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CONSTITUTIONAL COMPETENCE FOR CONCLUSION AND ENACTMENT OF INTERNATIONAL TREATIES *

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Abstract. *Questions of international relations rarely found its place in constitutions because it was considered that the foreign policy represents the freedoms of acting which does not bear legal limitations. However, when the politics was submitted to certain legal rules it was considered that it belongs to in the exclusive jurisdiction of a state in which other states and international community are not allowed to interfere. Today this standpoint is in a large measure changed, but has not been completely abandoned. Turning point are four French revolutionary Constitutions in which one can find provisions about the ratification of international conventions. This example was followed by the other state among which Serbia and Yugoslavia. In constitutions of European states in XIX and XX century one can notice enough similarities in respect of many solutions among which are conclusions of international conventions.*
The widened jurisdiction of republics sets up the question of executions of international conventions. Constitutions usually pass or arrange indirectly this question. Therefore one should often start from the content of international conventions and obligations the state. International law imposes obligations only to a state and makes it responsible for the non-fulfillment of international obligations regardless it internal organization.

Key words: *International law, constitutional charter, how to conclude international treaty, council of minister, human rights, international treaty implementation, international organization, international treaty conclusion, legal act, national law, legal system, how to ratify international treaty, Vienna convention, head of a state, foreign policy, national assembly, state representation.*

I INTRODUCTION

1. The scope of the problem

As principal instruments of international relations, international treaties have always been very relevant to states, of which one finds testimonies dating back to the most distant

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past. Even when, based on the self-obligation theory, states held that they could cancel these treaties at any time, they still had to accept the fact that these contracts were the source of their rights and obligations with regard to other states, regardless of the ways in which they viewed their relation to international law. Taken this way, treaties assumed at least two meanings. On the one hand, they worked as instruments to establish legal relations with other parties in international law, which therefore created an international legal community. On the other, through their sheer contents, they added up to the totality of these states' rights and commitments, whether or not they were officially considered constituent parts of the national law.

Different techniques for the origination of treaties and internal regulations allowed the states to act differently in relation to their legal equals than they acted to those within their jurisdiction. This provided some relative room in foreign affairs, but also limited freedom of action. If maintaining international ties was considered a part of foreign policy, a specific form of policy in general, constitutions had fewer provisions on international relations. It was considered superfluous to prescribe the competences and authorities of the supreme bodies (sovereigns) who did not have any limitations in this respect. Foreign, just like interior, policy was defined and conducted on the basis of free judgment. Since politics was liable to changes which were often quicker than law, the prevalent sentiment was that it should not be bound by any norms. Perhaps this is where one should seek explanation why the doctrine started discussing one of the oldest institutes of international law only in the early 17th century, when Grotius proposed methods for the interpretation of international treaties.[1] However, when policy was subjected to certain limitations, it was generally believed that it would be sufficient to prescribe who was in charge of maintaining relations with other states, while everything else would remain within the exclusive domestic jurisdiction of states, with which other states and the international community were not to interfere.[2]

In German theory of law there was an opposite view – that anything occurring in the international realm belonged to international law, which would also include anything related to the emergence of international treaties, including the question who was competent to conclude international treaties. Only this was "granted" to states. O. Nippold wrote: "National law defines who can conclude treaties in the national law. This law cannot at all define more than this, as it would then exceed its competences."[3] There is no doubt that activities of state bodies in the international domain constitute a specific kind of connection between the "two laws", or two legal systems. Still, the view of the exclusive internal jurisdiction of states prevailed. Early changes were seen in the French Revolution, whose constitutions (of 1791, 1793, 1795, 1799), for reasons political much more than legal, included provisions on negotiations and the conclusion, in particular ratification, of treaties.[4] Similar provisions were incorporated into the 1815 Dutch Constitution (Art. 60), and were then taken over and added to the constitutions of many countries.

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[1] For explanations, see the text in the Proceedings, P. Reuter, Introduction au droit de traités, Paris 1972, p. 9.
[2] More detail in M. Milojević, The Principle of Non-Interference in the Internal Affairs of States, "Facta Universitatis", 2000, No 4, pp. 427-447.
[3] Nippold, Der völkerrechtliche Vertrag, seine Stellung im Rechtssystem und seine Bedeutung für das internationale Recht, 1894, S. 115. For critical remarks see H. Kelsen, Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rectslehre, Tübingen 1920.
[4] For texts of constitutions, see A. Thiers, Histoire de la Révolution française, t. 4, 15 éd., Paris 1851; - L. Du-

2. Representation of the state and conclusion of treaties

Old constitutions did not make any difference between the representation of the state and the conclusion of international treaties, while more recent constitutions made this distinction, but covered both issues in the same provision. One should seek reasons for this in the fact that both functions were then part of the competence of the same body (head of state or sovereign). State representation meant that the state had full powers for negotiating and concluding international treaties. It was much more important in the past than it is today due to the general position of the head of state. In the times in which states were viewed as personal estates of rulers, where the population consisted only of subjects, rulers were much more prominent than the states they represented, and they personally were seen as parties in international law. Only with the development of the state was this relationship changed. The growth of parliamentarism separated the functions of state representation and conclusion of international treaties.

