes de Laloï Naturelle Appliques a la Conduite et aux Affaires des Nations et des Souveains (1758); see also Stephen D. Krasner, Sovereignty: Organized Hypocrisy 14 (1999).
rule . . . is a command. Or, rather laws or rules, properly so called, are a species of commands."

Analytical jurisprudence, represented by Austin and many of his followers, did not go beyond the examination of the positive law or what allowed the sovereign to issue concrete commands. The coherence of the statutes and other decisions of the sovereign were to be analyzed, not their quality of serving justice. As Isaak Husik wrote,

The business of the analytical jurist is to expound in a systematic and scientific way what it has actually pleased the sovereign to command his subjects or citizens . . . [T]he law itself cannot be according to law or against the law, hence the law itself is neither just or unjust, neither right nor wrong.

The courts' decisions in the nineteenth century widely confirmed that states were independent and fully immune from judicial process in other countries. As the French Supreme Court stated in 1848 in Government v. Lambege et Pujol:
The reciprocal independence of states is one of the most universally respected principles of international law, and it follows as a result therefrom that a government cannot be subjected to the jurisdiction of another against its will, and that the right of jurisdiction of one government over litigation arising from its own acts is a right inherent to its sovereignty that another government cannot seize without impairing their mutual relations.

The court in Great Britain pronounced the same doctrine in The Parlement Belge, decided in 1880. The court stated:

As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign.

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35 John Austin, Lectures on Jurisprudence 88 (5th ed. 1885).
37 Quoted in Joseph M. Sweeney, The International Law of Sovereign Immunity (Dep't St Pub 1963) at 20-21.
At the turn of the nineteenth and twentieth centuries, the philosophical framework was well prepared for the heated dispute between the monists and dualists. The dualist viewpoint was gaining ground in Germany and Italy where it was closely associated with such scholars as Heinrich Triepel and D. Anzilotti. The monistic position was strongly supported by Hans Kelsen of the Vienna School of jurisprudence; in the United Kingdom, Hersch Lauterpacht became an outspoken promoter of this doctrine.

II. INTERNATIONAL DIMENSION. DECLINE OF DUALISM.

In the twentieth century, the monistic approach seemed to prevail in international legal scholarship, while dualist concepts, recognized as more precise and less confusing, were still applied by the domestic courts of a great number of states. As Mark W. Janis stated,

Whatever the logical attractions of monism, it is not usually as reliable a guide to practice as dualism. Most states and most courts, including those in the United States, presumptively view national and international legal systems as discrete entities and routinely discuss in a dualist fashion the incorporation of rules from one system to the other.

On international ground, the sixteenth century theory of absolute sovereignty, which traditionally enhanced the dualistic viewpoint, was subject to the most serious challenge. It soon became obvious that the fortress-like concept of a state was obsolete. The domestic authorities' sole right to control the territory of the state and the judge legitimacy of the citizens' behavior was gradually eroded and the division between international and domestic law was no longer as sharp.

In practice, political sovereignty was called into question by almost routine interventions into the domestic affairs of a great number of states. The right to limited intervention was used and misused in the interest of national groups, ethnic minorities and individuals. It was often claimed that the concept of absolute equality and independence of sovereign entities was a scholastic

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42 Krasner, supra note 32, at 28; see also Ann Thomas & A.J. Thomas, Jr., The Era of Intervention in the Americas, in Thomas & Thomas, Jr., supra note 33, at 15-54.
dogma and was not even expressly represented by authorities such as Bodin, Vattel or Grotius.43

It also has often been maintained that sovereignty has several components that ought to be sharply distinguished. Stephen D. Krasner has most eloquently presented the development of this multi-focal concept of sovereignty. He wrote:

The term sovereignty has been used in four different ways—international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty. International legal sovereignty refers to the practices associated with mutual recognition, usually between territorial entities that have formal juridical independence. Westphalian sovereignty refers to political organization based on the exclusion of external actors from authority structures within a given territory. Domestic sovereignty refers to the formal organization of political authority within the state and the ability of public authorities to exercise effective control within the borders of their own polity. Finally, interdependence sovereignty refers to the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, or capital across the borders of their state.44

The idea that sovereignty has several elements triggered the observation that a state might be sovereign, but with limitations. The state authorities might lose internal control over domestic affairs, but the state might still be internationally recognized and not subject to any sort of external pressure. The regimes might not be recognized by other states but might still have full control over some territories and population. On the other hand, fully recognized states, in control of their internal affairs, might be subject to foreign economic, political or military intervention. The assumption that the lack of some of these elements may not necessarily undermine the validity of the whole concept of sovereignty facilitated the development of the theory of limited sovereignty.

The courts in the twentieth century were also determined to reexamine the old fashioned doctrine of states’ absolute immunity. As the Supreme Court of Belgium stated in 1903, “[s]overeignty is

43 Bodin did not dismiss the limitations of the sovereign by natural law and private obligations for the subordinates; Vattel, who often was recognized as the father of the theory of nonintervention, himself spoke in favor of the intervention for humanitarian reasons; Grotius was himself an eloquent defender of the concept of bellum justum. See ANN VAN WYNE THOMAS & A.J. THOMAS, JR., supra note 33, at 4-7.
44 KRASNER, supra note 32, at 3-4.
involved only when political acts are accomplished by the state."\textsuperscript{45} Commercial activity and other acts by state authorities of semi-private character were left outside the scope of the concept of restrictive immunity. It was recognized that the states' agencies might buy, sell, employ people and be responsible for injuries caused to private persons in the same way that individuals or private companies can be held liable. The armor of the theory of absolute immunity that was pierced by some European courts in the early twentieth century was finely broken in the United States by the famous letter of the acting legal adviser for the Secretary of State, Jack B. Tate. He proclaimed that a number of states, such as the U.S., Great Britain, Czechoslovakia, Estonia, Poland and to some extent Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway and Portugal supported the classic theory of immunity. The courts in other countries were neither clear nor consistent in their decisions. Suggesting changes in the United States approach, Tate concluded that:

it should be observed that in most of the countries still following the classical theory there is a school of influential writers favoring the restrictive theory and the views of writers, at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.\textsuperscript{46}

World War II brought not only the abundant evidence of empirical violations of the states' sovereign rights but proved that the rulers' control over states' territory and population might be subject to evaluation based on internationally accepted criteria. Regardless of the theoretical assumptions that sovereign governments are not capable of international legal limitations,\textsuperscript{47} the post-war era proved that most states habitually observe the rules of international law and those who do not might be forced to accept judgments of the international community. The conclusion of the war confirmed that individual activities were subject to the regulation of international law and that national decision-makers could not hide behind their superiors' orders or behind the concept of superiority of mu-

\textsuperscript{45} Societe Anonyme des Chemins de Fer Liegeois Luxembourgeois v the Netherlands, quoted in Sweeney, supra note 37.
\textsuperscript{46} Reprinted in Carter, supra note 38, at 555-558.
\textsuperscript{47} See Fisher, Bringing Law to Bear on Governments, 74 Harv. L. Rev. 1130 (1961).
nicipal legal systems. The existence of peremptory norms of general international law (*jus cogens*) "from which no derogation is permitted" is clearly defined by the Vienna Convention on the Law of Treaties. Empirically the nations could disregard the rules set up by the international community, but the Nuremberg era proved that international law is real and its norms are binding.

The conclusion of World War II also triggered the development of the contemporary human rights movement. Protection, promotion and codification of human rights, according to international standards, became one of the most important concerns of the new international structures. International conventions, a major development of the twentieth century, created the huge body of human rights obligations for the states that altered the scope of domestic authorities' power. The numerous human rights organizations monitoring violations began interfering in domestic policies, publishing periodic reports, comparing states' records on human rights protection and bringing the states and the decision-makers to international courts, alleging human rights abuses.

