

## LEGAL INTEGRATION IN THE COMMON MARKET

Harold L. Marquis\*

### I. INTRODUCTION

The European Court of Justice was one of the institutions established when the European Coal and Steel Community (ECSC) was formed by Belgium, France, Germany, Holland, Luxembourg, and Italy in 1952.<sup>1</sup> The Court was granted comparable authority in other areas of the economy with the formation of the European Economic Community (EEC) by the same six countries in 1957.<sup>2</sup> Its geographical jurisdiction was enlarged in 1972 when Denmark, Ireland, and the United Kingdom became members of the European Communities.<sup>3</sup>

The Court occupies a unique status vis-à-vis the courts of Member States. While the Court has the ultimate responsibility for interpreting Community law, it does not possess normal appellate court jurisdiction over national courts. The integrative efforts of the Court and other Community institutions could have been seriously undermined by the national courts, given the degree of independence and sovereignty which the national courts retained when the Communities were created. The primary purpose of this article is to analyze the interaction between the Court of Justice and national courts from the standpoint of its impact upon integration in the Common Market. The status and success of the Community as an important new type of legal order depends upon this interaction being in a Community-building direction. In particular, conflicts between national and Community law must be satisfactorily resolved. A sufficient number of important cases have been decided by national courts and the Court of Justice during the last twenty-five years so that a preliminary historical assessment of the integrative role of the courts can be made.

---

\* Professor of Law, Emory University School of Law.

1. Treaty Establishing the European Coal and Steel Community, done April 18, 1951, arts. 31-45, 261 U.N.T.S. 140 (effective July 25, 1952) [hereinafter cited as ECSC Treaty].

2. Treaty Establishing the European Economic Community, done March 25, 1957, arts. 164-188, 298 U.N.T.S. 11 (effective Jan. 1, 1958) [hereinafter cited as EEC Treaty].

3. Treaty Concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community, done Jan. 22, 1972, in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES 871-79 (1973), reprinted in 2 COMM. MKT. REP. (CCH) ¶ 7011 (effective Jan. 1, 1973) (Norway did not join. The proposed accession was defeated by popular referendum.) [hereinafter cited as the Accession Treaty].

## II. LEGAL STATUS OF THE COMMUNITY

The European Community occupies a status somewhere between a loosely knit international organization, such as the European Free Trade Association (EFTA)<sup>4</sup> or the General Agreement on Tariffs and Trade (GATT),<sup>5</sup> and a federal system. The relatively new term "supranational" has sometimes been applied to Community institutions and their decisions. Although the power to make decisions that are binding on Member States without their prior consent is an important characteristic of supranational organizations, this power does not adequately distinguish supranational organizations from international organizations.<sup>6</sup> Some international organizations, clearly lacking the authority of Community institutions, have this power. For example, the Security Council of the United Nations can make decisions for the maintenance of peace and security that are binding on members of the United Nations.<sup>7</sup> An organization must possess a number of other powers before it becomes truly supranational.

One of the more important of these powers is the power to make decisions that are directly binding on natural and legal persons.<sup>8</sup> These decisions are binding upon persons without any implementation by municipal legislative organs. As a further distinction, the Community institutions make these decisions as institutions and not on a traditional contract basis, as an international organization would.<sup>9</sup> This power results largely from the independence of the supranational organization from the Member States. This independence was partially created in the Council of the EEC through the use of majority and qualified majority voting formulae.<sup>10</sup> It is the full panoply of power, functions, and jurisdiction given to the Community that establishes its supranationality.

Community institutions were endowed with certain supranational powers so that economic integration would be more easily

---

4. Convention Establishing the European Free Trade Association, done Jan. 4, 1960, 370 U.N.T.S. 3 (effective May 3, 1960).

5. General Agreement on Tariffs and Trade, done Oct. 30, 1947, 61 Stat. A3 (1948), T.I.A.S. No. 1700, 55 U.N.T.S. 187 (effective Jan. 1, 1948).

6. See Robertson, *Legal Problems of European Integration*, in 91 RECUEIL DES COURS 105, 143-48 (1957).

7. U.N. CHARTER art. 25.

8. Dagtoglou, *European Communities and Constitutional Law*, 32 CAMBRIDGE L.J. 256, 261 (1973).

9. *Id.*

10. See EEC Treaty, *supra* note 2, art. 148.

achieved, a step which some hoped would lead to political integration. There has been some thought that this step might ultimately result in a federal system similar to that of the United States and Canada. While the Community has successfully achieved much economic integration, little progress has been made towards political integration. Whether the Community will achieve a high degree of political integration, or lapse into a new free trade area with only international characteristics, remains uncertain.

