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TREATIES AS LAW IN NATIONAL COURTS: COMMENTS FROM AN ITALIAN VIEWPOINT*

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It is a great honor for me to be here today and to participate in this conference as *collega minor, sed multo minor,* among a number of distinguished scholars of international law. I am far from being a specialist in public international law; my knowledge of the field is derived from the course I took at the University of Rome years ago and from some scattered readings in the meantime. I certainly feel unqualified to comment authoritatively on Dean Dihigo's scholarly address, whose main conclusions I entirely accept; nor could I add anything to Professor Kaufmann's learned and acute observations. It has been one of my most pleasant and rewarding experiences in this country to live in the atmosphere of an American law school, to participate personally in that exchange of knowledge, in that stimulating dialogue between teacher and students which is carried on day by day in the classrooms, and the greater value of which is more human than technical. It is with this in mind that I have accepted with pleasure the invitation to be here this afternoon. For what I will try to do is bring the contribution of a student to this discussion, continuing that symbolic dialouge just mentioned. In this role I trust that I may be considered as speaking also as a representative of the L.S.U. Law School student body.

Professor Kaufmann has very clearly illustrated how the problem discussed today of the status of treaties as law in national courts poses itself in Germany, how it is solved, and has brought us the contribution of the German experience in this field. What I will attempt to do is to illustrate the Italian viewpoint and, therefrom, express a few scattered observations on what has been said by the distinguished speakers who have preceded me.

The period following the First World War on the Continent

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has been characterized by what has been called the internationalization of constitutions, through the inclusion into them of various provisions, among them some very similar in their purpose to article VI, clause 2, of the United States Constitution. I shall not mention the movements of this development, nor the well-known provisions in the different constitutions. Professor Kaufmann has conveyed to us the meaning of article 25 of the German Federal Constitution. This provision, together with the corresponding provisions of the constitutions of some Länder of the German Federal Republic, is probably, to my knowledge, the one which has carried to the furtherest extreme yet this process of global conversion of the rules of international law into rules of domestic law, to use Kelsen's expression. The new Italian Constitution, enacted on January 1, 1948, also contains such a provision. Article 10(1) of the Constitution reads as follows: "The Italian legal order conforms to the rules of international law, which are generally recognized." What is the meaning and the scope of this provision? Article 10 is more than a mere and formal declaration of the principle that the Italian State will conform to generally recognized rules of international law; it creates a constitutional obligation of the State in this direction. The very language of the provision is evidence thereof: the reference is to the "Italian legal order" and not to the "Italian State," as has been observed. It has been said that such an autolimitation of the State is not contrary to the concept of sovereignty. I shall not discuss this statement; other provisions in modern constitutions have limited this traditional concept. I express the doubt that perhaps today it is improper to speak of sovereignty in an acceptation which has become a little anachronistic and which, together with so many traditional concepts of our public law, does not correspond any longer to the reality of our world, both on the international and the national levels. Perhaps the time has come for a revision of these concepts, based on the concrete consideration of what are the functions of the modern state today in the domestic and in the international spheres.

It is said that article 10 contains a rule of legal production, by means of which a so-called automatic adaptation of the domestic legal order to international law is achieved. In its content article 10 is not new in the Italian legislation; it can be said that this automatic adaptation existed also under the

abrogated constitution, the 1848 *Statuto Albertino*. Its innovation consists in the creation of a special higher protection, a "constitutional" protection, of the command contained in the provision. Under the new Italian Constitution, which ranks itself among the so-called rigid constitutions, constitutional provisions belong to the highest hierarchy of sources of law in the legal order and as such they are offered a special protection. Every provision of law (statutory or of different source) contrary to the Constitution is invalid, even if emanated later; the procedure for the formation of constitutional norms requires special formalities, adding to the guarantees of their respect. Through article 10 this same protection is granted to the command contained in it: not the single provisions of international law as such are objects of the protection, but conformity to international law. This is the meaning of the incorporation of international law into domestic law attained through article 10. Every provision of law contrary to this constitutional command would be invalid. It is felt that the Constitutional Court, recently constituted, would be competent to declare such constitutional invalidity, thereby exercising a function as the one which was explicitly conferred upon the Austrian High Constitutional Court by article 145 of the 1919 Austrian Constitution.

International law in article 10 means all international law which is positive and general. What is the scope of article 10 with regard to treaties? It is said that the fundamental rule of international law, *pacta sunt servanda*, is comprised within the protection afforded by article 10; not as the expression of a category of general international law of conventional origin, but insofar as it indicates an obligation which derives from general international law. What is the effect of the incorporation of this rule into the Italian legal order? As said above, its purpose is to create a constitutional obligation of the Italian State to conform to its internationally assumed conventional commitments, by putting into movement the necessary machinery of legal production in order to execute them. Article 10 protects this fundamental obligation and does not cover the modes of execution of treaties. It does not incorporate the single provisions of the treaties into the domestic legal order by way of a process of automatic legal production, but provides for the guarantee of their insertion through the necessary devices offered by the legal order. Against the violation of this obligation

various remedies are afforded, which I shall not discuss now.

