

THE SUPREMACY OF EUROPEAN UNION LAW AND THE TRANSITION OF SOVEREIGN POWER

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Abstract

*Discussions and explanations of State sovereignty are always important in the world, in terms of the State's power and its influence over a region and the world, because the notion of sovereign power is always a key issue as long as the State exists. However, the meaning of sovereignty, both internationally and domestically, is no longer a viable concept for the State. Internationally, States cannot act independently on the political level, and they also agree to the restrictions of international law with on the legal level. Internally, the sovereign power of the State is limited by international restrictions (Jacobs, 2007). One of the foreign affairs questions, which contemporary European constitutions deal with, concerns the "[l]imitation of sovereignty clauses, which specify the conditions on which [S]tate powers may be transferred to international organisations or more specifically to the [European Union]" (Witte, 2008). This paper studies supremacy and the direct effect of European Union (EU) law on Member States. It also explains the transition of sovereign power from Member States to EU law by examining two landmark cases, *Flaminio Costa v. ENEL*¹ (ECR 585, 1964) and *Van Gend en Loos v. Belastingen*² (ECR 1, 1963), in the EU. Some implications, which prove that the EU is sovereign, are also explained in this paper. Thus, this research aims to demonstrate that EU law imposes limitations on Member States.*

Key words: State sovereignty, European Union law, sovereign power, direct effect, supremacy.

Introduction

"Sovereignty has become a semblance of the modern State." (Ozdan, 2014, p. 371). However, in the current world order, sovereignty can be deemed a back-breaking notion to unpack, particularly in the European Union (Marquardt, 1994, p. 631), because the European Union indispensably hosts political conflict and legal paradox. Financial, legal and political crises coerce the European Union to have central power. In respect of the central power of the European Union law, this situation gives rise to lose State sovereignty, because the supremacy of the European Union law over domestic law is always a threat to State sovereignty. "Sovereignty is not only a political concept but also a highly politicised concept." (Lindahl, 2003, p. 87). With regards to the criteria of sovereignty, the European Union Member States present intensely paradoxical and enigmatic picture (Wallace, 1999). Despite the stupendous

¹ "Mr Costa refused to pay an electricity bill. He was opposed to the nationalization of the Italian electricity industry which had occurred after the EEC Treaty had come into force. In defending his non-payment Mr Costa argued that the nationalization legislation breached... Arts 117, 108, and 37 TFEU. The magistrate... sought a preliminary ruling from the ECJ." (Allen & Thompson, 2011, p. 375).

² "Van Gend en Loos was charged an import duty on chemicals imported from Germany by the Dutch authorities. It considered this to be in breach of Article 25 EC, which prohibited custom duties or charges having equivalent effect being placed on the movement of goods between Member States. It sought to invoke Article 25 EC in legal proceedings before a Dutch tax court, the Tariefcommissie. The question for the European Court of Justice was whether a party could invoke and rely on provisions of Community law in proceedings before a national court? ... The Court's answer was that it does." (Chalmers & Tomkins, *European Union Public Law: Text and Materials*, 2007, p. 47).

alterations “in the European polity over the decades since the early 1960s, and most notably its evolution from Community to Union, the twin principles of supremacy and direct effect remain fairly central to the legal conception of the polity” (Burca, 2003, p. 450).

The connotation of supremacy has always been associated with “sovereignty”. “Supremacy – especially supreme authority – is at the root of sovereignty.” (Donnelly, 2014, p. 225). John Burke (1977) defines “supremacy” as “sovereign dominion, authority, and pre-eminence”. Before proceeding further, it becomes necessary to put into words the meaning of the supremacy of European Union law. It means that European Union law intervenes in the domestic law of the European Union Member States and also “trumps even later-enacted inconsistent national law, an intrusion into the domestic legal order far beyond anything ordinarily found in international law governing responsibility between states”. (Marquardt, 1994, pp. 633, 634); (Weiler, 1991). The supremacy of European Union Law namely is “the principle that EC law is supreme over any conflicting national law establishes a hierarchy of legal rules which national and European courts must respect and enforce. This means that Member States may not plead that national legal or political restrictions are a justification for their failure to comply with EC law obligations, such as the duty to implement a Directive within the prescribed time limit or the requirement to respect directly effective provisions of the EC Treaty” (Peter & Conaghan, 2008).

The Sovereignty Of European Union Law

According to Bellamy and Castiglione (1997, p. 441), “there [is] something fundamentally new, or, as is often said, *sui generis*, in the constitutional structure of the European Union, and ... such novelty is captured by neither federal nor nation-based forms of political architecture”. The question becomes whether the novelty of the European Union's (henceforth the EU) structure is divided or decreased sovereign power or not. No matter which, the legislature of any organisation or union has sovereign power to make law; therefore it has its own sovereignty. European law has primacy over national law (Weiler & Haltern, 1996, pp. 417, 418). However, “as long as the Member States act in unison, they may change the status or the capacities of the organisation” (Weiler & Haltern, 1996, pp. 417, 418). States, as fundamental parts of international organisations and treaties, may collectively decide on treaty amendments; they may also make an interpretation of a treaty or terminate it. Amendments, terminations and interpretations become valid as long as States act collectively on these issues (Weiler & Haltern, 1996, p. 418).