II – Conclusion of International Treaties

1. Conclusion of treaties in serbian constitutions

The process in which state representation was separated from the conclusion of international treaties can perhaps best be seen in Serbian constitutions. In the 1835 Constitution there is not a single provision on international links, whereas in the 1838 Constitution the Sultan ordered prince Milos to open an "office", headed by his personal representative, which would "issue passports and manage relations between the Serbs and foreign authorities" (Art. 5). Due to the position Serbia had in the international law of that time, there is no mention here of declaring wars and concluding international treaties, which was a common thing in the constitutions of the period. However, the Act on the Soviet (1861) authorized the prince to represent Serbia "in relations with foreign countries" and to "conclude treaties and make conventions", while the 1869 Constitution prescribed that the prince was "head of state" (Art. 3, Par. 1), and that he should "represent the country in all international affairs and conclude contracts with other countries" (Art. 8, Par. 1). Declaration of war and conclusion of peace would appear only in the Constitution of the formally independent Serbia of 1888 (Art. 52), and would then be transferred to future Serbian Constitutions (1901, 1905), and to the first two Yugoslav Constitutions (1921, 1931).

The competence of the head of state to conclude international treaties was gradually reduced, and it was constantly extended in favour of the National Assembly and the Government. Nevertheless, contemporary international law holds that heads of state or government and foreign ministers are authorized, by their position, to conclude all kinds of international treaties (Art. 7, Par.2, point *a* of the Vienna Convention of the Law of Treaties, 1969). Moreover, heads of diplomatic missions are authorized to conclude treaties between the accrediting State and the State to which they are accredited (Art. 7, par. 2, point *b* of the Convention), while representatives of states accredited to an international

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guit et H. Monnier, Les Constitutions et les principales lois politiques de la France depuis 1789, 3 éd., Paris 1915 More detail in B. Mirkinne-Guetzévitch, Les nouvelles tendances du Droit constitutionnel, "Revue du droit public et de la science politique en France et à l' étranger", 1929, No 2, pp. 193-199.

conference or an organization or one of its bodies are authorized to conclude treaties adopted in that conference, organization or body, even without having to produce full powers (Art. 7, par. 2, point *c* of the Vienna Convention).

2. Conclusion of treaties in yugoslav constitutions

In the first Yugoslav Constitution, of 28 June 1921, conclusion of international treaties was covered in two separate articles. Article 51 regulated the representation of the state in international affairs, declaration of war, and conclusion of peace, while Article 79 covered the conclusion of international treaties. In this respect, the Constitution made a difference between several types of treaties: 1) treaties in general, 2) "purely political treaties" (Art. 79, Par. 1), 3) treaties pertaining to foreign armed forces, crossing the state territory and owning it (Art. 79, Par. 2), and 4) treaties on exchange or transfer of state territory (Art. 79, Par. 4). Separate rules were valid for accepting any of these treaty types. All treaties were concluded by the king, but to conclude treaties from the first, third, and fourth group, an approval of the National Assembly was needed, as was the situation with the treaties from the second group, if they were opposed to the Constitution and legal acts. The Constitution adopted on 3 September 1931 provided almost identical solutions, except for the fact that now the approval of the Houses of National Representation (the National Assembly and the Senate) was not required for the treaties from the second group.

In post-war Yugoslav constitutions, conclusion of international treaties was harmonized with the federal system, on the one hand, and with the multi-house Parliament with separate competences of individual houses, on the other. The Constitution of 31 January 1946 defined that the Presidium of the National Assembly of the Federative People's Republic of Yugoslavia, functioning as head of state, was authorized to ratify international treaties (Art. 75, Par. 1, Sen. 9) (as was the case with heads of state in some countries). However, some treaties were ratified by the National Assembly and the Government. The Constitutional Act on the Foundations of Social and Political System in the Federative People's Republic of Yugoslavia and Federal Agencies of Government, passed on 13 January 1953, introduced some novelties in terms of ratifying international treaties, for which now several agencies were authorized. Treaties from the competence of the Assembly were ratified by the Federal House and the House of Producers or the Federal House itself, and the House of Commons could also provide its opinion. Treaties not within the authority of the Assembly were ratified by the Government (the Federal Executive Council). The President of the Republic issued instruments for the ratification of international treaties.

Principal solutions of the Constitutional Act (1953) were retained in the 1963 and 1974 Constitutions, with a number of amendments to the Constitutions and Acts on the Federal Executive Council, related to the conclusion of international treaties. Constitutional amendments VIII and IX (of 1968) strengthened the role of the House of Commons in ratifying international treaties, while the amendment XXXV (1971) defined that international treaties requiring adoption or change of republic or provincial acts, or which imposed specific obligations for one or a number of republics or provinces, were to be concluded upon the compliance of the assemblies of republics or provinces. In times of "state of war or imminent emergency, the President of the Republic and the Presidency of the Socialist Federative Republic of Yugoslavia were allowed to pass statutory decrees, otherwise the competence of the Assembly, i.e. to ratify international treaties." Such solutions were

incorporated into the Constitution adopted on 21 February 1974. Acts on the Fundamentals of the State Administration System, on the Federal Executive Council and Federal Administrative Agencies, and on the Conclusion and Enactment of International Treaties (1978) further defined the details of the procedure for concluding treaties, where the role of the federal government and administrations of republics and provinces was increased.

