
Constitutional Restraints of Supranational Judicial Activism — a Challenge to European Integration¹

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Summary

Today it is a commonplace that the Court of Justice of the European Communities has played an indispensable role in the process of European legal integration.

The practice of the European Court, often described as activist, has resulted in at least, two developments: (a) transformation of the original (treaty forged) relationship between national and European law, and (b) remodeling of the vertical separation of powers between the Union and its Member States.

These developments seem to be restrained by the reaction of some Member States, acting on both, supranational and national level.

Supranational judicial activism developed in the European Union has threatened to jeopardize constitutional values of Member States and strip them off their residual powers. In other words, the European Court of Justice acts as a supranational counter-majoritarian force in respect of national legislatures. On the other hand, national courts, following the traditional reasoning infused with the concept of national sovereignty are reluctant to recognize the supremacy of supranational legal rules when they are at variance with national constitutional law.

It is suggested that the issue of legitimacy is of essential importance for the future of the European Union. However, one has to distinguish the sources of legitimacy of judicial and legislative branch. While the latter is derived from the democratic process, the former is derived from procedural and substantive justice. While legislative regulation reflects interests, judicial regulation is an expression of justice. In other words, the two branches of government are to certain extent incommensurable. That explains why the ECJ has retained its legitimacy even in the absence of democratic process. That also explains why the battle for supremacy has to be won not only on the legislative but also on the judicial ground.

I Introduction

Legal developments described in this paper are nothing new for scholars of European Law. Today it is a commonplace that the Court of Justice of the European Communities has played an indispensable role in the

¹This article represents a modified version of the author's paper presented at the conference on Amsterdam and Beyond: The European Union Facing the Challenges of the 21st Century, Brussels, July 9—12 1997.

process of European legal integration. It is widely agreed that its integrative rhetoric was often based, not in the letter of the constituent treaties, but also in its spirit. Indeed, the so-called judicial activism of the European Court has managed to push European integration forward in the legal arena even in those instances where political integration was stalled.

Activist practice of the European Court has resulted in at least, two developments: (a) transformation of the original (treaty forged) relationship between national and European law, and (b) remodeling of the vertical separation of powers between the Union and its Member States.

(a) European law overrides national law, even of Constitutional nature. That is the “rule of recognition” within the European union starting from *Costa v. ENEL* and *Simmental* cases. It is a common place that the original wording of the founding treaties (Article 189 EEC) has been extended to cover an ever larger set of supranational rules. Not only Treaty provisions and Regulations may have direct effect on national legal orders and supremacy over national legal rules, but the family of “higher norms” has been extended to cover Directives, both implemented, and unimplemented. In certain sense, judicial assertion of numerous “subjective supranational rights” has improved the legal status of individuals — however, without their political participation.

(b) Formally speaking, the principle of separation of powers either in horizontal or in vertical sense does not exist within European union. The founding treaties rather speak about “tasks” (Article 2 of the EC Treaty) and “activities” (Article 3 of the EC Treaty) of the European Communities. Those tasks are to be performed by the supranational institutions which lack the democratic legitimacy which is the characteristic of nation states based on popular sovereignty. The vertical separation of powers between the Community and its Member States has undergone a significant evolution. While in 1957 the European Court of Justice has clearly defined the Community as one of limited and enumerated powers,² today, it is widely agreed that the powers of Member States have no reserved status, and that the extension of supranational powers is not likely to be blocked by any constitutional guarantees.³ The described situation is due to several developments, such as the elaboration, by the European Court of Justice, of the doctrine of implied powers, illustrated by the landmark *ERTA* case⁴, the evolution of the doctrine of judicial pre-emption,⁵ and

²Cases 7/56, 3—7/57 *Algera v. Common Assembly* (1957) E.C.R. 39.

³Koen Lenaerts, Constitutionalism and the Many Faces of Federalism, 38 *Am. J. Comp. L.* (1990), 205, 220, *et. seq.*

⁴Case 22/70 *Commission v. Council* (1971) E.C.R. 263.

