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The Supremacy of EU Law over National Law: The ECJ’s Perspectives

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Introduction: What has been the ECJ’s response regarding the supremacy of EU law?

The notion of the supremacy of European Union (EU) law has been developed by the European Court of Justice (ECJ), formally known as the Court of Justice of the European Union. This essay deals with how and why the ECJ has done so and what reasoning has it put forward. However, to provide a detailed answer as to whether the EU law is superior to domestic law, I will dedicate a series of more essays (to be published in the future issues of Political Reflection Magazine) to concentrate on the Member States’ responses to the notion of the superiority of EU law. The Member States studied are the United Kingdom (UK), Germany and France.

This and my future essays are relevant to both Law and International Relations (IR) Courses for similar reasons I explained in my previous article (Dorani, 2019b). Strictly speaking; however, the essays are relevant because more and more Europeans, especially a number of their political parties, are unhappy, to say the least, about the EU’s ‘power-grab’ from national governments (Weiss, 2019). One of the main ‘debate[s] about the exit from the European Union (“Brexit”) has been dominated by a yearning for “restoring” U. K. sovereignty” (Bryant, 2018). Nationalism is, therefore, on the rise in both the EU and beyond, and no surprise, individuals like Donald Trump has come to power (Dag, 2019; Dorani, 2019a).

This and my future essays in their totality will bring to light the what, how and why of the domestic courts and the ECJ’s reasons and justifications for the superiority of EU law over the domestic law or vice versa. More than ever, these contrasting viewpoints are essential to be understood and analysed in the light of the increasingly heated ‘arguments for and against the European Union’. In addition to the European and national courts’ justifications, my essays will also focus on public opinion within the Member States ‘on the role of the EU’. Again, the UK, Germany and France are the countries covered. My final essay, incidentally, will provide a comparison of the Member States’ reactions towards the supremacy of EU law and analyse whether opposition to the (unity of) EU can prove to be healthy or counterproductive; that is, whether populism is the answer to the current challenges (such as terrorism, immigration, climate change) the EU faces (Mark, 2017).
The ECJ’s Landmark Rulings Regarding the Supremacy of EU Law

Although the doctrine of the supremacy of EU law is not spelled out in the Treaty,¹ the ECJ ‘consistently held that [it] is implied into the Treaty’ (Vincenzi and Fairhurst, 2002: 185).² The concept of EU supremacy has been mainly developed by the ECJ ‘on the basis of its conception of how the new legal order should be developed’ (Craig and De Burca, 2002).

In Van Gend en Loos (1936), Article 25 of the Treaty was in conflict with an earlier Dutch law and the main question was whether Article 25 was directly effective.³ The ECJ held that the Treaty is ‘more than an agreement which merely creates mutual obligations between the contracting states’ (Van Gend en Loos, 1936: 12), as the preamble to the Treaty not only referred to the governments of the States but also the people. Furthermore, it was ‘confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects the Member States and also their citizens’ (Van Gend en Loos, 1936: 12). The ECJ made it clear that EU law was ‘not just tools of international law but had direct effect’ (Douglas, 2002: 55) since ‘the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which compromise not the only Member States but also their nationals’ (Van Gend en Loos, 1936: 12). However, the question of superiority of EU law was not directly raised (Steiner, 2003: 66), as under the Dutch Constitution, international law would take precedence over the Dutch law. This question was raised one year later in Costa (1964: 585).

