CHAPTER III

POLITICAL AND CONSTITUTIONAL ISSUES

The membership of the EC has a profound effect upon the states and individuals since it constitutes a distinct legal order at once different from and common to the countries which form the Community. It entails adaptation of the national, political, economic and social systems to the common rules enshrined in the founding Treaties.

The original Six member states had to adjust their constitutions to the obligations arising from the membership and, as the Community developed, they continued the process of adaptation, Newcomers have to do the same though they do not influence the events. Therefore, the greater the European integration, the more complex becomes the process of adaptation of new members. This will be particularly difficult as a result of the completion of the internal market by the end of 1992 and the progressive development of new policies and the ratification of the Treaty of Maastricht of 1992.

Countries aspiring to membership must take stock of the position and take measures preparatory to application. If they neglect the challenge they will risk either a rebuff that "they are not up to the membership standart" or a reluctant admission on unfavourable terms and subject to excessively long transition periods. Thus the political, economic and social conditions of Turkey have to be examined in the light of the Treaty provisions, Community legislation and case law bearing in mind the aspirations and failures of the Ankara Agreement.

A.GEO-POLITICAL ISSUES

Geo-political issues have already been examined with the conclusion that the Community and Turkey need each other, especially in the light of the Community Mediterranean policy. Other related issues raised either expressly or implicitly in the Commission's opinion on Turkey's application for membership impinge upon bilateral relations between Turkey and Greece as well as the Cyprus problem. The former have been put on the right course in the Davos process and, given the good will demonstrated by Turkey, ought to develop naturally into friendly, neighbourly re-

lations. Each party has too much to lose and too little to gain from an irreconcilable stance.

The Cyprus problem is more complex since it concerns a sovereign third country whose constitution has been guaranteed by both Greece and Turkey as well as the United Kingdom but which, through internal strife, has disintegrated and has de-facto, if not de jure split into two seperate republics. The problem is both internal to Cyprus and international for it impinges not only on the island but also the whole area and thus has become a United Nations problem. However the world organization has, so far, proved ineffective in finding a solution for the troubled island. Therein lies a challenge to the E.C. not only in the context of its Mediterranean policy but also in the context of the European Political Co-operation. Statesmanship in the handling of the problem and evenhandedness towards Greece and Turkey as well as towards the two communities of Cyprus may enable the E.C. to succeed where the U.N.O. has so far manifestly failed.

B.DOMESTİC POLITICAL ISSUES

In its Opinion the Commission was concerned with the following areas, where progress ought to be made:

a) Trade Union Rights,

b) Human Rights, and

c) Rights of Ethnic Minorities.

Concerning the Trade Unions:

Turkish Labour Law reflects the international norms enacted in this field mainly through the ILO Conventions. Indeed the first Labour Act of 1936 was drafted with the advice of the ILO experts the main scheme of the Act was followed in subsequent legislation culminating in the Labour Act 1475 which is in force today.

The Turkish Constitution of 1961 was inspired likewise especially in the provisions on "Social and Economic Rights and Obligations. The Constitution of 1982, though introducing certain retrictions necessitated by the state of the country at that time, preserved the same approach.

The Trade Unions Act 2821(Reference) and Act 2822 concerning Collective Bargaining, Strikes and Lock-outs, at present in force, continue to be based on Western European model. Trade Unions Act 2821 (article 5) provides that only Turkish citizens may set labour unions, be elected to leading posts and be the representatives of their unions in their undertakings. This conflicts with article 8 of EC Regulation 1618/68. This restriction would have to be removed.

Moreover article 52 of the Constitution and article 43 of the Act provide that Trade Unions must deposit their assets in banks with more than half State ownership. Such a rule is unlikely to be compatible with EC law on competition and free movement of capital (Pazarcii135).

Act 2822, on the other hand, does not raise any problems except for article 56.

There should be, therefore, no obstacle in aligning the Turkish system to EC rules. Such alignment would be nesessary, in particular, if the Social Charter proposed in 1989 and incorporated in the special Protocol attached to the Maastricht Treaty were implemented in the EC and Turkey continued to aspire to the membership of the EC.

C. ACCESSION AND RATIFICATION

Accession Treaties are negotiated in accordance with the procedure laid down in the Treaties founding the Coal and Steel Community, the Atomic Energy Community and the Economic Community. A country seeking accession must join all three Communities. With the exception of the Coal and Steel Community, (which was set up for 50 years) the commitment is for "unlimited period" (EEC Art. 240 EAEC Art 208.) There is no provision for withdrawal, suspension or expulsion of a member state from any of the three Communities. Thus the Constitution of the acceeding state must allow for such commitment or be amended accordingly.