⁵See e.g. Denis Waelbroeck, The Emergent Doctrine of Community Pre-emption — Consent and Redelagation, in: *Courts and Free Markets: Perspectives from the*

by an extensive interpretation of the Founding Treaties, especially but not exclusively in the field of the interpretation of Articles 30—36 (Free Movement of Goods) as well as 85. and 86. (Competition) of the EC Treaty.⁶

Both developments seem to have reached their limits.

As far as the extension of the powers of the European Union is concerned, it has been blocked by introducing the subsidiarity principle into the Maastricht treaty.

Second, certain developments related to the Maastricht Treaty indicate that an embryonic mechanism of checks and balances has developed in the European Union. It is evidenced by reversal of the *S.P.U.C. v. Grogan* decision of the European Court of Justice by a protocol to the Maastricht Treaty.

Third, supremacy of European Law in national legal systems, though theoretically unquestioned, has been put in question in the United Kingdom and Germany. In the United Kingdom the doctrine of Parliamentary supremacy leaves Parliament, at least in theory, at will to enact national legislation contrary to either primary or secondary Community law. In Germany, the supreme position of the European Court of Justice and its case law has been seriously undermined first by the Maastricht decision of the Constitutional Court and later by the developments in the Banana cases.

II. The Restraints

1. Subsidiarity

Despite its earlier presence in the Draft Treaty on European Union,⁷ and even its legal expression in the Single European Act,⁸ the subsidiarity principle has been first comprehensively introduced to the body of European Law by articles 3b A(2) and B(2) of the Maastricht Treaty. The function of the Article 3b of the Maastricht Treaty seems to be analogous

United States and Europe, Vol. II, Clarendon Press, Oxford (1982) at p. 548 *et seq.*

⁶On forms of judicial activism of the ECJ see. e.g. Hjaelte Rasmussen, *On Law and Policy in the European Court of Justice. A Comparative Study in Judicial Policymaking*, Nijhoff, Dordrecht, Boston, Lancaster, 1986; Joseph Weiler, The Transformation of Europe, 100 *Yale L. J.* (1991) 2403.

⁷Adopted by the European Parliament on February 14th 1984, O. J. 1984 C 77/33, Article 12(2).

⁸Article 130r(4) which introduces subsidiarity principle in the area of environmental protection.

to the X Amendment to the US Constitution which allocates residual powers to the individual States and enumerated powers to the Federal Government. When discussing the issue of subsidiarity the most important question is whether it should be understood as a political concept or as a justiciable legal principle. So far it seems that the former view prevails, and that the subsidiarity clause of the Maastricht treaty is addressed to the legislative and not to the judicial branch.⁹ It is witnessed by the rather extensive definition enacted by the Protocol to the Draft Treaty of Amsterdam,¹⁰ on the Application of the Principles of Subsidiarity and Proportionality. For all that can be said, the principle of subsidiarity remains to be addressed to the Commission and the Council, and not to the judicial branch of the Union.

2. Checks and Balances

The other important limit to the judicial activism of the European Court of Justice originates from the persistence of some Member States to defend values of their constitutional order when put in question by the European Court of Justice. In 1991 the European Court of Justice was seised with the *S.P.U.C. v. Grogan* case¹¹ and had to decide whether Irish public authorities can restrict advertising, in Ireland, of the medical termination of pregnancy in other Member States. In a broader perspective, the issue was whether to give precedence to a protected value of Irish constitutional law (right to life of unborn (Art. 40 section 3 of the Irish Constitution)) or to one of the market freedoms protected by the Founding treaties. The ECJ has made a first step by defining the medical termination of pregnancy as a service, but has stopped short of giving precedence to the freedom of movement of services by avoiding the whole issue. As a consequence, Irish Constitution was to be applied in respect of non-economic operators, but it was left open what would have happened if abortion had been advertised by economic subjects. In its subsequent case law the Irish Supreme Court has repeatedly accepted the supremacy of Community Law in Ireland. It has also accepted the definition of abortion as “services.”¹²

⁹For the U.K. see e.g. House of Lords Select Committee on the European Communities, *Report on Economic and Monetary Union and Political Union*. Session 1989—90 27th Report (1990), London, H.M.S.O. at p. 55; for Germany see e.g. Vlad Constantinesco, Who is Afraid of Subsidiarity, 11 *Y. B. Eur. L.* (1991) 33, 38—39.

