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EUROPEAN COURT OF JUSTICE - SUPREME COURT OR CONSTITUTIONAL COURT?

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Abstract

A main task of the European Court of Justice is to enforce the uniform interpretation and effective application of european legislation.

For some reasons, the European Court of Justice can be considered as a quasi-constitutional court.

It applies in practice such a competence by ordering a national court to directly disapply domestic law provisions on limitation periods in a pending case. Legality and legal certainty are at stake here.

În such conditions, we can speak about the evolution of a "constitutional" relation between the European Court and national courts.

Keywords

European Court of Justice, supreme court, constitutional court, supremacy models of federalism, political theory

1. General aspects

Special constitutional courts exist, together with specialised high courts in Germany (BVerfG – Bundes Verfassungs Gericht, Austria (Verfassungsgerichtshof), Italy (Corte Costituzionale), Portugal (Tribunal Constitucional), Spain (Tribunal Constitucional), and Luxembourg (Cour Constitutionnelle).

In Ireland (Supreme Court) and Denmark (Højesteret) the supreme courts are in the same time constitutional courts.

In Great Britain, the second (upper) chamber of Parliament, the House of Lords, exercised until 2009 the functions of a constitutional and a supreme court. Since 2009 Great Britain has a classical supreme court.

In the Netherlands, we have a number of specialised courts of equal rank, the Raad van State and the Hoge Raad. In Sweden, we found the Supreme Court (Högsta Domstolen) and the Supreme Administrative Court (Regeringsrätten), as well as in Finland (Korkein Oikeus) Supreme Court, and (Korkein Hallinto-Oikeus), Supreme Administrative Court.

In France, there is no clasic constitutional court aside from the highest courts for administrative law (Conseil d'Etat) and for civil and criminal law (Cour de cassation). The Conseil constitutionnel, originally limited to the review of draft legislation, does increasingly exercise the role of a constitutional court.

Belgium has specialised supreme courts (Conseil d'Etat and Cour de cassation), and since 1983 a constitutional court that specialises in, but limited to control the exercise of competencies, the Cour d'arbitrage.

In Greece, there are several supreme specialised courts, the Symvoulio Epikrateias (Council of State), the Elegktiko Synedrio (Court of Audit) and the Areios Pagos (Supreme Court). Also is a Special Supreme Court, (Anotato Eidiko Dikastirio), which is composed of judges from the highest specialised courts.

A constitution has three main functions.[1]

Firstly, it is organizing and sharing powers between the different governing bodies within a given society.

Secondly, it gives for the protection of certain principles and individual rights, which, for the very reason that they derive from the constitution, are called ''fundamental.''

Thirdly is is providing safeguards to ensure that the governing bodies, in exercising the powers granted to them.

In such conditions is obvious that the European Court of Justice (ECJ) has constitutional tasks.

In the same time, the ECJ decides in cases without a constitutional dimension (actions for annulment of an EUadministrative decision, actions regarding an EU institution's failure to act; actions concerning infringement, when a member state is charged with failure to fulfill an obligation under EU law), preliminary rulings, when member states' national courts refer issues to the court for a preliminary ruling on the interpretation of a point of EU law, and appeals (of rulings by the Court of First Instance -CFI) on points of law.[2]

We can speak about problems with a constitutional nature only in the context of preliminary rulings that specifically request the ECJ to interpret the meaning of

[1] See B. Vesterdorf *A constitutional court for he EU* International Constitutional Law Review, nr. 4/2006, *p. 608*

[2] See B. Vesterdorf Op. Cit, p 610

ancillary provisions of the directives prescribing the general principles to be incorporated into the environmental laws of the member states.

The ECJ has biger duties than a specialized constitutional court. It has a role also in promoting the unity and the consistency of the law, whether constitutional or not, by advising national courts through preliminary rulings and by judging on appeal from the CFI.[3]

2. The supremacy of European Union law

Since the beginning of its activity, the ECJ has developed a doctrine of supremacy based on three elements claims: first is that the ECJ has the power to give answers to all questions of European law; second is that the ECJ has the competence to say what issues are questions of European law and third that European law has supremacy over all conflicting national laws.

