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The Community Court and Supremacy of Community Law: A Progress Report

Peter Hay

Vicki Thompson

THE COMMUNITY COURT AND SUPREMACY OF COMMUNITY LAW: A PROGRESS REPORT

*Peter Hay**
*Vicki Thompson***

The dedication of an annual issue of the *Vanderbilt Journal of Transnational Law,* to the case law of the Court of Justice of the European Communities is an appropriate tribute to the significant contribution of the Community Court to the integration of the European Communities. The Court of Justice is perhaps the most remarkable and successful of the common institutions (Council, Commission, Parliament, and Court), which the process of European integration has produced thus far.[1] The Communities—Common Market, Coal and Steel Community, and Euratom—have been beset by numerous political and economic problems; integration beyond the original Treaties, and sometimes within the original framework, has often been difficult and slow.[2] Within its "federal"[3] role, however, the Court has been uniquely

* Associate Dean and Professor of Law, University of Illinois. B.A., 1958, J.D., 1958 University of Michigan.

** J.D. Candidate 1975, University of Illinois.

1. The progressive case law of the Court of Justice has promoted integration by firmly advocating the principle of supremacy of Community law. *See, e.g.,* Costa v. Ente Nazionale per l'Energia Elettrica [ENEL], 10 Recueil de la Jurisprudence de la Cour 325 (Cour de Justice de la Communauté Européenne) [hereinafter cited as Recueil], 2 CCH COMM. MKT. REP. ¶ 8023, 3 Comm. Mkt. L.R. 425 (1964), and text accompanying note 39 *infra.*

The success of the Court has not, therefore, reflected the halting progress of other Community institutions, a phenomenon most visible in the shift of power away from the integration-directed Commission to the politically oriented Council.

2. *See* Schermers, *The European Court of Justice: Promoter of European Integration,* 22 AM. J. COMP. L. 444, 444-45 (1974) [hereinafter cited as Schermers].

3. The division of jurisdiction between the national courts and the Community court set forth in the Treaties—with provision in article 177 for reference of Community law questions by national courts to the Court of Justice for interpretation—enhances the "federalizing" role of the Community Court. *See* Treaty Establishing the European Economic Community, *entered into force* Jan. 1, 1958, arts. 173, 177 & 189, 298 U.N.T.S. 11, 75-77, 78-79 [hereinafter cited as EEC Treaty]; P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS 98-101, 152-202 *passim* (1966).

successful in exercising the dual purpose of insuring the legality of Community law-making[4] and of integrating the national judicial systems in the area of Community law.

Much literature has been devoted to the various aspects of the Court's jurisdiction and its extensive case law; therefore this introduction will focus only on the increasingly complex relationship between the Community Court and the national courts and on the successful accommodation of the two legal systems to one another. Although national courts initially resisted the role of the Community Court as the final arbiter in questions concerning the validity and interpretation of Community law,[5] the growing use of the referral procedure under article 177 of the Treaty of Rome (discussed in Part I *infra*) indicates increasing coordination between the Community legal system and each national system. Accommodation has also been achieved with respect to the important constitutional problem of the authority of Community law over national law: national courts increasingly accept the Community Court's view of supremacy (see Part II *infra*). In one area, however, the process of accommodation by national courts to the Community legal system is reversed: national constitutional law guarantees certain basic rights to national citizens.[6] These guarantees may be touched upon by Community law or legislation and the question arises (see Part III *infra*) to what extent national constitutional guarantees must yield to the Community's claim of supremacy for its law, or conversely, to what extent the Community, in this instance, must be mindful, even yield, to national concerns.[7]

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4. EEC Treaty, art. 173.

5. This federalizing element of the Treaties, whereby the Court of Justice has exclusive authority to interpret Community law issues which come before it, does not entirely limit the *theoretical* power of national courts to determine Community norms. A national court acts as a Community court when it renders a decision that is not appealed (inaction of the parties) or when reference to the Court of Justice is not accepted by the latter (inaction of the Court). See text accompanying note 15 *infra* for a discussion of the *practical* power of national courts over Community norms.

Inaction by the Community Court is relatively unusual, and the Court rarely declines to make a preliminary ruling when requested to do so by a national court. *See* Schermers, *supra* note 2, at 448-49; discussion at note 33 *infra*.

6. Fundamental rights are guaranteed by constitutional law, or other provisions, in all the Member States, but only in two countries—Italy and Germany—may these rights be litigated. Pescatore, *Fundamental Rights and Freedoms in the System of the European Communities*, 18 AM. J. COMP. L. 343, 344 (1970).

7. Judgment of May 29, 1974, [1974] NEUE JURISTISCHE WOCHENSCHRIFT 1697

The increasing volume of Community law has naturally multiplied the legal relationships of private parties (both individuals and companies) that are governed or affected by Community law.[8] The Community Treaties contain substantive law, much of which the Court has declared to be "directly applicable"[9] in national law, as well as the conferral of power on Community institutions to make law.[10] In the latter instance, the institutions make law that is itself directly applicable in the Member States, or they impose binding obligations on Member States to enact laws to achieve a specified effect. In cases when the Community institutions act, review of the legality of these acts may be obtained by Member States or by individual plaintiffs.[11] The Court's case law, however, has severely restricted the access of private plaintiffs to the Court through the elaboration of very stringent requirements on standing.[12] Except in cases in which the Community administration has

(Bundesverfassungsgericht), with critical comment by Meier at 1704.

8. Schermers, *supra* note 2, at 446-47. The legal relations of private parties are governed by Community law and national law as a unitary legal system. The notion of a unitary legal system with a two-tiered judicial structure is somewhat difficult to reconcile with the Community Court's view of "separate legal systems." See text accompanying note 47 *infra*; Hay, *Supremacy of Community Law in National Courts: A Progress Report on Referrals Under the EEC Treaty*, 16 AM. J. COMP. L. 524, 525 (1968) [hereinafter cited as Hay].

9. Potential conflict between the national courts and the Court of Justice arises when Community law is declared to be directly applicable in the Member States by Community institutions. Directly applicable Community law confers rights and obligations on private parties under Community law, which may be raised in disputes before the national courts. When an issue of Community law arises in the national courts two potential questions are presented. First, may the national courts interpret Community law in resolving the dispute before it, or must it refer the issue of Community law to the Court of Justice for a preliminary ruling? (See part I *infra*). Secondly, when Community law, once interpreted, conflicts with inconsistent national law, which should prevail? (See parts II and III *infra*).