¹⁰Draft Treaty of Amsterdam presented to the Conference of the Representatives of the Governments of the Member States, Brussels, June 19th 1997.

¹¹Case C-159/90, *Society for the Protection of Unborn Children Ireland LTD. (S.P.U.C.) v. Stephen Grogan and Others* (1991), *Common Mkt. L. Rep.* 849.

¹²Case *Attorney General v. X and Others* (1992), *Common Mkt. L. Rep.* 277, point (32).

However, it seems that the effects of the ECJ's decision in the Grogan case have been reversed by the Protocol annexed to the Treaty on European Union and to the Treaties Establishing the European Communities.¹³ According to the said protocol, "(n)othing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3. of the Constitution of Ireland." The said protocol can mean only that prior to its enactment, the application of the Irish Constitution in Ireland was not taken for granted. Yet, it excludes interpretation to that effect and re-establishes the supremacy of the Irish Constitution. Similarly to the United States situation, where the rulings of the Supreme Court can be reversed by the Constitutional Amendment¹⁴ the Protocol has blocked the effects of the ECJ decision in the Grogan case. However, unlike the United States, the mechanism of checks and balances has developed without the participation of the electorate.

It can be seen that so far, judicial activism of the ECJ purporting to strip the Member States of their regulatory competencies can be curbed by the Member States, acting on supranational level. However, such action requires investing of it significant efforts and incurs high decision-making costs.¹⁵ Therefore is not reasonable to expect the same kind of long term effective opposition to ECJ's activist decisions.

3. National Checks on Supranational Supremacy

But has the supremacy of European Law ever been taken for granted in some Member States? In the United Kingdom it runs against the well settled dogma of Parliamentary Sovereignty as defined by Coke, Blackstone and Dicey.¹⁶ Coupled with the dualist understanding of the relationship between international and national law, that doctrine, according to the prevailing position of the courts, ever since the enactment of the 1972 European Communities Act, grants precedence to both primary and secondary Community law, *in absence of a Parliamentary declaration to the*

¹³*Treaty of European Union*, Office for Official Publications of the European Communities, Luxembourg, 1992, at p. 205.

¹⁴In fact that has occurred four times for that purpose. See. e.g. Burton Caine, *Judicial Review — Democracy Versus Constitutionality*, 56 *Temple L. Q.* 2 (1983), 297, 330.

¹⁵See e.g. James M. Buchanan and Gordon Tullock, *The Calculus of Consent*, University of Michigan Press, Ann Arbor, 1974.

¹⁶See e.g. W. Blackstone, *Commentaries on the Laws of England*, 16th edition, Butterworths, 1825., Vol. I, Book 2, pp. 160, 161; H.W.R. Wade, *The Basis of Legal Sovereignty* (1955), *C.L.J.* at p. 172.

contrary.¹⁷ Though subsequent case law has shown that the disapplication of an act of Parliament and the application of legal rules of European law is possible (*Factortame I*¹⁸ and *Factortame II*¹⁹), the basic dogma of Parliamentary supremacy seems to remain intact. The Parliament may, by express words, always set European Law aside. In absence of such express words, European law may have precedence over national law.²⁰

While in the United Kingdom, European law is granted supremacy until the Parliament decides to the Contrary, in Germany limits have been set by the Federal Constitutional Court. There the issue has been raised whether the European Court of Justice, when developing European law, has ensured the preservation of “certain unalienable Rights in the comparable manner as it is the case in Germany. Or, in other words, is it legitimate for national authorities, particularly courts, to deny precedence to European legal rules violating unalienable fundamental rights?”