Costa claimed that a subsequent Italian statute, ‘lex posterior’, breached Articles 37, 93, 95 and 102 of ‘the EC Treaty’ and the Giudice Conciliatore, Milan, referred the issue to the ECJ under Article 234 (ex 177). The ECJ this time firmly established the doctrine of EU supremacy, setting out series of arguments pertaining to the notion of EU supremacy, which can be divided into two categories: a) those regarding the nature of the Community (or Union); and (b) those regarding the purpose of the Community (or Union) (Steiner, 2003: 67). As far as the first category is concerned, the ECJ distinguished the Treaty from other international treaties since the EU ‘created its own legal system which became an integral part of Member States and which their courts are bound to apply’ (Costa, 1964: 586). It maintained:

‘by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity of representation on the international plane and, more particularly, real powers stemming from limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves’ (Costa, 1964: 593).
This reasoning of the ECJ refers to the ‘independent nature of the new Community legal order’, which was voluntarily established by the Member States at the cost of ‘permanent limitation of their sovereign rights’ (Steiner, 2003: 67). To support this point, the ECJ referred to Article 249 (ex 189), which says that a Regulation ‘shall be binding (and) directly applicable in all Member States’ (Craig and De Burca, 2002: 278). (Although Craig and De Burca at page 278 call this the only genuinely textual argument, they claim it is still weak as the said Article only refers to Regulations, whereas the ECJ wanted to establish general supremacy of all EU law).

With regard to the purpose or aims of the Treaty, the ECJ held the ‘executive force of Community law’ (Costa, 1964: 594) would be undermined if it varied from one State to another in accordance to their constitutional problems, or if a subsequent domestic law was held superior to EU law. This is a purposive or ‘teleological’ argument rather than a textual one, which is always present in the case law of the ECJ (Craig and De Burca, 2002: 278); namely the uniform application and the effectiveness of EU law in all Member States.

Finally, the court concluded that ‘the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however, framed, without being deprived of its character as Community law’ (Costa, 1964: 594). As far as the lex posterior was concerned, it was held by the ECJ to have not violated the EC articles, but the ECJ made it clear that any ‘subsequent unilateral act incompatible with the concept of Community cannot prevail’ (Costa, 1964: 594). At that stage, one would wonder what would be the outcome if a constitutional law of a Member State was in breach of EU law. This situation took place six years later in a German case of Internationale Handelsgesellschaft (1970).

The question for the German Administrative Court was if there was a conflict between an EU Regulation and a provision of the German Constitution, which law prevailed? Under the German Constitution, any ordinary law incompatible with the German Constitution was invalid since the Constitution is the highest source of law, as parliament is in Great Britain. This question was referred to the ECJ and the ECJ ‘in the strongest terms held … the legality of a Community act cannot be judged in the light of national law’ (Steiner, 2003: 67). Moreover, the validity of EU law should only be judged in the light of EU law and its effect in the Member States cannot be affected by ‘allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure’ (Craig and De Burca, 2002: 280). With reference to the rights protected by the German Constitution, the court added that the protection of such rights was the main aims of the Treaty (Internationale Handelsgesellschaft: 1970, 1125). For the ECJ, the absolute supremacy of EU law was vital in order to ‘preserve the uniformity and efficacy of Community law in all the Member States’ (Weatherill, 1993: 316).

Soon after the ECJ in another case held that ‘no provision whatsoever of national law may be invoked to override Community law’ (Commission v
Italy: 1972, 532). In *Internationale Handelsgesellschaft*, the Administrative Court, the highest supreme court, disregarded the German provision. The question was whether a lower court had such competence. This issue was addressed in Simmenthal (1978: 629).

The Italian Judge, Pretore di Susa, was asked by the Italian fiscal authority that the subsequent national law in breach of EU law should be held unconstitutional by the Italian Constitutional Court before it was disregarded, as an ordinary ‘national court could not simply refuse to apply a national law which conflicted with Community law’ (Craig and De Burca, 2002: 280). Usually, it is the highest court (i.e. the Italian Constitutional Court) that decided to disregard the incompatible national law. The issues for Pretore were whether a lower court could decide such an important question? Secondly, did the lower court have to wait for the incompatible national law to be set aside by a constitutional authority before they disregard it? It should be remembered that in the Member States with written constitutions (i.e. Germany/Italy) only the constitutional courts have the power to declare a national law invalid. However, in countries with unwritten constitutions (i.e. the UK), no court has the power to disregard or hold a statute invalid.

