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China and Turkey: Escaping the Trap of the "Uyghur Issue"

by Hrvoje Ćiković

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Contents

The Supremacy of EU Law over German Law: EU Law vs National Law

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Introduction

This essay is in continuation of my previous two papers published by *Political Reflection Magazine*. The first paper dealt with how and why the notion of supremacy of European Union (EU) law has been developed by the Court of Justice of the European Union (ECJ) (Dorani, 2020a), and the second one focused on whether the United Kingdom has accepted the supremacy of EU law (Dorani, 2020b). Those essays (together with my article entitled 'Shall the Court Subject Counter-Terrorism Law to Judicial Review: National Security vs Human Rights') also explain why the series of essays (and the article) are relevant to both Law and International Relations Courses. This essay concentrates on whether Germany has recognised the primacy of EU law over German law. It consists of three stages, which cover the German courts' reactions to the notion of the supremacy from the beginning of the EU's creation up to now, followed by detailed concluding remarks.

The German Court Systems

Germany is a dualist country. Article 23 (ex. 24 (1))[1] of the German Constitution implies EU supremacy over German law. There are five separate court systems, dealing with ordinary matters, tax, labour, social security and administrative issues. Each of these court systems is headed by a Federal Supreme Court. These courts do not bind to each other. However, on constitutional matters, the Federal Constitutional Court (FCC) binds all five courts. While the lower courts' referral (preliminary reference) to the ECJ on a constitutional matter is not obligatory, it is compulsory to the FCC, which has the final say (Roth, 1991: 154). It is the function of the FCC under Article 100GG to view the constitutionality of a piece of secondary legislation, and EU secondary measures are also subject to view, as they are incorporated by the German Parliament (Kumm, 1999: 362) Therefore, throughout the essay the main focus is on the FCC as the issue of supremacy falls within the sphere of the FCC.

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Stage One (1960-70): The FCC, EU Law Supremacy and No Condition

There were mixed reactions about the supremacy of EU law by the German

courts. In *Re Tax* (1963), the Tax Court challenged the constitutionality of the ratification of the Treaty of Rome 1957, holding the EU regulation concerned was invalid since Article 249 (ex. 189) was 'unconstitutional' (Alter, 2000: 74). Further, Article 23 was not an authority for transferring legislative power to the EU. Many German scholars claimed that the Treaty of Rome was unconstitutional because it gave unusual power to the EU (Alter, 2000: 74-6).

The Tax Court referred the issue to the FCC. Incidentally, the Federal Tax Court (FTC), in rejecting the argument in *Re Tax*, had held that Article 23 transferred sovereignty to the EU and it should not be measured in accordance with the standard applied to 'constitutional authority within the State itself.' Four years later, the FCC made its judgment on *Re Tax* by saying that the unconstitutionality of one provision did not mean that the whole Treaty was unconstitutional. It went further in another case to confirm the 'independent nature of the EC [and the] ECJ's right to issue regulations binding inside Germany'.

With regard to Article 23, it did transfer 'certain sovereign rights to the EC.' The FCC was very supportive of the 'special nature' of the EU. Thus, the FCC sent a clear message to the lower courts and to the other litigants that they should not challenge the ECJ's authority and the ratification of the Treaty. In affirming the validity of *Van Gend en Loos* (1963) (for the details of the case, see Dorani, 2020a) the FCC added since EU regulations were not acts of German authorities, 'it lacked the jurisdiction to assess the validity of them.'[2] This language of the FCC supported the ruling of *Costa* (1964), in which the ECJ had held that the validity of EU law due to its special and original *nature* could not be overridden by domestic legal provisions.