### III. THE EUROPEAN COURT OF JUSTICE

The European Court of Justice, skillfully interpreting and developing Community law through its landmark decisions, may have expanded the supranational character of the Community more than any of the other institutions.<sup>11</sup> In this respect, the Court of Justice has performed a role comparable to the early nineteenth century expansion of federal powers by the United States Supreme Court. Perhaps the fragile status of the Community provided the necessity for bold decisions to be made in much the same way as early bold decisions of the United States Supreme Court may have been necessary to preserve the federal system.

The Court of Justice logically occupied the vanguard because of certain inherent or developed weaknesses of the other institutions. One might have expected little progress to be made by the European Parliament because the Treaties gave it few significant powers. It is difficult for the EEC Council to greatly advance the development of supranationality because its members represent individual states rather than the Community. While the EEC Commission, whose members were supposed to represent the Community, significantly advanced supranationality in the early years, the watchdog activities of Permanent Representatives appointed from each state later undercut its role.

#### A. Jurisdiction

The jurisdiction of the Court of Justice derives from three separate treaties: the ECSC Treaty, the EEC Treaty, and the European Atomic Energy Community (EURATOM) Treaty. Its jurisdiction under the ECSC Treaty differs from its jurisdiction under the EEC and EURATOM Treaties.<sup>12</sup> Although the ECSC Treaty confers the

---

11. Dagoglou, *supra* note 8, at 261-62.

12. Compare ECSC Treaty, *supra* note 1, arts. 37-40 with EEC Treaty, *supra* note 2, arts. 170-182 and Treaty Establishing the European Atomic Energy Community, done March 25,

greatest supranational powers upon the institutions, it is more beneficial to analyze the EEC Treaty and decisions thereunder because of its application to a broader segment of the economy.

The EEC Treaty vests in the Court of Justice exclusive jurisdiction over cases between Community institutions and Member States. The Commission may request a declaratory judgment that a Member State has violated its treaty obligation under article 169. A Member State may seek annulment of a binding act of any of the Community institutions under article 173. A Member State enjoys a broad right of appeal since it need not satisfy any particular standing requirements. For example, the Member State would not have to show that the act directly affects it. The Court also has jurisdiction when a Member State seeks a declaratory judgment that another Member State has violated a treaty obligation.<sup>13</sup> The Community follows the pattern of traditional international organizations in permitting states to bring suit before a treaty-created tribunal.<sup>14</sup>

By permitting individuals and enterprises to appeal institution decisions,<sup>15</sup> the EEC Treaty makes a significant departure from traditional international law which has generally permitted only states to sue.<sup>16</sup> However, the Treaty severely limits this right by conferring standing upon a private party only when the decision is of "direct and individual concern" to him.<sup>17</sup> Thus, ordinarily a private party cannot challenge a Community regulation by a declaratory action, but he can contest the enforcement of the regulation against him upon grounds that it is inapplicable to him.<sup>18</sup> Private parties were probably not accorded greater rights to challenge Community acts for fear that such challenges would open a Pandora's Box of litigation, delaying the implementation of Community programs. A similar fear underlies the standing requirements in the United States. Even though the European Court of Justice has exclusive jurisdiction over such cases, it has refused to relax the standing requirements for private parties.<sup>19</sup> Although the standing requirements do

---

1957, arts. 136-160, 298 U.N.T.S. 167 (effective Jan. 1, 1958) [hereinafter cited as EURATOM Treaty].

13. EEC Treaty, *supra* note 2, art. 169.

14. See I.C.J. STAT. art. 34, para. 1.

15. EEC Treaty, *supra* note 2, art. 173.

16. See I.C.J. STAT. art. 34, para. 1.

17. EEC Treaty, *supra* note 2, art. 173.

18. *Id.* art. 184.

19. *Plaumann & Co. v. EEC Comm'n.*, [1963] E. Comm. Ct. J. Rep. 95, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8013. The plaintiff was denied standing to sue

not directly affect the degree of supranationality attained, there may be less resistance to the building of supranational institutions if private parties gain broad rights to challenge any rules promulgated.