Thus Pretore sought ECJ’s help to shine a light on these constitutional difficulties. Discussing again the nature of EU law, the ECJ emphasised that the relationship between EU law and national law was such that EU law ‘not only by their entry into force render automatically inapplicable any conflicting provision of current national law but... also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions [emphasis added]’ (Simmenthal, 1978: 632). The italic part of the quotation is very interesting as the Member States are prohibited from passing any law inconsistent with EU provisions. This could suggest that the ECJ constitutionalised the Treaty by declaring the supremacy of EU law, and by holding the legality of national law would be determined in accordance with ECJ’s rulings (Craig and De Burca, 2002: 257).

To support the constitutional point, it is claimed that the ECJ adopted similar arguments to develop the doctrine of EU supremacy to those of US Supreme Court, which were both successful and effective ‘in maintaining ultimate control over the federal and state legal systems in the early nineteen century’ (Douglas, 2002: 257). However, Karen Alter refuses to accept the notion of constitution of Europe by saying that ‘European Union is still an international organisation, not a federal polity’ (2000: 4).

However, as far as the constitutional problems of Member States were concerned as to whether a lower court had the power to disregard or set aside a domestic law, or in the case of the UK any court had the power to question the legality of a statute, the ECJ ruling was clear:
...a national court which is called upon...to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing...to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means' (Steiner, 2003: 69).

The immediate decision of holding the inconsistent national law invalid not only extended to national courts but also ‘administrative agencies’ (Steiner, 2003: 69–70). The ECJ reasoned, in addition to its arguments of ‘uniformity and effectiveness’, that if the national courts were given to apply their own constitutional rules, this would ‘weaken the effect of EU law, it would undermine solidarity among the Member States, and in the end threaten the Union itself’ (Steiner, 2003: 65).

The cases, above, were approved and followed in many of the ECJ’s later rulings and it repeatedly stressed the importance of EU law being superior to national law (Factortame, 1991: 603; Marleasing, 1990: 1).

**Conclusion**

The notion of EU supremacy has been developed by the ECJ. From the ECJ’s perspective, the Member States, in particular, national judges, faced with a conflict between national law of any nature and EU law, must immediately give precedence to EU law. On the other hand, the Member States were in the belief that the relationship between the EU law and national law was a matter of the constitutional rules of the State concerned, which in turn depended on whether the Member State was monist or dualist (explained in the future essays). Thus the national judges were caught on the horns of a dilemma of whether to obey the new legal order of EU developed by the ECJ, or their own national constitutional rules.

My future essays will examine how the Member States’, the judiciaries, in particular, responded to the notion of the primacy of EU law.

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1 The European Economic Community (EEC) Treaty 1957. Also Known as the Treaty of Rome. It was changed to EC Treaty by the Treaty on European Union 1993.
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Further, Advocate General Karl Roemer in Van Gend en Loss at page 20 suggested that Article 10 (ex 5) implied supremacy. Article 10 (ex5) provides Member States are under a duty to fulfil their obligations arising out of the Treaty. The ECJ in Costa (below) at page 594 named Article 249 (ex 189) to justify the implication of EU supremacy in the Treaty.

If a provision of EU law is directly applicable, it gives rights to individuals to rely on them before their national courts.

In Great Britain it is because of the notion of Parliamentary sovereignty. This is now doubted. It is discussed in my essay on the UK.

Douglas at page 257 gives the argument based on the necessity of ensuring the uniformity and effectiveness of EU law as an example. Further, Douglas points out Advocate General Lagrange who stated in Costa at page 605 ‘it is certainly true to say that the EEC Treaty has, in a sense, the character of a genuine constitution, the constitution of the Community.’

Steiner at page 70 gives Larsy (Case C- 118/00) in which the ECJ held that the national social security should disregard the national law in conflict with the EC law.
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