10. *E.g.*, EEC Treaty, art. 87 (antitrust law). *See also* EEC Treaty, art. 189 (defining the force of the various acts adopted by Community institutions).

11. EEC Treaty, art. 173.

12. A private party has access to the Court of Justice under the EEC Treaty, art. 173, when a Community act (usually a decision) is specifically addressed to the complainant or specifically concerns him. A private party may dispute the validity of general Community legislation (usually a regulation) only indirectly, namely, in those cases in which the general legislation becomes an issue in litigation concerning a specific act of a Community institution (such as a decision) in which the complainant already has standing (EEC Treaty, art. 184). *See* Albert Toepfer KG v. EEC Commission, 11 Recueil 525, 2 CCH COMM. MKT. REP. ¶ 8031, 5 Comm. Mkt. L.R. 111, (1965); Plaumann & Co. v. EEC Commission, 9 Recueil 197, 2 CCH COMM. MKT. REP. ¶ 8013, 3 Comm. Mkt. L.R. 29 (1963). On the

acted directly with respect to a private plaintiff—for instance, by imposing a penalty under the antitrust laws[13]—the private party will usually be unable to satisfy the standing requirement. Thus, questions about the effect of directly applicable Treaty law, of "secondary" Community law resulting from Community law-making, or of national law enacted in response to a Community mandate often, indeed increasingly frequently, will arise in *national* courts.

I. REFERRAL FOR UNIFORMITY

To avoid that national decisions would bring about a lack of uniformity, article 177 of the Rome Treaty requires national courts of last resort (and permits inferior courts) to certify Community law questions to the Community Court for a binding interpretation to be applied in the cases pending before the national courts. The reference under article 177 must be made by the national courts; private parties *cannot* petition the Court directly through a procedure similar to our writ of certiorari.[14] National courts, therefore, exercise considerable authority over issues of Community law since the national court itself decides whether the question presents an

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Court's restrictive interpretation of the standing of private plaintiffs under art. 173, generally, see Norgetreide GmbH & Co. KG v. Commission of the European Communities, 18 Recueil 105, 2 CCH COMM. MKT. REP. ¶ 8173, 12 Comm. Mkt. L.R. 177 (1972); Zuckerfabrik Watensted GmbH v. E.C. Council, 14 Recueil 595, 2 CCH COMM. MKT. REP. ¶ 8063, 8 COMM. MKT. L.R. 26 (1968); CONFÉDÉRATION NATIONALE DES PRODUCTEURS DE FRUITS ET LÉGUMES v. E.C. COUNCIL, 8 RECUEIL 901, 2 CCH COMM. MKT. REP. ¶ 8005, 2 Comm. Mkt. L.R. 160 (1962).

An important factor in the ability of private parties to question general Community acts is, thus, the availability of an additional avenue for relief. Art. 177 of the EEC Treaty provides such a possibility, *e.g.*, by allowing private parties to allege the invalidity of national legislation in national courts on the ground that the underlying Community legislation is invalid, with the consequence that the national court may (should) refer the Community law issue to the Community Court under art. 177. The Community Court has accepted this broad interpretation of the scope of art. 177. *See* Firma C. Schwarze v. Einführ- und Vorratsstelle für Getreide und Futtermittel, 11 Recueil 1081, 2 CCH COMM. MKT. REP. ¶ 8039, 5 Comm. Mkt. L.R. 172, (1965). See in this light the Court's restrictive view of the access of private parties under art. 173 is compensated by a shift of the burden of litigation to the national courts without lessening availability of legal redress to private parties.

13. *See, e.g.*, Council Regulations 17/62 and 59/62, [1962] J.O. 204, 1655, enacted pursuant to art. 85 of the EEC Treaty and which provide for penalties and fines for violation of the EEC antitrust law.

14. For a criticism of this limitation see Hay, *supra* note 8, at 551; Hay, *Une approche politique de l'application de l'article 177 du traité CEE par les juridictions nationales*, [1971] CAHIERS DE DROIT EUROPÉEN 503, 516-17.

issue of Community law or an issue of national law.[15] Thus, the extent to which Community law is *applied* depends in large measure on the cooperation of the national courts. A vital question during the early years of the Community, therefore, concerned the readiness of courts to make such referrals.[16] That willingness to make referrals gauged the extent to which the principle of uniformity of application of legal rights created under Community law could be achieved.

What happens when a national legislature or administrative agency fails to comply with Community law? Typical situations include cases in which national authorities either misapply Community law, to the plaintiff's detriment, or apply national law instead, again to the plaintiff's detriment, or simply disregard Community law that is favorable to the plaintiff. Two issues are presented to the national court when the plaintiff attacks a national act as a violation of Community law. First does the individual plaintiff have a right to raise an issue of Community law, since he may do so only when the Community law in issue is directly applicable[17] in national law? Secondly, if the plaintiff has a right to raise the issue, how should it be resolved? The national court decides whether the Community law issue is "necessary"[18] for its

15. The national court also decides when referral should occur, if at all. Thus, once a national court has determined that an issue of Community law is involved, a further discretionary problem arises: at what point in the course of litigation in the national court should referral occur? *See generally* Hay, *supra* note 8, at 526-32.

16. Hay, *supra* note 8, at 535-43.

17. Bebr, *Directly Applicable Provisions of Community Law*, 19 INT. & COMP. L.Q. 257 (1970). By declaring provisions of primary and secondary Community law directly applicable the Community Court insures to individuals of the Member States "an indirect, effective protection against the member state's violation of some of their obligations." *Id.* at 263. Directly applicable Community law is to be distinguished from the traditional international law concept of self-executing Treaty provisions. Provisions of international treaties are said to be self-executing when no further act of ratification is required within the legal order of the nation executing the agreement in order to bind itself to the agreement. To say that a treaty provision is "self-executing" does not, however, determine what rank that Treaty provision has *vis-à-vis* national legislation or national constitutional law, nor does the term "self-executing" convey any legal rights under the treaty for citizens of the contracting nations. Traditional international treaty law binds only the actual parties to the agreement, the national governments, at the national level. By contrast the concept of directly applicable Community law both articulates the immediate conferral on Community citizens of rights and obligations under Community law and also determines the rank of Community law as a separate and higher legal order, which binds both the Member States and Community citizens.