The EU Treaty as amended by the Lisbon Treaty gave considerably more weight to the principles of subsidiarity, proportionality and national identity.

The EU must respect the identities of the member states.[4]

A " national identity clause" was first mentioned in the Treaty of Maastricht. Article F (1) TEU was the first provision to constitutionalise such obligation by mentioning that 'the Union shall respect the national identities of its member states'. Article F (1) TEU of the Maastricht Treaty was later replaced by article 6 (3) TEU of the Amsterdam Treaty which then gave way to current article 4 (2) TEU of the Lisbon Treaty. The second provision is a lot more comprehensive compared to its predecessors.[5]

The respect to national identities can be claimed by a member state as a way of placing under review the legality of EU legislative acts in accordance with article 263 TFEU. Article 4 (2) TEU says that national identity is balancing with the principle of EU law primacy. This aspect of article 4 (2) TEU as a cause of action under article 263 TFEU is particularly beneficial for the UK and Dutch governments whose general aversion towards making a federation out of the EU is well known.[6]

Article 4 (2) TEU can be claimed by a member state as a means of derogating from its obligations under EU law – claiming that transposing a piece of legislation into national law conflicts with legitimate interests or principles which are deeply entrenched in its national identity. In this fashion, article 4 (2) TEU provides member states with an express EU law derogation over the preservation of their national identity.[7]

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[3] See B. Vesterdorf Op. Cit, p 610

[4] See T. Konstantinides *The constitutionalisation and the national identity in EU law and its implications* Cambridge Yearbook of European Legal Studies, 2011, p. 1

[5] See T. Konstantinides, Op. Cit, p 1

[6] See T Konstantinides, Op. Cit, p 2

[7] See T Konstantinides, Op. Cit, p 3

The Bundesverfassungsgericht's vision about sovereignty is based on Europe's 'statist' tradition, according to which sovereignty is indivisible.[8]

The Bundesverfassungsgericht's arguments if Germany would lose its sovereignty by ratifying the Lisbon Treaty does not differ from that in the Maastricht decision. The Bundesverfassungsgericht's view on sovereignty is primarily based on the notion of Kompetenz-Kompetenz. The Basic Law is forbiding the transfer of such a competence on the European Union. The member states must be'masters of the Treaties'.[9]

The member states as sovereign states must remain the source of all competences enjoyed by the European Union and they must be able to revoke these at any time.[10]

The reality that the European Union has some degree of Kompetenz-Kompetenz is more evident if we are looking at article 352 TFEU (Lisbon), which extends the scope of article 308 EC to all policy areas. According to the article 309, the European Union can act even in fields for which it has no competence if this is necessary for the attainment of one of the objectives set out in the Treaty. Procedurally, article 352 TFEU (Lisbon) provides for a decision by the Council and the European Parliament but does not require that the member states approve it.[11]

The procedure is a internal procedure for the European Union since no national authority can block the decision. Article 352 TFEU (Lisbon) will permit the European Union to extend its own competences.

Member states can no longer unilaterally exercise some of their powers to the disadvantage of the European Union, losing their Kompetenz-Kompetenz.

The Bundesverfassungsgericht says that the European Union may not attain Kompetenz-Kompetenz and a degree of statehood. [12]

The court explicitly is putting on the same level the European Parliament with second chambers of national parliaments, which are characterised by imbalances in representation and find the Parliament not a necessary institution when it comes to democratic legitimation. Under the Lisbon Treaty the Parliament's influence is grow . The co-decision procedure, known as the ordinary legislative procedure, was extended.[13]

This means that the European Parliament's agreement is necessary for almost all parts of european legislation. Is important as the Council in the ordinary European legislative process.

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[8] See T. Lock *Why European Union is not a state.. Some critical remarks* European Constitutional Law Review, nr. 5/2009, p. 408

[9] See T. Lock, Op. Cit, p 409

[10] See T. Lock, Op. Cit, p 409

[11] See T. Lock, Op. Cit, p 412

[12] See T. Lock, Op. Cit, p 413

[13] See T. Lock, Op. Cit, p 419

The community's law supremacy gained force by the ECJ's ruling in the *Simmenthal* case, where the Court said that community law would take precedence even over national legislation which was adopted after the passage of the relevant european norms. [14]

The existence of Community rules made inapplicable any contrary provision of national law, *and* precluded the valid adoption of any new national law which was in conflict with the Community provisions.

