

USA SUPREME COURT OF JUSTICE AND EUROPEAN COURT OF JUSTICE (COMPARISON)

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Abstract

The US Supreme Court and the European Court of Justice are coordinating constitutional review. Although the European Union does not have a constitution, the European Court often engages in what functionally amounts to constitutional review, particularly in relation to the quasi-federal structure of the EU. Both courts have engaged in the constitutionalization of politics and seem in risk of politicizing the constitution. The threats to their respective powers and legitimacy are different. The US Supreme Court is vulnerable to internal forces (the President, Congress, national public opinion) whereas the European Court is vulnerable to external forces (the member states and, in particular, their constitutional courts).

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JEL Classification: K33, K40.

1. Introduction

In the US, the federation is classical and complete, not growing or accepting more member states.

It is a *static* union.

In the EU there is no a similar federation, just a union of states, supranational in its nature.

Negotiations continue with countries outside of the union about membership and the newest member states contribute to the potpourri of law that makes up the law of the EU.

It is a *dynamic* union.

2. General aspects

The European Court of Justice is considered to be the only actor in the constitutionalization of the Treaties, transforming them into constitutional entities, as a result of some judgments of the 60s and 70s.²

In those judgments the Court was prointegrationist in excess and too audacious.

Some constitutional courts, in particular the German Constitutional Court with its Maastricht decision of 1993, would have voiced their concerns, establishing potential limits to judicially driven integration.³

As an effect, the Court of the 90s would have become wiser, more self-restrained, and even minimalistic.

After the European Convention and the drafting of the Treaty establishing a Constitution for Europe, the Court would have been more than ever on a second plane..

In two decisions of 1963 and 1964, *Van Gend & Loos* and *Costa v ENEL*, the Court established the two essential features of community law, the direct effect and the supremacy.

In both, the Court approached the problem from a general perspective and gave a general answer.⁴

The arguments were similar in general aspects and referred to the special nature of the Treaty establishing the European Economic Community.

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² Baquero Cruz, J, *The Changing Constitutional Role of the European Court of Justice*, *International Journal of Legal Information*, Volume 34, Issue 2, 2006, p. 223.

³ *Ibidem*, p. 223.

⁴ *Ibidem*, p. 224.

3. European Court of Justice

The member states gave to the Court those issues of interpretation left more or less open in the Treaty, such as the status of community law in national law.

The text of the Treaty included information enough as to make direct effect and supremacy the most compelling interpretations. In choosing them, the Court did not “transform” the Community legal order. The Court clarified its nature through an interpretation of the relevant materials.

The seventies and the eighties were a period of consolidation and development of the basic principles established in the sixties. Two decisions are the most important in this period.

In *Internationale Handelsgesellschaft*, of 1970, after recalling the principle of supremacy and holding that “the validity of measures adopted by the institutions of the Community can only be judged in the light of Community law”, the Court said that “respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.”⁵

The protection of such rights, inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community”.

In order to maintain the supremacy, uniformity and effectiveness of community law, the Court had to ensure that its compatibility with fundamental rights would not be assessed unilaterally in each member state and according to different standards. Fundamental rights were to be protected within the Community legal order according to an the constitutional traditions common to the Member States.

The Court was protecting those rights.

In *ERTA*, of 1971, the Court stipulated that “each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form they may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules or alter their scope.”⁶

A similar vision to competences exists in the tobacco advertisement case (on the scope of article 95 EC), or in Opinion 1/94 (on the World Trade Organisation), rejecting a dynamic interpretation of the common commercial policy and reduced the operative scope of *ERTA*.

“Restrictive on competences, expansive on individual rights” was the motto of the Court after the turn of the 90s.

The reasons of this changing may be many.

One explanation was that the Court was reacting to the Maastricht decision of the German Constitutional Court. In that decision, the German Constitutional Court denounced that the Court’s case law on Community powers was too expansive, that the use of *effet utile* was excessive, that interpreting the Treaty was one thing and amending it another, and that the Court could not achieve through interpretation what should be done through Treaty revision.⁷

Another problem is the position of different states towards preliminary reference.

The first group are the constitutional courts that have already made a preliminary reference or declare their readiness to do so.⁸

The first preliminary reference ever made by a Constitutional Court was made by the Belgian Cour d’arbitrage whose preliminary references have become quite frequent.

The same visiin is belonging to the Austrian Constitutional Court which has already initiated a preliminary ruling for several times and by the Portuguese Constitutional Court declaring its readiness to do so.

⁵ *Ibidem*, p. 231.

⁶ *Ibidem*, p. 231.

⁷ *Ibidem*, p. 234.

⁸ Navratilova, M, *The preliminary ruling before the constitutional courts*, University of Munchen working paper, 2014, p. 7.

Making a preliminary reference is deemed as a natural element of own decision-making by the Irish High Court.

If we are speaking about the constitutional courts of the new member states, the Lithuanian court has already referred the matter to Luxembourg.

The second group is composed by the constitutional courts which chose to approach the community law generally in a very self-confident manner.⁹

We are speaking here about Germany, Italy and Spain.