The Federal Constitution passed on 27 April 1992 restored the classical framework for the issue of concluding international treaties, reducing the problem to ratification (approval) for which sole competence lay with the Federal Parliament (Art. 78, Par. 4), i.e. with the House of Commons and House of Republics on equality basis (Art. 90, Par. 1). In addition, republics were allowed, "within their competences", to conclude "international treaties", but not at the expense of Yugoslavia or the other republic (Art. 7, Par. 2). The preparation of the treaty was the duty of the Government, which defined and conducted foreign policy and maintained international relations (Art. 99, Par. 1-2). By this, the Government retained its decisive role in concluding international treaties, even though it was no longer responsible for their ratification. During the state of war, imminent threat of war, or state of emergency, the Government "may pass legal acts which are otherwise the competence of the Federal Parliament" (Art. 99, Par. 11), which means it was also allowed to ratify international treaties. However, this cannot be used to deny the fact that the Government, which had been regularly allowed to ratify international treaties for almost four decades, was now exempt from this competence, and the ratification was allowed to it only in extraordinary circumstances (as was the case with the Presidency of SFRY and the President of the Republic since 1963).

The Act on the Conclusion and Enactment of International Treaties remained in effect although it was to be "harmonized with the new Constitution, like other federal acts" (Article 10 of the Constitutional Act for the Enactment of the Constitution of the Federal Republic of Yugoslavia), such as those which were not individually listed as discontinued, or those which were to be accorded with the Constitution. Its harmonization with the Constitution, i.e. passing of the new act, was needed not only because it was not accorded with the new constitutional system, but also because from the very beginning it was not accorded with the international practice and the provisions of the Vienna Convention on the Law of Treaties, because it did not recognize conclusion of treaties in the simplified form, exchange of instruments constituting a treaty, acceptance of the treaty, and accession to a treaty, where it only prescribed that its regulations also referred to accession to international treaties (Art. 21). In principle, this is good, but useless because all constitutions accept only ratification, even the 1974 Constitution, which was adopted after the ratification of the Vienna Convention by the Federal Executive Council (1972). This is why there are instances of ratifying international treaties which can be only acceded to. It would not be redundant to recall that Article 11 of the Vienna Convention defines that a state can be bound by acceptance, approval, "or by any other means if so agreed". Although these procedures are usually practiced in international organization, it would not hurt if they were "allowed in national texts, as well", particularly because currently effective regulations know only of ratification. International treaties may be concluded by both international and national regulations, i.e. regulations found in the constitution and legal acts.

3. Constitutional charter of Serbia and Montenegro and conclusion of international treaties

Basic regulations on the conclusion of international treaties are today found in the Constitutional Charter of the State Union of Serbia and Montenegro, the Act on the Council of Ministers, the Bylaw on the Foundation of Ministries, Organizations, and Departments of the Council of Ministers, and the still effective Act on the Conclusion and Enactment of International Treaties. Along with these, regulations provided in the Serbian Constitution are also effective.

The basic principles are found in the text of the Constitutional Charter, whose Article 15 prescribes:

"Serbia and Montenegro shall establish international relations with other countries and international organizations and shall conclude international treaties and concords.

Member states may maintain international relations, conclude international treaties, and found representative offices in other countries if this is not contrary to the competences of Serbia and Montenegro and the interests of the other member state."

With some changes, this provision was taken over from Article 7 of the 1992 Constitution. The change is seen in the fact that states are now constrained only by the (narrowed down) competence of Serbia and Montenegro, and no longer by their own competence which has been significantly extended. In addition, states do not have to pay attention whether they will cause harm to the state union, but they should only keep in mind the interests of the other state. A related issue is how much this type of provision will be valid in international law. International law does not accept the subjectivity of parts of countries. Thus, Article 6 of the Vienna Convention does not allow that parts of a state could conclude international treaties, as was the case in "drafts of the International Law Commission."[5] In our theory of law, too, the position prevails that only states as subjects of international law can conclude international treaties, although the practice of some states has introduced some exceptions in this respect.[6] However, this cannot change the general rules of international law and no one can proclaim himself a subject of international law, not even to a limited extent.[7] As noticed by Nippold, states are allowed only to define bodies that would represent them in concluding international treaties. According to the regulations of the Constitutional Charter, competence for concluding international treaties is divided among a few state bodies: the Parliament, the Council of Ministers, and individual ministries, i.e. their ministers.

As in all constitutions so far, the Parliament has the power over the most important phase in the final acceptance of international treaties – their ratification (Art. 19), but the Council of Ministers defines and conducts policy (Art. 33), which can mean that this body retains the most important role in concluding treaties. This is repeated in the Council of

[5] On this problem see O. Lyssitzyn, Territorial entities other than independent States in the Law of the treaties, "Recueil des cours de l'académie de droit international de la Haye", 1968, vol. 125, pp. 1-95.