Certainly since the early *Stauder v. Ulm* case,²¹ the European Union deems itself bound by fundamental human rights, and the legal basis for their protection originates from several sources.²² However, the question is whether higher national standards of protection of fundamental rights can justify a departure of the principle of the supremacy of European Law.²³

¹⁷See e.g. cases *Blackburn v. Attorney General* (1971), *W.L.R.* 1037 (C.A.); *McWhirter v. Attorney-General* (1972) *Common Mkt. L. Rep.* 882; and especially Lord Denning’s *obiter dictum* in *McCarhys v. Smith* (1979), *I.C.R.* 785; (1978) *W.L.R.* 849: “If the time should come when our Parliament deliberately passes an Act — with the intention of repudiating the Treaty or any provision in it — or intentionally of acting inconsistently with it — and says so in express terms — then I should have thought that it would be the duty of our Courts to follow the statute of our Parliament.”

¹⁸Case *R. v. Secretary of State for Transport ex Parte Factortame Ltd.*, (1989) 2 *Common Mkt. L. Rep.* 353; 2 *W.L.R.* 997 (H.L.).

¹⁹*Factortame Ltd. v. Secretary of State for Transport (No. 2)* (1991) *All E. R.* 70.

²⁰See e.g. P.P. Craig, *Sovereignty of the United Kingdom Parliament After Factortame*, 11 *Y.B. Eur. L.* 221 (1991) at p. 234; Philip Allott, *Parliamentary Sovereignty — from Austin to Hart*, 49 *Cambridge L. J.* 377, 380 (1990).

²¹Case 29/69, *Stauder v. City of Ulm, Sozialamt*, (1969) *E.C.R.* 419.

²²Henry G. Schermers, *The European Communities Bound by Fundamental Human Rights*, 27 *Common Mkt. L. Rev.* (1990), 249; See also Antonio Cassese, Andrew Clapham and Joseph Weier (eds.), *Human Rights and the European Community*, Vol. II, *Methods of Protection*, Nomos Verlagsgesellschaft, Baden-Baden, 1991.

²³As it reads in the great American Declaration of Independence: “That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of

Probably the strongest constitutional assertion of fundamental rights can be found in German constitutional order. An extensive Constitutional set of guarantees of fundamental rights and their broad interpretation by the Federal Constitutional Court have set the stage for the battle for judicial supremacy between the Bundesverfassungsgericht and the European Court of Justice.

Following the landmark *Maastricht* decision²⁴ of the Federal Constitutional Court, as well as its previous case law on the point, and especially the decisions in the cases *Solange I*²⁵ and *Solange II*²⁶, the relationship between German and European law is the following: As long as the standards of protection of fundamental rights on European level are substantially comparable to the ones in Germany, the Federal Constitutional Court shall no longer review community law as to its compliance with the Constitutional guarantees of fundamental rights. However, if the European Court of Justice or any other body of the Union extends the meaning of European Law so that it is not covered with the German act of ratification, respective legal acts shall have no application in Germany.²⁷ As a consequence the Federal Constitutional Court shall first look whether certain piece of European legislation is covered by the ratification act, and if it is, whether the supranational standards of protection of fundamental rights are substantially similar to German ones. Ultimately, European law is granted supremacy in Germany, unless *ultra vires* and as long as the standards of the protection of fundamental rights are respected. The described interpretation of the Federal Constitutional Court is subject to a lively debate in Germany, since it clearly contradicts to the position of the European Court of Justice which deems European Law absolutely supreme.²⁸

An occurrence of one of the mentioned situations has until recently been deemed purely theoretical. However the unfolding “Bananas Saga”

Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it...”.

²⁴*BVerfGE* 89, 155.

²⁵*BVerfGE* 37,271.

²⁶*BVerfGE* 73, 339.

²⁷Würden etwa europäische Einrichtungen oder Organe den Unions-Vertrag in einer Weise handhaben oder fortbilden, die von dem Vertrag, wie er dem deutschen Zustimmungsgesetz zugrundeliegt, nicht mehr gedeckt wäre, so wären die daraus hervorgehenden Rechtsakte im deutschen Hoheitsbereich nicht verbindlich. *BVerfGE* 89, 155 (188).