Within the traditional relationship between municipal and international courts, municipal courts remain free to interpret and make international law. In an important departure from traditional international law, article 177 requires referral to the Court of Justice of any questions concerning the interpretation of the Treaty, or the validity or interpretation of acts of the institutions, which are in issue in litigation before municipal tribunals. Referral to the Court of Justice is proper only when a decision on a Community law question is necessary for the municipal court to decide the case.<sup>20</sup> Thus, the question must arise in an actual dispute before a national court. Until then, referral to seek an advisory opinion is not proper. Referral is mandatory for municipal courts of last resort and discretionary for lower courts.<sup>21</sup>

The type of integration exemplified by the Court under article 177 may be stronger evidence of the supranational character of the Community than the direct power of the institutions.<sup>22</sup> Municipal courts, with their high degree of independence, must undergo profound adjustments to accept the dictation of critical parts of their opinions in cases that the courts have yet to decide.<sup>23</sup> Jurisdiction of the Court under article 177 may impinge upon the sovereignty and independence of municipal courts to a greater degree than in cases in which the Court has exclusive and original jurisdiction, such as under article 173.

Referral jurisdiction is essential to achieve uniformity in the interpretation of Community law. Lack of uniformity could well lead to Community law being ignored, an occurrence which would

---

as the Commission decision addressed to the German government did not concern the plaintiff directly and individually within the meaning of article 173, para. 2, of EEC Treaty, *supra* note 2. However, the Court rejected the argument of the German government that individuals should never be permitted to challenge Commission decisions addressed to Member States, stating that the letter and grammatical construction of this article justified the broadest interpretation. Cf. Alfred Toepfer KG v. EEC Comm'n, [1965] E. Comm. Ct. J. Rep. 405, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8031 (challenge by a grain importer to a Commission decision directed at German governmental import safeguards allowed).

20. EEC Treaty, *supra* note 2, art. 177.

21. *Id.* art. 177, paras. 2-3.

22. Opsahl, *National Courts and the Community Court under Article 177 of the EEC Treaty*, in FESTSKRIFT TIL FREDE CASTBERG 280, 285 (1963).

23. *Id.*

undermine the viability of the Community. The solution to the problem of the interrelationship between Community law and municipal law depends in large measure upon referral jurisdiction.<sup>24</sup>

Referral jurisdiction is seriously weakened by the fact that the parties themselves are not permitted to invoke jurisdiction of the Court. A question can be referred to the Court only by the national court. Thus, a national court can easily avoid referral by deciding the case on independent municipal law grounds.<sup>25</sup> The Court has also stated that there is no duty to refer a question which has been previously answered by the Court.<sup>26</sup> However, the Court has ruled that referral was proper under these circumstances.<sup>27</sup> These weaknesses undermine the supranational character of the Court, since frequent referrals are essential to afford the Court an opportunity to develop Community law.<sup>28</sup>

In addition, the doctrine of *acte clair*, as developed by the French Conseil d'état, could emasculate referral jurisdiction. Ironically, an advocate general of the Court of Justice first espoused the doctrine by urging the Court to reject referral jurisdiction in a case.<sup>29</sup> Advocate General Lagrange argued that, where the text of the EEC Treaty is perfectly clear, there is no need for interpretation and the national court should simply apply the law.<sup>30</sup> While the Court of Justice did not accept M. Lagrange's conclusion, the French Conseil d'état, in a few cases, adopted the *acte clair* doctrine as grounds for not referring a question to the Court.<sup>31</sup> Fortunately, the doctrine has

24. E. STEIN & P. HAY, LAW AND INSTITUTIONS IN THE ATLANTIC AREA 136, 180 (1967).

25. In the United States, for example, the Supreme Court decided the case on independent, municipal grounds in NAACP v. Alabama, 357 U.S. 449, 455 (1958).

26. N.V. Internationale Crediet- en Handelsvereniging "Rotterdam" v. Minister van Landbouw en Visserij, [1964] E. Comm. Ct. J. Rep. 1, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8021, at 7360.

27. Da Costa en Schaake N.V. v. Nederlandse Belastingadministratie, [1963] E. Comm. Ct. J. Rep. 31, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8010.