18. The "necessary" test allows national courts to protect against attempted

decision, whether it is "clear"[19] or is in need of interpretation and thereby plays a major role in assuring or possibly denying supremacy to Community law. Failure by a national court to comply with the mandate of article 177 is, of course, itself a treaty violation.[20] Vindication, however, requires action by another Member State or the Community,[21] a sensitive situation that makes such action an inadequate remedy.

Not only the frequency of referrals but also the manner of referral and the types of issues posed by decisions requesting referral indicate the degree of influence of Community law in the national judicial systems.[22] Issues of deep significance for the evolution of the Community legal order have been referred to the Court by the national courts under article 177;[23] among them are issues of the effect of Community law as possibly directly applicable,[24] the supremacy of Community law,[25] the protection of fundamental rights,[26] and respect for international obligations.[27] The task of the

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delaying tactics by the parties.

19. *See* note 36 *infra*.

20. EEC Treaty, arts. 169-71.

21. EEC Treaty, arts. 169-70.

22. Pescatore, *Rôle et chance du droit et des juges dans la construction de l'Europe*, [1974] REVUE INTERNATIONALE DE DROIT COMPARE 5, 15-16 [hereinafter cited as Pescatore].

23. *See, e.g.*, Alphonse Lutticke GmbH v. EEC Commission, 12 Recueil 27, 2 CCH COMM. MKT. REP. ¶ 8044, 5 Comm. Mkt. L.R. 378 (1966). In that decision a compensatory turnover tax had been collected because of Germany's failure to amend its law in conformity with EEC Treaty, art. 95(3). The Court of Justice held that art. 95(3) creates directly enforceable rights in private parties, in effect ruling that art. 177 of the EEC Treaty creates a right in private parties to seek compliance of national governments with affirmative treaty obligations. A flood of references to the Community Court followed the *Lutticke* decision. *See* Hay, *supra* note 8, at 539-43.

24. *See, e.g.*, Leonesio v. Italian Ministry of Agriculture & Forestry, 18 Recueil 287, 2 CCH COMM. MKT. REP. ¶ 8175, 12 Comm. Mkt. L.R. 343 (1972); Molkerei-Zentrale Westfalen/Lippe GmbH v. Hauptzollamt Paderborn, 14 Recueil 215, 2 CCH COMM. MKT. REP. ¶ 8064, 7 COMM. MKT. L.R. 187 (1968); N.V. ALGEMENE Transport- en Expeditie van Gend & Loos v. Netherlands Fiscal Administration, 9 Recueil 1, 2 CCH COMM. MKT. REP. ¶ 8008, 2 Comm. Mkt. L.R. 105 (1963). *See also* Pescatore, *supra* note 22, at 16.

25. *See, e.g.*, Costa v. Ente Nazionale per l'Energia Elettrica, 10 Recueil 325, 2 CCH COMM. MKT. REP. ¶ 8023, 3 Comm. Mkt. L.R. 425 (1964).

26. *See, e.g.*, Internationale Handelsgessellschaft Gmbh v. Einfuhr & Vorratsstelle fur Getreide & Futtermittel, 16 Recueil 1125, 2 CCH COMM. MKT. REP. ¶ 8126, 11 Comm. Mkt. L.R. 255 (1970); Stauder v. City of Ulm, 15 Recueil 419, 2 CCH COMM. MKT. REP. ¶ 8077, 9 COMM. MKT. L.R. 112 (1969).

27. *See, e.g.*, International Fruit Co. NV v. Produktschap voor Groenten en

Community Court within the framework of the Community legal order is to insure the legality of the Community law-making process[28] and to insure the direct application of Community law within the Member States.[29] Consonant with the latter obligation, the Court of Justice has adopted a broad view of the extent of the duty of national courts to refer issues of Community law to the Court for preliminary ruling under article 177.[30] The Court has prudently confined itself, however, to interpretation only and has not undertaken to apply its holding to the merits of the case before the national court.[31] The Court of Justice has been careful to demonstrate respect for the national judiciary and the national legal systems, while at the same time firmly advocating—in speeches and articles by its members[32] as well as by official decision—its monopoly with respect to the binding interpretation of Community law, an issue that merges into the question of "supremacy" for Community law (discussed in Part II *infra*). In the interest of mutual cooperation, the Court disregards "rigid formalism" in its relations with national courts that seek preliminary rulings under article 177,[33] and strives to make the national courts "partners in

Fruit, 18 Recueil 1219, 2 CCH COMM. MKT. REP. ¶ 8194, — Comm. Mkt. L.R.— (1972).

28. EEC Treaty, art. 164.

29. EEC Treaty, art. 177.

30. *See, e.g.*, Costa v. Ente Nazionale per l'Energia Elettrica, 10 Recueil 325, 2 CCH COMM. MKT. REP. ¶ 8023, 3 Comm. Mkt. L.R. 425 (1964); N.V.Algemene Transport en Expeditie van Gend & Loos v. Netherlands Fiscal Administration, 9 Recueil 1, 2 CCH COMM. MKT. REP. ¶ 8008, 2 Comm. Mkt. L.R. 105 (1963); Robert Bosch GmbH v. Kleding-Verkoopbedrijfde Geus en Vitdenbogerd, 8 Recueil 89, 2 CCH COMM. MKT. REP. ¶ 8003, 1 Comm. Mkt. L.R. 1 (1962).

31. *See, e.g.*, S.A.S. Eunomia di Porro E.C. v. Italian Ministry of Education, 17 Recueil 811, 2 CCH COMM. MKT. REP. ¶ 8148, 11 Comm. Mkt. L.R. 4 (1971); N.V.Algemene Transport-en Expeditie van Gend & Loos v. Netherlands Fiscal Administration, 9 Recueil 1, 2 CCH COMM. MKT. REP. ¶ 8008, 2 Comm. Mkt. L.R. 105 (1963). For earlier criticism of this practice see *e.g.*, Hay *supra* note 8, at 541-43. In a similar vein, application of the doctrine of supremacy of Community law by a national court does not, in the Court's view, effect a repeal of the inconsistent national law, but rather, results in nonapplication of the conflicting national law in the particular case. Bebr, *How Supreme Is Community Law in the National Courts?*, 11 COMM. MKT. L. REV. 1, 7 (1974) [hereinafter cited as Bebr]. *See also* Comment, 34 MOD. L. REV. 597, 605 (1971).