Being in the nature of an international agreement the Accession Treaty has to be signed on behalf of the Community and all the existing member states as well as the applicant state. It has to be ratified by all the states involved "in accordance with their respective constitutional requirements".

The Treaties do not provide for a national referendum but if a national Constitution so provides the referendum must be carried out in order to enable the country to ratify.[1]

D- STATE SOVEREIGNTY

The Community, like a federal state, is based on the delegation of power from sovereign states and the division of functions between the Community institutions and the member states. However the Community is, at present, only a "functional federation" which means that the power necessary for the Community to exist and to function is limited to the areas defined by the founding Treaties.

Depending on the national Constitutions[2] the delegation reflects either a monist or dualist theory of law which controls the international treaties and foreign relations of a state. Since the founding Treaties fall into the category of self-executing treaty-laws, countries subscribing to the dualist theory had to adjust their constitutions accordingly. Thus Italy had to pass a ratification law which at the same time provided for "full and complete execution" of ratified Treaties. The United Kingdom, being a dualist country without a written Constitution, had to pass a special law not only to transform the implementation of the remaining rules of Community law present and future but also to avoid a direct confrontation with the British Parliament.

Sovereign powers, once granted, cannot be withdrawn[3] or made conditional upon a continuing support of the electorate or the institution representing the sovereignty of the state. Delegated powers exercised by the Community institutions within the framework of the Treaty result in what is commonly known as the "occupied field" which means that, where the Community has acted within its competence, the member states must refrain from taking concurrent action [4].

In order to enable the Community to function the delegation of power must be continuous and permanent. It means that the member states submit to the decision-making process of the Community in which they participate mainly through the Council of Ministers and implement the lawfully enacted Community acts. In other words they have to recognize the direct effect of directly applicable provisions of the Treaties and Community legislation, carry into effect indirectly applicable Community legislation and, in the event of conflict between Community law and national law, recognize and enforce the supremacy of Community law.

In the final analysis the member states are committed to a diminution of their sovereignty in accordance with their Treaty obligations and, since the ultimate object of the Community is a political union, they are committed to a development the extent

and form of which remain still unknown.

E-.MEMBER STATES DUTIES IN THE COMMUNITY

The E.C. system is based on a concept of duty which the member states owe to the Community they have created, to each other and to the citizens of the fellow member states as well as their own. These duties transcend the obligations normally undertaken by sovereign states in the field of international law and, as regards member states' own citizens, they may be more extensive than the obligations imposed by their constitution or the ordinary law of the land. As a corollary individuals have acquired Community rights which the member states have to respect over and above the normal constitutional guarantees.

An analysis of the founding Treaties reveals in detail the existence and extent of state duties. However the most important and the most far-reaching general duty is expressed in the form of solidarity[5] which binds the Community as well ,[6] whereby the member states undertake to take all appropriate measures to promote the objectives of the Community and to refrain from any measures which could jeopardize the achievements of these objectives. Next is the duty of non-discrimination on the ground of nationality[7] which, in practice, has been applied to all relations within the Community.

Community duties impinge upon all the organs of the state. Thus the Executive must play its part in the decision-making process of the Community, including the European Political Co-operation and refrain from taking actions (even to protect the national interest) incompatible with the Treaty obligations; the Bureaucracy has to carry out the Community measures falling within its competence and refrain from introducing administrative measures frustrating the Community policies; the national Parliament, notwithstanding its constitutional claim to reflect the sovereignty of the people, must implement Community law and where necessary, abrogate conflicting national legislation,[8] it must likewise, refrain from passing laws incompatible with the Treaty obligations; whilst the Judiciary must apply directly applicable Community rules, ensure the protection of individual rights guaranteed by the Community Treaties and either overrule or disregard national rules inconsistent with Community law[9] When in doubt as to the interpretation of Community law the national courts will refer the case to the ECJ for a ruling preliminary to their judgment (EEC Art.177). This is both a right and an obligation which the Treaty grants to national courts, but it is not a remedy automatically available to individuals. However the national procedures must facilitate the process and ought not to restrict or inhibit the courts in exercising their power to make references in appropriate cases[10].

The member states, in their corporate capacity, are responsible for the proper func-

tioning of their organs and, should any state organ fail to do so, they are subject to enforcement action to be taken by the EC Commission.