The post-war conventions uniformly confirmed the principle of non-intervention in the internal affairs of sovereign states. As Louis Henkin wrote, "[p]rohibitions of intervention and interference, it should be clear, are part of the quest for an ideal of equally sovereign and independent nations." Theoretically, the doctrine of non-intervention was not supposed to collide with the right of the Security Council to undertake actions with respect to threats to peace, breaches of the peace and actions of aggression, and measures taken by the nations exercising their rights of collective and indi-

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49 See J. BRIERLY, *THE OUTLOOK OF INTERNATIONAL LAW* 5 (1944) ("States may often violate international law, just as individuals often violate municipal law; but no more than individuals do states defend their violations by claiming that they are above the law.").


52 See U.N. CHARTER art. 2(4); art. VI, Conference on Security and Co-operation in Europe, Final Act; art 20, Charter of the Organization of American States.


54 U.N. CHARTER ch. VII.

55 U.N. CHARTER art. 53.
vidual self-defense. Practically, however, the theory of self-defense seemed like an inflatable balloon that was engulfing the concepts of anticipatory self-defense, preemptive strikes, and the right to defend allies and nationals beyond the states' borders. In time, the states also began claiming the right to defend human rights wherever they were violated, and the right to intervene into the civil strife that became internationalized. The concept of peacekeeping actions and humanitarian interventions denied the sovereign states' authority to violate the liberties and rights of humanity beyond the limits of justice and reason tolerable for the international community. Although these theories have never been fully acknowledged as a part of international law, they began to undermine the once untouched bastion of a states' right to control all domestic problems.

The protection of international human rights contributed to general recognition that there are values that transcend national interests. The notion that there are goals and values common to all people, such as protection of environment, human rights protection, global security and many others, grew out of the discussions about new world order and triggered the trend toward globaliza-


59 See Schwelb., HUMAN RIGHTS AND INTERNATIONAL COMMUNITY, (1964); Lilich, Intervention to Protect Human Rights, 205 MCGILL L.J. (1969); D'Amato, Invasion of Panama was a Lawful Response to Tyranny, 84 AM. INT'L. L. 516 (1990).

60 For a different position, see BOWETT, supra note 57, (noting that humanitarian intervention had been lawful before the UN Charter and remained lawful thereafter). Compare I. Brownlie, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES, 301 (1963).

tion of the law. Global institutions, established to sponsor international or supranational cooperative activities, began codifying the rules of fair trade, prescribing environmental and health standards and extending financial resources contingent on the borrowers' adjustments of their domestic politics. As Stephen Krasner wrote:

Over time the conditions imposed by agencies such as the World Bank and the International Monetary Fund have become more explicitly political—for instance, insisting on the establishment of independent commissions to attack corruption. This trend accelerated after the collapse of the Soviet Union, which left weaker borrowing states with no alternative to the West, something that some of them welcomed, such as the former Communist countries of Eastern Europe, and others did not. The last international financial institution to be established, the European Bank for the Reconstruction and Development, made commitment to democracy a condition of membership. Borrowers have accepted these terms because they are better off with the money and with some loss of autonomy than without the money and a higher level of autonomy. Finally, the European Union, with its panoply of supranational institutions, is a clear example of a voluntary contractual arrangement that contradicts Westphalian sovereignty.

From the international community's perspective, the superiority of international legal order over domestic law seemed to be less questionable than ever. The states could disregard or violate international obligations and rules but they could not appeal to their domestic regulations to justify such conduct. The Permanent Court of International Justice pronounced this principle in the Greco-Bulgarian Communities case and in an Advisory Opinion on the Exchange of Greek and Turkish Populations. It was clearly

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63 See Gelber, supra note 34, at 173-92 (providing an extensive examination of the increasing interdependence of the domestic economy with the external world). Gelber claims that "economic interdependence had grown steadily between World War II and the 1970's."
64 See Krasner, supra note 32, at 226.
confirmed by the Vienna Convention on the Law of the Treaties that stated that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

In a domestic forum, the supreme laws of the country could still prevail in a conflict with international law; internationally, however, even the violation of constitutional norms could not release the states from international obligations. Within the uniform and hierarchically constructed legal system, the supreme laws always take precedence over all other inferior laws. From the perspective of an increasingly monistic doctrine of international law, this assumption leads to a logical conclusion: if the states could neither claim the right to violate international obligations nor to adopt the laws that would violate general principles of customary international law or norms *jus cogens*, they cannot claim that their laws are supreme. The concept of supremacy of the components of the municipal legal system that are bound to yield to another (namely international law) is logically inconsistent. The question remains whether the idea of constitutional supremacy is still defendable even in a municipal forum.

III. THE UNITED STATES CONSTITUTION — BASIC OR SUPERIOR COMPONENT OF THE SUPREME LAW OF THE LAND?

The relationship between U.S. domestic laws and international law has been exhaustively explored and does not require extensive summarization. In the following pages, the predominant trends in the academic discussion and judicial decisions in the United States will be presented only to the extent that will allow conclusions regarding the status of the constitution within the supreme law of the country.

1. The basic principles, incorporated in the Supremacy Clause of the Article VI section 2 of the Constitution, were most clearly articulated by John Marshall in *Marbury v. Madison*.

Most of Marshall's "logic" still remains untouched. He wrote:

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67 Entered into force on Jan 27, 1960, art. 27; see also art. 46.
68 See supra note 1, for the selected literature on the topic.
69 5 U.S. (1 Cranch) at 177 (1803).
This is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary the legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative is true, then a legislative act contrary to the Constitution is not law, if the latter part be true then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.\textsuperscript{71}

The conclusion that the Constitution is the "Supreme Law of the Land" to which all other legislative sources are subject\textsuperscript{72} seems to be unquestionable. The statement that the people's power is "illimitable" has at the least been debatable and the relationship between two components of the "Supreme Law," other than the Constitution, namely, treaties and federal statutes, was not clearly explained by the Constitution and was subject to extensive judicial interpretation.

2. The post-Nuremberg era paved the way for discussing the limits of constitutional power of the people. A legitimate question became whether the people in any country of the world have a right to adopt laws that would violate the natural law or the law of nations. As Professor Jules Lobel convincingly argued, the idea that people have to recognize restraints imposed on their power, was not alien to the members of the U.S. Constitutional Convention. Lobel wrote:

The theorist who most fully grasped and developed the fundamental principle of popular sovereignty underlying the Constitution was James Wilson of Pennsylvania, a key figure at the Constitutional Convention and at the Pennsylvania ratifying convention. Wilson viewed constitutional limitations as supplemental to natural law controls on legislative authority. He recognized that the people could not grant the government the power to violate natural law, which did not derive from popular consent. Wilson understood that although supreme power re-

\textsuperscript{71} Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{72} See E. Allan Farnsworth, \textit{Introduction to the Legal System of the United States}, 61 (3rd ed. 1996)
sided with the people in a free society, a constitution could not confer any right to violate international law:

"When I say that, in free states, the law of nations is the law of the people; I mean that as the law of nature, it is indispensably binding upon the people, in whom the sovereign power resides; and who are, consequently, under the most sacred obligations to exercise that power, or to delegate it to such as will exercise it, in a manner agreeable to those rules and maxims, which the law of nature prescribes to every state."\(^7\)

Although, in fact, the Constitution does not \textit{expressis verbis} prohibit the President or the Congress from violating international law, the arguments articulated above clearly support a monistic interpretation of the Constitution. If the people themselves were limited in their power, the people's representatives could not be free from the same restraints.