32. *See, e.g.*, Kutscher, *Community Law and the National Judge*, 89 L. Q. REV. 487 (1973); Pescatore, *supra* note 22; Pescatore, *Fundamental Rights and Freedoms in the System of the European Communities*, 18 AM. J. COMP. L. 343 (1970).

33. The Court of Justice reformulates referrals when necessary to meet the formal requirements of art. 177, rather than dismissing them outright for impro-

the field of European integration."[34] The influence of the Court's adroit handling of the sensitive issues of conflict and cooperation between itself and the national courts should not be undervalued in measuring the Court's success in establishing the *applicability* of Community law, with the ensuing problem of its *supremacy* over national law (see Part II *infra*).

The practice of referral has varied widely among the member states, with some countries referring quite readily while others have not,[35] often by finding that no question existed because the interpretation was "clear."[36] Slowly, the referral requirement has taken hold; even the more reluctant national courts now refer,[37] and first referrals are pending from the recently admitted Member States.[38]

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per form or incorrect formulation of the issue involved. *See, e.g.*, Robert Bosch GmbH v. Kleding-Verkoopbedrijfde Geus en Uitdenbogerd, 8 Recueil 89, 2 CCH COMM. MKT. REP. ¶ 8003, 1 Comm. Mkt. L.R. 1 (1962); Schermers, *supra* note 2, at 448-50.

34. Schermers, *supra* note 2, at 447.

35. Hay, *supra* note 8, at 535-43.

36. The French courts in some instances refused to make a referral under art. 177 on the basis of the French administrative law doctrine of the *acte claire*; under this view a national court need not make a referral when it determines that the Community law issue is free of interpretative difficulties. *E.g.*, Judgment of June 19, 1964, [1964] REVUE DU DROIT PUBLIQUE 1019, 3 Comm. Mkt. L.R. 462 (Conseil d'État, 1964); S.A. des Établissements Petitjean, [1967] L'Actualité Juridique, Droit Administrative No. 5, at 285; Comité National de la Meunerie d'Exportation, [1967] L'Actualité Juridique, Droit Administrative No. 5, at 287, 7 Comm. Mkt. L.R. 313 (Conseil d'État 1967); Syndicat National des Importateurs Français en Produite Laitiers at Avricoles, [1967] L'Actualité Juridique, Droit Administrative No. 5, at 284, 7 Comm. Mkt. L.R. 81 (Conseil d'État 1968). *See also* Judgment of May 24, 1966, [1966] FinG 536 (Landgericht Berlin); Judgment of July 10, 1967, [1967] Wirtschaft und Wettbewerb 743 (Landgericht Wiesbaden); P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS 136-37 n. 123 (1966).

Authorities are virtually unanimous that no discretion exists in the national courts of last resort to determine whether an issue of Community law is free from doubt except possibly in a situation where the issue is one that the Community Court has already ruled on in a similar context. *Id.* The discretion of lower courts to make referral should be guided by the need for uniform application of Community law within the Member States.

37. *See* E. BERGSTEN, COMMUNITY LAW IN THE FRENCH COURTS (1973) [hereinafter cited as Bergsten].

38. *But see* Bullmer Ltd. v. Bollinger, 14 Comm. Mkt. L.R. 91 (May 22, 1974) (Court of Appeals England).

II. SUPREMACY[39]

The primary question still troubling the two legal systems—Community and national—is the resolution of substantive conflicts between Community law and national law. Problems arise (a) when subsequently enacted Community law is inconsistent with national law;[40] (b) when subsequently enacted national law conflicts with existing Community law;[41] and (c) when a national constitutional court determines that Community law conflicts with prevailing national constitutional law (see Part III *infra*).[42] There is no corollary in the Community Treaties to the Supremacy Clause of the United States Constitution. Thus, while the Court of Justice has consistently adopted the view of the supremacy of Community law, such a doctrine also requires acceptance by the national legal systems.

The Court views supremacy as the legal foundation of the Communities "without which its legal order could not function effectively."[43] This judicial assertion of the supremacy of Community law is responsive to the unique legal and political order created by the Treaties[44] and to the mutual submission to the rule of Community law that is implicit in the Treaties.[45] The Court has advanced the doctrine of the supremacy of Community law primarily[46] on the ground that Community law exists as an independent

39. *See generally* Hay, *supra* note 8; Hay, *Une approche politique de l'application de l'article 177 du traité CCE par les juridictions nationales,* [1971] CAHIERS DE DROIT EUROPÉEN 503; Bebr, *Directly Applicable Provisions of Community Law,* 19 INT. & COMP. L.Q. 257 (1970).

40. *See, e.g.,* cases at note 61 *infra.*

41. *See, e.g.,* SpA Marimex v. Italian Ministry of Finance, 18 Recueil 89, 2 CCH COMM. MKT. REP. ¶ 8176, 11 Comm. Mkt. L.R. 907 (1972); Politivi v. Italian Ministry of Finance 17 Recueil 1039, 2 CCH COMM. MKT. REP. ¶ 8159, 12 Comm. Mkt. L.R. 60 (1973).

42. *See, e.g.,* Costa v. Ente Nazionale per l'Energia Elettrica, 87 FORO ITALIANO I (FORO ITAL. I.) 465 (Corte Constituzionale 1964) *Eng. trans. in* 3 Comm. Mkt. L.R. 425.

43. Bebr, *supra* note 31, at 3.

44. The Treaties base union of the Member States not on political expediency alone—whereby continued alliance is dictated by internal political pressures—but rather on a limitation of sovereignty in favor of the common organization and concurrent submission to a higher legal order. *See* Pescatore, *supra* note 22, at 1-10.