In *Lutticke* (1966), the Federal Tax Court (FTC) made a reference to both the ECJ and the FCC in which it asked that, inter alia, the notion of direct effect was 'in the essence of a political nature' and hence it was not legally valid (Alter, 2000: 83). On appeal, the FCC strongly criticised the remarks made by the FTC regarding the direct effect of EU law, adding Article 23 implied 'not only that the transfer of sovereignty to interstate organs [was] valid, but also that decisions of the ECJ [...were] to be recognised' (*Lutticke*, 1972; Alter, 2000: 85). Moreover, all directly effective EU law and the rulings of the ECJ, 'the autonomous sovereign authorities' (Alter, 2000: 85), were directly effective within the national sphere, and all lower courts were entitled 'not to apply national laws which [were] contrary to EU law' (Horspool, 2000: 176).

The FCC became one of the first European supreme courts to accept the superiority of EU law over a subsequent national law, as well as the ruling of the ECJ as having the power to indirectly set aside national law (Alter, 2000: 87). By doing this, the FCC set a precedent to the lower courts to disregard the incompatible national law. The FCC exactly did what the ECJ wanted national courts to do in *Van Gend* and *Costa*, and therefore, one could conclude that by the end of 1970 the FCC had accepted the supremacy of EU law over German law without any condition (Roth, 1991: 141).

However, one unclear issue was whether that supremacy was extended to the Basic Rights enshrined in the German Constitution.

Stage two (1970-90): the FCC, EU law supremacy and conditions

In 1970, Professor Hans Heinrich Rupp in his important speech – which is claimed to have triggered off the famous *Solange I* (1970) decision – called the EU 'a government without a sovereign', having no 'democratic safeguards' as well as protection for 'basic rights'. As a result of these deficiencies, the FCC (as opposed to the ECJ) should be the final arbiter regarding conflicts between the German Basic Rights and EU law (Alter, 2000, 88).

Some weeks later, an EU regulation was argued to have violated the claimant's Basic Rights, which resulted in the case of *Solange I*. The ECJ, in response to the preliminary ruling in *Solange I*, finding the EU regulation was not in breach of the German Basic Rights, held that EU law was even superior to the German Constitutional law. The Administrative Court, believing the ECJ's ruling would undermine the German Basic Rights, refused to accept the ECJ's decision as it was unconstitutional and, therefore, not binding (Alter, 2000, 89). It made a reference to the FCC. In it, inter alia, the Administrative Court argued that the German Basic Law should take precedence over EU law, strongly criticising those who argued that EU law was supreme to the German Basic Rights, accusing them of facilitating 'European integration at the expense of basic rights protection' (Alter, 2000: 89).

On appeal, the FCC repudiated its previous decision, namely that it had no authority to review EU law and held that it had now the jurisdiction to review EU acts because 'Community regulation is implemented by' an authority of Germany and hence 'this is an exercise of German state power' (Alter, 2000: 91). Therefore, all EU acts could be viewed as acts of a German authority which were subject to constitutional review. So long as the Community protection for human rights were not measured up to the federal rights of the German Constitution, EU measures would be subject to the fundamental rights provisions of the German Constitution (Hartley, 1999: 236-7). Thus, the FCC established itself as the final arbiter to decide whether the protection of the fundamental rights at the EU level was satisfactory (Kumm, 1999: 370). The FCC added Article 23 did not transfer 'power to amend the inalienable feature of the German Constitution' (Douglas, 2002: 33). Stephen Weatherill (1093: 322), incidentally, claimed that the FCC decided so because at the time the EU lacked a directly-elected parliament and also it did not have 'a precise catalogue of fundamental rights' comparable to those of the German ones.