F- ENFORCEMENT OF MEMBER STATES' DUTIES

In accordance with the Treaties[11] the member states have unequivocally and unconditionally undertaken to submit the differences arising from the interpretation and application of the Treaties to no other method or authority but the adjudication of the ECJ. This excludes the methods of diplomatic nature normally used in the management of international conflicts.

Having submitted to compulsory adjudication by the ECJ the member states have also delegated to the Commission the power of investigation and procecution[12] . The procedure provides for a dialogue between the Commission and the state concerned in which the latter has to co-operate and provide the requested information. This procedure is "far exceeding the rules hitherto recognised in classical international law"[13] .

The function of the judical process is to declare the correct legal position on the assumption that the state concerned will comply with the judgment. Should it fail to do so the Commission may bring another action, this time for the declaration that the state concerned has failed to fulfil an obligation under the Treaty[14] . The Maastricht Treaty provides that in such cases the Commission may ask the Court to impose a "lump sum or penalty payment" and the Court will sanction such request where appropriate.

There is no physical enforcement of judgements against the member states but the willingness to submit to the judicial process of the Community is one of the state duties and indeed a condition of membership since the Community is an organization based on law. Every member state has to recognize this principle and, if necessary, adjust its Constitution accordingly.

G- THE TURKISH CONSTITUTION AND MEMBERSHIP TO THE EUROPEAN COMMUNITY[14a]

The Question of National Sovereignty

As it has been aptly pointed out above, membership of a state to the Community results in the transfer of such degree of sovereignty from the former to the latter as the foundingTreaties require. Therefore, the constitutional issues which may arise in case of Turkish membership of the Community have to be addressed in that context.

The Turkish Constitution has not any clause similar to Article 11 of the Italian Constitution or to Article 24 of the German Constitution under which the national sovereignty can be transferred to an international organisation. Rather, it has a nationalistic focus. It vests the sovereignty in the Nation, with strict restrictions on its use:

"Sovereignty is unreservedly vested in the Nation. The Turkish Nation shall exercise its sovereignty through the competent bodies in accordance with the principles laid down by the Constitution".

"Exercise of the sovereignty shall not be delegated to any single person, any single group or class. No person or body may exercise a state authority which is not derived from the Constitution" (Article 6).

Article 7 spells out the organs which can exercise the sovereignty on behalf of the Nation:

"The legislative power is to be exercised by the Turkish Grand National Assembly on behalf of the Turkish Nation. That power cannot be delegated".

Article 8 provides that the Executive powers and duties are to be exercised and carried out by the President of the Republic and the Council of Ministers in accordance with the Constitution and the relevant laws.

It is clear that according to the Constitution : (1) the sole source and possessor of the national sovereignty is the Turkish Nation, (2) the Nation shall exercise its sovereignty through the competent bodies which are specified in the Constitution, in accordance with the principles and rules laid down in the Constitution. Accordingly, the Legislative power is to be exercised by the Turkish Grand National Assembly (TGNA), but it cannot delegate that power. And the Executive Power is to be exercised by the President and the Council of Ministers.

In the light of this arrangement, it is obvious that the Community, being an entity which does not derive its competence from the Constitution, would be unable to act in the legislative and executive fields on behalf of the Turkish Nation, although it is able to do so by the terms of its own constitutional rules, in areas transferred to it. Thus, in the absence of a provision in the Constitution for the transfer of the national sovereignty to international organisations in general or to the Community, in particular, any use by the Community institutions of the legislative and executive power is a Constitutional impossiblity[15] .

As for the exercise of the Judicial power, Article 9 of the Constitution reads that "the judicial power is to be exercised by independent courts on behalf of the Turkish Nation." When this provision is read in conjunction with other relevant articles it follows that by the phrase "independent courts" is meant only the Turkish courts. Standing alone, this arrangement may raise questions about the standing of the European Court of Justice and the effects of its judgements vis-a-vis the Turkish courts and within the Turkish legal system. But the exercise of the judicial power being the exercise of part of the sovereignty itself, the question should be addressed in connection with the overall arrangement whereby the transfer of sovereignty will be affected. Yet, an amendment to the Civil Procedural Law (or to the Act Concerning Private International Law and Procedural Law) has to follow, in order to make it sure that the requirements of the provisions of the Rome Treaty regarding implementation of judgements of European Court are satisfied. Likewise, the effects of the preliminary rulings under Article 177 of the Rome Treaty should not create any Constitutional problem after the above mentioned main arrangement has been made, although such rulings may not easily accord with Article 138 of the Constitution which reads as follows:

"No organ, authority or person may give orders or instructions to the courts and to the judges with respect to the exercise of judicial power; no circulars may be issued; no advises and suggestions may be made in that regard."

