



Supremacy in EU Law & the member states

EU LAW 2230/ 3145

Lecture 9

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Peace in Europe and international organisations

- The Marshall Plan 1947 : CEEC 1947 & OEEC 1948 (=> OECD)
Committee of European Economic Co-operation
Organisation for Economic Co-operation & Development
intergovernmental organisation

- Treaty of Paris 1950 (ECSC) → *created supranational body which would manage integration within the ECSC*
European Coal and Steel Community
- Treaty of Rome 1957 (EEC => EU)

- Members: Germany, Italy, France, Belgium, the Netherlands and Luxembourg

- 'it was by no means clear whether the EEC would develop into an effective European organisation, or whether it would stagnate or even decline.'

*take account
bind the MS*

Political and Legal Authority of International Organisations

- Treaty-based (Vienna Convention on Law of Treaty)
- State-centric
 - Signatories and 'subjects'
 - Tasks and objectives
 - Actions & obligations
 - External affairs only
 - Monopoly of violence 暴力的垄断
 - Incorporation 吸纳 into national law

Political authority in the EU

- Treaty of Rome 1957 (EEC)
 - Members: Germany, Italy, France, Belgium, the Netherlands and Luxembourg
- **Art 5 TEU**
 - 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
 - 2. the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein...
- **Art 13 TEU**
 - 2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.
- Member states: 'Herren der Verträge' (Grimm)

Legal authority in the EU: 'monism' &
'dualism'



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Legal authority in the EU

- Treaty silence on co-existence with national law:
 - 6 different national legal systems
 - 6 different types of relationship with international law (monism/ dualism)
 - Approach to conflicts?
- How to assert legal autonomy for EU?
 - Creation of political and legal independence
 - Creation of common market

How does EU law become part of national law?

dualist

Eg. Art 30 TFEU (*van Gend*)

“Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States...”

monist



Can individuals rely on EU law before national courts –
does EU law have ‘direct effect’?



dualist

van Gend: Art 30 TFEU has ‘direct effects’

monist

declared the EU law could directly confer rights upon individuals, independently of any action taken by the MS
new law
the CJEU had to create a new legal order within international legal law.

C 26/62 *van Gend & Loos* - Declaration of EU legal authority ('supremacy'):

not only develop legal authority for EU law, but also create legal certainty
create legal integration across the EU.

- the 'constitutional juggernaut' (Wilkinson)
 - 'The community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals.
 - Independently of the legislation of member states, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.
new rights
 - These rights arise not only where they are expressly granted by the treaty, but also by reason of obligations which the treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the community.
set out provisions of the treaty

Explaining Supremacy – 4 claims in *van Gend*

- **Novelty**: a new type of tie between sovereign states
- **Independence**: permanent; own institutions, own personality and legal capacity and capacity of representation internationally
- **Autonomy of Community law**: sovereign powers based on a transfer from sovereign MS; autonomous body of law which binds nationals and MS
- **Primacy**: the spirit of the treaty precludes giving 'precedence to a unilateral and subsequent measure over a legal system' accepted on a reciprocal basis

禁止

違法的

互惠的

Novelty: what made the EEC 'new'?

- Objective of the Treaty – creation of a common market

- Subjects of the Treaty - 'peoples' of Europe PLUS governments
- treaty create new/individual subject to national law*

- Establishment of 'institutions endowed with sovereign rights that when exercised would affect both the state signatories and their citizens. Eg. the European Commission

- Establishment of 'intermediary' bodies such as the European Parliament and the Economic and Social Committee (ECOSOC) bringing nationals together

Independence: production of 'direct effects'

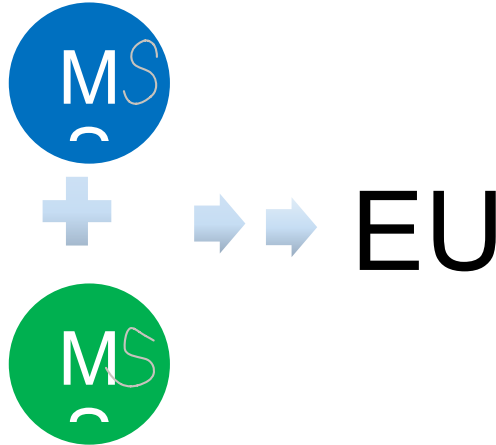
- CJ: EU is 'new legal order' that can *of itself* 'produce direct effects'. Under certain conditions, provisions of EU law provide rights for individuals before their national courts.
- Direct effects determined by EU law not MS courts or legislatures.
- All member state legal systems became monist ^{一元論者} if the conditions for direct effect are fulfilled.
 - Eg. Case 6/64 *Costa v ENEL*: Article 49 TFEU (freedom of establishment) = 'legally complete in itself' and 'capable of producing direct effects...'