45. Pescatore, *supra* note 22, at 1, 8; Schermers, *supra* note 2, at 445.

46. Another source for the supremacy of Community law has been found in art. 189, a provision that is possibly analogous to the Supremacy Clause of the United States Constitution. *See* Costa v. Ente Nazionale per l'Energia Elettrica, 10 Recueil 325, 2 CCH COMM. MKT. REP. ¶ 8023, 3 Comm. Mkt. L.R. 425 (1964).

legal order created by the limitation of the sovereignty of the Member States and by a limited transfer of sovereignty to the Community.[47] A national court, according to the Court of Justice, participates simultaneously in two separate legal orders—the Community legal system and its own national legal systems.[48]

In the Court's view, the legal order created by the Treaties is unlike any other legal order and requires a different manner of assimilation into the national legal system than either traditional international law or foreign law.[49] Thus, although the domestic law of a Member State governs its manner of applying foreign law in its decisions (for example, when national conflicts law requires the court to apply the law of a foreign jurisdiction) such rules would not govern the application of Community law within the national legal system. Similarly, national law may govern the application of international law within a member state, determining the rank of international law in relation to national law, without, however, limiting in any way the sovereignty of the national legal order.[50] Community law should not, under the doctrine of supremacy formulated by the Court of Justice, be assimilated into international law. Unlike international law, Community law is to be applied within the Member States as a superior legal order over which unilateral national law *cannot* prevail.[51] Although the Court more frequently upholds the supremacy of Community law on the basis that Community law is a separate and superior legal order created by the transfer of certain powers to the Community from the member states, the Court also considers the supremacy of Community

See also Bebr, *Directly Applicable Provisions of Community Law*, 19 INT. & COMP. L.Q. 257 (1970).

47. *See* E.C. Commission v. Italy, 18 Recueil 529, 2 CCH COMM. MKT. REP. ¶ 8127, 11 Comm. Mkt. L.R. 699 (1972).

48. *See generally* Kutscher, *Community Law and the National Judge*, 89 L. Q. REV. 487 (1973).

49. *Id.* at 488-89.

50. *But see* the rationale of the decisions affirming supremacy of Community law in the Belgian courts (text accompanying note 68 *infra*) and the French courts (text accompanying 72 *infra*).

51. Costa v. Ente Nazionale per l'Energia l'Elettrica, 10 Recueil 325, 2 CCH COMM. MKT. REP. ¶ 8023, 3 Comm. Mkt. L.R. 425 (1964). Several national courts, in disputes involving a conflict between national law and Community law have nonetheless relied on national constitutional provisions which either recognize the higher legal status of international treaties as compared to national law (France) or actually place international above constitutional law (Netherlands) to uphold supremacy of Community law.

law when it declares provisions of Community law to be directly applicable in the Member States[52] since the direct applicability of the Community law confers on private parties direct rights or obligations under Community law, which can be litigated in national courts.

Issues of supremacy generally arise in the context of proceedings under article 177. The Court first squarely faced the problem in *Costa v. ENEL*[53] in which the Court announced that the Member States, in joining the Community, "relinquished, albeit in limited areas, their sovereign rights and thus created a body of law applicable to nationals and to themselves . . . ."[54] Thus, it was no longer possible for the Member States "to assert against a legal order accepted by them on a reciprocal basis a subsequent unilateral measure which could not be challenged by that legal order."[55] The Court has ruled that Community law prevails over subsequently enacted national law, and in a decision under article 169[56] the Court reaffirmed its position that Community law prevails over national law under all circumstances.[57] The case law of the Court and its formulation of the doctrine of supremacy has been embraced by some national courts and resisted by others. Setting aside for the moment situations in which Community law conflicts with prior national constitutional law, a conflict between national law and subsequently enacted Community law, whether primary or secondary, has generally been resolved by national courts in favor of Community law.[58] Unfortunately, these decisions have been resolved too frequently on the traditional ground that subsequently enacted law impliedly repeals a prior inconsistent law,[59]

52. Bebr, *supra* note 31, at 4.

53. Costa v. Ente Nazionale per l'Energia l'Elettrica, 10 Recueil 325, 2 CCH COMM. MKT. REP. ¶ 8023, 3 Comm. Mkt. L.R. 425 (1964).

54. 3 Comm. Mkt. L.R. at 455; *translation in* STEIN & HAY, LAW AND INSTITUTIONS IN THE ATLANTIC AREA 204 (1967).

55. *Id. See also* Stein, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the* Costa *Case,* 63 MICH. L. REV. 491 (1965).

56. E.C. Commission v. 18 Recueil 529, 2 CCH COMM. MKT. REP. ¶ 8172, 11 Comm. Mkt. L.R. 699 (1972). The Community Court has jurisdiction in a case brought under art. 169, both to interpret and to apply Community law.

57. The Court of Justice was not persuaded by the reasoning of the Italian Government in this case that an Italian statute previously determined to be in conflict with Community law must remain in force until repealed in accordance with appropriate constitutional provisions. The Court found that the Italian view would deprive directly applicable Community law of all practical effect so long as an inconsistent national law remained on the statute books.

58. *See, e.g.,* cases at note 61 *infra.*

59. This is the familiar principle of *lex posterior derogat lege priori. See, e.g.,*

which results in a correct solution but for the wrong reasons. This resolution and the accompanying rationale ignore the Community Court's theory of separate legal orders since it places Community law and national law on an equal plane; logically extended, it would obviously mandate supremacy of subsequently enacted national law over prior Community law, in derogation of the doctrine of supremacy.[60]

The approach of the Belgian courts illustrates another possible response of the national courts to the conflict between national law and subsequently enacted Community law. The Belgian courts, upholding the supremacy of Community law, have either failed to indicate a rationale for their decision[61] or have found that the Community provision in issue was directly applicable and, thus, became part of Belgian law.[62] While neither the Luxembourg courts nor the Dutch courts have had occasion to rule on the issue of supremacy, there appears to be no obstacle in either legal system that would prevent adoption of the case law of the Court of Justice.[63] The constitution of Luxembourg[64] is silent concerning the relationship between international law and national law, and its legal system does not provide for judicial review of legislation on the basis of constitutional standards. In light of the present experience with the more recalcitrant national courts,[65] these factors would indicate that Luxembourg would adopt the case law of the Community Court. The Dutch courts are expected to uphold the supremacy of Community law either on the basis of articles 65-67

Judgment of Nov. 24, 1967, 32 RECHTSKUNDIG WEEKBLAD 1139 (Tribunal Civil Tongeren, Neth. 1969).