[6] See for ex. E. Hiss, De la competence des cantons suisses de conclure des traites internationaux, "Revue de droit international et de legislation comparee", 1929, No 3, pp. 454-479; - J.Y. Morin, La conclusion d'accords internationax par les provinces canadiennes a la lumiere du droit compare, "The Canadien Yearbook of International Law", 1956.

[7] P. Reuter, op. cit., p. 44.

Ministers Act (Art. 2, 3), with further explanation: "The Council of Ministers shall direct the establishment and advancement of relations between Serbia and Montenegro and other states and international organizations by defining and conducting the foreign policy of Serbia and Montenegro… based on the principles of international law" (Art. 4, Par. 1). The manner of defining and conducting policy is defined in Article 3, Paragraphs 2-3, and Articles 6-11 and 35, which all largely resemble the period 1971-1992.

According to the Constitutional Charter, the Minister of Foreign Affairs "conducts foreign policy and is responsible for its conduction" and "negotiates international treaties" (Art. 40). In accordance with the Act on the Implementation of the Constitutional Charter, the Federal Ministry of Foreign Affairs has temporarily (until the election of the Council of Ministers), taken over the affairs of all federal ministries and bodies, related to "negotiating and concluding international treaties… except the affairs related to international treaties from the realm of economic relations with foreign countries" (Art. 18, Par. 1, Sen. 1), which were taken over by the Federal Ministry of Economic Relations with Foreign Countries (Art. 18, Par. 1, Sen. 2). After the constitution of the Council of Ministers, the Bylaw on the Constitution of Ministries, Organizations, and Departments of the Council of Ministers was adopted. It defines the competences of the ministries and ministers of foreign affairs, international economic relations, human and minority rights, and internal economic relations, if they emerge from international treaties (Art. 44 of the Constitutional Charter and Art. 9 of the Bylaw). Some affairs are conducted by organizations such as the Office for the Association to the European Union (Art. 17 of the Bylaw) and some departments outside the ministries.

The Constitutional Charter does not prescribe that the President of Serbia and Montenegro should issue instruments for ratification, but his competence of promulgating legal acts (Art. 26) entails that he should proclaim decrees on the promulgation of laws and ratification of international treaties. The Act on the Conclusion and Enactment of International Treaties does not mention this because this was defined by previous constitutions already. This is important as the exchange or deposit of instruments of ratification establishes the consent of a State to be bound by a treaty.

III – Enactment and Implementation of International Treaties

1. Theoretical and practical issues

Implementation of international treaties is one of the general problems of the implementation of international law, or, more precisely, of the functioning of the legal system. In its essence, the creation of legal regulations is relatively centralized, while their enactment and implementation is decentralized. This applies to both unitary and regional states, to national and international law, which increasingly covers issues from people's daily lives in many domains (e.g. trade, traffic, human rights, health and environmental protection) which were once within the exclusive jurisdiction of states. For this reason, international treaties are increasingly recognized as international laws[8] so that, for quite some time

[8] M. Lachs, le Développement et les fonctions des traités multilateraux, "Recueil des courc", 1957, t. 92, pp. 229-341; - P. Reuter, op. cit., p. 11.

now, they have not been discussed only in terms of conclusion[9], but also, though to a far lesser extent, in terms of enactment[10]. With regard to international treaties, sometimes conclusion and enactment, i.e. the start of implementation, are merged. Some provisions of international treaties are executed already while the treaties are being defined, and have already been executed through the adoption of the text (for instance, on the languages in which the treaty is written), in other words, even before signing. Yet others need to be enacted in order to be finalized (signing, ratification, deposit of instruments of ratification) and thus become implementable.[11] All this is the task of applicable state institutions, usually within their respective states (except for the signing), in accordance with their internal regulations.

The intertwining of national and international legal regulations poses several fundamental questions. It is indisputable that states are obliged to abide by international treaties they have accepted, but, in relation to this, numerous questions are asked such as, for instance, on the moment of the treaties' coming into effect, their enactment and implementation, institutions, monitoring, consequences of failure to execute, etc. The complexity and sensitivity of these issues helps us explain why there are very few general theoretical discussions of the matter. Probably not so because it has been believed that enactment of legal documents simply goes without saying.

One often fails to make a distinction between enactment and implementation, although this should be legally clear. The difference is seen both in acts and bodies and in actions. Individual acts are only enacted, while general acts are implemented. The latter are enacted only to the extent in which their implementation needs to be made possible. Constitutions, laws and other normative acts are only implemented, and if enactment is needed, specific acts are passed (constitutional acts or other acts). Enactment means taking over measures defined in the legal act so that this act could be implemented. This is done by applicable institutions which are obliged to do so, within a time frame that can be definite. Contrary to enactment, implementation is not time-bound and it is related to the duration of the act making it possible. In the act there are clear statements on what should be done in order to ensure implementation. There are many examples of this kind in the treaties signed by Serbia and Yugoslavia so far.

