
Direct Effect in Germany and France

A Constitutional Comparison

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DIRECT EFFECT

I Introductory remarks

As can easily be guessed from the title, the purpose of this paper is to scrutinise the doctrine of direct effect from the point of view of German and French constitutional law. The merit for framing the subject goes to Eijsbouts. His suggestion allowed me to work on a topic which turned out to be a very challenging but still insufficiently explored one. Though the general issue of the relationship between national constitutions and European integration, as well as the principle of supremacy, has been studied from the domestic constitutional law perspective, up to now, the principle of direct effect has apparently been neglected to some extent by constitutional lawyers. The three following paragraphs intend to show why the point of view of constitutional law is particularly relevant (I.1), why the comparative analysis seems to be appropriate (I.2) and why the choice of Germany and France is convenient (I.3).

I.1 The relevance of the constitutional law position

The relevance of constitutional law with regard to the principle of direct effect has been abundantly discussed in the *Van Gend en Loos* case itself, especially by the three intervening Governments (Germany, Belgium and the Netherlands¹) who denied jurisdiction to the ECJ on the ground that the issue of the effect of an international treaty in (Dutch) internal law must be determined, according to well-established international law practice, exclusively by (Dutch) constitutional law. In response, Advocate General Roemer pointed out in his Opinion that:

'it is impossible to clarify the real legal effects of an international agreement on the nationals of a Member State without having regard to the constitutional law of that Member State. But, on the other hand, it is clear that the question does not refer exclusively to problems of constitutional law'.²

The reception of the 'direct effect doctrine', as it has been developed by the ECJ since 1963, within the national legal orders is without any doubt one of the most interesting aspects of what may be called today 'European constitutional law'. As this concept, however, may be given at least three different meanings, which all relate to the principle of direct effect, it calls for some clarification. Taken in the first sense, the controversial expression 'European constitutional law' suggests

¹ Three out of six governments at the time intervened with strong submissions which indicates that the concept of direct effect probably did not accord with the intention of those States when they became parties to the EC Treaty.

² Case 26/62 *Van Gend en Loos* [1963] ECR I.

the emergence of a Constitution for Europe.³ In this context, the shaping of the doctrine of direct effect appears indeed to be a capital step within the process of ‘constitutionalization’ of the Treaties themselves and could be considered as one of the pillars of the EC’s ‘constitutional charter’.⁴ In a second sense, the penetrating of EC Law (and international law) in the national legal orders and the acceptance of the direct effect doctrine is a matter of national constitutional law and will fall, in an increasing number of Member States, under special constitutional provisions. Some of these special clauses which make European integration a topic of national constitutional law may also be called ‘European constitutional law’.⁵

Finally, in a third sense, ‘European constitutional law’ also has a ‘horizontal’ dimension. The European States, members of the Council of Europe, and *a fortiori*, the Member States of the European Union, share a common constitutional heritage which only the comparative approach can make visible.⁶ This is well known in the field of protection of fundamental rights where the ECJ has deduced general principles of law from common constitutional standards within the Member States. Nevertheless, the comparative method can also be helpful when national judges are confronted with similar problems.

For the purpose of this limited contribution, the principle of direct effect will therefore be examined solely from the point of view of national constitutional law. Considerations on the administrative law practice or the positions of ordinary courts will only be made if they concern closely enough the constitutional law issue. This will make it possible, in return, to embody the question of direct effect of EC Law within the broader subject of direct effect of international law. The focus will be put on the question how constitutions respond to the claim of international (and Community) law to generate rules enjoying direct applicability within the national legal orders which is one manner to approach the old issue of the relationship between legal orders.⁷

1.2 The appropriateness of the comparative approach

Many reasons plead for a comparative analysis in the present field of study. As Prechal puts it elsewhere in this volume, the concept of direct effect causes confusion because of various national perceptions - or even

³ See Gerkrath (1997).

⁴ See Stein (1981), at p. 3, who considers the *Van Gend en Loos* judgment ‘the cornerstone for the constitutional evolution’ within the Community.

⁵ German authors sometimes refer to what they call *nationales Europaverfassungsrecht*, cf. Häberle (1995), p. 308. See also Gerkrath (1997), at p. 21 et seq. and p. 129 et seq.

⁶ Cf. Grewe & Ruiz Fabri (1995).

⁷ See Vandamme & Reestman (2001). See also the very substantial contribution of De Visscher (1952), notably at p. 559 et seq.

‘national sub-doctrines’- of the classic EC doctrine.⁸ A comparison of these perceptions, which derive naturally from different legal traditions formed in the course of centuries, but also from different constitutional options taken by the Member States more recently, might contribute to facilitating mutual understanding. Within the field of ‘European constitutional law’ the comparative approach appears furthermore to be particularly fertile as a means of understanding the phenomena of European integration and the emergence of a ‘multilevel constitutionalism’.⁹ Finally, comparative law is a discipline which allows sometimes to reconsider unsatisfactory national solutions to legal problems shared with other Member States.¹⁰

But choosing the comparative approach also involves special constraints: one has to be very cautious with the legal terms and expressions used by courts and scholars in different national contexts. They need to be clarified and should be used uniformly. A rapid glance at the case law and the legal writings in the two countries studied here reveals, however, that the contrary is true. In France the vocabulary varies from one author to another and, moreover, the terms such as *immediateté*, *effet direct*, *applicabilité directe* and *invocabilité* are employed with sometimes divergent meanings.¹¹ In Germany we will encounter equivalent expressions such as *Durchgriff*, *unmittelbare Geltung*, *unmittelbare Wirkung*, *Direktwirkung* and *unmittelbare Anwendbarkeit* or *unmittelbare Anwendung* as well as similar problems of differentiation.¹²

The main difficulty caused by this profusion of terms is to retain a singular (English) terminology which makes it possible to confront the two national viewpoints properly. In order to avoid further confusion, the comparison will be based on the following distinction between ‘direct applicability’ and ‘direct effect’:¹³

- I. The concept of ‘direct applicability’ concerns the relation between a treaty (or any other act of international or Community law) and the national legal order. Saying that such an act is ‘directly applicable’ means that it will become part of the domestic legal order without any formal measure of reception or transformation. Hence, direct applicability proceeds from domestic constitutional law, at least with regard to traditional international law.¹⁴ In theory, a treaty which enjoys direct applicability, will be

⁸ In chapter II, paragraph 2.1.

⁹ Pernice (1999).

¹⁰ Vitzthum (1998).

¹¹ Cf. Sauron (2000), p. 38, who presents a chart representing the three main examples of terminology and signification.

¹² See Jarass (1994) p. 68 et seq. Cf. also Klein (1988).

¹³ This distinction appears indeed essential for the understanding of the doctrine of direct effect and will be followed strictly hereafter.