The Spanish Constitutional Court says that its task is to watch over the respect towards the constitutionally guaranteed human rights and not to search for a possible violation of community law. The duty of safeguarding the respect towards the community law belongs to the general courts in cooperation with the Court of Justice.

This is the reason why the objection alleging the failure to make a preliminary reference can be used only when community law is applied which is not the case in the proceedings before the Constitutional Court. It is obvious that the Constitutional Court did not gain insight to the fact that all the national bodies bear the obligation to enforce the respect towards community law.

The reality that the frequency and the available instruments of enforcement are different is not decisive and cannot lead to a conclusion that the Constitutional Court is deprived of this duty.

The Italian Constitutional Court tried to find the most suitable solution how to deal with the problem. At beginning, it felt to be competent to refer to the Court of Justice (despite the fact that it did not make use of this possibility and interpreted the community law autonomously).

Four years later, the Constitutional Court denied its declaration and asked to a general court to make a preliminary reference since the Constitutional Court did not regard itself as a court in sense of article 234 par. 3 of the Treaty.

The attitude of the German Constitutional Court seems is obscure.¹⁰

The Solange decision indicates that the Court accounts itself to be a court according to the article 234 par. 3 of the Treaty but afterwards the case law in question has become rather unclear; what is important is the fact that the German Constitutional Court has not made a preliminary reference so far.

4. United States Supreme Court

The Supreme Court of the United States is one of the most interesting institutions of study for political scientists, constitutional scholars, and lawyers. All members (justices) of this nine-member body are appointed by the President for life.

The court system in the United States is divided into two separate systems (federal and the state).¹¹

This is because the United States Constitution creates a governmental structure for the United States which is known as federalism.

Federalism is dealing with sharing of powers between national government and state governments.

The constitution gives exclusive powers to federal governments in some matters and exclusive power to state governments in certain matters. The state governments and federal government are supreme in these matters. This is known as separate sovereignty.

Both federal and state government need their own court system to apply and interpret their laws.

According to the article 3 of the United States Constitution, the judicial power of the United States is composed by one Supreme Court and in such inferior courts as the congress may from time to time ordain and establish.

⁹ *Ibidem*, p.7.

¹⁰ *Ibidem*, p. 8.

¹¹ Kalam, P. B, *Decision – making in criminal cases by trial courts – factors leading to prejudice: A functional study*, Mahatma Gandhi University, 2014, p. 38.

The federal jurisdiction is divided into three main levels.¹²

The first level are the federal district courts, with original jurisdiction in most of the federal law.

There are more than 1 to 20 judges in each district. The District Court judges are appointed for life by the President. The cases analyzed by the Federal District Courts include violations of constitution and other Federal law, maritime disputes, cases directly involving the State or Federal government etc.

The second level are appellate courts known as United States Court of appeal.

They were created in 1891. The courts of appeal consists of 11 judicial circuits throughout 50 States and in addition one in the District of Columbia. There are 6 to 27 judges in each circuit. In addition to the appellate jurisdiction over the District Courts, the Courts of appeal have original jurisdiction in cases involving challenge against order of federal regulatory agencies.

The highest court in the federal system is the Supreme Court of United States. It has one Chief Justice and 8 Associate Judges.

The states court system is complicated.¹³

You can not find two identical state systems.

Usually the state court systems has three levels too.

The lowest level of State courts are named inferior courts, including magistrate courts, municipal courts, Justice of peace court, Police Court, Traffic Court, County Court etc.

They are dealing with minor civil and criminal cases.

More serious offences are analyzed by superior courts known as State District Courts or Circuit Courts. They hear appeal from inferior courts and original jurisdiction from major and civil cases.

The biggest parts of the judicial trials are taking place in these courts.

The highest State court is called the State of court of appeals or State Supreme Court, hearing appeals from State superior courts. In addition, it has original jurisdiction over important cases

The federal courts can be considered as a kind of "impartial mediators" between the differing opinions of the state courts. If the state courts could interpret the Constitution at their own will "the Federal Government would be much impaired, if, indeed, it were not destroyed".¹⁴

For this reason, the federal courts are allowed to decide on certain specific issues.

The jurisdiction of the federal courts can be found in article 3 of the Constitution, where all the types of cases that can be brought before a federal courts are listed.

All other cases not going in within their jurisdiction go to the state courts.

Another point of tension between the federal and state courts is the border issues concerning the jurisdiction to rule in certain cases.

The federal courts are generally cautious to formulate state law. Only the states can "authoritatively declare what the state law is".

The tenth amendment of the US Constitution says that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

5. Differences

The European Union is a form of union, on the middle way between a federation and a confederation, The official name of the European Court of Justice is formally called the Court of Justice of the European Union¹⁵

¹² *Ibidem*, p. 39.

¹³ *Ibidem*, p. 39.

¹⁴ Bundzen, A., *The United States Supreme Court and the European Court of Justice A Comparative Study of Compliance* Master thesis Orebro University, 2011, p 4.

¹⁵ *Ibidem*, p 9.

It has a greater number of judges compared to the Supreme Court, twenty-seven, one from each member state. In full plenary court, there are thirteen judges sitting.