The U.S. courts frequently departed from this position and either followed the Executive's claims that the constitutional restraints on federal government do not apply in the area of foreign affairs\(^7\) or ruled that limitations imposed on federal powers by international law are nonjusticiable political questions.\(^7\) The dualistic approach of the courts has been criticized by numerous commentators who claim that the President himself cannot violate the intent of the constitutional drafters to observe the rules of international law;\(^7\) others went on and argued that even the support of Congress cannot relieve the federal government from the obligations imposed by the peremptory norms of international law and human rights treaties.\(^7\)


\(^7\) Curtis A. Bradley refers to this position as "foreign affairs exceptionalism." \textit{Id.}; see also Curtis A. Bradley, \textit{The Treaty Power and American Federalism}, 97 MICH. L. REV. 390 (1998). For more extensive analysis of the judiciary decisions, see Jordan J. Paust, \textit{Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined}, 9 HASTINGS CONST. L. Q. 719-720 (1982); see also Lobel, \textit{supra} note 73. On the other hand, courts also showed a tendency to take a narrow view of the circumstances in which the Executive may exercise extraordinary powers in the situations justified by national security. \textit{See} Morton Halperin v. H. Kissinger, 196 U.S. App.D.C. 285; 606 F.2d 1192, 1201.

\(^7\) See Paust, \textit{supra} note 75, at 726-27.

\(^7\) See Lobel, \textit{supra} note 73; see also Bradley, \textit{Breard, supra} note 3, at 529.
3. The relationship between treaties and federal statutes was even more uncertain than the restraints imposed by international law on the federal government. First of all, the Constitution does not explicitly mention international agreements other than treaties. Although Congress was not consistent in distinguishing between Article II treaties and other forms of international agreements,\textsuperscript{78} the courts assumed that self-executing agreements concluded by the President, with authorization of the Congress, and agreements implemented by a federal statute should be given the supreme law status, prevailing over State law.\textsuperscript{79}

Secondly, the Constitution itself does not resolve the problem of potential conflicts between international agreements and statutes. It did however render these two components of the Supreme Law equal authority, a step that led the courts to the initial assumption that in case of conflict the later in time should prevail.\textsuperscript{80} The doctrine of \textit{lex posterior derogat legi priori}\textsuperscript{81} was, nevertheless, applied with some reservations. The courts ruled that the principle "later in time" does not apply in the case of conflict between sole presidential agreements and federal statutes.\textsuperscript{82} The courts also assumed that the domestic law is not supposed to violate international obligations of states and, in the case of a conflict between a statute and an earlier treaty, judges are expected not to construe the Acts of Congress as violating the law of nations, if another interpretation is possible. Although the presumption of compliance of domestic law with international law, known as the Charming Betty's principle, apparently confirmed the growing tendency to recognize the primacy of international components of the domestic legal system. The courts, however, interpreted the Charming Betty's principle by applying the doctrine of \textit{lex posterior derogat legi priori}.

\textsuperscript{78} The Supreme Court confirmed this in Wenberger v. Rossi, 456 U.S. 25; 102 S.Ct. 1510, 1515 (1982).

\textsuperscript{79} The Supreme Court construed "treaty" to include international agreements concluded by the President with authorization of Congress. Altman & Co. v. United States, 224 U.S. 583 (1912). The Court stated, "If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of the President. We think such as compact is a treaty." \textit{Id.}

\textsuperscript{80} \textit{See} Ralph G. Steinhardt, \textit{The Role of International Law as a Canon of Domestic Statutory Construction}, 43 \textit{VAND. L. REV.}1105 (1990).

\textsuperscript{81} "A later law takes away the effect of a prior one."

\textsuperscript{82} \textit{See} United States v Guy W. Capps, Inc., 204 F.2d 655 (4\textsuperscript{th} Cir. 1953). For other grounds affirming this approach, \textit{see} \textit{RESTATEMENT OF THE LAW THIRD, VOL I} (1987) § 111 at 44. \textit{See also} § 115 n.5.
canon in a dualistic way. In the cases of irreconcilable conflict, the domestic law still prevails, if such intention is clearly expressed by the Congress.

4. Whether customary international law is a part of the supreme law of the United States remains an issue of fundamental importance for the determination of the status of the Constitution in the legal system of this country. The courts were usually inclined to recognize that the customary international law bends to the will of Congress. The commentators split into two major camps.

According to the traditional monistic position, international law, superior to national law, did not need to be incorporated into the domestic legal system; all main components of the law of nations were self-executing parts of national law. The modern internationalist faction does not go that far. The representatives of this group rather try to develop arguments that opinio juris and the courts should confirm the presence of elements of international law in the domestic legal system. Similarly, the confirmation of the concordant practice by a number of states creating the rules of customary international law is evidenced in the writings of international lawyers and in judgments of national and international tribunals. Some claimed that customary international law is embedded in the Constitution the same way as some values are implicitly reflected in the body of constitutional law without their

83 See Steinhardt, supra note 80, at 1132 (arguing that at least in Weinberger v. Rossi the Supreme Court showed some tendency not to construe the Charming Betsy canon in dualist way).

84 For comments on the changing interpretation of the Charming Betsy canon see Bradley, The Charming Betsy Canon, supra note 1.

85 In Weinberger v. Rossi, the Supreme Court stated, "one isolated remark by a single Senator, ambiguous in meaning when examined in context, is insufficient to establish an intent to abrogate provisions in thirteen international agreements." 456 U.S. at 33 (1982). For more extensive comments, see Steinhardt, supra note 80, at 1166.

86 For an examination of the widely criticized Supreme Court decisions, see United States v. Alvarez-Machain 504 U.S. 655 (1992); Ker v. Illinois 119 U.S. 436, (1886). See also J.M. Rogers, Treaties and Statutes Against the Background of Custom, in INTERNATIONAL LAW AND UNITED STATES LAW, 172-181 (1999); see also Schroeder v. Bissell, 5 F. 2d 838 (D. Conn.1925); United States ex rel Pfefer v. Bell, 248 F. 992, 995 (E.D.N.Y. 1918). For comments, see Steinhardt, supra note 80, at 1104.

87 For more extensive discussion, see Louis Henkin, INTERNATIONAL LAW: POLITICS AND VALUES, 64-67 (1995). See also Bradley, Breard, supra note 3, at 530.

88 Bradley uses the term "internationalist conception" to distinguish the position of modern doctrine from "pure" and old-fashion monism. See id.

89 See M. Akehurst, A MODERN INTRODUCTION TO INTERNATIONAL LAW, at 32 (3d ed. 1977).
explicit acknowledgment in the text of the constitutional act. Flexibility of the constitution allows for accommodation of customary international law without the process of formal incorporation.

Some claim that customary international law has the same status as federal common-law. As the Reporters stated in the Restatement (Third):

"Matters arising under customary international law also arise under "the laws of the United States," since international law is "part of our law," and is federal law. That federal common law is within "the laws of the United States" for purposes of both the "judicial Power of the United States" (Article III) and the jurisdiction of the federal district courts is now established. In Illinois v. Milwaukee the Supreme Court concluded, "Section 1331 jurisdiction will support claims founded upon federal common law as well as those of statutory origin."

Commentators who opposed the "internationalist conception" argued that just as the states may reject any new rule of customary international law, they may block the incorporation of customary international law into the national legal system. Summarizing some other arguments, critical to internationalists’ position, it has been contended that there is a clear difference between the federal common law that is produced by domestic courts and customary international law, which is a product of the foreign practice and local opinio juris. The customary international law may be ap-

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90 See Steinhardt, supra note 80, at 32. For “value” approach to constitutional interpretation, see WILLIAM A. KAPLIN, CONCEPTS AND METHODS OF CONSTITUTIONAL LAW 23 (1992).