60. *E.g.*, Judgment of June 19, 1964, [1964] REVUE DU DROIT PUBLIQUE 1019, 3 Comm. Mkt. L.R. 462 (Conseil d'État 1964), *summary in* 2 COMM. MKT. L. REV. 221 (1965).

61. Judgment of Sept. 24, 1965, 31 RECHTSKUNDIG WEEKBLAD 260 (Tribunal Tongeren, Neth. 1967); Judgment of Oct. 31, 1968, 84 JOURNAL DES TRIBUNAUX 120 (Cour d'appel Bruxelles 1969).

62. Judgment of Jan. 17, 1969, 156 PASICRISIE BELGE, (II), 74 (Cour d'appel, Bruxelles 1969).

63. Bebr, *supra* note 31, at 34-35.

64. The EEC Treaty has been approved in Luxembourg by passage of the necessary constitutional amendment, required to validate treaties which restrict national sovereignty. *See* NEUEN, JURISPRUDENCE SUR LES PROBLÈMES GÉNÉRAUX DE L'INTÉGRATION, 26-76 (FIDE, VIe Congrès International de Droit Européen, Luxembourg, May 24-26, 1973, Rapport national luxembourgeois); P. PESCATORE, L'ORDRE JURIDIQUE DES COMMUNAUTÉS EUROPÉENNES 25 (1971).

65. *See* text accompanying note 70 and 74 *infra*.

of the constitution[66] or by following the case law of the Community Court.

Conflicts between Community law and national law can also arise when Community law is inconsistent with *subsequently* enacted national law, as mentioned earlier. Again, "supremacy" and the Court's view require that the application of Community law should not depend on any priority of time, but rather should result from the nature of Community law as a separate, and higher, legal order. Referring to the *Costa* decision, the Belgian courts unequivocally upheld the supremacy of Community law over inconsistent, subsequently enacted national law in two leading decisions. In the first case,[67] a lower court followed the Community Court's perception of Community law as a separate legal system of a higher legal order and rejected the theory that legislation subsequent in time prevails. The Cour de Cassation,[68] in the second case, equated Community law with international treaty law, which is of a higher legal order than ordinary national law, and, thus, found Community law entitled to supremacy, as would be any international treaty, over inconsistent national law.[69]

The French courts have been less than eager to refer issues of Community law to the Court of Justice for preliminary rulings under article 177 and have, thus, avoided facing the issue of supremacy. Lower French courts frequently resolve conflicts between a Community law and national law on the basis of a constitutional provision that grants superior authority to *ratified* international agreements.[70] Higher French courts are reluctant to embrace the

66. Bebr, *supra* note 31, at 35 & n.7.

67. Sociaal Fonds voor de Diamantarbeiders v. Chougol Diamond Co., 84 JOURNAL DES TRIBUNAUX 281, 8 Comm. Mkt. L.R. 315 (Magistrate's Court, Antwerp 1968) (request for preliminary ruling); *on reference*, 15 Recueil 211, 2 CCH COMM. MKT. REP. ¶ 8078, 8 Comm. Mkt. L.R. 335 (1969).

68. Minister for Economic Affairs v. S.A. Fromagerie Franco-Suisse 'Le Ski', 86 JOURNAL DES TRIBUNAUX 281, 11 Comm. Mkt. L.R. 330 (1e chambre, Cour de Cessation, Belg. 1971).

69. *But see* text at notes 50 and 51 *supra*. It is unclear whether the Belgian court has by this decision erected a possible future barrier to the application of the doctrine of supremacy in the Belgian legal system. *See also* Bebr, *supra* note 31, at 11.

70. The practice of French courts in relying on the French Constitution, art. 55 (1958), as a basis for upholding supremacy of Community law is unfortunate; the provision is ambiguous and formally applies only to international treaty law and not to acts of international organizations. Reliance on this provision precludes acceptance of the view of the Community Court that Community law is a separate and higher legal order, of a different nature than traditional interna-

Community Court's perception of a separate, independent, and higher Community legal order. After initial refusal to accept supremacy of Community law,[71] however, the French courts now appear to be moving toward a resolution of the conflict between Community law and national law.[72] This approach affirms the superior position of Community law, but achieves that result by equating Community law with traditional international law.

III. Supremacy and National Constitutional Law

In another context supremacy has become a major problem in Italy and Germany, the two Member States that have constitutional courts empowered to review legislative acts for their conformity with constitutional standards. The issue of how national constitutional guarantees should fit into the Community legal framework or, indeed, be protected against intrusion by Community law has been keenly debated in both countries.[73]

In Italy the constitutional court, adhering to a conservative dualist approach, initially adopted the view that Community law had no higher status than ordinary domestic law and was subject, therefore, to the scrutiny of the constitutional court. The Italian constitutional court's decision in *Costa v. ENEL*[74] (decided prior to the decision rendered by the Community Court on a reference for a preliminary ruling in the same case) illustrates the traditional approach followed by Italian courts. There the court viewed the Treaties as international obligations, which became national law through the means of the Italian law ratifying the Treaties. The nature of the ratification statute (and thus of the Treaties) as ordinary law meant that Community law could have no higher status than other domestic legislation. It followed that an Italian law subsequent in time would prevail, to the detriment of the Community law involved.

Adherence to the dualist approach could have been avoided

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tional treaty law. *See* Bebr, *supra* note 31, at 12. *See generally* Bergsten, *supra* note 37.

71. *See, e.g.*, Syndicat Général de Fabricants de Semoules de France, [1968] Recueil Dalloz-Sirey (D.S. Jur.) 285 (Conseil d'État) (*Eng. trans. in* 9 Comm. Mkt. L.R. 395).

72. *See* Bergsten, *supra* note 37.

73. A list of authorities can be found in Pescatore, *Les droits de l' homme et l'intégration européenne*, [1968] Cahiers de Droit Européen 629, at II. *See also* Kropholler, *Die europäischen Gemeinschaften und der Grundrechtsschutz*, 4 Europarecht 128 (1969).