The decision was strongly criticised by the three dissenting judges, the Commission, and some critics, including Jean Darras, a French scholar. The dissenting judges said that the fundamental rights were already adequately defended at the EU level (Roth, 1991: 143). The FCC had no jurisdiction under the German Constitution to review secondary EU law, and it was a

trespass to the ECJ's jurisdiction (Alter, 2000: 91). The decision confronted the 'smooth development of the relationship between national law and EC law' (Craig and De Burca, 2002: 291). It was a moment that the ECJ never wished to witness, as predicted then, it jeopardised (albeit in theory rather than practice) the ECJ's main aim, that is, the uniform application of EU law throughout the EU (Douglas, 2002: 269). There was a fear that if the FCC carried out its threats, it would become a precedent, and other national courts would follow it and, therefore, hold EU law inapplicable (if in breach of their fundamental rights similar to those of Germany) and the ECJ's preliminary rulings as a mere opinion (Alter, 2000: 93). The Commission called the decision a threat to the EU legal system, as it set 'the founding principle of the treaty in play' and 'through it a legal fragmenting in the Community could be introduced' (Alter, 2000: 92).

Many critics asked the decision to be reversed, and the Commission threatened to start proceeding against Germany under article 226 (ex. 169). Ensuring the Commission that the FCC would not execute its threats, the German Government (Minister of Justice) criticised the FCC to have undermined Germany's participation in the EU (Alter, 2000: 92-3).

As a result of these criticisms, the FCC softened its position in *Vielleicht* (1980) by saying that, due to the recent political and legal development in the EU, its *Solange I* decision might no longer apply to EU regulations and directives. The ruling in *Vielleicht* was called the 'perhaps' decision, as perhaps the ruling took a friendlier step towards the EU (Alter, 2000: 94). The FCC modified its stance further in *Solange II* (1987) by holding that the level of protection for human rights at the EU level now measured up to those of the German Constitution, and as long as they stayed like that, the FCC would no longer review EU law against the German standards (Craig and De Burca, 2002: 292).

Three months after *Solange II*, the FCC further softened its *Solange I* stance in two cases. The FTC in *Re Vat Directives* (1982) and *Re Kloppenburg* (1988) had refused the direct effect of the directives concerned because Article 249 (ex. 189) left the Member States to choose the form to give effect to directives. The FTC had followed, incidentally, the French case of *Minister of Interior v Cohn- Bendit* (1980) which held that the ruling of the ECJ was not binding on the FRC, accusing the ECJ of transgressing the limit of Article 226 (ex. 169) by giving direct effect to directives (Roth, 1991:140). The FCC reversed the decision of the FTC, calling it unconstitutional because neither had the FTC followed the ruling of ECJ nor had made a second reference to it since the ECJ was the final arbiter regarding secondary EU law (Steiner, 2003: 103). The FCC created constitutional sanctions for lower courts if they disobeyed the ECJ's rulings (Alter, 2000: 98). The FCC clearly affirmed the supremacy of EU law 'in the strongest terms' (Steiner, 2003:103) by the end of the eighties.

The ruling established a precedent for the lower courts that they should follow the decision of the ECJ, and they should choose an 'interpretation of national law (purposive approach) which corresponded to the purpose of the relevant directive' (Roth, 1991: 140). The FCC likewise accepted the

indirect effect of directives, as later held by the ECJ in *Von Colson* and *Marleasing* (1990) (for the details of the cases, see Dorani, 2020a and Dorani, 2020b). The fact that the FCC confirmed that the EU protection for human rights had been developed at the EU level strengthened the supremacy of EU law, and hence the *Solange I* story ended up happily in favour of the ECJ (Hartley, 1999: 238).

However, Karen Alter (2000: 96) argued to the contrary. He reasoned that the FCC did not say that the power it had claimed in *Solange I* would be reduced. It also did not pretend any longer that the EU was a special legal order or EU law was 'autonomous sovereign authority'. The latter argument was rightly predicted, as five years later, the FCC moved back to its *solange I* decision in *Brunner* (1994).