This conjectural power of Member States (to effect decisions and interpretations of EU law) was pushed aside by the cases of *Flaminio Costa v. ENEL* (ECR 585, 1964) and *Van Gend en Loos v. Belastingen* (ECR 1, 1963). While the *Van Gend en Loos* case emphasised and established the direct effect doctrine, the *Costa* case presented the doctrine of supremacy. (Burca, 2003, p. 453). These two cases were landmark decisions for the European Court of Justice. (Vauchez, 2010, pp. 1,9).

The *Van Gend en Loos* case has revealed “the reality of the transfer of powers to the EC and the restrictions of Member States’ sovereign rights deriving therefrom ... [and] the reality of shared sovereignty to use a more current expression”. (Timmermans, 2001, p. 2). In the *Van Gend en Loos* case, “[t]he European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights...” (Foster, 2012, p. 122) and “the [European Court of Justice] ruled that Union law can confer rights upon individuals which national courts must protect. Thus Union law may have a direct effect³ in Member States’ domestic law.” (Allen & Thompson, 2011, p. 382). Therefore, this case demonstrates that the EU has supremacy over domestic laws. Furthermore, it proves that “EU members have already ceded sovereignty in the formal sense [and] the European Court of Justice has [some] limitations on national sovereignty or the pooling of sovereignty within the EU.” (Marquardt, 1994, p. 633).

³ The direct effect is a fundamental principle of the European Community. It accords a right and gives some privileges to all European Union citizens in order to defend themselves in front of the states and European community courts. European Union law has become a part of national law, thanks to the direct effect. It makes European law more effective in national laws. “The direct effect of European law is, along with the principle of precedence, a fundamental principle of European law. It was enshrined by the Court of Justice of the European Union (CJEU). It enables individuals to immediately invoke European law before courts, independent of whether national law test exist.” (Summaries of EU Legislation).

The *Costa v ENEL* case also considered the sovereignty of EU law. It explicitly confirmed EU law's sovereign power and its direct effect by expressing "the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed" (Flaminio Costa v ENEL ECR 585, 1964) (Chalmers, Davies, & Monti, 2010, p. 187). Therefore, European law has superiority in any case of conflict (Pernice, 2010, p. 47). The sovereign rights of all Member States are limited and are shared by becoming a member of the EU (Shaw, 2000, pp. 432, 433) (Bethlehem, 1998); this diminution in the sovereignty of Member States was highlighted in *Flaminio Costa v. ENEL* (ECR 585, 1964, pp. 593, 594): "The transfer by the States from their domestic legal systems to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail." These two cases display the superiority of EU law by expressing its sovereignty over national laws; however, more implications, which stem from the expression of sovereign EU law, can be stated in international law. The next section mentions these implications of sovereign EU law.

Implications Of Sovereign Eu Law

There are three inferences which derive from the understanding of EU law being sovereign. The first one is the superiority of EU law. EU laws cannot be repealed, unless they explicitly give priority to domestic laws; therefore, the meaning of sovereignty of EU law can demonstrate its primacy among the laws of EU Member States. The second implication concerns competence; namely, EU law designates the boundaries of its authority. For the EU, the competence meaning of sovereignty spells out that the EU has legislative power and determines the extent of that power. The third implication is about adherence or fidelity. This feature of the EU's sovereignty demonstrates that all Member States, and their public institutions and domestic courts, have a responsibility to keep completely effective the legal system of the EU (Chalmers & Tomkins, 2007, pp. 185, 186).

The superiority of EU law becomes the most distinct characteristic of the sovereign EU. "While there was little scope for ambiguity in the ECJ's [European Court of Justice] conclusion that regulations, directives and decisions were capable of having direct effect, the Court was remarkably inconclusive on the question of whether EEC [European Economic Community] law also required such EEC measures to possess a superior hierarchical status to some (or all) provisions of domestic law." (Loveland, 2009, pp. 367, 368). When the domestic law of an EU Member State is inconsistent with EU law, the superiority of EU law over domestic law had remained in question until the case of *Internationale Handelsgesellschaft* (ECR 1125, 1970). Briefly, the case was about whether a German company had have permission or a licence to export flour. For the export process, first, an operation or performance deposit was required by the EU provisions. If the licensee failed to export the allowed amount designated by the licence, the deposit would be forfeited as the provisions required. In this case, the plaintiff failed to export the amount of produce designated by the licence; therefore, the deposit was forfeited (Allen & Thompson, 2011, p. 376). "[T]he Frankfurt Court asked if it was obliged under EEC law to give precedence to the regulations even if they were inconsistent with the Basic Law." (Loveland, 2009, p. 368). The answer of the ECJ was that the superiority principle applied to national fundamental rights. The ECJ declared:

"Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure." (Internationale Handelsgesellschaft, ECR 1125, 1970, at para. 3) (Amministrazione delle Finanze dello Stato v Simmenthal SpA, 1978, at para. 17)

The *Internationale Handelsgesellschaft* (ECR 1125, 1970) case demonstrates that the EU has a hierarchical administration system and this prevents the EU from vitiating its sovereignty. "There is a hierarchy of norms: Community norms trump conflicting Member State norms. But this hierarchy is not rooted in a hierarchy of

normative authority or in a hierarchy of real power” (Weiler, 2001, p. 57). Weiler (2001, p. 57) also stated that a top to bottom hierarchy system of norms dominates in European federalism, instead of a bottom to top hierarchy of authority.