Many regulations, even entire international treaties, can be implemented directly, either by those bound to this or by bearers of rights listed in the treaty. Some authors call this the "system of automatic adoption of international law regulations in legal systems of states."[12] Some regulations of this kind include those of diplomatic relations, consular relations, or other relations of states, privileges and immunities, rights of foreigners, fundamental human rights and freedoms, various technical standards, etc. Undoubtedly, direct implementation of international treaties in their entirety is the easiest in those states in

[9] For ex. J. Basdevant, La conclusion et la rédaction des traites et des instruments diplomatiques autres qua les traités, "Recueil des Cours", 1926, t. 15, pp. 535-643; - G. Balladore Pallieri, La formation des traites dans 1a pratique internationale contemporaine, "Recueil des Cours", 1949, t. 74, pp. 465-545.

[10] See for ex. G. Scelle, Théorie et pratique de la fonction executive en droit international, "Recueil des Cours", 1936, t. 55, pp. 87-202.

[11] P. Reuter, op. cit., p. 33.

[12] P. De Visscher, Les tendances internationales des constitutions modernes, "Recueil des Cours", 1952, t. 80, pp. 522 et suiv.

which the treaties, and especially the whole of international law, have been declared part of the national legal system, or in the countries in which the national legal system has been accorded with the international legal system. However, even if one embraces the dualist view of the relation of international and national laws, direct implementation of international law, international treaties in particular, may be conducted parallelly with the implementation of internal acts and regulations. It is enough to ratify and publish the international treaty, and specific legal acts are not always necessary in order to implement the international treaty.[13] Since international treaties still mostly cover relations between states, then law making treaties may be implemented separately, with the assistance of legal acts of the states or their substantive or procedural regulations. Regardless of the doctrinal view and contents, treaties must be ratified in accordance with the constitutional regulations of signatory states. This is the criterion for the validity of their acceptance (Art. 46, Par. 1 of the Vienna Convention). Legal assistance and extradition are carried out abiding to the regulations of states interested, so that, when state institutions act in order to enact, and especially to implement international treaties, one may conclude that, in this role, they also act as institutions of the imperfect international legal system. Signatory States of the Final Act of the Conference on Security and Cooperation in Europe (1975) related most provisions on cooperation in the economic and humanitarian domain to the activities of their institutions, as if they had a premonition at that time that this, primarily political, act would become the principal document of an international organization. Even though one may not claim that by this, even to the smallest extent, regulations of national law became part of the international legal system, it is certain that many regulations of national law serve the purpose of executing international obligations. This is where one finds an organic (functional) relatedness of the rules of national and international law, in case someone would not like to hear the word *unity* here. It is quite clear that not a single regulation of international law would be applicable without the rules of national law. In this process, the most important legal acts of states (laws) serve the purpose of implementation of international treaties, while substantive and procedural regulations facilitate their enactment. This can be understood easily if one has in mind the fact that enactment creates preconditions for implementation. Thus, enactment starts in the supreme legal act, or an action of an applicable institution, while implementation consists in a series of actions representing individual acts in every particular instance. Differences between and intertwining of enactment and implementation were more and more conspicuous in more recent international treaties, many of which were signed by Yugoslavia.

Implementation of international treaties by states most often consists of the activities of institutions for protection, which injured individuals can address, while states are due to submit reports to specific bodies, commonly formed under the auspices of an international organization, now parts of a specific monitoring system. Typical such organizations are the United Nations, International Labour Organization, UNESCO, and others, which have not yet introduced judicial protection of human rights.[14] Some federal states face serious difficulties in the implementation of human rights regulations (for instance, Argenti-

[13] Ch. Rousseau, Droit international public, I, Paris 1970, p. 179.

[14] N. Valticos, Un système de contrôle international: la mise en oeuvre des conventions internationales du travail, "Recueil des Cours", 1963, t. 123, pp. 311-407; - J. Charpentier, Le contrôle par les organisations Internationales de l'exécution des obligations des Etats, "Recueil des Cours", 1983, t. 182, pp. 143-286.

na, Australia), because, prior to the ratification of international treaties, they must enact numerous legal, economic, social, and cultural changes.[15] This harmonization represents the enactment of international treaties.

National law regulations are mostly directly implementable and it is known (or ought to be known) which institutions are authorized for implementation and how this should be done. This issue is more important in terms of international treaties because a discrepancy (conflict) between national and international legal regulations is possible. Proclaiming that international law (or its main sources) are part of the national law is not enough, as it is not enough to declare the supremacy of international law. Rather, one must know who is in charge of enactment or who may decide on the conflict or supremacy in each individual instance, especially so because international law also contains rules of behaviour binding many subjects: states, their bodies, institutions, associations, even individuals. Hence not only different forms of enactment or implementation but also different competences and authorized subjects. In 1954, the International Committee for Comparative Law, appointed by UNESCO to discuss how states were viewing their obligations and responsibilities to the international community, recommended that states should appoint only one body, which should be in charge both of the acceptance of international commitments, and of their unhampered implementation in the national law. This body would accept the international commitment on behalf of the state and would be bound by this commitment also in the cases in which it could not ensure that the states should undertake internal legal measures needed to implement the applicable norm of international law.