There are four particular issues inside the national legal systems. [15]

The first problem is how far have national courts accepted the supremacy of Community law, and if they placed any limits on this acceptance in relation to clashes between community law and the national constitution.

The second problem is the conceptual basis for the national judicial decisions.

The third problem is the position of a member state on the issue of *Kompetenz-Kompetenz*.

The fourth problem is to understand this supremacy in continental national legal systems.

In Belgium there were many unsuccessful attempts to insert a provision in the Belgian Constitution which would provide for the primacy of treaties over conflicting statutes.[16]

3. The french and german examples

There are three differences between the french and german legal systems important in the present context (the powers of the respective constitutional courts; the relationship between the higher courts; and the relationship between the lower courts and the higher courts). [17]

Firstly, for much of its history the Conseil Constitutionnel had restrained powers relative to the BVerfG.

The Conseil constitutionnel had not the BVerfG's concrete review powers until the introduction of the QPC mechanism in 2008. Access to the Conseil constitutionnel has also been limited, with individuals party to trials only able to refer constitutional questions to the Conseil constitutionnel since 2010.

Secondly, the Conseil constitutionnel is not the head a strictly vertical hierarchy like the BVerfG. In part by virtue of its reluctance to hear such cases, the

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[14] See See P. Craig *The ECJ, national courts and the supremacy of community law*. European Constitutional Law Network Conference, Rome, 2002 Op. Cit, p 35

[15] See P. Craig Op. Cit, p 36

[16] See P. Craig Op. Cit, p 36

[17] See C. White *National Constitutional Courts and he EU. The evolution of he Conseil Constitutionnel and the Bundesverfassungsgericht*, Institute for the Study of Civil Society Working Paper, London, 2014, p 19

Conseil Constitutionnel has not had the same control over the French judicial dialogue with the ECJ that the BVerfG has had.

The Conseil constitutionnel was forced to have a race with the Conseil d'État and the Cour de Cassation to determine French doctrine on European law supremacy. [18]

In France, development of judicial doctrine was a gradual process of back-and-forth between the courts, in contrast to the comparatively rapid development in Germany given the latter's more streamlined legal system. The clarity of the German system is advantageous in terms of efficiency.

The checks inherent in the French legal system might be defended on the grounds of the politically sensitive nature of european law doctrine.

Thirdly, the lower courts in France lacked the german courts' influence over doctrinal change.

This is partly the effect of the lower administrative courts limited ability to challenge the Conseil d'État's European jurisprudence, together with the lower civil and criminal courts' lack of a legal way for challenging higher court jurisprudence given that the Cour de Cassation and ECJ have largely concurred in their doctrine.

The supremacy of european law created particular problems for the UK. This is because parliamentary sovereignty is one of the main principles of british constitutional law.[19]

This doctrine says that Parliament has the power to do anything other than to bind itself for the future.

The UK has a dualist view about the relationship between international treaties and national law.

Such treaties, even are signed and ratified by the United Kingdom, are not considered to be part of the national law of the United Kingdom. In order to be enforced at the national level, they must be included in an Act of Parliament.[20]

In the United Kingdom, the acceptance of the supremacy of european law has produced many problems.

According to this principle, Parliament has the power to do anything other than to bind itself for the future. [21]

The supremacy of european law is assured in the U.K. only in so far as Parliament intends it to be. [22]

All these particularities of the british system played their role in the process of Brexit.