The second inference of sovereign EU law relates to competence. There are four types of EU competence: exclusive competence, shared competence, minimum harmonisation and coordinating, supporting action.

Exclusive competence requires full commitment to EU legislative power by Member States (Chalmers & Tomkins, 2007, pp. 188, 189). Grainne de Burca (1999) stated that the discussion on exclusive competence is still alive but completely indeterminate. However, the Constitutional Treaty explained the scope of exclusive competence:

- 1- The Union shall have exclusive competence in the following areas:
 - (a) Customs Union;
 - (b) The establishing of the competition rules necessary for the functioning of the internal market;
 - (c) Monetary policy for the Member States whose currency is the euro;
 - (d) The conservation of marine biological resources under the common fisheries policy;
 - (e) Common commercial policy.
- 2- The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope (Treaty Establishing A Constitution for Europe, 2004, Art.I-13).

Shared competence covers following areas: internal market, social policy, economic, social and territorial cohesion, agriculture and fisheries (excluding art. I-13 (d)), environment, consumer protection, transport, trans-European networks, energy, areas of freedom, security and justice, common safety concerns in public health matters, technological development and space, development cooperation and humanitarian aid (Treaty Establishing A Constitution for Europe, 2004, Art.I-14).⁴ On these issues, Member States have the power to address problems, however Member States must obey the EU rules; namely, they must not conflict with them (Chalmers & Tomkins, 2007, p. 191).

- 3- Minimum harmonisation: domestic authorities may take some measures which are more binding and more protective than the EU (Chalmers & Tomkins, 2007, p. 192). The case of *Deponiezweckverband Eiterköpfe* is an example of minimum harmonisation. Briefly, Eiterköpfe sought permission from Land Rheinland-Pfalz to fill two landfill sites with waste. Land Rheinland-Pfalz claimed that National German Law Regulations on Environmentally Sound Deposits of Municipal Waste prohibited this action. Therefore it was refused (Chalmers & Tomkins, 2007, p. 193). As is seen, national law regulations determine the issue if they are more binding than an EU directive.

The last form of competence is “supporting, coordinating and complementary action ... This EU competence is where the field remains one of national competence, but in respect of which the European Union may take supporting, coordinating or complementary action.” (Chalmers & Tomkins, 2007, p. 193) This EU competence’s fields are the protection of and improvements to human health, industry, tourism, culture, administrative cooperation, education and civil protection (Treaty Establishing A Constitution for Europe, 2004, Art.I-17). Domestic courts have an interpretative role in these issues.⁵

The last inference of sovereign EU is fidelity. According to the fidelity principle, domestic institutions should assure their national legal system in order to maintain the integrity of EU law and Member States should not sanction violations of EU law (Chalmers & Tomkins, 2007, p. 195). Article 10 of the EC Treaty highlights the fidelity principle; it states: “Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community’s tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.” (TEC, 1957, Art. 5)

⁴ See, for example, Case 60/86 *Commission v. United Kingdom* [1988] ECR 3921.

⁵ See for example Case 322/88 *Salvatore Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407.

CONCLUSION

EU Member States have notably lost the classical meaning of State sovereignty, because States' legal control over domestic and external affairs has been transferred to the EU as a whole (Keohane, 2002, p. 748). The supremacy and direct effect of EU law become crucial limitations on the sovereignty of Member States (Weiler, 1999) (Keohane, 2002, p. 748). “[State] sovereignty in the EU has changed significantly. What the Member States are fighting to preserve using the rhetoric of majesty and the illimitable power of a people is really only relative freedom of action.

It can be obviously observed that the European Court of Justice has proclaimed “to clarify the legal nature and, increasingly, the constitutional nature of the new order established by the series of European treaties” (Burca, 2003, p. 450). Additionally, Burca (2003, p. 450) clearly states that “the authority of the Court’s rulings... have never been seriously undermined nor politically challenged despite the opportunity for the Member States... to overturn or amend them”.

The limits on sovereignty in the EU go beyond the practical limitations on the power of the [S]tate to achieve its goals that have always existed. The Member States have given up their trump card, their formal right to have the last word on the legal order within their borders.” (Marquardt, 1994, pp. 634, 635). Therefore, with regard to this authority transformation from Member States to the EU, the Member States have agreed to a system in which domestic government is no longer entitled to make supreme law within the state (Marquardt, 1994).

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