¹⁴ Whereas EC regulations are ‘directly applicable in all Member States’ according to Art. 249 EC.

in force as a part of domestic law upon its ratification by the contracting parties. This is of course legal fiction because even States whose constitutions reflect a ‘monist’ attitude toward international law, do in general maintain some formal requirements which must be fulfilled prior to any application.¹⁵

2. The notion of ‘direct effect’ goes further than ‘direct applicability’. It concerns the relation between a rule of external origin and the individuals within the national legal order. Since the advisory opinion of the Permanent Court of International Justice of 3 March 1928, there can be no doubt that, ‘the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts’.¹⁶ In international law, ‘self-executing’ treaties are still rather rare and the principle of direct effect of such law is at the mercy of state courts which often give restrictive interpretations.¹⁷ Within the European Community, on the contrary, the Court of Justice, invoking the ‘spirit’ of the treaties, considers direct effect as an element of the very nature of EC Law. Furthermore, the existence of the preliminary ruling procedure and the persuasive method followed by the Luxembourg Court have made the national judges become the common judges of Community law.¹⁸ The effectiveness of the principle of direct effect depends indeed very much on the behaviour of the national courts. As the ECJ stated in *Van Gend en Loos*: it’s up to the national courts to protect the rights which are conferred upon individuals by Community law and which become part of their legal heritage. In order to answer the question whether a rule has direct effect or not, it is either necessary to look at the ‘intention of the contracting Parties’¹⁹ or to consider ‘the spirit, the general scheme and the wording of those provisions’²⁰, which is merely a (constructive) method for interpreting this intention. Nevertheless, this is a matter of international law and not

¹⁵ E.g. publication of the Treaty in an Official Journal. Cf. Art. 55 of the French Constitution.

¹⁶ *Danzig* PCIJ, Ser. B, No. 15 (1928), at points 17-18.

¹⁷ E.g. the case law of French courts with regard to the UN Convention on the rights of children, see 3.1.1 below.

¹⁸ See Mancini (1989), p. 606: ‘It was by following this courteously didactic method that the Luxembourg judges won the confidence of their colleagues from Palermo to Edinburgh and from Bordeaux to Berlin; and it was by winning their confidence that they were able to transform the procedure of Art. 177 into a tool whereby private individuals may challenge their national legislation for incompatibility with Community law’.

¹⁹ According to the PCIJ’s advisory opinion of 3 March 1928.

²⁰ According to the ECJ, *Van Gend en Loos* (as cited).

of domestic constitutional law. Direct effect is closely linked to direct applicability because no rule can be enforced by national judges without having complied with the constitutional requirements for its formal reception. Still, direct effects are inherent to a treaty. They pre-exist its formal reception, but they remain latent as long as the constitutional hurdles have not been jumped over.²¹ The conditions for direct effect of Treaty provisions or other forms of Community law have been set out by the ECJ since *Van Gend en Loos*. Accordingly, a rule has direct effect whenever it is clear, unconditional and does not require any national implementation measure, or, in the words of Pescatore, ‘whenever its characteristics are such that it is capable of judicial adjudication’.²² Although these far-reaching effects of a rule do not proceed from the Constitution but from the Treaty itself, they cannot be attained in presence of conflicting constitutional law.

Therefore, this contribution will focus on direct applicability and direct effect as defined above. Any other consequences of the doctrine of direct effect in the widest sense, e.g. *invocability*, the duty of consistent interpretation or State liability, will be left aside. These are either questions of judicial process or of administrative law and will be dealt with by more authorized contributors.²³

1.3 The convenience of the choice of Germany and France

The selection of these two Member States appears appropriate for several reasons. The German-French co-operation is indeed often referred to as a ‘motor’ for European integration and, as such, the couple is naturally predestined to be a choice object of comparative analysis.²⁴ The recent case law of the German and French constitutional courts constitutes moreover an interesting field for comparative studies.

Since the well-known *Maastricht* decision of the German Federal Constitutional Court (FCC) of 12 October 1993,²⁵ the question of domestic effect of EC law has again become a potential source of conflict between the German Court and the ECJ. The two main issues are, firstly, where to draw the border-

²¹ Cp. F. Rigaux, quoted by Joliet (1983), p. 292.

²² Pescatore (1983), p. 176.

²³ Cf. especially the contributions of Prechal, Betlem and Jans & Prinssen in this volume’s chapters II, IV and V.

²⁴ See for instance N.N. (1998). On the question whether there is already a German-French legal science, cf. Beaud (1999).

²⁵ Often quoted as the ‘*Brunner*’ decision, BVerfGE (collection of decisions of the FCC) vol. 89, p. 155 et seq. English translations have been published in [1994] 1 CMLR 57 and [1994] ILM 388.

line between the effect of Community law and the authority of national constitutional law and, secondly, who will fix this border-line. Compared to the situation under French law, the topic becomes particularly stimulating because the French *Conseil constitutionnel* has developed quite a different doctrine with regard to the relation between Community law and domestic constitutional law.

This could of course be considered as a direct consequence of the contrasting general attitude of the two Constitutions with respect to international law. The French Constitution of 1958 is indeed considered as being 'monist' while the German Basic Law (BL) of 1949 is known as 'moderately dualist'.²⁶ But, as a matter of fact, these differences, which are important in legal theory, have to be tempered in practice especially with regard to Community law.²⁷ The divergent positions of the two Courts may also be explained by the very different standing they enjoy within their national political system and by their different competences. But these undeniable differences should not be exaggerated. The main reason is to be found in their attitude towards Community law and their self-image as 'guardians of the Constitution'.

Concerning Community law but also international law in general, it appears, indeed, that 'what the Constitution says' seems to be pretty similar in France and Germany, both countries having 'constitutionalized' their membership within the European Communities and the European Union by specific clauses which were introduced in 1992.²⁸ The comparison of 'what the judges say' that the Constitution says²⁹ intends to underline to what extent the dogmatic position of the *Bundesverfassungsgericht* contrasts with the more pragmatic attitude of the *Conseil constitutionnel*. The German Basic Law, which is often referred to for its 'openness' to European integration, is interpreted in a very defensive way while the French Constitution, which is deeply marked by the classic concept of national sovereignty, is construed in a rather harmonious manner.

As a matter of fact, 'what the Constitution says' (2) does only deal with the question of direct applicability, whereas 'what the judges say' (3) refers to both: direct applicability and direct effect.

²⁶ See for example Autexier (1997), p. 152.

²⁷ On the question whether the debate between monism and dualism is still useful, see Daillier (1998), p. 9.

²⁸ Other Member States like Portugal (Art. 7 §§ 5 and 6) and Austria (Art. 23 a-f) have also introduced such special clauses. Cf. Grewe & Oberdorff (1999).

²⁹ Referring to a statement made by Charles Evans Hughes, judge and later president of the US Supreme Court, in a speech in 1908: 'the Constitution is what the judges say it is'. See C.E. Hughes, Speech before the Elmira Chamber of Commerce, Addresses and Papers, quoted by Van Alstyne (1969), p. 2.

2 What the Constitution says

With regard to the substance of constitutional law, there are stronger similarities than one might expect, considering the fact that the French Constitution is generally presented as belonging to those inspired by ‘monism’, whereas the German Basic Law passes for a convenient example of the theory of ‘dualism’. As we will see in the following, these distinctions have lost much of their force of conviction and must be handled with caution with regard to Community law. As both Constitutions contain general provisions with respect to international law and international organisations but also special clauses on European integration, these two aspects will be presented separately.

2.1 General clauses on the domestic effect of international law

The embodiment in the Constitution of articles dealing *inter alia* with the effect and the force of international law within the national legal order is a phenomenon which has been analysed under the name of ‘international constitutional law’.³⁰ De Witte characterizes it as ‘that part of constitutional law which deals with the external relations of the State and the domestic effect of international law’.³¹ For the purpose of this contribution, only the rules concerning the domestic effect of international law will be examined.