The problem becomes even more complex with regard to acts of international organizations which are not liable to any acceptance procedure in individual states (other than recommendations), but which are binding as of the moment of their adoption or declaration. By accepting statutes of international organizations, states have committed themselves in advance to executing their decisions, especially if the international organizations in question are those upon which states have transferred some legislative, administrative, and judicial competences.[16]

Today much more than ever before, enactment and implementation of international treaties must be viewed, on the one hand, as part of the extended international normative competences, and, on the other, as a portion of the broken down executive competences in our country, which must not be blurred by declarative mottos that we accept the supremacy of international law and direct implementation of certain international treaties. Declarations of supremacy of international law or its sources have neither theoretical nor practical relevance (except as an assumption: in the case of a legal vacuum) because it has always been "undisputed that states have been obliged to abide by their international obligations".[17] This is why the Vienna Convention (1969) defined that states "may not invoke the provisions of their internal law as justification for their failure to perform a treaty" (Art 27). The only exception could be that of the "instance of a violation of provision of internal law regarding competence to conclude treaties" (Art. 27, Par. 46), which includes counter-constitutional ratification.[18]

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[15] H.A.R. Snelling, "ILA Report of the Fifty-Third Conference", Buenos Aires 1968, p. 414.

[16] A typical such example is found in the regulations and decisions of the European Union (Art. 189 of the Treaty Establishing European Economic Community, or Art. 249 of the Amsterdam Treaty of 1997).

[17] Ch. Rousseau, op. cit., p. 47.

[18] H. Kelsen, The Law of the United Nations, London 1951, pp. 57, 58; - Principles of International law, 1952;

The general provision on the implementation or supremacy of international law imposes a series of theoretical and practical questions pertaining to law in general, and to its executive function in particular. All regulations of national law are directly performed and it is well defined how this is done or must be done. This should apply to international law even more because of the discrepancy (conflict) between the regulations of international and national laws. It is not enough just to state that rules of international law have supremacy. Rather, in each individual case, the existence or non-existence of this supremacy must be determined. Who is to do this? Constitutional regulations, as well as others, barely mention this issue, so everything boils down to general rules on the enactment of legal acts and regulations.

The problem of enactment and implementation of international treaties has been solved in practice according to the specific nature of each individual instance. Oldest international treaties allowed the states to cover the matter themselves, where their only responsibility was the fulfillment of the end of the treaty. Subsequent treaties contained more provisions on ways of enactment and implementation, which then became constituent parts of international commitments of states. International monitoring of these treaties' fulfillment has been added to this in recent decades. It has reached perhaps the highest degree in the form of international judicial monitoring of the respect of fundamental human rights and freedoms in each individual case, which practically created two judicial instances – that of the national and international proceedings. Meager constitutional provisions on enactment and implementation of international treaties were supplemented by individual states on occasions in which treaties were ratified. This was also the case with Serbia and Yugoslavia.

2. Enactment in Serbia and Yugoslavia

The executive was first mentioned in the 1888 Serbian Constitution. It was in the hands of the king, who exercised his power over ministers that he appointed and relieved of duties (Art. 38). The king was to verify and promulgate legal acts (Art. 43), where not a single act proclaimed by the king was enactable without the countersignature of the applicable minister (Art. 56). Since the king also concluded international treaties (Art. 52), both functions were embodied in the same person. An identical solution is found in the Constitutions of 1901 (Art. 10, 11, and 13) and 1903 (Art. 38, 43, 52, and 56).

The king's executive competences were reduced in the Constitution of the Kingdom of Serbs, Croats and Slovenes (1921), and they pertained to the confirmation and promulgation of legal acts (Art. 40, Par. 1; Art. 80, Par. 1), which had to be countersigned by the applicable minister (Art. 54, Par. 1) and all members of the Government (Art. 80, Par. 1). Administrative power was the competence of the Council of Ministers (Government), appointed by the King (Art. 90, Par. 1). He was authorized to proclaim bylaws for the implementation of legal acts (Art. 94, Par. 1), which included international treaties ratified by the law. Upon special authorization by the National Assembly, "when needs of the state require so", the Council of Ministers was authorized to proclaim measures for immedia-

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- B, Vukas, National Procedures for Giving Effect to Governmental Obligations Undertaken and Agreements Concluded by Governments,, "Yugoslav Reports for the Ninth International Congress of Comparative law, Teheran 1974", Beograd 1974, p. 160.

te implementation of the yet unratified ("proposed") treaty (Art. 79, Par. 3). The 1931 Constitution contains almost identical solutions.

Post-war Constitutions defined the Federal Government as the "supreme executive and administrative body of state power" (Art. 77 of the 1946 Constitution), which attended to the "implementation of international treaties and commitments" (Art. 80). The same solution is found in the 1953 Constitutional Act (Art. 79) and 1963 Constitution (Art. 225). With the changed conditions in the Federation, bodies of republics and provinces became mostly in charge of the enactment of federal laws and other general acts and regulations. They were allowed to enact and implement treaties in direct relations with other states and international organizations (Amendment XXIV (1971) and 21, 271, 273 of the 1974 Constitution), while the Federation retained its competences in the domain of foreign policy and ensured enactment of international commitments (Art. 281 of the 1974 Constitution).