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[18] See C. White, Op. Cit, p 20

[19] See E. Papageorgiou *The European Court of Justice and he supremacy of EC law*, The Law Office of the Republic of Cyprus, 2017 pag. 18

[20] See E. Papageorgiou Op. Cit, p 18

[21]See P. Craig, Op. Cit, p .40

[22] See P. Craig, Op. Cit, p .40

In France, the Cour de Cassation accepted the supremacy of community law over French law in 1975. It was considered that the question was not whether it could review the constitutionality of a French law.[23]

The italian courts have a dualist perspective on the relationship between national and international law. [24]

The national and international norms are separate, each regulates its own sphere of competence, and the latter do not become part of national law until they have been transformed or adopted into the national legal system. The national jurisprudence was influenced by Article 11 of the Constitution which provides that Italy can accept, on the same conditions as other countries, those limitations of sovereignty that are necessary to take part in international organisations aimed at fostering peace and justice among nations.[25]

A basic element of European law supremacy is the preliminary references mechanism. [26]

The preliminary references mechanism, specified in the Treaty on the Functioning of the European Union (TFEU), permits to courts to refer questions regarding the interpretation of European treaties and the validity or interpretation of acts by European authorities to the ECJ.

4. The French example

The main function of the french Conseil Constitutionnel is to ensure that legislation conforms with the Constitution. The Conseil had initially only abstract review power, whereby it had the power to review legislation referred to it by certain actors (these were increased in 1974) prior to its promulgation. [27]

After 2009 the Conseil has also concrete review competences due to the July 2008 constitutional revision establishing the *question prioritaire de constitutionnalité* (QPC) procedure.[28]

The litigants may now claim that a statutory provision infringes the rights and freedoms guaranteed by the Constitution. The case is then send to the competent court, the Conseil d'État or the Cour de cassation, which determines whether the case should be taken to the Conseil.

If the Conseil finds that the legislative provision is in breach of the Constitution, it is repealed.

The Conseil d'État is the supreme court of the administrative branch of the justice system, having also an advisory role for the executive. [29]

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[23] See P. Craig Op. Cit, p 37
[24] See P. Craig Op. Cit, p 38
[25] See P. Craig Op. Cit, p 38
[26] See C. White, Op. Cit, p. 4
[27] See C. White, Op. Cit, p 5
[28] See C. White, Op. Cit, p 5
[29] See C. White, Op. Cit, p 5

The Cour de cassation is the supreme court of the judicial branch of the system, acting as the court of final appeal for civil and criminal matters. [30]

The legal doctrines of the french courts in the matter of european law have, perhaps evolved since the begining of the European Union, starting from a position of extreme negativity and gradually became closer to the EU.

The 1960s were marked by disagreement between the french courts and the ECJ over the obligation of national courts to enforce the supremacy of European law over national law. The Conseil constitutionnel was declared by the Conseil d'État to be the only authority entitled to enforce european law supremacy in France. [31]

In the first years of the 1970s, the Conseil Constitutionnel considered that enforcing international law supremacy was not respecting its constitutional mandate, despite the concurrent expansion of its powers in other areas. [32]

The Cour de cassation exploited the opportunity left it by the two Conseils to claim authority to enforce european law over national law.

Before the Maastricht Treaty, the French judges had a flexible legal order. allowing them to avoid ruling on sensitive questions, even though the ECJ had been reiterating the supremacy of European law. [33]

After the constitutional amendment to article 88, made to permit the adoption of the Maastricht Treaty, the supremacy of European law, and the obligation of the French courts to enforce it, was included in french law.

After the 2000s, the Conseil Constitutionnel has sought to balance the demands of the european and french legal orders.

Since 2004, the Conseil Constitutionnel considered that there exists a constitutional obligation to transpose european directives into french law according to article 88-1. In 2006 the court specified that the obligation of transposition is limited. Transposed legislation must not respect principles of french constitutional identity without the consent of the constituent power. .

The Conseil d'État didn" t want to accept the decreasing of its power entailed by the growing importance of european law, but was forced to change its position in recent years, adopting a similar approach to that of the Conseil constitutionnel.[34]

Adopting the same position with the Conseil Constitutionnel, the Conseil d'État acknowledged a constitutional obligation to transpose directives into french law, as limited only by a core of constitutional values on a case-by-case basis.

The Conseil d'État wanted to indicate whether there were principles in european law equivalent to the relevant french law. The court said that in such cases the task of interpreting the law must fall to the ECJ to ensure uniform interpretation of the principles across the EU.