2.1.1 The German Basic Law

The *Grundgesetz* of 23 May 1949 includes four articles regarding international law and institutions (Arts. 24, 25, 26 and 59(2)) and one additional provision about the jurisdiction of the FCC in this field (Art. 100(2)). Article 24 BL relates to the participation of the Federation within the International Community of States. It explicitly entitles ‘the Federation’ to transfer (by legislation) ‘sovereign powers to intergovernmental institutions’ (Art. 24(1)).³² Furthermore, it rules that ‘for the maintenance of peace, the Federation may join a system of mutual collective security’, and that ‘in doing so it will consent to such limitations upon its rights of sovereignty as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world’ (Art.

³⁰ See the pioneer work of Mirkine-Guetzévitch (1933) and more recently Favoreu (1993).

³¹ De Witte (1995), p. 149.

³² The 38th amendment of the BL of 12 December 1992 introduced a new section 1a) to Art. 24: ‘Insofar as the States [*Länder*] are responsible for the exercise of state rights and the discharge of state duties, they can, with consent of the Government, delegate sovereign powers to institutions for neighborhood at state borders’.

24(2)). Finally, it declares that ‘for the settlement of disputes between states, the Federation will accede to agreements concerning international arbitration of a general, comprehensive, and obligatory nature’ (Art. 24(3)).

Coupled with the wording of the preamble and Article 26, which indicate that the German People adopted the Basic Law ‘animated by the purpose to serve world peace’ and that ‘acts tending to and undertaken with intent to disturb the peaceful relations between nations ... are unconstitutional’, Article 24 manifests one of the fundamental choices of the constituent power. Its decision, in favour of a strong integration of Germany within the international Community, is often summarized by using the image of ‘openness’ or ‘friendliness’ of the German legal order towards international law (*offene Staatlichkeit, Völkerrechtsfreundlichkeit*).

Two provisions, Article 25 and Article 59(2), deal with the position of the rules of international law within the German legal order. At first glance, they seem to attribute different effects to the ‘general rules of international law’ on the one hand and to ‘treaties’ on the other hand. Under the title ‘Public international law and federal law’, Article 25 BL proclaims indeed that:

‘The general rules of public international law constitute an integral part of federal law. They take precedence over statutes and directly create rights and duties for the inhabitants of the federal territory’.

Thus, Article 25 could lead to the impression that the Basic Law takes a ‘monist’ attitude at least towards ‘the general rules of public international law’.³³ In fact, the distinction between monism and dualism has been progressively abandoned in Germany in favour of a more practical approach based on the technical operation of reception or transformation. Accordingly, the Basic Law distinguishes between ‘the general rules of international law’ which have been introduced on the whole into German law by virtue of Article 25 and ‘international agreements’ which need to be transformed one by one.³⁴ This view is confirmed by Article 100(2) BL which attributes jurisdiction to the FCC on the question ‘whether a rule of public international law is an integral part of federal law’.³⁵ The wording of Article 100(2) presupposes indeed implicitly the existence of two spheres of law.

³³ See Dupuy (2000), p. 391 who underlines the ambiguity of certain constitutions but quotes Art. 25 BL as revealing clearly the ‘monist option’ of the German Constitution.

³⁴ See Autexier (1997) p. 152 et seq.

³⁵ Art. 100(2) indicates indeed that : ‘Where, in the course of litigation, doubt exists whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual (Art. 25), the Court obtains a decision of the Federal Constitutional Court’.

The situation of treaties is governed by Article 59 BL. The President, who represents the Federation in its international relations, 'concludes treaties with foreign states on behalf of the Federation'. According to Article 59(2):

'Treaties which regulate the political relations of the Federation or relate to matters of federal legislation require the consent or participation, in the form of a federal statute, of the bodies competent in any specific case for such federal legislation. As regards administrative agreements, the provisions concerning the federal administration apply mutatis mutandis'.³⁶

Nothing is said about the validity and the applicability of treaties within the domestic legal system nor about their ranking. Each treaty or administrative agreement needs to be transformed either by a federal statute or a legal act of the executive power.

2.1.2 The French Constitution

The rules which constitute French 'international constitutional law' are not embodied in one single document as in Germany.³⁷ According to the preamble of the Constitution of 4 October 1958: 'The French people solemnly proclaims its attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946'. These three documents form, together with a number of 'fundamental principles acknowledged by the statutes of the Republic', what is known in France as *bloc de constitutionnalité*.³⁸ Thus, one has to refer to the preamble of 1946 and the Constitution of 1958 in order to assemble the relevant rules.

Section 14 of the preamble of the Constitution of 1946 delivers a first, though imperfect and ambiguous, indication specifying that 'the French Republic complies with the rules of public international law'. This is completed by section 15 which allows, 'subject to reciprocity', that 'France consents to limitations of sovereignty necessary for the organisation and the defence of peace'.

Since the founding of the Fifth Republic, the monist tradition, initiated by Articles 26 and 28 of the Constitution of 1946, continues throughout part VI of the Constitution entitled precisely: 'on treaties and international agreements'. According to Article 53:

³⁶ The last sentence signifies that the conclusion of such administrative agreements may require prior approbation by the *Bundesrat* according to Art. 80(2).

³⁷ A comprehensive and well documented introduction to the French situation is to be found in: Conseil d'Etat (2000).

³⁸ In a famous decision of 16 July 1971 on the freedom of association, the *Conseil constitutionnel* referred for the first time to the preamble of the Constitution of 1958. As a result, he conferred full constitutional value not only to the preamble of 1958 but also to the preamble of 1946 and the declaration of 1789.

‘Peace treaties, commercial treaties, treaties or agreements relating to international organisation, those that commit the finances of the State, those that modify provisions which are matters for statute, those relating to the status of persons, and those that involve the cession, exchange or addition of territory, may be ratified or approved only by virtue of an Act of Parliament. They shall not take effect until they have been ratified or approved’.

The most significant provision is, however, to be found in Article 55 which rules that:

‘Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party’.

This clause is generally presented as a rule governing the authority of international treaties in the national legal order. In fact, the requirements laid down by Article 55 do not only concern the question of supremacy of a treaty vis-à-vis Acts of Parliament but constitute first of all conditions for its applicability in the broadest sense.³⁹ A treaty, duly ratified and applied by the other contracting party, will indeed become applicable upon publication in the *Journal officiel de la République française* which is considered as being typical for a monist system.⁴⁰

The three conditions of applicability laid down by Article 55, ‘due ratification’, ‘publication’ and ‘reciprocal application’ of the treaty, are nevertheless very strict and difficult to apply in court. Additionally, the formulation of Article 55 appears to be particularly unsatisfactory because its wording only fits bilateral agreements and does not include international customary law. Thus, Article 55 opens the door to more or less ‘dualist’ interpretations as we will see in the following.

As a first result, the short presentation of German and French international constitutional law clearly reveals that the antagonism between a claimed ‘dualist’ German *Grundgesetz* and an assumed ‘monist’ French Constitution fails to provide an adequate theoretical scheme of comparative analysis. Both Constitutions share an approach vis-à-vis international law which might be qualified as being open to far-reaching but still ‘home-steered’ integration. Further parallels have appeared with the introduction of special articles on European integration.

2.2 Special provisions on European integration

Until 1992, both Germany and France participated actively in the process of European integration without encountering major obstacles due to

³⁹ Cf. Alland (2000), p. 379.