Autonomy: 'emancipation' from the sovereign states

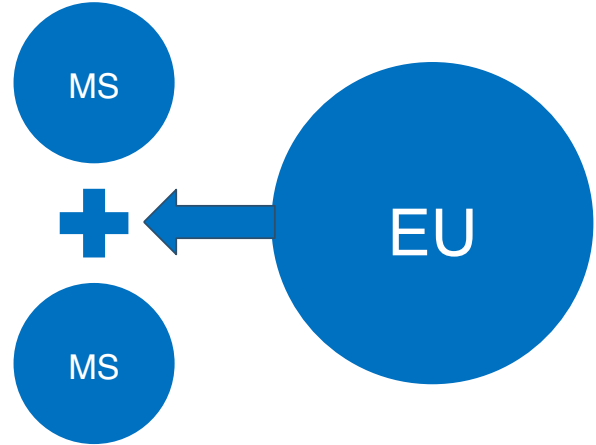
- 'By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty became an integral part of the legal systems of the member states and which their courts are bound to apply.
- By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have **limited their sovereign rights** and have thus **created a body of law which binds both their nationals and themselves**...
- The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights.
once transferred, no reverse.

Who are the Masters of the Treaty? (Grimm)

Pre 1957:



Post 1957:



Primacy

- **C 6/64 Costa**: the law stemming from the Treaty...because of its special and original nature cannot be overridden by **domestic legal provisions, however framed**, without being deprived of its character as community law and without the legal basis of the community itself being called into question... the spirit of the treaty precludes giving 'precedence to a unilateral and subsequent measure over a legal system' accepted on a reciprocal basis...
 - Displacement - EU law takes priority over any conflicting national law (*Factortame*)
 - Immediate - applies without delay to all MS law regardless of MS procedure (*Simmenthal*)
 - Authority of the CJEU – MS cannot declare EU rule invalid (*Foto-Frost*)
 - Moral - EU law respects fundamental rights (*Internationale*)
-

Declaration 27 on the Primacy of EU Law

- ‘The Conference recalls that, in accordance with well settled case law of the EU Court of Justice, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law...’
- Relevance? House of Lords Select Committee:
 - ‘...the affirmation of this principle in the Declaration does not give it any meaning that it has not previously had: it is a statement of the existing position...’

Is supremacy...

if the goal the treaty has to be achieved.

- Necessary?

- “The Community legal order is intended to bring about a profound transformation in the conditions of life – economic, social and even political – in the Member States. It is inevitable that it will come into conflict with the established order, that is to say the rules in force in the Member States whether they stem from constitutions, laws, regulations or legal usage...
- Community law holds within itself an existential necessity for supremacy. If it is not capable in all circumstances of taking precedence over national law, it is ineffective and, to that extent, non-existent. The very notion of a common order would thereby be destroyed.”

- Inevitable?

- Nation states are...incompetent and unable to adequately provide for the needs that its citizens now articulate.
- inadequate to provide security, prosperity or a decent environment
- Effective co-operation between states only option

Emergence of the EU Human Rights Agenda

C- 11/70 *Internationale*

- The validity of Community measures can only be judged in the light of community law.
- Treaty law cannot be overridden by rules of national law, however framed, without being deprived of its character as community law.
- The validity of a community measure or its effect within a member state cannot be affected by allegations that it breaches national fundamental rights
- Respect for fundamental rights forms an integral part of the general principles of law protected by the court of justice. ('constitutional absorption')

A European Constitution and a Constitutional Court (CJEU)

Opinion 1/91

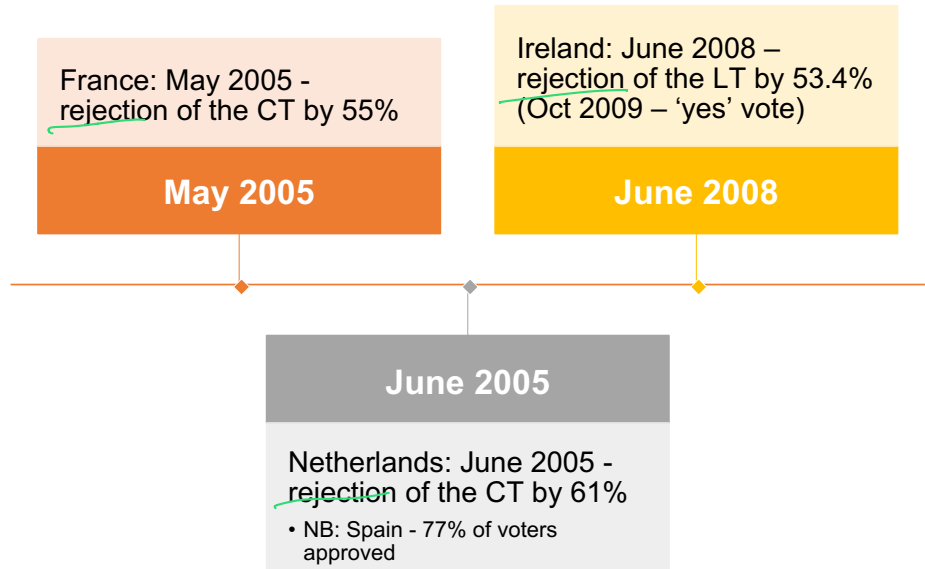
‘...the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes **the constitutional charter of a Community based on the rule of law**.