The judges are "chosen from persons whose independence is beyond doubt" by the national governments and a panel of seven persons (of which one member is from the European Parliament). They serve for a six year period which is renewable.

In addition to the judges there are eight Advocate Generals. They are assisting the ECJ the judges by presenting opinions on cases. They have the obligation to act "with complete impartiality and independence, to make, in open court, reasoned submissions on cases which ... require his involvement".

Along with the the ECJ, there is the General Court, called before the Court of First Instance, and the European Civil Service Tribunal.¹⁶

The General Court is dealing with more administrative aspects and therefore gives off the light as being the "central administrative court" of the European Union. It "deals with cases brought forward by private individuals, companies and some organisations, and cases relating to competition law".

It also analyses appeals from the Civil Service Tribunal as well as having its own right of appeal to the ECJ.

The Civil Service Tribunal is the court hearing the disputes between the EU institutions themselves or their employees.

As a result, something made by the state is naturally to be interpreted by the state. In a case where the line between federal and state jurisdiction is blurred it is possible for conflict to arise.

The ECJ is one of the main institutions of the EU, interpreting and developing the European law.¹⁷

That means it not only explaining the law as it is, but is also developing it (most often basing its ruling on its earlier jurisprudence) to fit with the evolving state of the Union.

The ECJ is considered to have an "activist" attitude, interpreting the Treaties in ways often considered *avant-garde*.

The ECJ is able to be "forward" due to a number of reasons.¹⁸

First reason is that the Treaty of Rome (now called the Treaty on the Functioning of the European Union, TFEU) is a "relational contract".

This means that there is *no clearly developed law-path* which the ECJ can follow when determining the cases pending before it. The Treaty simply does not go into such minute details. Instead it must develop the paths of law that have been set up in the Treaties in order to make clear the particular subject.

Due to its position as the interpreter of the Treaties, the ECJ can rule in an active way.

The second reason is that the judges are independent.¹⁹

They are able to judge without risk interference from their own national governments. As there are no dissenting opinions in the ECJ judgements, it is impossible to know what each individual judge thinks of the case. This isolation from the pressure of the governments and the judges' anonymity allow them to develop such case law that might not have been accepted, had they been exposed to public scrutiny.

The single opinion of the ECJ may bring about a more activist decisions than would have been possible had the opinions been public.

The ECJ has the advantage that its nature is secret from the beginning.²⁰

The deliberations are not open to the public and the judges do not pronounce separate opinions, etc.

¹⁶ *Ibidem*, p. 9.

¹⁷ *Ibidem*, p. 18.

¹⁸ *Ibidem*, p. 18.

¹⁹ *Ibidem*, p. 18.

²⁰ *Ibidem*, p. 19.

Even such an approach could be good for the ECJ, in the sense that it gives judgements without any visible division, it is not as good for the legislative branches of the EU.

A third reason for an activist approach is the internal market.

The internal market's aim is to guarantee the four freedoms: the free movement of goods, capital, services and people. The reason for the existence of the EU is to "make pan-European armed conflict inconceivable". This was done "through a vigorous emphasis on free trade".

Even the two courts have many common characteristics, they also have differences.²¹ The different use of the certificate and the preliminary reference procedure illustrates one of these differences.

In the American system there are not many questions of law referred to the Supreme Courts from the lower courts, instead the state courts ask the higher federal courts these questions.

In the European space the courts of the member states, that including both lower and higher national courts, do ask questions of law to the ECJ.

The Supreme Court is acting inside US, and the ECJ is outside of the member state.²²

The citizens have a greater possibility of making an appeal in the US. In the EU, they are after all required to use totally the national remedies, and wait for the national court to refer for a preliminary reference procedure to the ECJ.

In the US, there is after all a right to carry a case to the Supreme Court, as well as a way to appeal via certiorari, hoping that the judges will take the case on.

6. Conclusions

The Supreme Court is receiving most of its appeals from parties in court (*via certiorari*).

While the Supreme Court struggles with its right to be the final interpreter of the Constitution and not getting involved in politically questionable issues, the ECJ wants to lead the judicial evolution of EU law.

As EU law is changing sometimes, member states' courts might be more willing to implement ECJ decisions, because they know that the law might change, or that the ECJ might interpret the law different in view of new legislation.

In the US interpreting Constitutional rights, and making new rights, is not a task that the Supreme Court was explicitly must do according with the Constitution.

Its decisions may more often able to be criticized.. Such dissent has a higher chance to come from state courts, as it was found that the US federal courts and the EU member state courts had, according to statistics, roughly the same percentage of compliance, both being over 90%, but the US state courts stood out, with lower compliance ratings at about 85%.

In US, the political situation is influencing the activity of the courts making them less or more likely to accept Supreme Court rulings. By creating a less separated political climate, actual compliance should increase, as recognition of the Supreme Court's judgements would become more wide spread, even amongst the states where a political majority disagrees with a ruling. Higher compliance could also mean a decrease in the number of litigations, and thus less challenges of the decisions.

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²¹ *Ibidem*, p. 21.

²² *Ibidem*, p. 21.