In order to enable Turkish courts to refer to the European Court of Justice for a preliminary ruling without any hesitation about the constitutionality of such an action, this Article should be so amended to reflect it.

Having said this, we have yet to test our conclusion that no transfer of sovereignty to the Community is possible as long as Articles 6, 7, and 8 are not amended, against Article 90 which governs the conclusion and the internal effects of international treaties.

First four paragraphs of the said Article deal with the procedure of ratification and the power-sharing and co-operation between the Executive and the Legislative bodies in the field of treaty-making.

The last paragraph determines the question of applicability of treaties within the national legal system and their status in relation to Turkish laws. It has nothing to do with the transfer to or use by international organisations of sovereignty. It simply highlights conclusion, applicability, internal effects, and perhaps status of treaties which can be made in accordance with the relevant provisions of the Constitution including Articles 6,7 and 8. In other words, the treaty-making power of the state is conditioned by the

requirements of these articles. Article 90 cannot give a power which is denied by these articles[16]. This is further supported by the fact that treaties like the one which would make Turkey a member of the Community have to be ratified after the Parliament has given its approval therefor, in the form of an Act of Parliament which is to be passed by a simple majority of the votes cast, whereas an amendment to any provision of the Constitution requires an affirmative vote of 2/3 majority. Consequently, under the present Constitution the transfer of sovereignty from the state to the Community cannot be affected through an international treaty concluded in conformity with the provisions of Article 90[17].

2.Modalities for Transfer of Sovereignty: Simple Amendment or Referendum?

Having concluded that for the transfer of the national sovereignty to the Community the Constitution has to be amended, the next issue is whether the contemplated amendment of the Constitution can take place through the normal procedure for the amendment of the Constitution or through a national referendum.

A normal Constitutional amendment can be affected, as it was indicated before, by an affirmative vote of 2/3 of the members of the Parliament, while the referendum is not a usual way for amendment of the Constitution. It can be used in cases where the Parliament and the President deadlock on some legislative issues. However, there is no reason why it should not be used for such an important issue as the membership of the EC.

Here, the threshold question is whether membership of the Community results in renunciation by the member states of the sovereignty which they have transferred to the Community, or whether what they have transferred is simply the use of the sovereignty rather than the sovereignty itself.

Although the question may seem to be of academic importance, it is not totally irrelevant to the main question under consideration, viz. whether under the present Constitution national sovereignty may be transferred to the Community through a simple amendment.

According to one view, the powers transferred to the Community cannot be classified as delegation du pouvoir; but a renunciation of the power[18]. Therefore, upon accession of Turkey to the Community, the argument goes on, a part of the national sovereignty has to be renounced.

However, sovereignty is unreservedly vested in the Nation. Only its use is delegated to the TGNA, which it cannot delegate to any other group or person. The way out must be a national referendum[19].

As opposed to this pro-referendum view, the majority of the scholars are of the view that any article of the Constitution may be amended through normal procedures; there is no need for a referendum. First, the Constitution does not make any difference between the amendment of the so-called basic articles, namely articles 6, 7, and 8 and other articles. They all are subject to the same procedure for the purpose of amendment. Secondly, the referendum is not a normal way of amending the Constitution. Rather, it is a procedure which the President invokes in cases where he disagrees with the Parliament on issues of special importance. Its use very much depends on the decision of the President to call a referendum. Consequently, a majority of the TGNA which may amend other provisions of the Constitution should have the same competence with respect to the amendment of Articles 6,7 and 8 as well.

An amendment along the lines with the former view would be more democratic and would be in keeping with the solemnity of this historical event, whereas an amendment according to the latter view would be more practical and easy to realise.

Suggestions for Amendment

The practice and experience of the present members of the Community should provide some useful guidance to Turkey in the task of bringing its Constitution into line with the Community requirements. In particular, the constitutions of the Netherlands, Germany, Ireland, or Greece may be seen as appropriate examples. Accordingly, a provision may be inserted in the Constitution after Article 9 reading that:

"Sovereign rights may be transferred to international organisations by an international treaty or by a national law. In such a case, the treaty cannot be ratified before the Parliament has given its approval therefor by an affirmative vote of at least 2/3 majority of its members and the law can only be passed if it is adopted by the same majority."