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[30] See C. White, Op. Cit, p 5
[31] See C. White, Op. Cit, p 6
[32] See C. White, Op. Cit, p 6
[33] See C. White, Op. Cit, p 7
[34] See C. White, Op. Cit, p 9

The Cour de Cassation which has chosen to play the role of european court, describing itself as the 'upholder of community law' within its jurisdiction.

The Cour de Cassation used the first opportunity presented to it to made a preliminary reference to the ECJ regarding the compatibility of the QPC mechanism with european law, specifically with article 267 of the TFEU.

The introduction of the QPC procedure is a menace to the Cour de Cassation's influence over lower courts and its autonomy in developing its european law jurisprudence.

5. The german example

Article 24 of the German Constitution permits for the transfer of legislative power to international organizations, but there have been questions as to whether this article permitted the transfer to the European Union of a power to contravene certain basic principles protected under the Constitution itself. This question was mentioned in *Internationale Handelsgesellschaft mbH*. The German Federal Constitutional Court held that article 24 nullified any amendment of the EC Treaty which would destroy the identity of the valid constitutional structure of the Federal Republic of Germany by encroaching on the structures which constituted it. [35]

The part of the Constitution dealing with fundamental rights was an inalienable, essential feature of the German Constitution.

The Court held that at that time on european level it was not any codified catalogue of fundamental rights.

The BVerfG has concrete review powers. [36]

The ordinary courts may refer cases or constitutional questions to the BVerfG, which must formulate a decision. The result of this method has been limited by the ability of the court to exclude certain issues from discussion and so avoid addressing politically sensitive questions.

The BVerfG can analyse individual constitutional complaints. The BVerfG has some discretion here because it can choose to postpone cases in order to let matters evolve, for example through the introduction of new legislation.

The BVerfG can be called by state governments to resolve disputes between the state and federal tiers.

The BVerfG has the competence of abstract review over legislation referred to it by the federal or state governments, or by one-third of the Bundestag. The great degree of flexibility in these processes has allowed the constitutional judges to choose when to intervene in the debate surrounding european law. [37]

[35] See P. Craig Op. Cit, p 39

[36] See C. White, Op. Cit, p 12

[37] See C. White, Op. Cit, p 12

After the accession, it took place a judicial debate over the constitutionality of the EEC Treaty in Germany.

A tax court in the land of Rhineland-Palatinate suggested that the EC might violate the separation of powers written in the German Basic Law.[38]

The case was sent to the BVerfG, which, after giving a first response that avoided politically sensitive questions, decided that Germany's membership of the European Union was compatible with the Basic Law by virtue of Article 24. This article says that the german government may transfer sovereign powers to intergovernmental institutions' through legislation. This is coupled with the article 25 provision that international law is an 'integral part of federal law and that general rules of public international law take precedence over national laws, directly creating rights and duties for inhabitants of Germany.

6. Conclusion

European law provides a duty on national courts to make preliminary references to the ECJ in two situations.

In the first situation, any court or tribunal of a member state that has doubts about the validity of european law has to make a reference, because the ECJ is claiming a monopoly to decide upon the validity of European law. The second situation is the duty to make references to the ECJ under art. 234(3) EC, which requires that "a court or tribunal of a member state against whose decisions there is no judicial remedy under national law.

In such conditions, we can say that European Court of Justice is looking more like a supreme court

Restraining the ordinary jurisdiction of the ECJ to important questions can have some advantages.

First, the Court will analyse relatively unproblematic cases, those not requiring the time and attention of a supreme court for their resolution. The judges will have more time in order to balance the decisional options available to them and to provide more detailed legal reasoning in their judgments and orders.

Second, it will allow the ECJ to hear more cases in the grand or the plenary chamber, on a more regular basis than is the situation today.

The ECJ should have in the future competences in the matter of interinstitutional litigation, review of the CFI's judgments, and cases brought before the CFI that raise new constitutional questions and thus demand automatic transfer to the ECJ.

Thitd, it can act like an international court, solving conflicts between states, european institutions, etc.

[38] See C. White, Op. Cit, p 13

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