⁴⁰ Cp. Grewe & Ruiz Fabri (1995), p. 105.

their domestic constitutional law. Both ratified the founding treaties, the various amendment treaties or acts and accession treaties without being forced to adjust their Constitutions. Neither the German nor the French Constitution as adopted in 1949 and 1958 contained special provisions with regard to the process of European integration. The only reference to a 'united Europe' was to be found in the preamble of the *Grundgesetz*, which still indicates that the German People adopted it 'animated by the purpose to serve world peace as an equal part in a unified Europe'.⁴¹

This state of apparently peaceful co-existence between somewhat static constitutional provisions and the dynamic evolution of the founding treaties of the Communities ceased with the signature of the Treaty on European Union on 7 February 1992. Both Member States were indeed confronted with important constitutional challenges during the ratification procedure of the Treaty and both decided to amend their Constitution. In France, this was the direct and inevitable result of a decision of the *Conseil constitutionnel* declaring the Treaty contrary to the Constitution.⁴² In Germany, it was the other way round. The political decision to amend the Basic Law, did not prevent several German members of the European Parliament and a former high ranking official of the European Commission from lodging constitutional complaints with the *Bundesverfassungsgericht*. That court's decision finally opened the way for Germany's ratification of the Treaty but also formulated severe limits for the future development of the European Union.

As a result, the Basic Law has been enriched by a new Article 23, and a new title XV (Arts. 88-1 to 88-4) has been added to the French Constitution. Though there are undeniable differences in spirit and wording, which will be examined hereafter, these new 'European Articles' are similarly structured and follow common objectives. Both start indeed with a section about the conditions of the State's participation within the Union, followed by a section on the transfer of powers and both terminate with indications on the role of the national Parliament. It seems appropriate to follow this analogy in structure and found the comparison upon the three elements.

⁴¹ Not to forget Art. 24(2) which authorizes the Federation to join a system of mutual collective security and to 'consent to such limitations upon its rights of sovereignty as will bring about and secure a peaceful and lasting order in Europe'.

⁴² A 'première' in France. The *Conseil constitutionnel* had to decide three times on the Treaty of Maastricht: twice on the question of the constitutionality of the Treaty itself and once on the constitutionality of the statute authorizing its ratification. There are thus three 'Maastricht decisions': *Maastricht 1*, decision No. 92-308 (9.4.1992), Rec. p. 55, *Maastricht 2*, decision No. 92-312 (2.9.1992), Rec. p. 76 and *Maastricht 3*, decision No. 92-313 (23.9.1992), Rec. p. 94.

2.2.1 Participation in the European Union

Article 23(1) of the Basic Law, as well as Article 88-1 of the French Constitution, authorize explicitly the participation of the respective Member State in the European Union. There are, however, striking differences. Article 23 BL states indeed that:

‘To realise a unified Europe, Germany concurs to the development of the European Union which is bound to democratic, rule of law, social, and federal principles as well as the principle of subsidiarity and provides a protection of fundamental rights essentially equivalent to that of this Constitution’.

Whereas Article 88-1 of the French Constitution declares that:

‘The Republic shall participate in the European Communities and in the European Union constituted by States that have freely chosen, by virtue of the treaties that established them, to exercise some of their powers in common’.

There are obviously three main differences. The first one is a difference in attitude towards the process of integration. The Basic Law takes an attitude which might be qualified as ‘offensive’. The Federal Republic is indeed called upon to ‘concur to the development of the Union’ (*wirkt bei der Entwicklung der EU mit*) which means logically that all federal institutions have a duty to do so. Furthermore, several constitutional principles are ‘projected’ in the direction of the Union which is required to respect them. As these principles are clearly of national origin one might find that this is a kind of ‘constitutional imperialism’ especially in the field of fundamental rights. In comparison, the position of the French Constitution appears to be rather ‘defensive’ stating that the Republic merely ‘participates’ in the Communities and the Union. Underlining that the Member States have freely chosen to do nothing more than ‘exercise some of their powers in common’, Article 88-1 seems to be inspired by an attitude of fear to lose sovereignty.

The second difference is one in perception of the nature of the Union. The French Constitution insists indeed on the existing elements of traditional international nature (constituted by states and established by treaties) whereas the Basic Law exposes a ‘federal’ or ‘constitutional’ vision of the Union (united Europe, federal principles). Beside these differences, both States have, however, ‘constitutionalized’ their participation in the Union. Therefore they cannot anymore withdraw from the Union without prior modification of their Constitution.

The third difference concerns the process of European integration. The Basic Law seems indeed to take into account the dynamic ‘development of the

European Union' whereas the French Constitution reflects a static vision of the Union.

2.2.2 Transfer of powers

The transfer of state powers is the second common element in the structure of the two 'European clauses'. In this field, the German Basic Law took the option of a general clause allowing such transfers 'for the foundation of the European Union as well as for changes in its contractual bases' while the French Constitution agrees to the transfers necessary for the purpose of each treaty individually. But before continuing the comparison, let us bear in mind the wording of Article 23(1) which asserts that:

'The Federation can, for this purpose and with the consent of the Bundesrat, transfer sovereign powers. Article 79(2) & (3) is applicable for the foundation of the European Union as well as for changes in its contractual bases and comparable regulations by which the content of this Constitution is changed or amended or by which such changes or amendments are authorised'.

The corresponding French formula is to be found in Article 88-2 which is composed of two sub-sections introduced respectively in June 1992 and January 1999 after the decisions of the *Conseil constitutionnel* declaring the Maastricht and Amsterdam Treaty contrary to the Constitution. Thus, Article 88-2 is now composed as follows:

'Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, France agrees to the transfer of powers necessary for the establishment of European economic and monetary union.

Subject to the same reservation and in accordance with the terms of the Treaty establishing the European Community, as amended by the Treaty signed on 2 October 1997, the transfer of powers necessary for the determination of rules concerning freedom of movement for persons and related areas may be agreed'.

This time, the comparison seems to reveal a difference with regard to the extent to which transfers of powers are authorized. Similar to Article 24, Article 23 permits to transfer sovereign powers by legislation with the consent of the *Bundesrat*. This is valid for the present and the future of the Union. Article 88-2 of the French Constitution, on the contrary, only authorizes the transfer of powers which is strictly necessary to realize the objectives of the two treaties it mentions. Future amendment treaties will therefore probably require further

additions to Article 88-2.⁴³ This apparent difference is, however, not as important as it seems. Article 23 indicates that Article 79(2) & (3) BL applies if a future transfer of powers implies amendments to the Constitution. This means that a majority of two thirds is required in both houses of Parliament and the material limits of amendment must be respected.⁴⁴

2.2.3 Association of national parliaments

The role of the national parliaments is also governed by the two Europe-articles. The rather detailed rules on this point are to be found in Article 23(2)-(7) of the Basic Law and in Article 88-4 of the French Constitution. These provisions are similarly motivated by the wish to strengthen the place of the Parliaments and to associate them more closely to the decision-making procedure within the Union. Though they do not concern immediately the subject of direct effect, they also belong to European constitutional law and deserve to be quoted here. Article 23(2)-(7) has the following content:

(2) The Bundestag and the Länder, by their representation in the Bundesrat, participate in matters of the European Union. The Government has to thoroughly inform Bundestag and Bundesrat at the earliest possible time.

(3) The Government allows for statements of the Bundestag before it takes part in drafting European Union laws. The Government considers statements of the Bundestag during deliberations. Details are regulated by federal statute.