Stage three (1990-2020): the FCC, EU supremacy, more conditions added

In *Brunner*, the claimants asked the FCC to rule against the constitutionality of Germany's ratification of the Maastricht Agreement as, according to the claimants, the Maastricht Treaty had transferred further powers and competences of the German Parliament to the EU, which undermined the German Basic Rights and consequently was unconstitutional. The FCC stated the Treaty on European Union signed at Maastricht in 1992 demonstrated that the EU was a federation of states rather than, as suggested, a European state (Horspool, 2002: 178). The EU consisted of Member States, and these Member States conferred specific powers and competences on the EU, and hence the Member States remained the masters of the treaties (Hartley, 1999: 240). If the EU institutions did not act within the powers conferred, the FCC would hold the resulting measure invalid. Secondly, the FCC would continue to protect the Basic Rights of the German nationals, 'albeit in cooperation with the ECJ' (Douglas, 2002: 269). The FCC's judgment indicated that the EU was not an 'autonomous legal order' but consisted of a number of legal practices based on treaties concluded between sovereign states (Kumm, 1999: 355). Therefore, it was the will of those Member States that was supreme. It was those Member States that could expand or reduce the scope of a treaty.

The judgment in *Brunner* was argued to have repealed the *Solange II* decision (Douglas, 2000: 268). The FCC was very critical of the German Government, too, because most politicians 'hardly understood the Maastricht Treaty and they did not appreciate how much of their own authority they were giving away' (Alter, 2000: 107). The German Parliament was representative of the will of the German people and by giving away more sovereignty than allowed by the Act of Accession to the EU would undermine the Germans' ability to 'articulate their political will through the legislative process' (Alter, 2000: 107). Such a transfer would be held invalid. At the European level, went on the FCC, there was no real democracy since, for example, unlike the German Parliament, there was no exchange of ideas (Alter, 2000: 107).

The FCC cooperation with the ECJ was claimed to have meant that the ECJ should confine itself to the powers given to it and the FCC would make sure that it did so by reviewing EU measures 'on a case-by-case basis' (Hartley, 1999: 240). The power to review amounted to a 'quite flat denial of the supremacy of EC law [and] its supreme judicial organ' (Herdegen, 1994: 239). This was against the wishes of the ECJ, as it had made clear that 'national courts had no jurisdiction to rule an EU act invalid (Peers, 1998: 151). To the contrary, the 'Community legal order [was now] subject to the approval of the [FCC]', which was a 'major blow' to the supremacy of EU law (Alter, 2000: 106; Douglas-Scott, 2002: 270). If the FCC reviewed EU law, the courts of Member States would follow suit, and they might strike down EU law as frequently as they do national law. This might override the ECJ as the ultimate arbiter of constitutionality. It would take the EU into a state of 'inter-statal anarchy, ending the 50 years experiment of establishing a coherent legal order on the European level', and the EU 'would lose its credibility' and consequently 'degenerate into an inter-governmental forum' (Kumm, 1999: 353, 360).

Around the time of the decision (and even now), the ECJ was indirectly criticised by some constitutional experts for expanding too far the EU treaties (Alter, 2000: 105). Germany, argued many, was one of the masters of the Treaty of Rome, but if need be it could withdraw from the Treaty by a contrary act (Steiner, 2003: 81). However, many others, including Professor Mathias Herdegen (1994: 244), reasoned that 'unlike the United Kingdom, Germany, as one of the driving forces behind the transfer of monetary sovereignty in favour of the EU, had not reserved the possibility to opt-out of the [EU]'. Yet many more were of the opinion that, yes, Germany was (and is) unlikely to exit the EU, but the perception that Germany's acceptance of EU supremacy was both unconditional and unquestioning was (and is, below) no longer the case.

The FCC would only accept those EU measures that fall within the limit allowed by the German Act of Accession (Elber and Urban, 2001: 27). The scope of this limitation was unknown, and the FCC did not offer what 'the required general guarantee of fundamental rights [was]' (Craig and De Burca, 2002: 297). The ECJ could not rely on Article 10 (ex. 5) of the Treaty as an authority for EU law supremacy, as, according to the FCC, the said article only established 'inter-governmental cooperation' rather than the supremacy of EU law, which could not encroach on the German constitutional rights, and it must be 'distinguished from supranational acts having immediate effect' (Herdegen, 1994: 240).