The most comprehensive regulations were given in the Act on the Conclusion and Enactment of International Treaties (1978), which outlived all subsequent constitutional changes. In charge of the enactment of international treaties is the Government (Art. 31), which carries out this function over federal administrative bodies and federal organizations (Art. 31, Par. 1), which "monitor" enactment within their own domains (Art. 31, 33). In spite of all amendments and additions to earlier regulations, the Act was not able to remove or mitigate difficulties coming from the federal bodies' lack of constitutional competences to ensure enactment of accepted international treaties. This was a consequence of the overall regime of enactment of federal regulations, prescribed by the constitution (Art. 272-274, 275, 278 of the 1974 Constitution).

The 1992 Constitution completely changed relations in the executive domain. The Federal Government remained authorized to enact federal laws and general acts (Art. 99, Sen. 1) and to pass acts needed for the enactment of such acts (Art. 99, Sen. 4). In addition to the Constitution, the Act on Conclusion and Enactment of International Treaties remained. The fact it does not contain more provisions on enactment (as would be expected from its title) is the major drawback of this act.

3. CONSTITUIONAL CHARTER AND ENACTMENT OF INTERNATIONAL TREATIES

According to the Constitutional Charter, the Government shall "pass delegated legislation, bylaws and other acts for the enactment of legal acts and carry out other executive duties" (Art. 53). Such legal acts include the acts on "ratification of international treaties and agreements" (Art. 19). These provisions are given in more detail in the Act on the Council of Ministers (Art. 2-5, 13, 15). "The Council of Ministers is authorized to conduct foreign policy based on international law" (Art. 4), which includes enactment of international treaties. According to the Bylaw on the Formation of Ministries, all ministries carry out affairs related to the enactment and implementation of international treaties. The broadest competence is given to the Ministry of Foreign Affairs, which carries out tasks related to the implementation of international treaties (Art. 6), while other ministries carry out such affairs within their own domains. The Legislation Department supervises and sees to the publishing of "laws, other regulations, and general acts of the Council of Ministers and its bodies in the official bulletin." (Art. 14).

An important role in the enactment and implementation of international treaties is given to the Court of Serbia and Montenegro. "The Court establishes international cooperation with foreign and international courts and international organizations in accordance with its functions" (Art. 7 of the Act on the Court of Serbia and Montenegro, of 19 June 2003). This function is usually allowed to the Constitutional Court, but this Court is also in charge of citizens' appeals when "no other mechanism of legal protection is available for deciding on the legality of final administrative acts" (Art. 46 of the Constitutional Charter), of citizens' appeals and of other issues defined by the law (Art. 34, 37 of the Act on the Court of Serbia and Montenegro and Art. 9, Par. 1-2 of the Charter on Human Rights). In our national legal system the supremacy and direct implementation of international treaties are interrelated, although these two issues may be separated, or the second one may be seen as an inevitable consequence of the first. These provisions should be viewed within the overall regulations on the supremacy of international law, i.e. of international treaties and generally recognized rules of international law (Art. 16 of the Constitutional Charter), and also within the regulations on direct implementation of provisions of international treaties on human and minority rights and civic freedoms (Art. 10 of the Constitutional Charter, Art. 7 of the Charter on Human and Minority Rights and Civic Freedom of 28 February 2003). Human and minority rights are interpreted in "the way in which values of an open and free democratic society are promoted, in accordance with international guarantees of human and minority rights and the practice of international bodies monitoring their performance" (Art. 10 of the Charter on Human and Minority Rights). In the Yugoslav legal system, international treaties were directly enactable since 1963 (Art. 153 of the Constitution), and this was even more prominent as of 1974 (Art. 210 of the Constitution).[19] It is good that Article 10 of the Constitutional Charter does not limit implementation to courts only, but allows for it in the administrative proceedings, too. This is logical, since human rights are usually exercised outside courts.

Supremacy and direct implementation of international treaties must be interpreted together with the regulation not allowing the reduction of the level of human rights and freedoms attained (Art. 9, Par. 2 of the Constitutional Charter, and Art. 8 of the Charter on Human Rights). This is found in Article 5, Paragraph 2 of the Pact on Civic and Political Rights and Minimal Standards Legislated. For this reason, one must compare all regulations and implement those containing the highest standards, where there is no room for *lex specialis* as a pretext for the limitation of rights. The "attained level" available in the moment of adoption of the Constitutional Charter is most likely that of the 1992 Constitution, which was later surpassable only with the passing of the Charter on Human Rights. Defining the attained standard in the national law allows it to be implemented in case of it being higher than international standards, which depends on the interpretation of the provisions of these acts. Theoretically, one could reach the conclusion that something from the 1992 Constitution is still tacitly in force. But this claim wants further investigation.

[19] E.g. the International Covenant on Civil and Political Rights since its entry into force (23 March 1976). Before World War Two, in Yugoslavia there was direct implementation of treaties on protection of minorities and provisions of peace treaties related to the property of foreigners, although there were no regulations covering these domains in the 1921 and 1931 Constitutions. G. Andrassy - M. Barto, Jurisprudence des tribunaux et des autorités yougoslaves en matière de droit international, "Annuaire de 1'Association yougoslve de droit international", 1931, pp. 279-288; 1937, pp. 237-257.