91 The Paquete Habana, 175 U.S. 677 (1900).


96 As Louis Henkin wrote, “Unlike law made by treaty, this authentic customary law ordinarily has not been made intentionally, purposefully, by a ‘conspiracy’ of states. Nor is it the product of deliberate exercises of ‘will’ by states acting separately, aiming to develop new law. Customary law was not made, it resulted, from an accretion of practices, though often the practice of individual states was intended to conform to what others had done, and often it was thought to be required by law (opinio juris). Unlike law made by international agreement, it is rarely clear when a norm matured. The scope of the norm is also likely to be uncertain, as are the reasons for it and the values it is designed to protect.” HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES, supra note 87, at 34.
plied directly only in the absence of domestic law.\textsuperscript{97} The courts cannot enforce alleged legislative intent pronounced in legal writings but not in clearly evidenced adopted legislative acts.\textsuperscript{98} John M. Rogers wrote, "[t]o say that the courts have an additional body of 'higher law' to apply, to be found in the whole amorphous body of customary international law, is to inject an enormously distorting overdose of additional power into the Judicial Branch."\textsuperscript{99} Some other commentators observed that, even if the status of customary international law as part of the United States domestic law was confirmed, it still would not mean that this law enjoys equal status with the treaties and federal legislation.\textsuperscript{100}

5. The logical conclusions, which stem from the "internationalist conception" described above, have to be clearly pronounced. The concept itself leaves us with several alternatives. If we assume that customary international law is an element of the supreme law of the United States, but does not enjoy equal status to treaties and federal statutes, we have to conclude that the Constitution clearly prevails with respect to conflicts with any other elements of the legal system of the country. The Constitution is not only a "primus inter pares" element of the system; it is the highest and controlling component of the supreme law.

The above conclusion, however, stems from the assumption that customary international law is a component of the supreme law but does not enjoy equal status to treaties and federal legislation. This assumption itself is questionable because it leads us to the observation that the highest law of the country has not only a hierarchical but also a multi-layer structure, with the Constitution at the top, the treaties and federal statutes in the middle, and customary international law at the bottom of the pyramid. In light of constitutional construction, this concept seems to be, at the least, questionable.

\textsuperscript{97} The Supreme Court, in Paquete Habna, 175 U.S. 677, 700 (1900), confirmed that international law "is part of our law," but added that it is applied by the courts "where there is no treaty, and no controlling executive or legislative act or judicial decision." \textit{Id.}


\textsuperscript{99} \textit{International Law and United States Law, supra note 86, at 215.}

\textsuperscript{100} John F. Murphy, "Customary International Law in U.S. Jurisprudence—A Comment on Draft Restatement II" \textit{International Practitioners' Notebook}, October 1982, at 17.
It leaves us with the second possible interpretation that customary international law is not a component of the supreme Law of the Land, but still has the force of federal law and, as such, is superior to state law. This approach has further consequences with regard to other components of the federal law, such as federal executive orders or administrative rules and regulations. The assumption that customary law is federal law but not the Supreme Law of the Land brings us to the conclusion that it does not only bend to the will of Congress but, moreover, in a conflict, the rules and regulations of the federal administrative bodies, made pursuant to federal statute, prevail over the customary law. The way would be paved for the logical argument that the federal law of the United States does not prohibit the federal government to violate customary international law. The position of the Constitution as the highest law of the land would be unaffected but a conclusion that the government is not bound by customary international law would be highly unsatisfactory.

Let us consider the third possibility. If for the sake of this analysis, we assume that customary international law is a sine qua non element of the supreme law of the land and has authority equal to international agreements, the conclusions regarding the position of the Constitution in the legal system of the United States might be different. Compared to the Constitution, both treaties and federal statutes are flexible elements of the supreme law of the United States. They can be altered relatively easily if they conflict with more rigid constitutional principles. The rules of customary international law, however, are not subject to any formal amendment process. In fact, once established, they are more rigid than any municipal legal norms. As Prof. Paust convincingly argued, the rule "last-in-time" cannot apply to the collisions between customary law and federal statutes or treaties. "Since customary international law is constantly 're-enacted' through a process of generally shared legal expectation (or it will lose its validity as customary

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101 Professor Paust puts a special emphasis on the word "must" in the Court's statement, that customary international law "must be ascertained and administered." See Reply to John Murphy's Comment on Incorporating Customary International Law in U.S. Jurisprudence [hereinafter Reply], in INTERNATIONAL PRACTITIONERS NOTEBOOK, supra note 100.

102 See John F. Murphy, Customary International Law in U.S. Jurisprudence—A Comment on Draft Restatement II, in INTERNATIONAL PRACTITIONERS NOTEBOOK, supra note 100, at 17.
law), it seems that customary law must necessarily be 'last-in-time' and would prevail even under the Restatement test."\textsuperscript{103}

Along this line of reasoning, it may not be expected that customary international law will be changed if its rules collide with any constitution of the world. Contrarily, it is highly possible that the constitution will be amended to accommodate some new rules of customary international law inconsistent with the Constitution itself. Otherwise, any amendment or interpretation of the Constitution, bringing it in conflict with customary international law, would make the constitutional structure internally incoherent, and as such, would have to be recognized as unconstitutional itself.

It may be assumed, and is probably true as far as the United States is concerned, that in recent judicial practice the Constitution would prevail over inconsistent customary law. The result would, however, undermine the consistency of the constitutional system of the country. Logically, if customary international law is a component of the Supreme Law of the Land, it cannot be accepted that one element of the supreme legal structure will collide with another or that some components of customary international law will be recognized and others will be disqualified. If the consistency of the Constitution is to be maintained, customary international law has to be either left outside of the supreme law of the land or with time, being the most rigid element of the system, it will become its controlling component. The Constitution will be the basic and fundamental element but clearly not the superior one.

**IV. LAW OF THE EUROPEAN COMMUNITY AND THE CONSTITUTIONS OF THE MEMBER STATES**

Since the very early stages of the European Communities’ integration it became quite clear that it would be difficult to compare Community law with any other legal system in the world. The Community contained some features of an international organization and some features of a federal entity,\textsuperscript{104} and its law had components typical of international and national legal systems. On the

\textsuperscript{103} Paust, \textit{Reply, supra note 101}, at 19.

\textsuperscript{104} Although the status of the Community as a federation has never been formally confirmed, the presence of the federal elements in the Community's structure, especially with regard to judicial and legal system has been repeatedly emphasized. \textit{See} T.C. Hartley, \textit{Federalism, Courts, and Legal Systems: The Emerging Constitution of the European Community}, 34 A. J. COMP. L. 229 (1986); \textit{Integration Through Law}, (M. Cappelletti, M. Seccombe, J. Weiler, eds.) (1986) (3 vols).
one hand, the fundamental principles of the Community's structure can be found in international treaties; on the other hand, the legislation produced by the Community institutions is an important component of the Community's law. The fundamental goal of the Community (in accordance with Articles 2 and 3 of the Treaty of Rome), similarly to many international organizations, is to coordinate economic policy of the member states. Another and equally important goal is the creation of common policies toward outside world. This goal was to be accomplished by the replacement of custom territories of several states by one custom territory of the Community, a process resembling the creation of a national entity. The subjects of the Community law are the states, the Community's institutions, legal persons and individuals. It additionally gives the Community a hybrid nature characterized by international and national features.

Since the Community's conception, the relations between this 'supranational' entity and its national components have been complicated. The member states attempted to save their sovereign prerogatives and the Community institutions claimed that their acts were binding because the organs endowed with the appropriate supreme power adopted them. Both the member states and the Community institutions differ in their evaluation of the degree to which mutual interdependencies reflect on the concept of supremacy of member states constitutions. For this reason their views should be examined separately.

1. The Treaty of Rome provided only for an obligation of general loyalty to the Community but did not contain any express clauses about the supremacy of the Community law; the European Court of Justice has judicially developed this doctrine step by step.