However, it was only the FCC that could hold EU measures *ultra vires*, not the lower courts. If the lower courts were to do so, they would have to make a reference under Article 234 (ex. 177) to the ECJ. If unpersuaded by the ECJ's ruling, then they had to make a reference to the FCC under Article 100GG. Therefore, it was suggested that the FCC still regarded the ECJ as the ultimate arbiter (Kumm, 1999: 364-5). Furthermore, Frank Hoffmeister refused to accept that the FCC would review EU measures on a case-by-case basis because the fact that FCC required a general decrease in the European

human rights level demonstrated that it was reluctant to review EU measures. This was also implied by the then president of the FCC (Hoffmeister, 2001: 798).

The *Brunner* decision persuaded many litigants to challenge the EU regulation governing the banana regime. They argued that it, inter alia, breached their property rights protected by the German Constitution. Among them were the cases of *Alcan* (2000) and *Banana* (2000), in which the FCC reaffirmed its position of *Solange I* and *Brunner* (Hoffmeister, 2001: 791): if the EU institutions acted *ultra vires* their power, or if the human rights protections in the EU fell below the necessary level, the FCC would declare the EU act inapplicable in Germany (Hoffmeister, 2001: 794). The lower courts went on the FCC, could no longer refer a case to the FCC unless it showed that the human rights protections guaranteed by the ECJ fell below the German level of protection. Therefore, the claimants' claims were unsuccessful, as the lower courts did not show in their references any fall in the EU's human rights protection.

The 'Bananas rulings' were welcomed as a diffusion' of a threat to the EU supremacy even though they were not an 'unconditional recognition' of the EU supremacy (Elber and Urban, 2001: 31). It was suggested that, due to its friendly nature in those cases, the FCC established a 'new cooperation' between the FCC and the ECJ, and *Brunner* was 'partially repealed' (Steiner, 2003: 83). The new cooperation meant that as long as the ECJ sufficiently protected (German) fundamental rights and took those rights seriously (as it did, below), the FCC would not carry out its threats. Sionaidh Douglas-Scott (2002: 272) pointed out the *T Port Judgement* of the ECJ in which ECJ had stated that provisions of banana regulation could be adopted to protect the fundamental rights of the traders was an indication that the ECJ took the German Basic Rights seriously. The FCC itself pointed out that the ECJ did take note of fundamental rights in a case four years before the banana litigation decision as 'it affirmed the plaintiff's right to property and the Commission's responsibility to consider the hardship the plaintiff was facing' (Alter, 2000: 115). Indeed, the ECJ was well aware that it must as seriously protect human rights as it did the notion of supremacy in order to remain supreme (Peers, 1998: 155).

The *Brunner* decision was argued to be a 'revolt' against the ECJ's ruling in *Germany v Council* (1994) (Peers, 1998: 155). The ECJ must have realised this and eventually annulled those provisions of the banana regime (Peers, 1998: 155; Alter, 2000: 115). Incidentally, in *Germany v Council* (1994), the ECJ refused to annul the EU provisions contradicting Germany's other international obligations (i.e. GATT). This case gave rise to severe criticism in Germany. The German jurist and a judge at the ECJ Ulrich Everling felt that the ECJ's judgement to hold the regulations valid was a dangerous development, which violated not only the German importers' rights to engage in their profession but also their property rights (Peers, 1998: 155; Everling, 1996: 401). The decades-long criticism and warnings eventually led to the FCC carrying out its threats.