²⁸For the critique of the *Maastricht* decision see e.g. J. A. Frowein, Das Maastricht-Urteil und die Grenzen der Verfassungsgerichtsbarkeit, 54 *ZaöRV* (1994), 1.

has shed some new light on the Maastricht Judgment.²⁹ Theoretical checks to the supremacy of European law have been transformed into practice. According to the *obiter dictum* of the Federal Constitutional court, “it may not be excluded that the competent courts may temporarily suspend the application of the provisions of the Regulation...”³⁰ In pursuance of the Maastricht decision of the BVerfGE the Finanzgericht Hamburg held that “even if the Bananas Regulation was declared valid under Community law, the question would arise whether it is applicable without reserve in Germany.”³¹

III. The Diagnosis

The central position of the judiciary as a corrective of the majoritarian democracy lies in the essence of the liberal political thought. Mill’s observation that federal courts may replace traditional methods of dispute settlement (diplomacy and war) is valid for both the United States and the European Union.³² However, it seems that at the end of the 20th century the judiciary is by no means the least dangerous branch in Hamiltonian sense.³³ While in the United States the Constitution is subject to “amendment” through the “agency of judicial decision”³⁴, in the European Union supranational judicial activism has threatened to jeopardize constitutional values of Member States and strip them off their residual powers. In other words, the European Court of Justice acts as a supranational counter-majoritarian force in respect of national legislatures.³⁵

On the other hand, national courts, following the traditional reasoning impregnated with the concept of national sovereignty are reluctant to recognize absolute supremacy to supranational legal rules when it comes in conflict with national constitutional law. The European Court of Justice —

²⁹See eg. U. Everling, Will Europe slip on Bananas? The Bananas judgement of the Court of Justice and national courts, 33 *Common Mkt. L. Rev.* (1996), 401; Manfred Zuleeg, Bananen und Grundrechte — Anlaß zum Konflikt zwischen europäischer und deutscher Gerichtsbarkeit, *NJW* (1997), 1201.

³⁰Everling, at p. 432.

³¹Id. at 433.

³²J. S. Mill, O federalnim predstavničkim vladavinama, *Izabrani politički spisi, second volume*, Informator, Zagreb, 1989, at p. 171.

³³Hamilton, *Federalist* LXXVIII.

³⁴Horace A Davis, *The Judicial Veto*, Da Capo Press, New York, 1971 at p. 1.

³⁵In other words the counter-majoritarian difficulty appears on the vertical axis. See e.g. A. M. Bickel, *The Least Dangerous Branch*, Bobbs Merrill, Indianapolis, 1962.

a body lacking democratic legitimacy — is understood as an inappropriate instance to curb the national constituent power.

In effect, individuals in Member States of the European Union have found themselves in an environment where the democratic process has very little to do with the protection of individual rights (on supranational level). In fact, we are witnessing the competition between two different sources of legitimacy: national governments derive their legitimacy from democratic process, supranational authorities, from judicial protection of individual rights. Individuals shall be prepared to pledge their loyalty to the Union to the extent in which their rights are better protected by supranational legal rules. Otherwise, in an absence of “voice”, the remaining alternative is an “exit.”³⁶

IV. The Cure?

The classical remedy for the described situation says that the loyalty of citizens to the supranational Union can be attracted only by providing for a source of legitimacy. On the national level that source is the democratic process which provides legitimacy for all branches of government, including the counter-majoritarian judicial branch. By analogy the same principle should be applied on the supranational level by granting the European Parliament ever stronger powers that what would ultimately lead to its transformation into a fully-fledged parliamentary house. That path has been followed in the past, but the final step has never been made. Unlike the original design of the European Parliament, today its representatives are directly elected, the Parliament can pass the motion of censure to the Commission and has veto power in certain areas of regulation. Ultimately, it would transform the Union into a Federal Union.

The solutions proposed by the Draft Amsterdam Treaty, by and large, follow the same direction. It is generally recognised that the European Parliament is the overall winner in the supranational power play. The Parliament has gained new competencies and strengthened its position in the co-decision procedure with the Council. Maybe the most significant gain is the fact that following the unsuccessful outcome of bargaining in the conciliation committee, the Council may not push its original common position forward. This change in the co-decision procedure has provided the Parliament with a right of veto in the areas of regulation subject to the co-decision procedure.