106 In this way, the Community legal system differed from the international system in which international commitments are determined by the states themselves. See ECJ (European Court of Justice), Case 26/62 Van Gend & Loos v. Nederlandse Administratie der Belastingen (1963), E.C. R. 1 at 10-12. See also T.C. Hartley, The Foundations of the European Community Law (4th ed), 10 1998. See also Constitutional Law of The European Union, 505 (K. Lenaerts, P. Van Nuffel, R. Bray, eds.) (1999).
107 Article 5 of the Treaty of Rome stated that “Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's Tasks. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Treaty.” Treaty of Rome, art.v.
As early as 1963 the European Court of Justice (ECJ) declared that the Treaty of Rome was more than an agreement creating obligations between the contracting parties. In *Van Gend En Loos v. Nederlandse Administratie Der Belastingen*, the Court stated:

We must conclude from this that the Community constitutes a new legal order in international law, for whose benefit the States have limited their sovereign rights, albeit within the limited fields, and the subjects of which comprise not only the member-States but also their nationals. Community law, therefore, apart from legislation by the member-States, not only imposes obligations on individuals but also confers on them legal rights.\(^8\)

In this way the Court established the foundations for two fundamental doctrines of direct applicability and direct effectiveness of Community law. The first one was *expressis verbis* declared by Article 189 of the Treaty of Rome, which stated that regulations issued by the Community’s institutions “shall be binding in its entirety and directly applicable in all Member States.” In *Amministrazione Delle Finanze dello Stato v. Simmenthal Spa*\(^9\) the Court further explained that direct applicability “means that rules of Community law must be fully and uniformly applied in all the member-States from the date of their entry into force and for so long as they continue in force.” In *Van Gend*, the Court reminded the second doctrine that certain treaty provisions impose not only the obligations on the member-states but “produce direct effects in the legal relations between the member-states and their citizens.”\(^10\)

Building upon the *Van Gend* and *Simmenthal* cases, the European Court of Justice laid down the principle of the supremacy of Community law and explained fundamental rules of conflict between the Community law and the national laws. First, the Court stated that direct applicability of the Community law meant that the conflicting provisions of current national law would have to be inapplicable;\(^11\) second, it would “preclude the valid adoption of new legislative measures to the extent to which they would be in-

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\(^8\) 26/62 (1963), ECR 1 (1963), C.M.L.R. 105.


compatible with Community provisions." Logically these pronouncements imposed several positive obligations on the member states and national courts; the first had to adjust their laws that conflicted with the supreme Community law, the second had to refrain from applying voidable national provisions and had to interpret the national laws in accordance with Community law.

The question remained whether the principle of Community law primacy extends to the Constitutions of member states. The European Court reviewed this issue in *Costa v. Ente Nazionale per L’Energia Elettrica (ENEL)*. In this case, the Italian Constitutional Court ruled that the Treaty of Rome was ratified in Italy by a simple statute and in accordance with the national rules of conflicts it has to give way to any subsequent Italian legislation. The European Court of Justice was asked for a preliminary ruling and stated that “[t]he transfer, by member-States, from their national order, in favor of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community, cannot prevail.” Advocate General Lagrange submitted an opinion to ECJ and suggested that in joining the Community the member-States must reconcile their constitutions with the Community law. Furthermore, they have “only two courses of action . . . either to amend its Constitution or to renounce the Treaty itself.”

In *Internationale Handelsgesellschaft*, the ECJ clearly rejected the position of the German Administrative Court confirming the primacy of the German Basic Law over the Community law. The ECJ stated:

Recourse to legal rules or concepts of national law to judge the validity of instruments promulgated by Community institutions would have the effect of harming the unity and efficacy of Com-

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112 *Id.*
113 *Id.* For more comments, see *Constitutional Law of the European Union* 507 (K. Lenaerts, P Van Nuffel, R. Bray, eds., 1999).
115 Costa v. ENEL, Case 6/64 (1964), E.C.R. 585.
Community law. The validity of such instruments can only be judged in the light of Community law. In fact, the law born from the Treaty, the issue of an autonomous source, could not, by its very nature, have the courts opposing to it rules of national law of any nature whatever without losing its Community character and without the legal basis of the Community itself being put in question. Therefore the validity of a Community instrument or its effect within a member-State cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that State's constitution or the principles of a national constitutional structure.  

2. The member-States had two different approaches to the process of assimilation of Community law into their national legal systems. The monist approach, recognizing the supremacy of international or supranational law over the legal components of the national system, allowed the states to join the Community without having to revise their constitutions. The countries following the dualist approach had to transfer or delegate competencies to the Community.

The monist approach was most clearly represented by the constitutionalism of the Benelux countries, and equipped these states with a legal framework well suited for the acceptance of the principle of the supremacy of Community law. Concurrently with this doctrine, Article 94 of the 1983 Constitution of the Netherlands declares that "[s]tatutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions." The Constitution resolves that in conflict between the treaty and the Constitution, the treaty may prevail if this result was approved by the vote of two-thirds of the Parliament, the number of votes needed to amend the Constitution.

The position of Community law within the Belgian legal structure is less clear. Article 34 of the 1831 Constitution (amended in 1970) allows for the limited transfer of power by treaty or law to

120 Benelux was an agreement between Belgium, the Netherlands and Luxembourg, signed originally in 1948 and establishing the first custom unions in the Western Europe.
121 See NETH. CONST. art. 91(3) (1983).
122 See BERMANN, supra note 116, at 214.
international institutions. However, the Belgian courts did not originally confirm the priority of Community law over the domestic law. In *Minister for Economic Affairs v. Fromagerie Franco-Suisse 'LeSki'*\textsuperscript{123} the Belgian government used the argument that was already exploited in *Costa v ENEL*. Belgium argued that the subsequent statute of 1968 could supersede ratification of the Treaty of Rome by regular statute. The Belgian Court of Cassation rejected this argument and confirmed that a treaty prevails in a conflict with a statute. As T.C. Hartley commented: "[i]n other words, the Court declared in this case, that Belgium was a monist country. Consequently, the conflict was not between two statutes, but between two instruments of a fundamentally different nature: a treaty and a statute."\textsuperscript{124} The Court then continued:

The rule that a statute repeals a previous statute in so far as there is a conflict between the two, does not apply in the case of a conflict between a treaty and a statute. In the event of a conflict between a norm of domestic law and a norm of international law that produces direct effect in the internal legal system, the rule established by the treaty shall prevail. The primacy of the treaty results from the very nature of international treaty law.

This is a fortiori the case when a conflict exists, as in the present case, between a norm of internal law and a norm of Community law.

The reason is that the treaties which have created Community law have instituted a new legal system in whose favor the Member States have restricted the exercise of their sovereign powers in the areas determined by those treaties.\textsuperscript{125}

Similarly, in Luxembourg the supremacy of international law over national law was confirmed by the rulings of the Court of Cassation and the Council of State.\textsuperscript{126}

The member-States, following a dualistic approach, challenged some conclusions inherent in the logic of the principle of supremacy of Community law. First, they were not inclined to accept that the position of Community law in the national legal struc-


\textsuperscript{125} *Cour de Cassation*, C.M.L.R. at 373.

tures stems from the Community law itself. As it was expressed by the German Federal Constitutional Court examining the compatibility of the Maastricht Treaty with the German Constitution, the competence of the Union and the European Communities must lay somewhere other than in the organs of the Community; “the competence to determine the competence” still belongs to the member-states. Second, the transfer of competencies does not mean full subordination of member-states’ law to Community law. Some competencies and powers are shared by the European Union and member-States and some are clearly reserved for the states by the principle of subsidiarity. The German Court stated:

Accordingly, the Union Treaty takes account of the independence and sovereignty of the member-States, since it obliges the Union to respect the national identities of its member-States (Article F(91) of the Union Treaty), it equips the Union and the European Communities only with specific competencies and powers in accordance with the principle of limited individual competencies (Article E of the Union Treaty, Article 31 3b(1) of the E.C. Treaty), and then establishes the principle of subsidiarity for the Union (Article B(2) of the Union Treaty) and for the European Community (Article 3b(2) of the E.C. Treaty) as a binding principle of law.

Generally speaking, it took several years for the original member-states, following dualistic traditions, to recognize the principle of supremacy of Community law. The strongest objections were from the countries, such as Germany and Italy who after World War II incorporated strong protections of human rights into their constitutional laws. They claimed that the Treaty of Rome did not originally have any special provisions protecting human rights and the national courts may recognize direct effect of Community law only as far as this law does not fundamentally alter the Constitution.