74. 87 Foro Ital. I. 465 (Corte Costituzionale 1964) (*Eng. trans. in* 3 Comm. Mkt. L.R. 425).

since article 10 of the Italian constitution provides for recognition of the supremacy of international customary law. A broad reading of this provision to include international treaty law, or reliance on article 11 of the constitution (which provides for delegation of State powers to international bodies) might have provided a basis for attributing supremacy to Community law. Although the *Costa* court recognized that Italy had limited its sovereignty under article 11 of its constitution by joining the Community, it failed to accept the Community legal order as separate and higher. By denying a transfer of power or a limitation of Italian sovereignty in favor of the Communities,[75] the Italian constitutional court invited conflict and forced regular Italian courts—caught between conflicting mandates—to by-pass such conflicts by subterfuge.[76]

The decisions of the Court of Justice[77] severely criticized the approach of the Italian courts. This uneasy state of affairs apparently ended in late 1973, when the Italian constitutional court affirmed the constitutionality, under Italian law, of the ratification statute.[78] The decision was prompted by a request from two lower

75. The Italian constitutional court did not deny a theoretical limitation of sovereignty under art. 11 pursuant to the ratification statute. However, the court failed to analyze the relationship between Community law and national constitutional law and failed to make the necessary inference (from its recognition of a limited transfer of sovereignty) that Community law is a separate and higher legal order; thus it denied in practical terms a limitation of Italian sovereignty in favor of the Communities. *See* Bebr, *supra* note 31, at 18 & n.49.

76. *Eg.*, Costa v. Ente Nazionale per l'Energia Elettrica, 87 FORO ITAL. I. 465 (Corte Costituzionale 1964) *(Eng. trans. in* 3 Comm. Mkt. L.R. 425); *on reference*, 10 Recueil 325, 2 CCH COMM. MKT. REP. ¶ 8023, 3 Comm. Mkt. L.R. 425 (1964). In *Costa* the Justice of the Peace of Milan had original jurisdiction in the case and was also the court of last resort. The comlainant in that case challenged an Italian statute that allegedly conflicted with Community law. The Milan court in September 1963, certified five questions to the Italian constitutional court on the alleged constitutional invalidity of the Italian statute. In January 1964, the Milan court requested a preliminary ruling from the Court of Justice under art. 177 on the interpretation of related provisions of Community law. Thus, both the Italian court and the Court of Justice had opportunity to address the issue of the relationship between Community law and national law and the two decisions reveal incompatible views.

77. *See, e.g.*, EEC Commission v. Italy, [1973] E.C.R. 101, 2 CCH COMM. MKT. REP. ¶ 8201, 12 Comm. Mkt. L.R. 439 (1973); Fratelli Variola SpA v. Italian Ministry of Finance, [1973] E.C.R. 981, 2 CCH COMM. MKT. REP. ¶ 8226, — Comm. Mkt. L.R. — (1973).

78. Judgment of Dec. 18, 1973, No. 183, [1974] Foro. Ital. I. 314, (Corte Constituzionale, Italy); 14 Comm. Mkt. L.R. 372 (1974). *See also,* Feustel, *Anmerkung zu Italienischer Verfassungsgerichtshof-Urt. vom 18. Dezember 1973,* 3 EUROPARECHT 263 (1974).

Italian courts[79] for review of the constitutionality of the law ratifying the European Economic Community Treaty (especially in the context of article 189 of the Treaty). The constitutional court not only upheld the ratification statute but also declared the supremacy of Community regulations, an implicit recognition of the supremacy of the Community Treaties.[80] The court determined that a valid limited transfer of sovereignty pursuant to article 11 of the Italian constitution could be effected by a ratification statute that was in the nature of ordinary law; to hold otherwise would impair the accepted normative content of article 11.[81] Further, the power to review legislative acts under article 134 of the Italian constitution was found to extend only to legislation enacted by Italian public authority and not to Community acts whose legitimacy is measured by the Treaties and is subject to review by the Court of Justice.[82]

In Germany the conflict between national constitutional law and Community law was different and more complex. The German constitutional court held relatively early that its power to review statutes or other acts of a statutory nature was restricted, in its broadest sense, to law "emanating from German public authority" *(Staatsgewalt).*[83] The German court, therefore, refrained from reviewing Community law on either Community or German constitutional law grounds. By immunizing Treaty provisions and "secondary" Community law from its review, the German constitutional court implicitly recognized and accepted the Community court's theory that national law and Community law constitute "separate legal systems." Only *German implementing* legislation would be subject to review. Unresolved, and in view of these cases seemingly of little practical importance, was the question of whether Germany had only "delegated" powers to the Communities or had in fact "transferred" sovereign powers; jurisdictional inability to review Community law seemed to render the question moot.

In an unexpected—and to many Community observers disturb-

79. Ordinance of April 21, 1972, 125 GIURISPRUDENZE ITALIANA I. (GIUR. ITAL. I.), 355 (1973) (Tribunal of Turin); Ordinance of May 15, 1973 *(Fratelli Pozzani)* (Tribunal of Genova), *not published.*

80. Bebra, *supra* note 31, at 36, 37.

81. *Id.*

82. This approach is similar to the view formerly expressed by the German constitutional court, note 83 *infra.*

83. *See, e.g.*, Judgment of July 5, 1967, [1967] AWB 364; (1967) NEUE JURISTISCHE WOCHENSCHRIFT 1907. For a discussion of the early German case law on the issue of supremacy of Community law, *see* Hay, *supra* note 8, at 544-48.

ing—about-face, the German constitutional court declared (by dictum, in the American sense) in August 1974, that its jurisdiction *did* extend to the power to test whether Community law, whatever its nature, contravened the basic rights guaranteed German citizens by their Constitution.[84] This dictum, by implication, either rejects the theory of a "transfer" of sovereign powers to the Community by virtue of Germany's ratification of the Community Treaties or, if read narrowly, accepts the possibility of such a transfer but restricts it by excluding from any transfer the constitutional protection of basic civil rights. Whichever is the correct analysis, and the line is finely drawn and possibly unimportant, the decision—over the unprecedented, vigorous public dissent of three justices[85]—does signal an end, within limits, to the "separate legal systems" approach by the German constitutional court as well as its readiness to step in whenever particular facts seem to warrant intervention.