The Community treaties established **a new legal order** for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals.

The essential characteristics of the Community legal order which has thus been established are in particular its **primacy** over the law of the Member States and the **direct effect** of a whole series of provisions...’

Reaction of EU citizens to idea of a European Constitution

negatively



National reactions I: constitutional deference

- Spain: "...35. Once integration has taken place, it should be emphasised that it is no longer the Constitution that is the framework for the validity of Community laws, but the Treaty itself, the signature of which completes the sovereign act of assignment of the exercise of the powers derived from it...'[35]

- Germany:
 - *Internationale* [1974] 2 CMLR 540 ('Solange I'); *W uensche* [1987] 3 CMLR 225 ('Solange II')
 - *Brunner* [1994] 1 CMLR 57
 - The Lisbon decision (Thym): GCC 5 core areas of sovereignty (*domaine reservee*):
 - criminal law, basic fiscal decisions, the use of force, the guarantee of a just social order, decisions affecting national culture (education, the family and religion)
 - Weiss 2 BvR 859/15, 2 BvR 980/16, 2 BvR 2006/15, 2 BvR 1651/15: “
 - II. In light of the aforementioned considerations, the Federal Constitutional Court is not bound by the CJEU’s decision but must conduct its own review to determine whether the Eurosystem’s decisions on the adoption and implementation of the PSPP remain within the competences conferred upon it under EU primary law. As these decisions lack sufficient proportionality considerations, they amount to an exceeding of the ECB’s competences.”

National reactions II: conditional constitutionality

National Reactions III: declining (?) resistance

- the UK

- ECJ: Treaty is
- Van Gend 1962: original, has own powers; is source of own powers
- Costa 1964: separate from national courts; independent; supreme; permanent
- Internationale 1970: self-validating; not affected by conflicting validity claims based on constitutional provisions

House of Lords:

Blackburn v. Attorney General 1971

signing of Treaty is not irreversible – for Parliament to decide at appropriate time

the Court follows the instructions of Parliament

the Treaty is not unique

signatories have not limited their sovereignty

1974 - 1986

- ECJ: the CJ has
 - Simmenthal 1977: powers to invalidate any incompatible MS law and compel MS courts to act independent of national legal system on its behalf
 - Foto-Frost 1985: sole power to examine a Community act for invalidity and legality
 - Les Verts 1986: the Treaty is a constitution

House of Lords:

Bulmer v Bollinger 1974: the Treaty is separate to English law; EU law is equal in force to any Statute; Treaty rights and obligations are immediately effective but English judges have the final word on application; ECJ is the 'supreme tribunal' on interpretation by decree of Parliament (ie. S3 ECA 1972)

Macarthy Ltd v. Smith 1979: inconsistent legislation must defer to Community law; Courts have a duty to follow Parliamentary statutes

Garland v. British Rail Engineering 1983: statutes passed after the Treaty was signed are to be construed, 'as intended to carry out the obligation and not be inconsistent with it.'

1987 - 1990

- ECJ: EU law

- Marleasing 1989: has power to compel any public authority to act in its favour and oblige MS courts to interpret MS law in line with EU law; is stronger than a national statute.
- Factortame 1990: has power to compel MS courts to disapply any MS legal provision which restricts enjoyment of Community rights

House of Lords:

Factortame v Secretary of State (1990):
supremacy of EC law was always inherent in the EC Treaty, and well established before 1973, nothing novel about the fact that in protecting rights given by EC law, national courts must not be inhibited by rules of national law.

Reactions of the 'new' MS

- Czech CC: general acceptance with specific reservations on transfer of powers
- Poland: ^{不利地} hostile ^{抵抗} resistance
 - National constitutional autonomy
 - British rejection of uniqueness
 - German conditionality: 'Solange' resurrected
- Cyprus: deference
 - Article 169 CC – power to sign international treaties
 - Article 179 CC – constitution = supreme law of Cyprus; Article 182 CC – possibility and procedure for constitutional amendments
 - Spanish-style constitutional 'surrender'

Is supremacy necessary?

- YES:
- Legal certainty and stability in EU / world
- International credibility
- Development of fundamental values

NO:

Re-establishes statist hierarchies

CJEU not a 'Supreme' or 'constitutional' Court

Judicial deficits in EU legal system eg Art 263 (4)