

New German Constitutional Court Decision on “Treaty Override”: Triepelianism Continued

Anne Peters

By Court order of [decision of 15 December 2015 \(2BvL 1/12\)](#), published only recently, the German Constitutional Court (second Senate) has confirmed the practice of treaty override in tax law. The euphemism “treaty override” means that the German legislator adopts a law which violates a prior international treaty (often a treaty on double taxation). The Federal Tribunal on Finances (*Bundesfinanzhof*) had doubts about the constitutionality of this practice. It was convinced that a recent amendment of the Income Tax Act which is incompatible with a German-Turkish dual taxation treaty of 1985 is unconstitutional, exactly because it violates the treaty.

If in a pending judicial proceeding, a German court is convinced that a legal provision, which it needs to apply to resolve the case under scrutiny, is unconstitutional, that court must stay the proceeding and pose a reference question on the law’s constitutionality to the German Constitutional Court ([Art. 100\(1\) German Basic Law](#)). Such a reference procedure guarantees that the Constitutional Court retains the monopoly for declaring a law unconstitutional, and is thus a hallmark of the concentrated system of constitutional control in Germany.

Translation into constitutional questions

The judicial proceeding under Art. 100(1) Basic Law is available only for questions of constitutionality, not for questions of compatibility with international law. This worked, because the courts involved in fact “translated” the question of the relationship between international law and domestic law into a constitutional law question of the separation of powers and of constitutional principles: rule of law versus democracy.

The Federal Tribunal on Finances deemed the treaty override unconstitutional for violation of the rule of law and of the German constitutional principle of “friendliness towards international law” (*“Völkerrechtsfreundlichkeit”*).

The Constitutional Court did not follow this view. It opined that the constitutional principle of democracy (which includes the principle of discontinuity of parliament following elections) demands that the German Parliament is free to change its mind and to make or amend a law even if this violates an international treaty which had been ratified by a previous Parliament (Order of 15 Dec. 2015, paras 53-54). Also, the constitutional principle of friendliness towards international law does not have the legal effect to render statutes which violate international law at the same time (and for that reason) unconstitutional (para. 64). Put differently, this principle does not create a constitutional obligation to comply with international treaties “unconditionally” (para. 67). The reason is that the constitution does not prohibit Germany as a state to violate international law (para. 58). The Basic Law “does not renounce on the sovereignty which lies in the last say of the German constitution” (para. 68). (Note that the Court, as already in the [Görgülü decision](#) of 2004, ascribes “sovereignty” to the constitution, not to the state). The constitutional requirement of interpreting statutes in conformity with international law does not require a “schematic parallelism of the internal legal order with international law”, but (only) a “maximal adoption of substantive value judgments” – and only “to the extent that this is compatible (...) with the precepts of the Basic Law” (para. 72).

Finally treaty override is lawful and constitutional, independently of the option of denouncing the treaty first. Withdrawal can only be realized by the executive branch, and the Parliament cannot compel the government to do so. Also, from the perspective of the affected tax payer, denunciation of the double taxation treaty is not necessarily the better option (paras 89-91).

The dissenting justice Doris König, the only one on the Senate’s bench with a high profile in international and EU law, proposed a solution which follows a strand in German tax law (as represented, e.g. by Eckart Reimer) and which I find better: She argued that the two conflicting constitutional principles, rule of law and democracy, must be

balanced against each other. Considering a number of factors (para. 8), she opined that in this concrete case, the rule of law and thus respect for the treaty should prevail. Even this minoritarian approach is a far cry from blind obedience to international law, but it at least gives *pacta sunt servanda* a chance.

The translation of questions pertaining to the relationship between international law and domestic law into constitutional or domestic institutional questions is not unique. It reminds of the US American concept of “foreign relations law”, as espoused, e.g. by Curtis Bradley. I would say that this kind of translation in principle makes sense, because it draws attention to important constitutional principles which – in my opinion – pervade and should pervade both international law and domestic law, such as the rule of law, human rights, and democracy (or near-substitutes such as participation, inclusion, and transparency).

How to deal with Italy and German state immunity? – The merits of the golden rule

Justice König observes – correctly in my view – that if Germany demands respect for international law and international treaties by its counterparts, it must herself comply with its treaty obligations (dissent, para. 23). She here recalls the golden rule, an ethical precept shared by innumerable cultures and religions worldwide. The golden rule is that one should not do to others what oneself dislikes to be done to oneself. In international law, we call it the principle of reciprocity.

The German Constitutional Court was surely aware of the ongoing conflict between Germany and Italy concerning claims for reparation by former Italian military internees (IMIs) against Germany. Famously, the Italian Constitutional Court had in November 2014 in [Sentenza No. 238](#) declared the 2012 Judgement of the ICJ on state immunity to be inapplicable in the Italian legal order. (In a previous [blog post](#), I have called this judgment eminently Triepelian, and have suggested – in contrast a dualist compartmentalization of “legal orders” – interactive, network-type legal approaches should be explored).

Currently, the German government continues to rely on its state immunity, and protests against the numerous civil law proceedings instituted by IMIs or their heirs in Italian courts against the Federal Republic of Germany. Will it be more difficult for Germany to criticise the Italian Constitutional Court’s *Sentenza No. 238* and ongoing court proceedings? At first sight yes, because the German Constitutional Court refuses to honour international law, too.

Granted, legal experts might be able to distinguish the two cases: In the German taxation case, what was at issue was “only” a provision of a bilateral treaty, whereas in the Italian immunity case, a fundamental principle of the international legal order was deprived of effect in Italy.

The German justification for not honouring the treaty is the principle of democracy (freedom of the German legislator to make a new law). In contrast, the Italian justification for not allowing a domestic effect of the ICJ judgment is the cardinal rule of law-principle of access to justice.

Apart from these differences, the shared feature is the staunchly dualist (Triepelian) approach: The German Constitutional Court argues that a treaty which has been “transformed” into German law through a parliamentary statute enjoys only the rank and status of that statute. It can then, logically, be amended and superseded by a new parliamentary statute which functions as a *lex posterior* (Order of 15 Dec. 2015, para. 86; see also para. 49). Exactly the same dualist reasoning carried the Italian *Sentenza No. 238*: The Constitutional Court had found that the judgment of the ICJ (and the general principle of immunity) remained untouched but could simply not enter the Italian legal order and therefore display no relevance here. Also, the two constitutional courts’ basic message, namely that international law plays a part only when it fits into the domestic legal (constitutional) order, is similar. For this reason, the approach leaves a stale taste. And it will not facilitate the ongoing diplomatic efforts of the German government to negotiate a fair solution with regard to the IMIs.

Bits and pieces of global constitutionalism

What else is remarkable about the decision? It provides (as the Italian case) a nice example of the fictitious character of the State as a unitary actor, a fiction necessarily used for the purposes of applying international law. In

both states, Italy and Germany, the courts may have different opinions on questions involving international law than their executive branch. Also, the decision pushes further the probably global trend of constitutional courts' resistance against any hard-and-fast supremacy of international law if this stands in conflict with domestic (constitutional) principles.

A final feature of the German decision is that it distinguishes the less important provisions of a bilateral treaty on double taxation from more fundamental principles of international law such as "inalienable human rights". With regard to the latter, the Constitutional Court admits that these could probably not be "overridden" (recte: violated) by an ordinary domestic statute (cf. para.76). Good news for global constitutionalism.