The 2/3 majority being also the majority which can amend the Constitution, any treaty adopted by such majority could change the Constitution and the barriers against the transfer of sovereignty could be smoothly removed.

Alternatively, a formula exclusive to the Community may be adopted. Then, the following text may be inserted after Article 9:

"Nothing in this Constitution may be invoked as invalidating any part of the Treaties governing the European Communities and the existing and future acts adopted by the Institutions of the Communities which shall be binding on the state in their entirety. (and shall form part of the domestic law under the conditions laid down in those treaties)".

3. Other Provisions of the Constitution, the Amendment of Which may be Necessary

It is not intended here to examine exhaustively all provisions of the Constitution in terms of their compatibility with Turkey's potential membership of the Community. Rather, we would content ourselves with giving a list of those provisions, a perusal of which will show that they could create difficulties in case of such a membership[20]. The list should include the followings:

Article 16, on the position of aliens, which requires that basic rights and freedoms of aliens should not be restricted except in accordance with international law, may not be adequate in meeting the special position of "aliens from the member states".

Article 39, on the right to movement and establishment, which in places may give power to the government in contravention of the Community law.

Article 45, on agriculture and protection of workers, may infringe the Community rules, if not applied bearing in mind the relevant Community rules.

Articles 46 and 47, on expropriation and nationalisation, which give the power to the government to expropriate or nationalise such sections of the private property or industry as it deems necessary from national point of view, may infringe relevant Community rules, although Article 222 of the Rome Treaty and the case law embodied in the Costa/Enel Case (1964) ECR 585 may give reasons for a contrary view.

Article 48, on the freedom of work and contract, which enables the government to regulate and co-ordinate the private sector of energy may infringe the relevant Community rules since these rules are directly applicable.

Article 49, on the right to work, may also cause similar problems, if not applied bearing in mind the relevant Community rules.

The same considerations may apply in the following cases:

Article 50, on the conditions of work and the right to leisure; Article 55, on ensuring justice in wages; Article 56, on the right to social security; Article 65, on health services and the protection of environment; articles 66,67,68,69 and 70 concerning political rights and duties; Article 73, on the duty to pay taxes; Article 166, on the State planning of economic and social life; Article 167 on control and supervision of the external trade, which gives full authority to the state to regulate and control the export and import of goods and services.

However, it seems that the question of whether the above mentioned Articles have to be so amended as to be compatible with the Community rules will depend on how the basic Articles on the transfer and exercise of the sovereignty are re-formulated.

4. Application and Effects of Treaties in the Turkish Legal System

It is generally agreed that under Article 90, which provides that "international treaties duly put into force have the force of law", no act of transformation for application of treaties within the national legal system is required. But in real world, the practice is somewhat different. First, even if it is conceded that treaties become part of the national law once they have entered into force, without the need for any subsequent act of transformation, that would be the case for the self-executing treaties, for application of which no act of implementation is needed. Treaties which address the legislative body or contain programmes or policies rather than clear, precise and unconditional provisions, are not capable of direct application.

Second, there seem to be some elements inherent in Article 90 which suggest that some sort of transformation is needed for internal application of treaties. In particular where there is a need to have an enabling Act of Parliament in order to go ahead with the ratification, the Act may be considered both as a part of the process for expression of the consent of the state to be bound by the treaty and an act transforming the treaty into the national legal system, as is the case perhaps in Germany. Furthermore, all treaties, whether or not they need any prior enabling Act of Parliament to become binding, have to be ratified, under Act No.244, by a Decree of the Council of Ministers (the so-called internal ratification). Thus, the Decree serves, in a sense, as an act of transformation. Actually, when the phrase "duly put into force", as used in Article 90, is read in conjunction with Article 105, the suggestion seems to be that after the passing of the enabling Act of Parliament, there are necessary supplementary acts to be made because, even after the Act of Parliament the treaty needs to be ratified and published in the Official Journal, so that it can become law internally. In other words, the government has the last word as to whether it is in the interest of the Nation to be bound by the treaty in question. If it considers it to be so, it may take that step by issuing a Decree of the Council of Ministers to internally ratify it. The Decree must be adopted by the unanimous vote of all the members of the government and the President. It is published in the Official Journal to which the text of the treaty is enclosed. Additionally, the treaty enters into force on the date which is fixed in the Decree.These requirements ought to be satisfied if the treaty is to enter into force. This procedure sounds dualist. In particular, in cases where an Act of Parliament is not required for ratification, the Decree serves as an act of transformation, a point which is further supported by the Parliamentary Commentary on Act 244:

"However, the same acts have to take the form of an internal act at the same time,so that they could take effect within the national legal system. That can be realised only by a Decree".

