Georg Ress, in: Wechselwirkungen zwischen Völkerrecht und Verfassung bei der Auslegung völkerrechtlicher Verträge, Berichte DGVR Heft 23, Heidelberg 1982

Summary

Interdependence of International Public Law and Constitutional Law in the Interpretation of International Treaties

by Professor Dr. Dr. Georg Ress, Saarbrücken

1. For interpreting international treaties, the rules of interpretation as set out in the Vienna Convention on the Law of Treaties are to be considered valid as rules of customary law. In application of these rules of interpretation, it is possible and even necessary to differentiate between varying types of treaties and to take account of domestic constitutional law (and domestic law in general) depending on the specific function of the treaty. It is a characteristic feature of this fact that particular rules of interpretation have been developed in regard of EEC law (integration treaty) and of the law of the European Human Rights Convention (constitutional treaty).

2. There is an interaction of international public and constitutional law, which might be relevant for the interpretation, to be established in the case of international treaties which refer to the constitutional law of the contracting states or which concern constitutional law terms; this interaction is qualitatively stronger in the case of treaties of a quasi constitutional nature. Interaction in these cases emanates from the normative dependence of treaty and constitutional terms with due consideration of a common standard of values set up by the treaty.

3. The legal position assigned in domestic law to the international treaty entails an interaction of requirements under domestic law, in particular between constitutional and international public law, when interpreted by domestic courts or other state organs. The tendency to construe international treaties in conformity with international public law is prevailing in Western European States. Interpreting an international treaty (the ratification statute) in the course of constitutional review raises particular problems (harmonization of an interpretation in conformity with international public law and an interpretation in conformity with constitutional law).

4. The rule according to which a contracting party may not invoke the provisions of its domestic law as justification for its failure to perform the treaty (Art. 27 of the VCLT) does not imply that constitutional law may not be relevant for the interpretation of international treaties.

Art. 46 VCLT does not suggest this conclusion either. Apart from those instances where explicit or implicit reference is made to domestic law provisions, the terms of a treaty (by reason of the fact that international law is relatively poor as to autonomous terms in international public law) often are to be interpreted only by a resort to the contracting parties' domestic definition of terms.

5. In the case of bilateral treaties of a highly political nature, the principle of „in dubio mitius" and the international principle of good faith enable contracting parties which are in doubt about an interpretation to consider constitutional requirements, in so far as these are not contradictory to the unequivocal treaty provisions. Notwithstanding the existence of constitutional review in most Western European countries, contracting parties are not bound by the principle of good faith to consider any interpretation of the treaty by the partner's constitutional court as conforming to international public law.

6. In the case of bilateral treaties (with a balance and respect of mutual interests) the subsequent practice of the contracting parties which may also become manifest in the application of the treaty with respect to constitutional requirements, can be of a greater relevance as an additional means of interpretation than in the case of multilateral treaties and in particular of „constitutional" or „integration" treaties, if for their interpretation there exists an international court set up by the contracting parties.

7. The instruments of interpretation used by one party and explicitly or implicitly accepted by the other in the context of the conclusion of bilateral treaties, shall, in case of doubt, be construed in the light of the declaring party's constitutional implications insofar as these are discernable from the context to the addressee of the declaration.

8. In the case of treaties on the establishment of international organizations and in particular of integration treaties, the comparison of the constitutional law of the contracting parties (and of their domestic law in general) shall be considered for the teleological interpretation in order to determine particular common principles of law which are relevant for the interpretation of the treaty provisions and for filling lop-holes of the treaty.

9. The substantive and procedural particularities of domestic law are equally to be considered when interpreting law-making treaties or treaties of integration insofar as their dynamic interpretation allows for referring to the changing constitutional (legal) system of the contracting parties.

10. In the case of treaties of integration, the international decision-making authorities have to take domestic constitutional difficulties into account which may arise in the application of a treaty in a member-state. They have to align the interpretation with the compatibility (concordance) of both legal systems, without prejudice, however, to the functioning of the community.

11. Under the constitutional „principle of construction in conformity with international law" (Völkerrechtsfreundlichkeit), international treaties are to be construed according to the international law rules of interpretation and not according to the rules of interpretation of domestic law provisions. This principle does not preclude a „construction in conformity with the constitution" within the scope of justifiable possibilities of interpretation. In the courts, there is a clear tendency to be discerned to allow for such an interpretation in conformity with the constitution, if this latter does not impair the performance of the treaty.

12. The principle of „construction in conformity with international law" does not suggest a „favor conventionis" according to which treaties would have priority over the constitution. In the interpretation of the constitution, the consideration of the international legal situation is, to a limited extent, admissible even beyond the basic cases of the „doctrine of approximate constitutionality" („Annäherungstheorie" of the German Federal Constitutional Court), provided that it does not imply any injury of fundamental rights nor any interference with vital state structures.

13. Domestic courts in the Federal Republic of Germany, in their interpretation of the European Convention on Human Rights and of the European Community Law, have to give due regard to the decisions of the European Court of Human Rights and of the European Court of Justice as relevant auxiliary means of interpretation, although these decisions are conclusive only for the particular case in which they were passed. The obligation to give priority consideration to these decisions derives from the „principle of construction in conformity with international law".

14. There do not exist such „harmonizing" rules of interpretation which for any instance could establish a balance between the constitutional requirements and international regulations or treaties.