In light of what has been said, therefore, we can conclude that article 10 provides a rule for conformity to the general international law even with regard to treaties. This is the meaning of the adaptation to conventional international law authorized by article 10.

Professor Wright has mentioned this afternoon the distinction between self-executing and non-self-executing treaties. May I add that in several European countries today treaties are made self-executing by provision of law or by procedural devices, *e.g.*, article 26 of the French Constitution. In Italy treaties are made practically self-executing through the emanation of the order of execution before ratification. Professor Preuss, of the University of Michigan, a few years ago in a very interesting and rich report at the annual meeting of this Society, illustrated the different solutions given in many foreign countries.

I would like to add an observation to what Dean Dihigo said in his learned address. He said that in case of a conflict between a treaty and constitutional law, constitutional law prevails; and he gave many good reasons why such could and should be the solution. May I add that I think different solutions can be given according to the positive law of the state taken into consideration and to the hierarchy of sources of law ruling there. In Italy, and in countries where constitutional provisions similarly belong to the highest rank of legal norms, and as such enjoy the special protection mentioned before, there is a ground of positive law why constitutional law prevails over treaties. The explanation of the command contained in article 10 as to treaties clarifies the reason for this solution. It seems to me that a statement to the contrary would be in the nature of a noble emotion, but would be bereft of any basis in the law. A different solution has been suggested in Italy, with special regard to the Lateran Pacts. This poses a problem of interpretation of article 7 of the Constitution, and its so-called "constitutionalization" of the Lateran Pacts. In case of conflict — and there are such cases — between the provisions of the Constitution and the provisions of the Pacts, which one should prevail? It has been suggested — and the solution has been presented as general — that the provisions of the Pacts should prevail,

because of article 10 of the Constitution and its effect. I doubt that this opinion could be the right interpretation. Anyway, there might be a special reason for such a solution in the particular case because of the existence of article 7; but, again, I do not think that a general proposition following this opinion would be correct.

Dean Dihigo mentioned also the problem of a conflict between a treaty and a later national law; namely, whether a later law can derogate a treaty. According to the jurisprudence, the law prevails. His opinion, however, is to the contrary. In Italy, article 10 of the Constitution, with its incorporation of the principle *pacta sunt servanda* in the limits I have explained, provides the positive basis for a solution similar to the one advocated by Dean Dihigo, namely, for the prevalence of a treaty over a later national law.

Professor Dainow earlier this afternoon raised a very important question. In case of a non-self-executing treaty, if a state does not fulfill its obligation of executing the treaty, what shall the courts do? Shall they sustain the international validity of the treaty notwithstanding the fact that it has not received a valid sanction in the domestic legal order? It has been suggested in Italy that the treaty should be held valid; this opinion is based on the above-given interpretation of article 10, which puts a constitutional brake to the international responsibility of the state. This solution would be quite possible. As in most of these cases, it will be the function of our Constitutional Court to dictate the right interpretation of the law. From this viewpoint, Italian constitutional law in the next years might present very interesting developments.

Perhaps some of you are wondering (and so do I) why a non-specialist in public international law was invited to participate in this program. Maybe there is one reason; it is in the form of a warning, of a memento. The real importance of the study of international law is not in the understanding of a special language, of a technical terminology; nor in the penetration of the necessary interrelations and connections of the various branches of legal science; nor in its use in international trade and business. There is much more than this. International law plays today a much higher and more vital function in the world. The greatest contribution which the study of interna-

tional law could bring is the full comprehension of this function. With regard to this, I feel authorized to speak as a representative of the young generation, and particularly as a representative of the student bodies of Louisiana State University, of the University of Rome, and of the University of Muenster, and assure you that we young men are aware of the role played by international law in modern society and of the function we are called upon to fulfill with relation to it. Treatises of international law are often divided into a volume relating to the international law of peace and a volume relating to the international law of war. It would be too Utopian to hope to eliminate the necessity of the second volume. But we young men, who have witnessed the disasters ensuing from the violations of international law, are aware that it is our duty to contribute to that rationalization of power (to use the expression of a scholar of constitutional and international law who recently disappeared — Mirkine-Guetzévich) which has been achieved on the national level through parliamentarism and the devices of constitutional democracy, and which can be achieved on the international level only by the means of international law. This it seems to me is the very essential meaning of this meeting today, namely, to bring out to the responsible class of lawyers, judges, and students of the law the importance of international law in governing the present world and in molding it in a new and better one.