(4) The Bundesrat has to be included in the deliberations of the Bundestag insofar as it would have to participate in a domestic measure or insofar as the Länder would be accountable domestically.

(5) Insofar as, in the area of exclusive legislative competence of the Federation, the interests of the Länder are affected or insofar as, in all other cases, the Federation has legislative competence, the Government considers the statement of the Bundesrat. If legislative competences of the Länder, the installation of their agencies, or their

⁴³ Art. 88-3 introduces also a specific derogation allowing citizens of the Union to vote and stand as a candidate in municipal elections.

⁴⁴ Art. 79 is about amendment of the Constitution. Its first paragraph provides that the Constitution 'can be amended only by statutes which expressly amend or supplement the text thereof ... (2) Any such statute requires the consent of two thirds of the members of the *Bundestag* and two thirds of the votes of the *Bundesrat*. (3) Amendments of this Constitution affecting the division of the Federation into *Länder*, the participation on principle of the *Länder* in legislation, or the basic principles laid down in Arts. 1 and 20 are inadmissible'.

procedures are centrally affected, the opinion of the Bundesrat has to be considered as decisive for the Federation's deliberation; the responsibility of the Federation for the whole state has to be maintained in the process. The consent of the Government is necessary in matters possibly resulting in higher expenses or lower revenues for the Federation.

(6) The Federation shall delegate the exercise of rights of the Federal Republic of Germany as a member of the European Union to a representative of the Länder nominated by the Bundesrat if exclusive legislative competences of the Länder are centrally affected. These rights are exercised with participation of and in coordination with the Government; the responsibility of the Federation for the whole state has to be maintained in the process.

(7) Details of Paragraphs (4) to (6) are regulated by a statute requiring the consent of the Bundesrat'.

Thus, both houses of the German Parliament are associated to the European decision-making procedure on the national level. The most challenging element is to be found, however, in paragraph 6. This disposition makes it possible for a representative of the *Länder* to exercise rights of the Federation on the level of the European Union if exclusive legislative competences of the *Länder* are centrally affected.⁴⁵ This could also be considered as a consequence of direct effect.

Article 88-4 of the French Constitution indicates much more laconically that:

'The Government shall lay before the National Assembly and the Senate any drafts of or proposals for instruments of the European Communities or the European Union containing provisions which are matters for statute as soon as they have been transmitted to the Council of the European Union. It may also lay before them other drafts of or proposals for instruments or any document issuing from a European Union institution. In the manner laid down by the rules of procedure of each assembly, resolutions may be passed, even if Parliament is not in session, on the drafts, proposals or documents referred to in the preceding paragraph'.

As a matter of fact, these special clauses on European integration which have been introduced in both Constitutions do not refer explicitly to the question of domestic effect of Community law. This question must therefore be answered

⁴⁵ Since the coming into force of the Maastricht Treaty, Art. 203 (ex 146) EC provides indeed that 'The Council shall consist of a representative of each Member State at ministerial level, authorized to commit the government of that Member State'. Cf. also Gerkrath (1995).

according to the general provisions about international law as presented above. In the end it is generally up to the judges to say what the Constitution signifies.

3 What the judges say that the Constitution says

National judges often have a rather reserved position vis-à-vis international law. The main reason for such an attitude is precisely to be found in their quality of 'national' judges rather than in their claimed 'unfamiliarity' with international law. Their jurisdiction is indeed founded on the Constitution and they will only consider international law as part of the domestic legal order if the Constitution says so in clear and unequivocal terms.⁴⁶ The constitutional provisions concerning international law give, however, substance for divergent interpretations. The role of the national judges, and in particular the conception which constitutional judges have of their own jurisdiction, appears thus to be at least as important in practice as the Constitution's wording.⁴⁷ Having compared the wording in the first part of this contribution, it is thus indispensable to examine the case law of the two constitutional courts which will reveal important differences with regard to the domestic effect of international and Community law.

A comparison of the case law of the French *Conseil constitutionnel* and the German *Bundesverfassungsgericht* must take into account the fact that there are important differences between the two institutions. These differences do not only concern their composition, but also their standing in the legal system and their competences. The German Court benefits certainly from an exceptionally powerful status.⁴⁸ In comparison, the *Conseil constitutionnel* appears humble and its attributions modest. One should not forget, however, that the *Conseil* is at the origin of a 'veritable political revolution' transforming itself into the guardian of individual rights.⁴⁹

Both Courts have the power to construe the Constitution with final authority vis-à-vis all the other institutions. Or, in other words, they deliver the authentic interpretation of the Constitution *erga omnes*. One must not forget, however, that besides the constitutional judges, the ordinary judges will also be called to intervene. Their role is necessarily stronger in France than in Germany where an ordinary court, faced with a question of constitutionality, will normally have

⁴⁶ Such 'judicial self-restraint' may also be explained by a reference to the separation of powers principle, which prevents the judge to act as a legislator. Cp. on this point Daillier (1998), p. 16.

⁴⁷ See Dupuy (2000), p. 394.

⁴⁸ Cp. Grewe & Ruiz Fabri (1995), p. 85.

⁴⁹ Cf. Rousseau (1993), p. 60 et seq.

to obtain a preliminary decision from the *Bundesverfassungsgericht*.⁵⁰ No similar procedure exists in France.

As a matter of fact, we will find in both countries judicial interpretations of the constitutional provisions on international and EC law (3.1). These are of course of special interest for the comprehension of the national visions of the principles of direct applicability and direct effect. But, in the case law of the *Bundesverfassungsgericht*, we will also find a couple of decisions containing interpretations of certain clauses of the Basic Law which do not have any apparent link with Community law but which are, nevertheless, construed in a sense which relates to the doctrine of direct effect (3.2).

3.1 ... interpreting the specific clauses on international and EC law

On the one hand, the *Bundesverfassungsgericht* and the *Conseil constitutionnel* have both acknowledged direct effect of EC law as a principle notwithstanding the domestic Constitution. But, on the other hand, they have also both established more or less precise limits which need to be analysed.

3.1.1 The principle of direct effect is generally accepted under the domestic Constitution

The *Bundesverfassungsgericht* already mentioned the principle of direct applicability of EC regulations in an early decision from 18 October 1967 quoting the wording of Article 249 (ex 189) EC.⁵¹ Four years later, on 9 June 1971, in the *Lütticke* case, the FCC acknowledged the direct effect of Article 90 (ex 95) EC as it had previously been declared by the ECJ.⁵² In its decision, the Federal Court argued that Article 24 BL does not only allow to transfer powers to intergovernmental institutions but also requires that the domestic authorities must recognize the law adopted by them. The FCC even agreed with the ECJ in considering that the doctrine of direct effect is necessary to realize the subjective rights of the citizens within the Common Market.⁵³ Three years later, the FCC, in the case known as *Solange 1*, declared that 'Article 24 BL does not in fact entitle to transfer sovereign rights but opens up the national legal order, ... thus giving room to the direct effect and direct applicability of law coming from another source within the national territory'.⁵⁴ Hence, there can be no doubt:

⁵⁰ According to Art. 100 BL.

⁵¹ BVerfGE vol. 22, p. 293. The decision concerns also the question of the Court's jurisdiction, it will be discussed below at 3.2.

⁵² Case 57/65 *Lütticke* [1966] ECR 205.

⁵³ BVerfGE vol. 31, p. 174.