The matter discussed above is important for the direct implementation of international treaties. According to Art. 10 of the Constitutional Charter and Art. 7 of the Charter on Human Rights, they will not be implemented if internal legal standards of Serbia and Montenegro are higher than international standards (Art. 9 of the Constitutional Charter and Art. 8 of the Charter on Human Rights). The general provision on supremacy and direct implementation of international contracts is thus limited exactly for the purpose of the attainment of goals for which international treaties have been originally proclaimed.

4. Enactment and Implementation of International Treaties in Practice

As a rule, states become obliged to enact and implement an international treaty at the moment of its entry into force.

This moment is defined "by provisions of the Vienna Convention" (Art. 25) and by each individual treaty. This provides room for agreeing on provisional application (Art. 25), which was also allowed by Yugoslav 1921 and 1931 Constitutions, and it is still allowed today in accordance with Article 13 of the Act on Conclusion and Enactment of International Treaties. An international treaty may come into force once all actions necessary for its origination have been executed. For purposes of legal security, exchange or deposit of instruments of ratification is added to these actions.

Simple rules on an international treaty's entry into force may be blurred by different practice of state, especially if treaties are multilateral. Essentially, for such treaties to come into force, compliance of a certain number of states is required, where the number in question corresponds to the minimum assessed as necessary for the treaty to produce effect. By that moment, the treaty is not yet effective and does not compel even those states which have ratified it, notified depositories and informed their public on the treaty through official bulletins. This is particularly important for treaties which should produce effects within individual states, and most international treaties are of that kind.

Being new states, Serbia and Yugoslavia have most often acceded to previously concluded contracts, and later participated in the conclusion of contracts. For this reason, the issue of date of entry into force has not been posed often. Problems can occur only due to undue (belated) pronouncement in the state in which entry into force is bound to the proclamation (Art. 52 of the Constitutional Charter). This makes sense, but does not provide a theoretical justification if proclamation is considered a technical task, coming after the origination of the treaty. According to the rules of international law, the state is responsible for failure to perform the treaty, even if the reason for this is the lack of proclamation. Those who cannot exercise their rights for this reason suffer the most damage from such an outcome.

IV – Instead of Conclusion

The Constitutional Charter of Serbia and Montenegro and the Act on Conclusion and Enactment of International Treaties do not contain detailed regulations on the matter. For this reason, the two acts need to be appended, especially with regard to the ways of accepting international treaties and, even more, their enactment. The latter is partly compensa-

ted by the provisions on the act on ratification where applicable bodies to attend to this matter are listed.

Many issues from this field cannot be resolved by states alone, because many phases in the emergence of international treaties occur on the international plane, during negotiations between interested states and based on general rules of international law. What states can and should do is accommodate their internal regulations to the needs of concluding and enacting international treaties. Due to increasing numbers of treaties which may be directly implemented, in a range of domains, we are obliged to warn our legislators to pay more attention to this not only when passing the new Act on the Conclusion and Enactment of International Treaties, but in every instance of ratification and proclamation of international treaties. This way, the enactment and implementation of such treaties would be facilitated.

USTAVNA NADLEŽNOST ZA ZAKLJUČIVANJE I IZVRŠAVANJE UGOVORA

Momir Milojević

Pitanja međunarodnih odnosa su retko nalazila mesto u ustavima država zato što se smatralo da spoljnja politika predstavlja izraz slobode delovanja koja ne trpi pravna ograničenja. Međutim, i kada je politika podvrgnuta izvesnim pravnim pravilima smatralo se da spada u isključivu nadležnost država u koju druge države i međunarodna zajednica ne smeju da se mešaju. To gledište je danas u velikoj meri izmenjeno, ali nije sasvim napušteno. Prekretnicu su predstavljala četiri francuska revolucionarna ustava u kojima se nalaze u odredbe o ratifikovanju međunarodnih ugovora. Taj primer su sledile druge države među kojima Srbija i Jugoslavija. U ustavima evropskih država u XIX i XX veku se može zapaziti dosta sličnosti u pogledu mnogih rešenja među kojima je zaključivanje međunarodnih ugovora.

Proširena nadležnost republika postavlja pitanje izvršavanja međunarodnih ugovora. Ustavni akti to pitanje mimoilaze ili uređuju posredno. Zato se često mora polaziti od sadržine međunarodnih ugovora i obaveza država. Međunarodno pravo nameće obaveze samo državi i nju čini odgovornim za neispunjavanje međunarodnih obaveza bez obzira ne njeno unutrašnje uređenje."

Ključne reči: *Međunarodno pravo, ustavna povelja, kako zaključiti međunarodni ugovor, veće ministra, ljudska prava, primena i zaključenje međunarodnih ugovora, međunarodne organizacije, pravni akt, nacionalno pravo, pravni sistem, kako ratifikovati međunarodni ugovor, Bečka konvencija, šef države, spoljna politika, Skupština, predstavljanje države, kratak ustav, normativan ustav, demokratski ustav, čvrst ustav, moderan ustav.*