Whatever meaning might be given to the relevant text of the Constitution, in the face of Act 244, treaties ought to be either transformed into the national law or reproduced in the form of national legislation or incorporated by reference into the national legal system, through the ratifying instruments, (the enabling Act of Parliament and by a decree of the Council of Ministers), so that they could be internally applicable.

This conclusion is further supported by the fact that when the Turkish courts apply treaties they first refer to the enabling Act of Parliament or to the Decree whereby the particular treaty was ratified, citing the Official Journal in which it was published.

It is against this background that the question of the application of the Community law within the Turkish legal system should be dealt with.

In our opinion, with the ratification of an accession treaty which would make Turkey a member and which would require acceptance by Turkey of the founding treaties and the secondary legislation hitherto adopted within the Community (Acquis Communautaire), the latter would have become part of Turkish law.

However, a further question remains: would the acts of the institutions of the Community in the future be directly applicable in Turkey under the present system? The answer has to be "no"[21], for the simple reason that effects of resolutions or decisions of international organisations are not dealt with in the Constitution. If the Constitution had a provision whereby the sovereignty could be transferred to the international organisations in general or to the Community in particular, one could have concluded, with some imagination, that effects of decisions of such organisations must be considered as a continuation of the very effect of the treaty whereby the organisation itself was created. But such is not the case here. Our suggestion is that Article 90 should be so amended as to accommodate this contemplated situation.

Suggestions for Amendment

Thus after the last paragraph of Article 90 a paragraph in the following terms may be inserted:

"International treaties duly put into force in accordance with international law shall have direct effect in the national law if they are directly applicable by their own terms.

They shall have a status superior to national laws".

"The preceding paragraph shall apply, mutatis mutandis, to resolutions, decisions or acts of international organisations, which are binding upon the state and are directly applicable by their own terms".

Alternatively, a Community-specific amendment on the following lines may be contemplated:

"Nothing in this Article may be invoked as preventing the legislation or acts or decisions of the European Communities from taking direct effect in Turkey by their own terms and, in case of conflict, from having a status superior to national laws".

5. Status of international Treaties in Turkish Law

The Constitution is not clear on the status of international treaties in relation to Turkish law. Its relevant provisions are susceptible to different interpretations[22]. Article 90 in fine provides that "international treaties have the force of law". No proceedings may be instituted before the Constitutional Court in order to challenge them constitutionally".

Additionally, Articles 15,16 and 42 define indirectly the status of treaties on human rights. Article 15, which is modelled on Article 15 of the European Convention Human Rights, provides that in times of war or public emergencies the rights guaranteed by the Constitution may temporarily be suspended, provided that the obligations of Turkey arising from international law are not adversely affected. As international law necessarily includes treaties, then it follows that treaties of humanitarian character have a status superior to national law. Violation of them would also be a violation of the Constitution itself[23]. This is a rule of interpretation which has been upheld by the courts themselves.

As to the status of treaties of a non-humanitarian character (those governed by Article 90), the scholarly opinions differ. Some argue that these treaties have a superior status in relation to Turkish law, relying on the last paragraph of Article 90[24]. Others argue that, when all the relevant provisions of the Constitution are read together, the supremacy of treaties over conflicting national law is not substantiated. What Article 90 simply says is that treaties have the force of law. So, in the case of conflict between the two, the rule lex posterior derogat priori applies[25]. Yet others, while agreeing with the latter view, add a word of caution that in cases where there is a conflict between subsequent national law and an earlier treaty, one has to look into the intention of the legislator, i.e. whether it was his intention to violate the treaty in question. If it was, it is the duty of courts to give effect to the legislation, regardless of the

fact that the state may be held responsible internationally for the violation. Otherwise, every effort should be made to reconcile the two texts in such a way that the treaty is ultimately given effect[26].

The courts do not seem to have been influenced too much by the above-mentioned doctrinal arguments, however.

The Court of Cassation takes the practical conflict of laws approach. In cases where both a treaty and a national legislation are applicable, the Court takes the view that the applicable law is the treaty, whether or not it is subsequent in time, because the matter covered by the treaty is brought out of the realm of national legislation[27].