⁵⁴ BVerfGE vol. 37, p. 280, 'der unmittelbaren Geltung und Anwendbarkeit eines Rechts aus anderer Quelle innerhalb des staatlichen Herrschaftsbereichs Raum gelassen wird'.

direct effect and applicability is compatible with the Basic Law. However, this is not without limits, as the Court underlines in the same decision.

In another well known decision, dating from 22 October 1986 (*Solange 2*), the German Court pronounced itself on the question of direct effect of Community regulations according to Article 249 EC. It did so, however, considering direct effect of regulations as a result of the command to apply EC law given by the national ratification act which embraces Article 249 EC. Furthermore, the Court added, that this command, based on Article 24 BL is not without constitutional restraints.⁵⁵

Finally, on 8 April 1987, in the *Kloppenburg* case, the *Bundesverfassungsgericht*, acting on an individual constitutional complaint against a judgment of the *Bundesfinanzhof*, clearly took a position on the question of direct effect of EC directives. Arguing against the case law of the ECJ on direct effect of directives and unwilling to refer this question to the ECJ throughout the preliminary ruling procedure, the *Bundesfinanzhof* had refused indeed to apply Directive 77/388/EEC.⁵⁶ As a result, the FCC, presenting a detailed analysis of the case law of the ECJ on the question of direct effect of directives, decided that this case law did not exceed the limits of judicial interpretation and consequently annulled the judgment of the *Bundesfinanzhof*.⁵⁷

In France, the *Conseil constitutionnel* did not have so many occasions to pronounce on the question of direct applicability or direct effect. There are, however, several decisions which show that the French constitutional court is not hostile to it. The first reference to the principle is to be found in two decisions of 30 December 1977.⁵⁸ The *Conseil* was asked to control the constitutionality of two budgetary statutes which had been contested because they did not contain any provisions about certain agricultural levies established by EC regulations. Referring to the wording of Article 249 EC, the *Conseil* indicated clearly that the validity (*'force obligatoire'*) of the dispositions of the regulation 'does not depend on an intervention of Member States' authorities'.

In a second decision, of 25 July 1991, on the French statute authorizing the ratification of the implementing convention of the 'Schengen' agreement, there is a rather mysterious passage about the link between direct effect of decisions of the 'Schengen executive committee' and judicial review.⁵⁹ The *Conseil* admits indeed that the convention of 19 June 1990 does not submit this executive committee to any judicial control. But it also considers that neither the institu-

⁵⁵ BVerfGE vol. 73, p. 375.

⁵⁶ OJ 1977, L 6/13.

⁵⁷ BVerfGE vol. 75, p. 223, in particular at p. 235 et seq.

⁵⁸ Decisions No. 77-89 DC and No. 77-90 DC, *Prélèvement isoglucose*, (30.12.1977), Rec. p. 46 et seq., RJC I-54.

⁵⁹ Decision No. 91-294 DC, *Accord de Schengen*, (25.7.1991), Rec. p. 91, RJC I-455.

tion itself, nor its attributions, are contrary to the Constitution 'as no stipulation of the convention confers the decisions of this committee any direct effect in the territory of the contracting parties'. Thus, the implementing measures adopted by French authorities are submitted to judicial control by French courts.

A last reference to direct effect is to be found in a recent decision on the constitutionality of the statute on the social security budget for 1998.⁶⁰ Considering the principle of equal treatment between pharmaceutical laboratories and wholesalers, the *Conseil* takes into account a Council Directive of 31 March 1992, 'not yet implemented'.⁶¹ Consequently, the *Conseil constitutionnel* seems to admit the possibility of directives deploying direct effects.

Since a well-known decision of 15 January 1975, it is clear that the *Conseil constitutionnel*, acting as constitutional court, refuses to review the conformity of a statute vis-à-vis a treaty. Implicitly, it thus invited the ordinary courts to exercise this type of control.⁶² It is also well known that the *Cour de cassation* (since 1975) and the *Conseil d'Etat* (since 1989) agree to ensure that treaties 'duly ratified or approved' prevail 'upon publication' over Acts of Parliament, 'subject to its application by the other party'.

Therefore, it appears to be more interesting to have a look at the most recent case law of the two highest ordinary courts in order to present briefly their position with regard to direct applicability or direct effect of international and EC Law and to discover their interpretation of the pertinent constitutional provisions.

With regard to international agreements, the three conditions of applicability mentioned by Article 55 of the Constitution furnish a structure to present the rich case law. First of all, both *Conseil d'Etat* and *Cour de cassation* refuse to apply a treaty which has not yet been published in the Official Journal.⁶³ This is of course rather prejudicial considering that the publication sometimes takes a couple of months or is simply neglected by the administration.⁶⁴ In a recent judgment, the *Conseil d'Etat* accepted furthermore to verify the regularity of the procedure of conclusion of an agreement according to the requirement laid down in Article 55.⁶⁵ As to the condition of reciprocity, the *Conseil d'Etat* refers this

⁶⁰ Decision No. 97-393 DC, *Loi de financement de la sécurité sociale pour 1998*, (18.12.1997), Rec. p. 320, RJC II-721.

⁶¹ At point 16 of the decision; Council Directive 92/25/EEC, OJ 1992, L 113/1.

⁶² Decision 74-54 DC, *Interruption volontaire de grossesse*, (15.1.1975), Rec. p. 19, RJC I-30. The situation is different when the *Conseil* acts as judge on the regularity of elections

⁶³ See *Conseil d'Etat* (13.7.1965), *Société Navigator*, Rec. p. 423 and Cass. Civ. 1 (16.5. 1961), [1961] *Dalloz* p. 489.

⁶⁴ The link between the requirement of publication and direct effect has recently been stressed by a 'circulaire' of the Prime minister, cf. *RGDIP* 1997, p. 591.

⁶⁵ See *Conseil d'Etat* (18.12.1998), *Sarl du parc d'activité de Blotzheim*, Rec. p. 483, *RFDA* 1999, p. 315.

question systematically to the Minister of foreign affairs⁶⁶, while the *Cour de cassation* considers it to be satisfied as long as the treaty has not been officially repealed by the executive power.⁶⁷

The way these three conditions of applicability are handled by the *Conseil d'Etat* reveals clearly a 'dualist' attitude which has been confirmed by the judgment in the *Sarran* case of 30 October 1998. The *Conseil d'Etat* states indeed that the prevalence granted to international agreements by virtue of Article 55 of the Constitution 'does not apply, within the internal order, to dispositions of constitutional value'.⁶⁸ Difficult to find a more explicit formula to explain the theory of dualism.

Concerning the question of direct effect of treaty provisions, the case law on the UN Convention on rights of children from 26 January 1990 furnishes an example of divergent interpretation by the highest French courts. The *Cour de cassation* decided indeed that the provisions of this convention 'cannot be invoked in court, because they are not directly applicable' without considering these provisions one by one.⁶⁹ The *Conseil d'Etat*, on the contrary, recognized, first implicitly and later explicitly, the possibility of 'immediate applicability' of certain provisions of the same convention.⁷⁰

With regard to customary international law, it has been mentioned above that the French Constitution is not as explicit as the German Basic Law. Section 14 of the preamble of 1946 refers indeed to 'the rules of public international law' without further specification and Article 55 does only deal with agreements. It is therefore not surprising that the *Conseil d'Etat* refuses to give prevalence to customary international law over statutes. Thus, customary international law exists in the domestic order but does not prevail over statutory law.⁷¹

With respect to EC Law, the position of the ordinary French courts does not differ fundamentally from the position of the *Conseil constitutionnel*. The *Conseil d'Etat* is, however, somewhat 'reluctant' to recognize direct effect of directives. It does not accept indeed, since the famous *Cohn-Bendit* case in 1978, that an individual may invoke a directive against an individual act of the administration.⁷² Thus, the case law restrains the 'effectiveness' of the direct

⁶⁶ Cf. Conseil d'Etat Ass. (9.4.1999), *Madame Chevrol-Benkeddach*, Rec. p. 115, RFDA 1999, p. 937.