Despite the immediate and vigorous criticism engendered by this decision,[86] it does touch upon one fundamental problem within the Communities, which, to some observers, taints the Community law-making process: that it is not democratic.[87] The Community legal process is admittedly not democratic in the accepted sense of the term. Community law, other than the original Treaty provisions, which *were* examined by national parliaments as part of the ratification procedure, emanates either from the Council (cabinet ministers of the Member States), the Commission (consisting of independent international civil servants), or a combination of the two. The European Parliament, composed of national parliamentarians not directly elected to the European Parliament,[88] enjoys only an advisory role in law-making. "Law" thus emanates from a technocracy, and the German decision is the first official articulation of concern over what this kind of law-making may mean for individual citizens who enjoy the protection of national constitutional guarantees when national law-making is involved.

At the same time, it must be remembered that the Communities

84. Judgment of May 29, 1974, [1974] NEUE JURISTISCHE WOCHENSCHRIFT 1697 (Bundesverfassungsgericht, W. Ger.), with critical comment by Meier at 1704.

85. *Id.* at 1700.

86. Meier, *Anmerkung* (*Comment*), [1974] NEUE JURISTISCHE WOCHENSCHRIFT 1704.

87. *See* P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS 299 *passim* (1966).

88. *See generally* H. KUNDOCH, DIE KONSTITUIERUNG DES EUROPÄISCHEN PARLAMENTS—ZUR REFORM DES BERUFUNGSVERFAHRENS DER ABGEORDNETEN (1974).

act mainly in the economic, social and technical spheres, all areas in which the infringement of fundamental rights seemingly would occur only rarely.[89] In addition, even though the Communities display a lack of strong democratic guarantees in their organizations and structures, it does not follow that their framework is, therefore, unable to protect national constitutional guarantees.

> The response to this contention is that the Community, in contrast to other purely intergovernmental bodies, is characterized by a diversified organizational structure resulting in a system of "checks and balances" whose safeguards, while different in nature from those which operate inside a State, conform to the requirements of fundamental rights and freedoms. One must, in this connection, keep in mind not only the relationship between the Community and its Members States, which severely limits the competences and the powers of the Community institutions, but also the interaction between the institutions themselves which in turn restricts the exercise of absolute power. This rather complex pattern of relationships checks the concentration of excessive and uncontrolled power in the same hands.[90]

Interestingly enough, the Community Court addressed itself to this question quite explicitly at the same time that the German court rendered its decision (though publication of the latter did not occur for another three months).[91] In this decision, the Court directly acknowledged[92] its duty (derived from the foundation of the Community legal system in the legal traditions of its founding states) to safeguard basic rights. Since the Treaty is silent on the question of fundamental rights, what basic rights must the Court safeguard and how are they to be defined? According to the Court, the rights to be protected are those that are common to the laws of the member states, as well as rights internationally guaranteed in conventions ratified by all the Community states, for instance, the European Convention for the Protection of Human Rights. The Court's view of its duty to protect fundamental rights does not require identity with national constitutional guarantees (which, if applied cumulatively for each member state, would indeed stifle

89. *See* Pescatore, *Fundamental Rights and Freedoms in the System of the European Communities,* 18 AM. J. COMP. L. 343, 344 (1970).

90. *Id.* at 347.

91. J. Nold, Kohlen- und Baustoffgrosshandlung v. E.C. Commission, [1974] E.C.R. 491; *also reported in* 17 DEUTSCHES VERWALTUNGSBLATT 672 (1974), with critical comment by Meier at 674.

92. The Court had earlier indicated indirectly its duty with respect to basic civil rights. *See* cases *supra* note 26.

the Community legal order), but rather depends upon a Community "common law" of constitutional protection. After careful analysis of the issues before it, the Court found no infringement and upheld the Community law in question.

The decision of the German constitutional court did not specifically address the issue of recognition at the Community level of *common principles*, as distinguished from identity, although German literature had previously accepted this viewpoint.[93] In earlier case law, the Community Court demonstrated concern for the safeguarding of fundamental rights;[94] the Treaties themselves provide a basis for securing protection of basic rights in their substantive provisions combined with the procedures for legal redress;[95] and the Court has frequently drawn on "general principles of law" in reaching decisions in other contexts,[96] a practice which clearly embraces national traditions in respect of fundamental rights and freedoms. If the Community Court's rationale is ultimately accepted by the German constitutional court—and by other national courts—the problem would become moot for most practical purposes. The Community Court would evolve constitutional guarantees at the Community level, and the existence of these Community-wide guarantees should overcome the objections of the German court.

The acceptance by national courts of the Community Court's view of supremacy of Community law required, and was achieved through, the accommodation by the national courts and legal systems to the Community legal order. Similarly, emerging problems of assuring the democratic process require accommodation by the Community Court to the national legal systems and its acceptance of new tasks. The Court's willingness to undertake the task of safeguarding fundamental rights in the European Communities becomes a condition for the continued acceptance and implementation of supremacy at the national level, without which the Communities would revert to mere trade blocs. Both supremacy of

93. *See generally*, P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS 194 *passim* (1966).

94. *Supra* note 26.

95. *See* Pescatore, *Fundamental Rights and Freedoms in the System of the European Communities*, 18 AM. J. COMP. L. 343, 349-50 (1970); Schermers, *supra* note 2, at 454-55.

96. *See, e.g.*, Stauder v. City of Ulm, 15 419, 2 CCH COMM. MKT. REP. ¶ 8077, 9 Comm. Mkt. L.R. Recueil 112 (1969). *See also*, L. BRINKHORST & H. SCHERMERS, JUDICIAL REMEDIES IN THE EUROPEAN COMMUNITIES 236-39 (1969), 1972 SUPPLEMENT, *id.*, at 150-53.

Community law and observance of democratic restraints in its formulation and implementation are desirable, but they must occur together. The Community Court's recent decision is a major contribution toward that end.

It is obvious that these problems take on added importance with the addition of Member States whose legal traditions are not continental European, notably Ireland and the United Kingdom.[97] The strong democratic principles of these nations require safeguarding on the Community level, but again, insistence on *identity* of constitutional guarantees at the Community and national levels would destroy the structure. The two recent decisions of the German Court and the Community Court, therefore, may be as significant for the future of the European Communities as were the Court's early landmark decisions; they state, and provide a solution to, the only remaining problem of fundamental legal principle on the road to judicial integration.

97. *See* Grementieri & Golden, *The United Kingdom and the European Court of Justice: An Encounter between Common and Civil Law Traditions*, 21 AM. J. COMP. L. 664 (1973).