In *Costa v. ENEL*, the Italian Constitutional Court originally stated that Community law will be applied by the state judges only by virtue of the adaptation of national law to Community law.\(^{131}\) In *Internationale Handelsgesellschaft mbH v. Einfuhr-Und Vorratsstelle fur Getreide und Futtermittel*\(^{132}\) (frequently referred to as Solange I), the German Federal Constitutional Court went even further with the criticism of the Community’s human rights policy. It said that the Community still “lacks a democratically legitimated parliament” and “still lacks in particular a codified catalogue of fundamental rights.”\(^{133}\) Ruling on the relationship between the German Constitution and Community law, the German Federal Constitutional Court again confirmed the supreme character of the German Constitution over any other piece of law binding in Germany. It stated:

Article 24 of the Constitution deals with the transfer of sovereign rights to inter-State institutions. This cannot be taken literally. Like every constitutional provision of a similar fundamental nature, Article 24 of the Constitution must be understood and construed in the overall context of the whole Constitution. That is, it does not open the way to amending the basic structure of the Constitution, which forms the basis of its identity, without a formal amendment to the Constitution. Article 24 of the Constitution nullifies any amendment of the Treaty which would destroy the identity of the valid constitution of the Federal Republic of Germany by encroaching on the structures which go to make it up.\(^{134}\)

The status of international law in the French legal system is complicated. The 1958 Constitution (as amended) puts emphasis on the coherence of domestic law. On the one hand, Article 55 of the Constitution recognizes the superiority of international agreements over domestic laws (contingent on reciprocal approach of the other parties to the agreement); on the other hand, Article 54 states that “if the Constitutional Council shall declare that an international commitment contains a clause contrary to the Constitution, the authorization to ratify or approve this commitment may be given only after amendment of the Constitution.” In other

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\(^{131}\) PAOLO MEGNOZZI, *EUROPEAN COMMUNITY LAW FROM THE TREATY OF ROME TO THE TREATY OF AMSTERDAM* 95 (Patrick Del Luca trans. 2d ed. 1999).


\(^{133}\) DINNAGE, *supra* note 117, at 161-64 (quoting Solange I).

\(^{134}\) *Id.*
words, the Constitution does not allow international agreements to violate the Constitution, but creates a framework for amending the Constitution if the international commitments of the state would require this result. The problem of supremacy of Community law was left unresolved.

In the argument before French Court of Cassation in *Administration des Douanes v. Societe Cafes Jacques Vabre & J. Weigel et CIE Sarl*, the Procurator General encouraged the Court not to base the ruling confirming the superiority of the international agreement over the domestic statute on Article 55, but to recognize that Community law as superior because France transferred to the Community some portion of sovereign rights. The Court took the middle road. It referred to Article 55 of the Constitution but also confirmed that Community law is a separate legal order with "greater authority than that of statutes."\(^{135}\)

The French Council of State (Conseil d’etat) position was more controversial. In *Syndicat General des Fabricants de Semoules de France*,\(^{136}\) it stated that an administrative court cannot afford treaties precedence over subsequent legislation which conflicts with them; this position also applies to Community law. In other decisions, the Council tried to interpret this statement as recognizing that administrative courts, such as the Council of State, cannot review the validity of legislation.\(^{137}\) In *Raul Georges Nicolo and Another*, the Council confirmed that Article 55 of the Constitution should be interpreted as "a solemn reaffirmation of France's regard for the theoretical supremacy of international law"\(^{138}\) and that the courts in other member-States of the Community recognized the principle of the supremacy of Community law. It stated:

> So far as foreign courts are concerned, and here, I shall confine myself to the framework of European law, all I would say is that your Court is now the last which formally refuses to apply


\(^{137}\) See *Raul Georges Nicolo and Another*, (1990) 1 C.M.L.R. 173. The Administrative courts in France can review only the acts of administration and the constitutionality of the statutes before their enactment can be determined only by the Constitutional Council. See Hartley, *supra* note 125, at 242-50.

\(^{138}\) *Raul Georges Nicolo and Another* 1 C.M.L.R. 173 (1900). The court added that "by passing a law incompatible with a prior treaty the legislature would infringe the principle of the supremacy of international law as expressed by Article 55." *Id.*
Community measures which are contradicted by later laws. By way of example, it is sufficient to mention that the Constitutional Court of the Federal Republic of Germany for its part finally accepted the opposite principle no less than eighteen years ago, by a decision of 9 June 1971. And even more significant is the case of the Italian Constitutional Court which, although hindered by a dualistic legal tradition and preliminary reference machinery applying to international law, finally went so far as to authorize the ordinary courts of their own motion not to apply laws contrary to Community regulations, by an important judgment of 8 June 1984.\textsuperscript{139}

In fact, the French Council of State was right to observe that both German and Italian courts, originally reluctant to accept the superiority of Community law, significantly softened their positions. In the case, \textit{Re Application of Wunsche Handelsgesellschaft ("Solange II")}, the German Federal Constitutional Court admitted that the European Community has safeguards for human rights protection that comply with German constitutional standards.\textsuperscript{140} The Court still referred to the German Constitution as the highest domestic law but stated that it “will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany.”\textsuperscript{141} Similarly, in \textit{Apa Granital v. Amministrazione delle Fianze dello Stato}, the Italian Constitutional Court stated that “directly applicable EEC legal provisions enter and stay in force in Italy . . . without their effect being impaired by any municipal statute.”\textsuperscript{142}

In 1958, the French Constitution was amended after it was deemed incompatible with the Treaty of the European Union. Sections 1-4, added to Article 88, confirmed France’s participation in both the European Communities and the European Union and specifically stated that “France agrees to the transfer of powers necessary for the establishment of European economic and monetary union and for the determination of rules relating to the cross-
ing of the external borders of the Member States of the European Community.”

The problem of the superiority of Community law was even more controversial in the United Kingdom where it seemed to distinctly clash with the principle of legislative supremacy of the British Parliament. The European Community Act of 1972 instructed the British courts to construe “any enactment passed or to be passed” in accordance with Community law and to give legal effect to any “enforceable Community right.” The British constitutional system guarantees that the Parliament cannot bind its successor; that means that it cannot adopt laws that cannot be changed. This principle forced the incorporation of the clause that all commitments of the United Kingdom with regard to its participation in the Communities’ order are subject to the exceptions that may be provided by “any Act passed after this Act.”

This statement inevitably paved the way to the dispute about the result of a possible conflict between a British statute and Community legislation.

The Civil Division of the British Court of Appeals tried to address this issue in Macarthys Ltd. v. Smith. The Court concluded that in accordance with Articles 2(1) and (4) of the European Communities Act, the British legislation, deficient or inconsistent with Community law, should “give priority to Community law.” Lord Denning noted, however, that, although Parliament does not show any such intention, if it would deliberately pass an act violating Community law, the courts would have to follow the Parliamentary statutes.

Denning’s opinion was widely discussed but was not confirmed by the House of Lords. In Regina v. Secretary of State for Transport ex parte Factortame LTD, Lord Bridge, speaking for the Chamber, said:

If the supremacy . . . of Community law over the national law of Member States was not always inherent in the EEC

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143 See FR. CONST., Title XIV (1958).
144 See EMLYN COPEL STEWART WADE & ANTHONY WILFRED BRADLEY, CONSTITUTIONAL LAW 38-61 (1970) (Providing more extensive examination of the meaning of the principle of parliamentary procedure).
Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community... Under the terms of the [European Communities] Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.\textsuperscript{148}

During the 1990's, not only did this opinion prevail in British jurisprudence; the principle of the primacy of Community law was well established basically in nearly all Member-States.