The Conseil d'Etat seems to take it for granted that international treaties take precedence over national legislation. In a recent case, it relied on and gave priority to ILO Convention 111and the European Social Charter against an inconsistent subsequent Turkish statute (Public Law 1402) to enter judgement for a number of university professors who had been dismissed from their teaching posts by the military regime on the basis of the above-mentioned legislation[28]. Most recently, in a case which it decided on the basis of the freedom of thought guranteed by the Constitution and the European Convention on Human Rights, it observed that:

"It is indisputable that the individual has been made a subject of international law by provisions of international instruments on human rights. By these instruments the state has gone under the obligation towards other (contracting) states that its citizens will benefit from the rights (provided for in these instruments)."

Article 90 in fine of the Constitution, which was taken almost verbatim from the 1961 Constitution, provides that international treaties duly put into force have the force of law. No proceedings may be established before the Constitutional Court to challenge them constitutionally"[29].

From this observation the Court has come to the conclusion that:

"It is generally agreed in the Turkish jurisprudence that a treaty of this nature which is duly ratified and put into force has to be applied even if it might contravene the Constitution, that its application cannot be suspended on the grounds that it contravenes prior or subsequent legislations or that the subsequent legislation has amended the provisions of the earlier treaty" (emphasis added).

"By providing that it may not be pleaded before the Constitutional Court that treaties are in violation of the Constitution, the latter ought to be considered as having adopted the principle that treaties are superior in relation to the national law"[30].

In its examination of the constitutionality of the challenged legislation, the Constitutional Court has almost always referred likewise to international instruments on human rights[31]. But it has done it without strictly distinguishing between treaties as such and non-binding resolutions of international organisations. It may refer to a resolution of the Economic and Social Committee of the UN in justification of its holdings, alongside with a truly binding instrument such as the above-mentioned European Convention. However, on balance, it seems to treat international law on human rights on the same footting as the Constitution itself, a yardstick against which the constitutionality of national law is tested.

Perhaps one may take relief from this practice of the courts as giving effect to international treaties on human rights, although it is clear from the case-law that the courts do not make any distinction between self-executing and non-self-executing treaties. Yet this practice does not make it sure that in case of membership, resolutions or decisions of the Community, as opposed to the treaties as such, would be given priority over conflicting national laws.

The inescapable conclusion is that the Constitution ought to be amended, perhaps on the lines of the suggestion made in preceding paragraph.

CONCLUSIONS

1- Turkey's membership of the Community would require a transfer of as much of national sovereignty to the Community institutions as is necessary according to the founding treaties.

2- The Constitution in its present form does not permit any such transfer. It has to be amended in order to make the transfer of sovereignty possible.

3- The Constitution may create difficulties as regards the direct application of the Community law within, and its status in relation to national legal system, in cases of conflict. Therefore, we suggest that Article 90 should be amended as we proposed.

4- A number of other provisions of the Constitution need reformulation in the light of the requirement of the Community law and in full accordance with the form the transfer of sovereignty to the Community would take.

5- Amendment may take place through a national referendum or through ordinary procedures for amendment of the Constitution. The question which method should be given preference is a political matter rather than a legal one.

NOTES

1 See the case of Norway which signed the first Treaty of Accession but, in view of a negative result of the referendum was unable to ratify.

2 See Lasok, D. and Bridge, J.W., The Law and Institutions of the European Communities, 5th ed. 1991, Ch.10

3 Case 24/83: Gewiese v Mackenzie (1984) ECR 874.

4 See e.g. Case 22/70: Commission v Council (1971) ECR 263, at 274; Case 60/86:Commission v United Kingdom (1988) 3CMLR 437.

5 EEC Art.5; EAEC Art.192; ECSC Art.86.

6 See Case C-2/88, Re Zwartveld (1990) 3CMLR 457.

7 EEC Art.7; EAEC Arts.96 and 97: ECSC Art.69.

8 See e.g. Case 104/86: EC Commission v Italy, Re Repayment of Illegal Taxes (1989 3CMLR 25.)

9 See especially Case 35/76: Simmenthal v Italian Minister for Finance (1976) ECR 1871: Case 106/77: Simmenthal (1978) ECR 629; Case 70/77: Simmenthal (1978) ECR 1453.

.10 Case 146/73: Re Rhein-Mühlen (1974) ECR 139 at 147 and Case 166/73: Re Rhein-Mühlen (1974) ECR 39.

