**3 - International law. the relationships between the international legal order and domestic legal order**

State constitutions traditionally include references to foreign affairs and to international law. Classic examples are constitutional clauses on the powers of State organs in foreign affairs, especially with regard to the conclusion of international treaties. However, in recent decades, constitutional provisions relating to international law and international institutions have been significantly redefined. State constitutions usually provide for the binding force of international law within the domestic sphere and sometimes explicitly recognize the principle of supremacy of international law over domestic law. Reference is made in many State constitutions to international organizations and/or to other supranational forms of association, which are declared as constitutionally legitimate (usually upon certain conditions being met). More particularly, the constitutions of EU Member States reference is often made to the transfer of sovereign powers to the EU or the pooling of sovereignty within the EU. More recently, clauses regarding the International Criminal Court (ICC), concerning its jurisdiction of that Court, have also been introduced into some Charters.

As far as the Italian Constitution is concerned, in respect of the implementation of international law into domestic law, Article 10.1 of the Constitution states that “*the Italian legal system conforms to the generally recognized rules of international law*”. Moreover, the Italian Constitution contains provisions on State and regional legislative power, clearly providing that European and International law limit governmental powers (see Art. 11 of the Italian Constitution: “*Italy consents, on a reciprocity basis with other States, to limitations to sovereignty for the purpose of ensuring peace and justice among Nations; it promotes international organizations devoted to that purpose*”; art. 117 of the Italian Constitution: “*The legislative power is exercised by the State and the Regions, within the limits set out by the Constitution, the EU law and the international legal order*”).

When it comes to the mechanism enabling domestic law to be adapted to the international legal order, such (voluntary) mechanisms are needed only in case that international conventions or agreements come into play. When international custom is at stake, there is no need for any transposition system, since this is automatically applicable at a domestic level. Typical transposition proceedings are:

* “***ordinary***” proceedings: under these proceedings, international norms are “reworded” according to Italian law, so that Italian norms “replace” international norms. In other words, the Italian legislator adopts an ordinary law (or other kind of domestic legislation) containing the full test of the international norms.
* “***special***” proceeding: by virtue of these proceedings, an “order” is issued by an Italian Authority (*e.g*., the Parliament or the Government), declaring the international norm as binding in Italy. The “order” only refers to the international law source, without rewording the full text of the international norms (such implementation technique is also commonly defined as “incorporation by reference”).

In Italy, international law may have a different ranking (within the system of sources of law), depending on the status (and ranking) of the domestic law by which the international treaty is transposed into Italian law (“*legge di esecuzione”*). In particular:

* If the implementing norm is a provision contained in the Constitution, the norm has constitutional ranking: for instance, as mentioned, under Art. 10 of the Constitution, international custom is automatically applicable in Italy: so, by virtue of an explicit provision contained in the Constitution, custom is held as having constitutional ranking;
* if an international law norms is implemented by virtue of an ordinary law, the ranking of that international norm is equal to that of ordinary laws;
* Similarly, international norms will have administrative ranking if they are transposed by virtue of an administrative decision.

**International custom**

International custom is a source of international law.

In order to ascertain whether an international customary rule exists, the following requirements should be met:

1. repetition: a behavior should be constantly repeated by multiple States, giving rise to a “practice”;
2. the members of the community should hold such behavior as legally binding, although not confirmed by a written source of law (*[opinio juris](http://en.wikipedia.org/wiki/Opinio_juris_sive_necessitatis%22%20%5Co%20%22Opinio%20juris%20sive%20necessitatis)*).

As mentioned, article 10.1 of the Constitution states that “*the Italian legal system conforms to the generally recognized rules of international law*”. Implementation of international custom in Italian domestic legal system is, thus, automatic and permanent.

International custom prevails over ordinary laws, since it has constitutional ranking. But what if a conflict arises between an international customary rule and the Constitution? In such scenario (which is rather unlikely to happen), Italy would be under an obligation to conform to international custom (and, thus, to amend the Constitution, according to the applicable proceedings). However, it is generally held that the “domestic fundamental principles” (such as the citizens’ fundamental freedoms) may not be overturned.

**International treaties**

Article 87 of the Italian Constitution provides that the President of the Republic ratifies treaties, unless the authorization of the Chambers is required (by virtue of Article 80, in specific cases, transposition of international treaties is reserved to the Parliament). However, ratification of an international treaty is merely a formal act of the President; as a matter of fact, his participation in the conclusion of international treaties requires a specific initiative by the Government.

In contrast with Article 10 of the Constitution, regulating international custom, the Italian Constitution does not provide for any obligation or automatism, to adhere to or implement international treaties.

International treaties may contain either 'self-executing' norms or ‘non self-executing’ norms (to the extent that they may require implementing legislation, so a change in domestic law, to ensure application of the treaties at a domestic level).

Ratification of international treaties may also involve a handing over of sovereignty to an international body. Some treaties establish a committee, which receives reports and monitors the implementation of obligations flowing from the treaty by Member States. Treaties may define the scope of a State's action, and treaties which Italy ratifies may influence the way in which the latter behaves, both internationally and domestically. Implicit, however, in any Italian decision to ratify a treaty is a judgment that any limitations on the range of possible actions which may result are outweighed by the benefits which flow from the existence of a widely endorsed international agreement. Italy also retains the right to withdraw from the treaty if it judges that the latter no longer serves Italy's national and international interests.

**Regions**

Regions are also entitled to implement international norms. Article 117 of the Constitution states that:

1. the central State is entitled to issue norms regarding foreign policy and its relationships with the EU.
2. Regions, on the other hand, are entitled to issue norms, in cooperation with the central State, regulating the Regions’ relationships with the EU and with the international legal order, including international trade law.

All “implementation orders” are generally issued by the central State: any Regional laws conflicting with such orders may be declared as void and unconstitutional. Regions, instead, are entitled to issue detailed regulations, to ensure that international norms are adequately applied in their respective territories. According to the Constitutional Court, the central State may at any time replace the Regions when the need to ensure compliance with international obligations comes into play.

**international liability of States**

The term “international responsibility” covers the legal relationships arising under international law from internationally wrongful acts of a State (or an international organization).

The UN Commission on international law generally identifies the general conditions for a State to be considered responsible for wrongful actions or omissions, and the legal implications flowing from any such liability.

There is an internationally wrongful act of a State when a conduct (consisting of either an action or omission) is attributable to the State under international law and constitutes a breach of an international obligation of that State.

The attribution of a liability to a State is a question of international law. Before a State is held responsible for any action, it is necessary to prove a link of causation between the damage and an official act or omission attributable to the State alleged to be in breach of its obligations. The State is responsible for all actions of its officials and bodies, even if the body or official is formally independent from the central State and even if the body or official is acting beyond the scope of its powers and competences*.* Persons or entities not classified as “organs of the State” may still be imputable, when they are otherwise empowered to exercise governmental authority. Persons or entities not performing public functions may equally be imputable, if they in fact acted under the direction or control of the State.