V. INTERNATIONAL LAW IN THE CONSTITUTIONS OF THE NEW EAST-CENTRAL EUROPEAN DEMOCRACIES

The socialist approach to mutual relations of international and national law has always been vague. In theory, Soviet jurisprudence has criticized both monist and dualist positions as typical of "bourgeois" ideology.\textsuperscript{149} In practice, the socialist lawyers, following Moscow's official doctrine, claimed that international law imposes obligations on and grants rights to states exclusively and that individuals cannot invoke international agreements without their provisions being incorporated into the domestic legal system. A few legal authorities, such as S. Rozmaryn in Poland, took different positions and argued that international treaties should be applied directly (\textit{ex prioprio vigore}) within the domestic legal system.\textsuperscript{150}

The fall of communism in Europe that started in the nineties turned the region of former Soviet dominance into a major laboratory of constitutional works. Most of the East-Central European democracies, in drafting new constitutions, decided to clarify their positions on the relationship between international and municipal law. This process of constitutionalization of international law was not successful in many countries.

Several countries in the region decided to constitutionalize the principle of supremacy of the constitution within the structure of domestic law. To give a few examples, the 1997 Polish Constitution states (Article 8) that "[t]he Constitution is the supreme law of the

\textsuperscript{148} BERMANN, \textit{supra} note 116, at 241.


Republic of Poland;" the 1991 Constitution of Bulgaria declares in Article 5 that it "is the supreme law, and no other law may contradict it;" "[a]ny law or other statute which contradicts the Constitution shall be invalid," reads Article 7 of the 1992 Constitution of Lithuania; "[i]n the Republic of Croatia laws shall conform with the Constitution" proclaims Article 5 of the 1998 Constitution. Although some other states do not express this rule with comparable clarity, the intention of the drafters of the new East-Central European basic laws to recognize the supremacy of the Constitution within the domestic legal system is commonly admitted. The supremacy of the constitutional laws in relation to international law is much less clear. The careful examination of the new constitutions warrants several observations.

1. Most of the constitutions of the countries of the former Soviet Union declare their general respect for international law. Some restrict themselves to general and enigmatic statements, such as, "The Republic of Poland respects international law binding upon it." Others provide more elaborate provisions emphasizing the country's recognition of universal rules and regulations of international law and an intention to harmonize the internal laws with international obligations. Still others limit their recognition to the commitments under international treaties without giving mention to the rules of customary international law.

2. Following dualist tradition, several East-Central European countries are trying to emphasize that their commitments are limited to the elements of international law, which are recognized as components of municipal laws. In some states (such as Romania) this includes just international treaties; in others (such as Russia) it also includes "commonly recognized principles and norms of inter-

\[151\] Alb. Const. art. 4/2; see also Kaz. Const. art. 4/2 (showing similar provisions).


\[154\] Pol. Const. art. 9 (amended 1997).

\[155\] See Hng. Const. art. 7/1 (amended 1949) ("The legal system of the Republic of Hungary accepts the universally recognized rules and regulations of international law and harmonizes the internal laws and statutes of the country with the obligations assumed under international law.").

national law.” It is not clear at all whether these “commonly recognized principles” would have to be formally incorporated into the domestic laws or simply assimilated by the lack of their renunciation by the state’s organs. It also remains unclear as to whether this distinction makes a difference for the individuals claiming rights on the basis of these “principles” and for the courts that would have to apply them.

The statement of the 1997 Polish Constitution that the country “respects international law binding upon it” (Article 9) has been interpreted as meaning “automatic incorporation of the rules of customary international law into the domestic law.” The Russian Constitution, more elaborate than the Polish act, reads as follows: “Laws and other legal acts adopted by the Russian Federation may not contravene the Constitution of the Russian Federation. The commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system.” Whether the “adoption” means a formal incorporation or assimilation of the “commonly recognized principles” is not clear. As the second interpretation cannot be ruled out, the phrase has to be subject to interpretation of the Constitutional Tribunal.

3. The status of the principles of customary international law in the hierarchy of the domestic laws is vague. The dualistic approach subjects all elements of municipal law, including incorpo-

157 Id. (“The treaties ratified by Parliaments, according to the law, are part of domestic law.”); see also LITH. CONST. art. 138 (amended 1992) (“International agreements which are ratified by the Seimas of the Republic of Lithuania shall be the constituent part of the legal system of the Republic of Lithuania.”); RUS. CONST. art. 15 (amended 1993) (“The commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be a component of its legal system.”).


159 RUS. CONST. art. 15. It has to be observed that the 1992 Constitution of Lithuania provides only that “[i]n conducting foreign policy, the Republic of Lithuania shall pursue the universally recognized principles and norms of international law.” It is not clear whether the drafters intended not to bind the state with these principles within domestic policy.
rated elements of international law, to constitutional control. This is clearly confirmed by some constitutions.

The Constitution of Estonia reads as follows: “State power shall be exercised solely on the basis of this Constitution and such laws which are in accordance with the Constitution. Universally recognized principles and norms of international law shall be an inseparable part of the Estonian legal system.”\[160\] Even this relatively elaborate statement does not answer the question of what would happen if “universally recognized principles” collide with the Constitution? Does this mean that only selected universal principles that correspond with the Constitution, are part of the domestic legal system? The assumption that “all universally recognized principles” are automatically assimilated into domestic law might collide with the principle of primacy of the Constitution. On the one hand, as it was already observed, it is difficult to project that the collision with any national norms would trigger a change of the “commonly recognized universal principles;” on the other hand, the recognition of the necessary adjustments to the Constitution every time conflict occurs logically undermines the principle of the Constitution’s supremacy.

4. The intention of the drafters of some of East-Central European constitutions to recognize the special dedication of their states to the standards of international human rights protection is commendable but confusing.

The Constitution of Slovakia declares that “[t]he international agreements on human rights and basic freedoms which were ratified by the Slovak Republic and which have been declared legal, take precedence over its laws whenever they guarantee a wider scope of constitutional rights and freedoms.”\[161\] The Constitution of Romania goes even further in stating that “(1) Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration on Human Rights and with other treaties and pacts to which

\[160\] EST. CONST. art. 3 (amended 1992). Similarly, Article 15 of the Constitution of the Russian Federation states, “The commonly recognized principles and norms of international law and international treaties of the Russian Federation shall be a component part of its legal system.”

\[161\] SLOVK. CONST. art 11 (amended 1992). Article 10 of the Czech Republic Constitution reads as follows, “Ratified and promulgated international treaties on human rights and fundamental freedoms to which the Czech Republic is obligated are directly binding and take precedence over the law.”
Romania is a party; (2) if there is disagreement between the pacts and treaties on fundamental human rights to which Romania is a party and domestic laws, then international regulations will have priority.\textsuperscript{162} The intention of the drafters to assimilate into their countries' legal framework the rules of customary international law on human rights is clear. It is still unclear whether these rules would "have priority" over all "domestic laws" including the Constitution.

5. Most of the countries that have in their constitutions provisions concerning the rank of international law in the hierarchy of domestic law limit these statements to the relationships between statutes and international agreements.

The relevant provisions of the 1997 Constitution of Poland are quite elaborate. The Constitution grants the right to ratify and renounce international agreements to the President of the Republic.\textsuperscript{163} It distinguishes between international agreements that require the prior consent of the laws for ratification and those which are ratified without the consent.\textsuperscript{164} Self-executing agreements are directly applicable after their promulgation; other agreements become a part of domestic law after the adoption of implementing laws.\textsuperscript{165}

The Polish Constitution confirms that ratified international agreements are a source of domestic law, but their rank in the hierarchy of the laws varies. Article 91 (2) states that, in case of conflict, an international agreement ratified upon prior statutory consent takes precedence over statutes.\textsuperscript{166} The placement, after the statutes, of the other agreements in the list of the sources of law (Article 87), most likely indicates the intention of the drafters to give them a subordinate status in relation to the statutory law although higher than the acts of sub-statutory character.