11 EEC Art.219; EAEC Art.193; ECSC Art.87.

12 EEC Art.169; EAEC Art.141; ECSC art.88.

13 Case 25/59: Netherlands v High Authority (1960) ECR 355.

14 EEC Art.171; EAEC Art.143; See e.g.Case 48/71: Commission v Italy (1972) ECR 527; Case c-266/89:Commission v Italy (No.2) (1992) 1CMLR 188.

14a Aslan Gündüz

15 Accord : İzettin Doğan, Türk Anayasa Düzeninin Avrupa Toplulukları Hukuk Düzeniyle Bütünleşmesi Sorunu, 1979, at pp.196-97; A.F. Arşava,Avrupa Toplulukları Hukuku ve Bu Hukukun Ulusal Alanda Uygulanmasından Doğan Sorunlar, 1985, at p.485; Hüseyin Pazarcı, "Avrupa Topluluğu Hukukuna uyum Açısından Türk Anayasal Düzeni", in Avrupa Topluluk Hukuku ve Türkiye'nin Uyumu Semineri, at p.125; Haluk Kabaalioğlu, "Avrupa Topluluğu ve Topluluğa Katılmalar", in Avrupa Ekonomik Topluluğu Birinci Eğitim Semineri, İstanbul 1983, at pp. 151-167; Hikmet Sami Türk, "Avrupa Topluluklarına Üyeliğin Anayasal ve Ortaklıklar Hukuku Üzerindeki Etkileri", in BATİDER yıl 1989, C. XV, Sayı1, at p.15.

16 See, Arşava, supra note 15, pp.200-205.

17 Ibid., p.438,

18 See, Doğan's comments on the Pazarcı's paper cited in supra note 15, at pp.148-149

19 See, Doğan supra note 15, p.206 and supra note 18, pp.148-149.

20 Compare: Arsava, supra note 15, pp.444-446: Pazarcı, supra note 1, p.134.

21 Compare: Pazarcı, supra note 15, p.141.

22 Note that Article 90 of the Constitution is identical to Article 65 of the former Constitution (the Constitution of 1961) and that comments on Article 65 of the former Constitution are equally applicable to Article 90. For a full account of these interpretations see, A. Gündüz "Erosion of the Concept of National Sovereignty: the Turkish Example", in Marmara Journal of European Studies, No.1-2, 1991, pp.99-154.

23 See, Pazarcı, Uluslararası Hukuk Dersleri, 1.Kitap, 1985, p.30.

24 See, O.I. Akipek, Devletler Hukuku, Birinci Kitap, Başlangıç, 3.baskı, p.29; Mesut Gülmez, Memurlar ve Sendikalar, 1990, p.249; Tekin Akıllıoğlu, "Avrupa İnsan Hakları Sözleşmesi ve İç Hukukumuz", in AUSBFD, C.XLX, No 3-4, 1989, p.157; Şeref Gözübüyük, Avrupa İnsan Hakları Sözleşmesi ve Bireysel Başvuru Hakkı", in İnsan Hakları Yıllığı C.9, 1987, p.7.

25 See, Ergun Özbudun, Türk Anayasa Hukuku, 1988, p.178.; S.L.Meray, Devletler Hukukuna Giriş, Cilt 1, 1968, p.132.

26 See, Sevin Toluner, Milletlerarası Hukuk ile İç Hukuk Arasındaki İlişkiler, 1972, p.595 where she comments on identical Article 65 of the Constitution of 1961.

27 See, among others, the following cases: 11 HD, E. 1988/1928; K. 1988/3940; T.14.6.1988, reproduced in YDD Cilt XV, Sayı 5, 1989, pp.680-682, and E.1984/5161; K.1984/5886; T.18.1.1984, reproduced in YKD Cilt XI, 1985, pp.381-383.

28 See, Danıştay İçtihatları Birleştirme Kararı, Esas No. 1988/6; Karar No.1989/4 Official Gazette, 9 Şubat 1990, Sayı 10428, pp.67-78, and E.1977/1349; K.1978/955, in Danıştay Dergisi Yıl 18, Sayı 30-31, 1978, p.50.

29 See, 5.Daire, 22.5.1990, E.1986/1723; K.1991/933, reproduced in Amme Dergisi C.24, S.4, 1991, pp.173,176.

30 Ibid.

31 For example, in a case in which the constitutionality of Act 274 (Trade Unions Act) was challenged, the Court used, among others, Article 11 of the European Convention on Human Rights as a yardstick against which it examined the Act in question. E.1963/336; K.1967/29.