⁶⁷ The Conseil constitutionnel considered that the condition of reciprocity (contained in section 15 of the preamble of 1946) was satisfied in the case of the Maastricht Treaty as Art. 52 (ex Art. R) states that 'this treaty shall enter into force ..., provided that all the instruments of ratification have been deposited ...'.

⁶⁸ Cf. Dupuy (2000), p. 406.

⁶⁹ Cass. Civ. 1 (10.3.1993), *Lejeune*, RGDIP 1993, p. 1051. In two following judgments this formula has been 'softened'. See Braunschweig & de Gouttes (1995), p. 878 and Alland (1998), p. 213 et seq.

⁷⁰ Conseil d'Etat (29.7.1994), *Préfet de la Seine-Maritime c. Abdelmoula*, RGDIP 1995, p. 502 and Conseil d'Etat (10.3.1995), *Demirpence*, Rec. p. 610. See Alland (1998), p. 210 et seq. for further references.

⁷¹ Conseil d'Etat (6.6.1997), *Aquarone*, Rec. p. 206, RFDA 1997, p. 1068. See Alland (1997), p. 1054.

⁷² Conseil d'Etat (22.12.1978) *Cohn-Bendit*, Rec. p. 524. English translation in [1980] 1 CMLR 543.

effect doctrine. The most important limits have been fixed by the constitutional courts themselves.

3.1.2 Both constitutional courts maintain limits to direct effect deriving from domestic constitutional law

The study of the case law concerning European integration reveals a common tendency of the *Bundesverfassungsgericht* and the *Conseil constitutionnel* to use some circumscribing constitutional restraints in the field of European integration. These restraints are, however, quite different in substance. On the one side, the *Conseil constitutionnel* has developed a doctrine based on the ‘essential conditions of the exercise of national sovereignty’, on the other side, the *Bundesverfassungsgericht*, developed specific restraints founded on the protection of fundamental rights and the principle of democracy.

In an early decision, the *Conseil constitutionnel* made a distinction between ‘limitations of sovereignty’ which it considered to be allowed and ‘transfer of sovereignty’ which it held contrary to the Constitution.⁷³ Strongly criticized, this distinction has been definitely abandoned since a decision from April 1992, known as *Maastricht 1*.⁷⁴ In this decision, the *Conseil constitutionnel* inaugurated a new approach based on ‘transfer of competences’ similar to the wording of Article 88-2. Since then it considers that:

‘the respect of national sovereignty does not prevent France from concluding, on the basis of the dispositions of the preamble from 1946 and subject to reciprocity, international agreements in order to participate in the creation or in the development of a permanent international organisation having legal personality and being invested with decisional powers by virtue of transfer of competences consented by the Member States’.

Called to verify, according to Article 54 of the Constitution, whether ‘an international commitment contains a clause contrary to the Constitution’ the *Conseil* applies a three step test. The Treaty will indeed be held contrary to the Constitution not only if it contains a clause which is incompatible with the Constitution but also if it affects the constitutionally guaranteed rights or freedoms, or if it infringes the ‘essential conditions of the exercise of national sovereignty’.⁷⁵ The sense of this apparently undetermined notion has been explained by the *Conseil*. It refers to the duty of the State to ‘ensure the respect of the institutions

⁷³ Decision No. 76-71 DC, *Assemblée européenne*, (30.12.1976), Rec. p. 15, RJC I-41.

⁷⁴ Decision No. 92-308 DC, *Traité sur l’Union européenne*, (9.4.1992), Rec. p. 55, RJC I-497.

⁷⁵ Cf. the most recent Decision No. 99-408 DC, *Traité portant statut de la Cour pénale internationale*, (22.1.1999), Rec. p. 29. See also Flauss (2001), p. 48.

of the Republic, the continuity of the nation's existence, the guarantee of the citizens' rights and freedoms'.⁷⁶ The *Conseil* also indicated that the transfers of competences may affect the 'essential conditions of the exercise of national sovereignty' either by their 'nature' or because of the 'modalities' which are chosen to accomplish them.⁷⁷

In Germany, the Federal Constitutional Court has developed quite a different conception concerning the relationship between EC Law and the Constitution. Already in the decision *Solange 1*, in 1974, the Court states that Article 24 BL does not make it possible to 'invalidate the identity of the effective German Constitution by an intrusion in its constitutive structures'. In this context, the function of the Court is sometimes compared to 'bridge guard' controlling the extent to which Community law is allowed to step over and to enter the German legal order.⁷⁸

Two main restraints have been pointed out by the Court: the protection of fundamental rights on a level which is equivalent to the protection given by the Basic Law and the respect of the democratic principle. Concerning the first aspect, there is a long succession of decisions starting in 1967 and ending in 7 June 2000.⁷⁹ According to the latest decision, the Court makes clear that it will only control the constitutionality of EC Law if an applicant shows in detail that the protection of fundamental rights within the Community is no longer equivalent to the protection assured by the Basic Law.⁸⁰

The second aspect concerns the principle of democracy. In the *Maastricht* decision of 12 October 1993, the *Bundesverfassungsgericht* referred indeed to this principle in order to declare that it requires limits to be set to the transfer of powers to the institutions of the European Union.⁸¹ The Court considered especially that the dynamic interpretation of the Community Treaties must not result in a treaty amendment because in this case 'such interpretations of competencies would not have any binding effect in Germany'.⁸²

These extracts clearly show that the acknowledgement of the principle of direct effect is limited. Community law may have direct effect, provided that it does not conflict with basic principles and values enshrined in the Basic Law. Interestingly, several provisions of the Basic Law have been construed in a manner which connects them to the doctrine of direct effect even though they do not have any apparent link with international or Community law.

⁷⁶ See decision No. 91-294 DC, *Accord de Schengen*, (25.7.1991), Rec. p. 91, RJC I-455.

⁷⁷ Decision No. 97-394 DC, *Traité d'Amsterdam*, (31.12.1997), Rec. p. 344, RJC II-727.

⁷⁸ This image has been used by one of the judges. Cf. Kirchhof (1994), p. 11. See also Puissechet (2000), p. 86 et seq.

⁷⁹ For an overview cf. Kokott (1996).

⁸⁰ Decision of 7 June 2000, BVerfGE vol. 102, p. 147. See Zimmer (2001), p. 3.

⁸¹ BVerfGE vol. 89, p. 155.

⁸² *Ibid.*, p. 210.

3.2 ... interpreting other constitutional clauses related to the principle of direct effect

The case law of the German *Bundesverfassungsgericht* comprises several such decisions concerning articles of the Basic Law which do not show *a priori* any apparent link with EC law. Nevertheless they will be construed by the Court in a manner conferring on them a close connection with the question of direct effect. Where there are no comparable decisions to be found in the case law of the *Conseil constitutionnel*, three examples can be detected in German case law.