The constitutional provisions of other new East-Central European democracies, with regard to the relations of international agreements to statutes, do not depart from the position of the Po-

\begin{footnotesize}
\textsuperscript{163} See Pol. Const. art. 133(1).
\textsuperscript{164} See Pol. Const. arts. 88, 89, 90 (2, 3). The consent requires the vote of two-thirds of both chambers in the presence of at least half of the the Deputies and Senators. The consent can also be granted by a nationwide referendum. \textit{Id.}
\textsuperscript{165} Pol. Const. art. 91 (1).
\textsuperscript{166} The international agreements do not prevail, however, over the Constitution. See R. Szafarz, \textit{supra} note 158, at 33.
\end{footnotesize}
lish constituent organs. The 1992 Constitution of the Czech Republic briefly states that the treaties on human rights and fundamental freedoms, political treaties and economic treaties of a general nature, and non-self-executing international agreements require the approval of Parliament.\textsuperscript{167} Precedence over the domestic law is reserved only for ratified and promulgated international treaties on human rights and freedoms;\textsuperscript{168} the conflicts between other international agreements and statutes seem to be governed by the principle \textit{lex posterior derogat legi priori}.

The 1992 Constitution of Slovakia singles out the agreements on human rights and freedoms that are given superior status to the laws if the scope of protection granted by the international agreement is wider than that of national law.\textsuperscript{169} The agreement on accession of Slovakia to international organizations requires the implementing action of Parliament in the form of a constitutional law, which requires a vote of three-fifth of all the deputies;\textsuperscript{170} the requirement clearly gives the accession agreements a higher rank than regular statutes. The international “economic and political agreements of a general nature” require prior consent of Parliament and non-self-executing agreements need to be incorporated into domestic law through appropriate legislative action.\textsuperscript{171} These agreements have a status equal to statutory laws. The conclusion of other agreements seem to be left to the discretion of the government and as such they have the statuses equal to generally binding orders, meaning that they are valid only if they are adopted in accordance with the Constitution and statutes.\textsuperscript{172}

Article 5 of the 1991 Bulgarian Constitution gives the duly ratified, promulgated and, if necessary, implemented international agreements precedence over conflicting domestic legislation. The 1996 Constitution of Belarus recognizes only the supremacy of the universally recognized principles of international law over the national laws, but as far as the treaties are concerned it states only that they cannot violate the Constitution.\textsuperscript{173} Article 15 of the 1993 Constitution of Russian Federation more clearly confirms the pre-
supremacy of international treaties over conflicting national laws. The Constitutions of other countries in the region confirm that the ratified and eventually implemented agreements are an integral element of domestic law but leave working out the appropriate rules of conflict to the Constitutional Tribunals.

6. Several countries incorporated statements allowing them accession to European Community. The relevant constitutional provisions vary from general recognition of the states’ participation in international or regional structures to the specific clauses allowing the states to transfer sovereign rights to international organization. Article 136 of the 1992 Lithuanian Constitution provides an example of the first type of arrangement. It reads, “The Republic of Lithuania shall participate in international organizations provided that they do not contradict the interests and independence of the State.”\(^{174}\) The 1997 Polish Constitution is more specific and speaks about “the transmission of competencies of organs of State in some matters” to international organizations.\(^{175}\) If the accession takes place and the transfer of sovereign powers occurs, the countries of East-Central Europe will be subject to the supreme control of Community law in the same way as the other member-States that formerly joined the Union. The intention of the drafters of the Polish Constitution to recognize the priority of Community law is confirmed by Article 91(3) that states “[i]f an agreement, ratified by the Republic of Poland, establishes an international organization, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.”\(^{176}\) The constitutional commentators of this clause were quite aware that “transmission” (przekazanie) of competencies, although not irreversible, would eventually mean the renunciation of the exclusive control of the state’s organs over the country’s internal affairs.\(^{177}\) As it was argued in the chapter of this article on the European Community, the

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\(^{174}\) Article 7 of the 1992 Slovak Constitution reads: “The Slovak Republic may, by a free decision, enter a union with other states. The right of secession from such a union shall not be restricted. The joining of a union with other states or the secession from such a union shall be decided by a constitutional law and consequent referendum.”

\(^{175}\) POL. CONST. Article 90(1).

\(^{176}\) W. Czaplinski, in CONSTITUTIONAL ESSAYS, supra note 158, at 298.

\(^{177}\) J. Barcz, Konstytucyjne problemy stosowania prawa Unii Europejskiej w Poslice w świetle dotychczasowych doświadczeń państw członkowskich (Constitutional Problems with Application of the law of the European Union in Poland in the light of the recent experiences of the member-States), in Szafarz, supra note 158, at 207.
process leading to the recognition of the superiority of the Community law over the domestic law legitimizes the argument that questions the supreme character of the national constitution. As J. Barcz correctly observed in Poland, "[The law of the European Union] as a law of the treaty will be regulated by the (national) constitutional provisions on international agreements; as the constitutional law of a supranational organization it should take precedence before all 'national law,' constitutional law included."178

VI. Conclusions

The observations collected above warrant several conclusions. It is unquestionable that the traditional clear-cut split between the monistic and dualistic visions of the international and domestic legal systems' mutual relations is largely obsolete. While the view of the world from international perspective is still quite monistic, the decline of dualism at the domestic forum is clear and the global legal fabric is more pluralistic than monistic or dualistic.

In accordance with the article's leading argument, well-established presence of the elements of international law in most of the domestic legal systems effected the status of the Constitutions as the countries' supreme acts. In spite of the inclination of the courts in most of the countries to confirm the Constitution's prevailing position in conflicts with any other (international or domestic) elements of the municipal system, the opinio juris clearly worked out several meaningful arguments pointing out that the concept of the constitutional supremacy is indeed in decline. As this article shows, in the United States, both the jurisprudence and opinio juris faced problems to determine the position of customary international law within the law of the country. The status of customary international law as the lowest (lower than the statutes and international agreements) component of the supreme law does not find any convincing support on the ground of the constitutional construction. Its recognition, however, as an element of the supreme law of the land equal to the others and subject to the rule "last-in-time" might and most likely would undermine the position of the Constitution as the highest and all-prevailing law of the land.

The emergence of the supranational entities, such as the European Community, opened the Pandora's box of arguments pointing to the changing role of the constitutions of the Member states. It is

178 Id. at 221.
quite clear that from the perspective of the Community, the principle of supremacy of its law rules out the recognition of the supremacy of any components of the domestic legal system Constitutions including. The coherent and well-integrated legal system cannot digest the concept of more than one supreme element. The claims that the Member states preserved the remnants of their sovereign rights and that the institutions of the Community have only as much competence as was granted to them by the sovereign components of the union are not convincing. In the situation in which the Constitutions of all Member states were either amended or left flexible enough to accommodate the principle of the supremacy of Community law, the argument that they are still the supreme laws of these countries cannot bring us too far.

The status of the Constitutions in the new East-Central European democracies is not much different. Some countries already drafted their Constitutions in a way which would let them easily incorporate the principle of supremacy of supranational law; some others recognized the prevailing position of international law, including the elements of customary international law, in their national legal systems. As I tried to claim above, both tendencies result in the creation of the web of interdependencies, which might undermine the supreme position of the Constitution.

Professor Gelber in his “Sovereignty Through Interdependence” claimed that “the record does not suggest that interdependence need represent a loss of power or even independence.”179 I agree with the first part of this statement. It is highly possible that the state, cooperating and even dependent from other political entities, may be more powerful than one left alone. Interdependence, however, very rarely means equal mutual dependence. In fact, in most of the cases it means the situation in which decision-making process is highly determined or conditioned by the factors laying beyond the state’s control. It results in the abatement of self-governing and controlling qualities of the state. The process does not signify the loss of independence or sovereignty; it signifies, however, the replacement of the full independence by interdependence and the concept of absolute by limited sovereignty. From constitutional point of view it means the changing role of the constitutional act, from the supreme law to the law basic or fundamental in its

179 Gelber, supra note 34, at 231.
character but not clearly the highest or prevailing in the conflict with all other elements of the countries’ increasingly globalized legal systems.