The remaining question remains to what extent it is to expect the Council of Ministers to give away its regulatory powers. A further devel-

³⁶I. e. pledging loyalty rather to national than supranational government. Cf. A. O. Hirschman, *Exit, Voice and Loyalty — Responses to Decline in Firms, Organizations and States* (1970).

opment of instruments of parliamentary control and an enhanced participation of the European Parliament in the supranational regulatory process automatically leads to the loss of the power of national executives in their respective Member States. Also, the strengthening of powers of the European Parliament leads to the further affirmation of certain federal principles, primarily effective³⁷ representation of individuals on supranational/federal level.³⁸ Indeed, the fathers of the Maastricht Treaty were careful enough to avoid even mentioning the word “federalism.” Altogether, it seems to me that the transformation of the Parliament into a genuine legislative body would amount to a constitutional revolution which is not likely to be forged without serious problems.

Another proposal seeks to provide for legitimacy of supranational judicial review which would put an end to the recurrent challenges to the supremacy of European law on grounds of the protection of fundamental rights. In his recent paper J. H. H. Weiler has proposed the creation of a supranational Constitutional Council which would, following the French design, have jurisdiction only over issues of competencies, and would decide cases submitted to it after a law had been adopted but before coming into force.³⁹ While the proposal sounds reasonable in the context of conflict over competences which is unfolding between high national courts and the European Court of Justice, it does not appear to me that it would solve the problem of legitimacy. At present, the European Court of Justice is prompted to interpret European law in favor of individuals (though it is questionable whether it does so all the time)⁴⁰ if it wishes to attract their supranational loyalty. Its legitimacy is based on the respect for fundamental and other individual rights and their efficient and actual protection. The whole reasoning of the German Federal Constitutional Court in *Solange* cases is built on that proposition. It has also been suggested that strict standards followed by the Federal Constitutional Court have prompted the ECJ to develop and strengthen its own standards of protection. The proposed Constitutional Council, once it decides that the ECJ has jurisdiction in certain matter would, on the one hand provide for a green light to the ECJ to solve the case regardless of such concerns, and on the other hand put an end to the “German challenge.” Never-

³⁷I.e. representation granting the individuals its substantive traditional characteristics — participation in the law-making process.

³⁸Federal principles are understood in Elazar’s sense. See e.g. Daniel J. Elazar, *Exploring Federalism*, The University of Alabama Press, Tuscalosa, 1987.

³⁹J. H. H. Weiler, The European Union Belongs to its Citizens: Three Immodest Proposals, 22 *Eur. L. Rev.* (1997), 150, 155.

⁴⁰Coppel and O’Neill, The European Court of Justice: taking rights seriously?, 29 *Common Mkt. L. Rev.*, 669; See also Weiler and Lockhart, Taking Rights seriously seriously. The European Court and its fundamental rights jurisprudence, 32 *Common Mkt L. Rev.*, 51 and 579.

theless, if the German Constitutional Court is right in its assessment that standards of protection on supranational level may be lower than those in Germany, something obviously has to be done about it, since there is a little doubt that legitimacy and loyalty pertain to the one who protects individual rights better. Accession of the Union to the European Convention on Human Rights could be a solution. That is however, an entirely new problem which can not be discussed at this place.

Nevertheless, the crucial question for the future of the European Union remains to be the one of legitimacy. However, one has to distinguish the sources of legitimacy of judicial and legislative branch. While the latter is derived from the democratic process, the former is derived from procedural and substantive justice. While legislative regulation reflects interests, judicial regulation is an expression of justice. In other words, the two branches of government are to a certain extent incommensurable. That explains why the ECJ has retained its legitimacy even in the absence of democratic process. That also explains why the battle for supremacy has to be won not only on the legislative but also on the judicial ground. In that sense the intergovernmental conference has little to do with the relationship of national and supranational judiciary. That battle will have to be fought not in the lobbies of interest, but in the halls of justice.

Translated by the author