In the first place, there is Article 101(1) BL which declares extraordinary courts inadmissible and states that ‘no one may be removed from the jurisdiction of his lawful judge’. In the *Solange 2* case, the *Bundesverfassungsgericht* indicates that the Court of Justice has to be considered as ‘the lawful judge’ when it decides on preliminary questions following Article 234 EC. Therefore, an individual can challenge the refusal of an ordinary court to ask for a preliminary ruling of the ECJ as being contrary to Article 101(1) BL. If such a refusal is found to be arbitrary, the *Bundesverfassungsgericht* will overrule the incriminated judgment.⁸³ This interpretation of Article 101(1) BL confers direct effect on Article 234 EC.

In the second place, Article 38(1) BL is construed as an individual right to participate in the democratic process of legitimization of the sovereign power. In the *Maastricht* decision of 12 October 1993, the *Bundesverfassungsgericht* had first of all to solve a problem of jurisdiction. Indeed, according to Article 93(1)(4a) BL, constitutional complaints introduced by individuals must be based on the allegation of a violation of their fundamental rights. According to the FCC, such a complaint could be based on Article 38 BL which guarantees ‘general, direct, free, equal and secret elections’ of the deputies in the German *Bundestag*.

For the first time it construed this right as a subjective right of each citizen ‘to concur to the legitimization of the state power by the people on the federal level’. Consequently, the FCC reasoned, the right of a complainant from Article 38 BL can be violated if competences of the German Parliament are transferred to an intergovernmental organ of the European Union or the European Community to such an extent ‘that the minimum requirements of democratic legitimization of the sovereign power the citizen is faced with are no longer fulfilled’.⁸⁴

According to the FCC there are therefore limits to the transfer of powers to the Community institutions and there is a breach of Article 38 BL ‘if an Act that opens up the German legal system to the direct validity and application of

⁸³ For an example see, BVerfGE vol. 75, p. 223, decision of 8 April 1987, *Kloppenburg*.

⁸⁴ Cf. BVerfGE vol. 89, p. 172. Translation by the author (‘unverzichtbare Mindestanforderungen demokratischer Legitimation der dem Bürger gegenüber tretenden Hoheitsgewalt’).

the law of the - supranational - European Communities does not establish with sufficient certainty the intended programme of integration'.⁸⁵ The reasoning of the FCC is clearly influenced by the principle of direct effect. In order to resume its argumentation in a single phrase: the democratic principle laid down in Articles 20 and 38 of the German Basic Law imposes limits to the transfer of powers to Community institutions because the citizens are (directly) faced with their sovereign power and because the law adopted by them will apply directly in the Member States.

In the third place, the FCC decided that constitutional complaints under Article 93(1)(4a) BL may now be introduced directly against measures of Community law. This question had been answered negatively in the first place (decision from 18 October 1967) because Community regulations are not 'acts of the German public authority'. But in the *Maastricht* decision, the Court altered its jurisprudence explicitly indicating that acts emanating from the 'public authority of a supranational Organisation' do also affect the beneficiaries of the protection of fundamental rights in Germany.⁸⁶ Hence, it is again the doctrine of direct effect of Community acts which justifies a solution apparently contrary to the intent of the Basic Law.⁸⁷

Such an assimilation of acts of the Community institutions to acts of the German public authority appears indeed as a logical consequence of the direct effect doctrine. The procedural repercussions decided by the *Bundesverfassungsgericht* are, however, contrary to EC law. One might proclaim that Community acts have to be submitted to the same standards of judicial review as any act of German law, precisely because they affect individuals in Germany in the same way.⁸⁸ But the jurisdiction on the validity of Community law must remain with the Court of Justice.

These three examples illustrate that the doctrine of direct effect as developed by the Court of Justice and acknowledged by the national (constitutional) judges may sometimes generate a kind of 'boomerang effect'. Suddenly, national constitutional provisions which have not been written for this purpose will produce effects with regard to the European Union: the ECJ will become a 'lawful judge' in Germany, the principle of democracy (of the Basic Law) will limit the development of the European Union and the decision-making power of the Community institutions will be considered as 'public authority' on the German territory. As

⁸⁵ *Ibid.*, p. 187. Translation drawn from [1994] 1 CMLR 57.

⁸⁶ *Ibid.*, p. 175.

⁸⁷ According to Art. 93(1)(4a) 'The Federal Constitutional Court decides: (...) on complaints of unconstitutionality, being filed by any person claiming that one of his basic rights (...) has been violated by public authority'.

⁸⁸ The parallel to the above quoted passage in the decision of the *Conseil constitutionnel* in the *Schengen* decision (25.7.1991) is obvious.

with the principle of direct effect itself, these are all consequences which occur only within integrated or 'mutually overlapping' legal systems.⁸⁹

4 Conclusion

The comparison between French and German constitutional law and jurisprudence with regard to the question of domestic effect of international law in general and of EC law in particular leads to three final remarks.

Firstly, this comparison clearly shows, that the divergent constitutional options in favour of 'monism' or 'dualism' tend to become more and more secondary in practice. A clause like Article 55 of the French Constitution actually operates - in anticipation and under several conditions - a sort of general reception of international treaties. Thus, it appears that in the bottom dualism subsists and that the option in favour of monism, whether it is taken by the constitution or by the case-law, constitutes merely 'a modality of dualism'.⁹⁰

Secondly, the comparison of the case-law of the *Bundesverfassungsgericht* and the *Conseil constitutionnel* also revealed some interesting similarities corroborating the existence of common principles and values, which the 'guardians of the Constitution' defend legitimately. As it has been shown above, both courts accept - within certain limits - the principle of direct effect, especially in the field of EC law. In spite of undeniable and important differences in drawing these limits, the two courts notably agree on the necessity to maintain the constitutionally guaranteed rights or freedoms of the citizens. Furthermore, they also seem to agree on the point that Community measures with direct effect must be submitted to the same standards of judicial control as measures taken by national authorities.⁹¹

Finally, it is striking to see that the case law of the different French courts concerning the question of direct effect is not necessarily convergent. Compared to Germany, the French system appears to be dominated by the brevity of the dispositions of the preamble of 1946 and of Article 55, which altogether are rather elliptical, and by the coexistence of several orders of jurisdiction. As a result, this leads to the consequence that the direct effect of a treaty may be accepted or refused depending on the court to which the matter will be referred to (*Conseil d'Etat* or *Cour de cassation*). In Germany, such a situation is rendered impossible. According to Article 100 BL, ordinary courts must obtain a decision

⁸⁹ The expression is from Bieber (1988), p. 147.

⁹⁰ See Combacau & Sur (2001), at p. 180.

⁹¹ This results from the above quoted passage in the *Schengen* decision of the *Conseil constitutionnel* (Decision No. 91-294 DC, *Accord de Schengen*, (25.7.1991), Rec. p. 91, RJC I-455) and the *Maastricht* decision of the *Bundesverfassungsgericht*, BVerfGE vol. 89, p. 175.

from the Federal Constitutional Court 'where ... doubt exists whether a rule of public international law is an integral part of federal law and whether such rule directly creates rights and duties for the individual'. Therefore, the issue of direct effect is under the central control of the Constitutional Court through a mechanism of preliminary ruling (art. 100 (3)BL).