In a case described as 'a nuclear device', the FCC on 5 May 2020 ruled that bond-buying by the European Central Bank violated German law and hence the ECJ acted *ultra vires*, that is, beyond the competence that Germany had given to the EU. The case triggered strong criticism by the Commission, affirming that EU law was superior to national law and it was only the ECJ which had the competence to declare the legality of an EU act (not national courts). The German Chancellor Angela Merkel privately stated that the FCC's decision had 'institutional' bearing. The ruling has been argued to be a threat to the notion of the supremacy of EU law (Burke and Walsh, 2020; Kenny, 2020; Maduro, 2020; Vela, 2020).

Conclusion

The question is whether the German courts, the FCC, in particular, have accepted the primacy of EU law. The answer to this question would be in the affirmative, as the FCC, with the exception of one case, has never expressly rejected an EU provision thus far. However, the acceptance is conditional (Herdegen, 1994: 239).

As far as the FCC's conditions (or rather threats) are concerned, it, nevertheless, 'has erected such a high hurdle that it has become very improbable that the [FCC] will exercise its reserve control or its subsidiary emergency jurisdiction' (Craig and De Burca, 2002: 297). For example, the banana regulation caused a fall of 40 per cent in some German importers' business, which was a severe attack on the Germans' fundamental right from the German importers' point of view, but the FCC did not carry out its threats (Elber and Urban, 2001: 21). Even though Germany had strong arguments in *Germany v Council* (1994), the FCC did not make use of its new jurisdiction to hold the EU regulation concerned invalid (Steiner, 2003: 82). The FCC has clearly avoided the possibility to hold EU law inapplicable, and hence one can conclude that the FCC has accepted the supremacy of EU law (Hoffmeister, 2001: 802-3).

The test for the claimant to show that the EU protection for fundamental rights has deteriorated has become very difficult to meet, as there are 'no significant differences in the European and German level of protection' (Hoffmeister, 2001: 798) – especially when the 'Fundamental Rights Charter proclaimed at the Nice Summit will (and has to some extent) end(ed) all this discussion about comparability' (Hoffmeister, 2001: 802). Furthermore, the FCC in *Brunner* persuaded the EU that it should develop more and become a fully democratic organ so that Germany transfers more powers and competences without breaching the fundamental German rights and the 'the principle of democracy' (Craig and De Burca, 2002: 294-5). The FCC's willingness for transferring more power is an indication that the FCC still regards the EU as a sovereign authority. The transferring of more competences will eventually demolish the doctrine of *ultra vires*.

However, for the time being, the *ultra vires* doctrine might become of practical significance if the EU institutions overstep its competence (Hoffmeister, 2001: 803). And, as stated, the FCC did rule that the ECJ had

acted beyond the powers conferred to it by Germany in the 2020 case relating to the bond-buying by the European Central Bank. Although the case has received much attention, it is not a demonstration of the FCC's refusal to accept the doctrine of EU law supremacy. First, the case is a special one and can be confined to its own facts. Second, the ECJ has been careful not to disregard Member States' fundamental rights such as those of the Germans. Therefore, the possibility of the FCC (or other national constitutional courts) setting aside the ECJ's rulings in the future is slim. However, the ECJ's role to strengthen the EU legal order has been reduced by the FCC's rebellious position (Everling,1996: 436), as, in addition to the supremacy of EU law, it also has to take into consideration Member States' constitutional rights (or rather the FCC's threats).

Like the FCC, other (German) lower courts also accepted the supremacy of EU law. For example, the Federal Supreme Court, although refused to interpret the German law concerned to comply with a directive (*Re a Rehabilitation Center*, 1992), accepted the principle of state liability, which never existed before under the German Constitution (*Brasserie du Pecheur*, 1997).

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Wunsche Handelsgesellscaft [1987] 3 CMLR 225. Also referred as *Solange II*.

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[1] It was Article 24 (1) but the German Constitution was amended for Maastricht Treaty 1992 to authorise further transfer of power to the EU, so now it is Article 23 that provides for this transfer of power (Horspool, 2000: 176).

[2] All the above quotes are from Alter, 2000: 74, 77, 78.

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