28. *Da Costa* involved facts and issues identical to those in N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der belastingen, [1963] E. Comm. Ct. J. Rep. 1, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8008. For this reason the EEC Commission had urged that the referral to the Court of Justice be rejected, but the Court did not follow this suggestion and ruled the referral admissible. This ruling may imply that the Court believes that it is important to give a decision each time a case is referred in order to develop Community law, even though the question itself might have become moot in the national court.

29. [1963] E. Comm. Ct. J. Rep. at 45, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8010, at 7240-45.

30. *Id.*, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH), at 7240-45.

31. Re Societe Des Petroles Shell-Berre, 3 Comm. Mkt. L.R. 462 (Conseil d'état, Fr., 1964) (Conseil d'état refused to refer a question to the Court even though it involved interpretation of a complex treaty provision).

been infrequently applied by the Conseil d'état and other national courts of last resort in the last few years.<sup>32</sup>

The *acte clair* doctrine has the potential to destroy the supranational character of the Court and Community law. Uniform interpretation of the EEC Treaty cannot be achieved if national courts of last resort subscribe to the doctrine. National courts will differ not only as to the EEC Treaty provisions which they regard as clear, but also in the interpretation of such "clear" provisions. Automatic referral of all Community law questions<sup>33</sup> is probably the only remedy for this lack of uniformity.

It might seem that the Court of Justice would be engaging in a useless docket-clogging formality by accepting referral of questions it had previously answered. However, it might be impossible for the Court to change a prior interpretation if answered questions were not occasionally resubmitted for reconsideration. In addition, the Court may answer the resubmitted question differently because of a factual difference that was not regarded as critical by the national court. The Court has avoided clogging its docket with resubmitted questions by summarily reaffirming an earlier answer if it found no reason for a new interpretation.<sup>34</sup>

---

32. The *acte clair* doctrine has been applied by the French Cour de cassation in *State v. Cornet*, 6 Comm. Mkt. L.R. 351 (Cour de cassation, Fr., 1966). Here, the Cour de cassation refused to stay proceedings and to make referral to the Court under article 177, para. 3, upon finding that application of the authority of an interpretation of the provision under consideration by the Court of Justice in an analogous case made clear and left no doubt as to that provision's meaning. The authority of the previous interpretation thus removed all purpose from the obligation to refer. In *Lapeyre v. Administration Des Douanes*, 6 Comm. Mkt. L.R. 362 (Cour de cassation, Fr., 1967), the Cour de cassation held that the Cour d'appel correctly applied a provision of the Treaty which was clear and therefore not liable to interpretation by the Court of Justice. Referral under article 177 was not compulsory for the Cour d'appel because its judgments were subject to appeal under internal law. See note 20 *supra* and accompanying text. The Cour de cassation therefore noted that the lower court's decision was not appealable on failure to refer alone, as this decision was totally within their discretion. Lord Denning, in dicta, indicated the approval of the doctrine of *acte clair* by the British Court of Appeal. *H.P. Bulmer Ltd. v. J. Bollinger S.A.*, [1974] 2 All E.R. 1226 (C.A.) (English court may consider the point is reasonably clear and free from doubt, in which case there is no need to interpret the Treaty but only to apply it). The Italian Corte di cassazione, in *Schiavello v. Nesci*, 16 Comm. Mkt. L.R. 198 (Corte cass., Italy, 1972), applied the doctrine of *acte clair* in refusing referral to the Court of Justice, concluding that no doubt was raised "on the interpretation (on this point) of the Community regulation, which is expressed in perfectly clear wording, which it now remains only to apply in the internal order." *Id.* at 201.

33. See Chevallier, *Note on the Case Soc. des Petroles Shell-Berre*, 3 COMM. MKT. L. REV. 100, 107 (1965).

34. *Da Costa en Schaake N.V. v. Nederlandse Belastingadministratie*, [1963] E. Comm. Ct. J. Rep. 31, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8010.

### B. *Relationship Between Community Law and National Law*

The position of Community law compared with that of national law is an important aspect of the characterization of the Community. For example, a conclusion that Community law enjoys supremacy over national law would attribute constitutional character to Community law and suggest a characterization of the Community as a state. On the other hand, a conclusion that Community law is subordinate to national law would attribute mere statutory force to Community law. Its enforcement would then depend on the national constitutional norms and the Community would be characterized as having international status.<sup>35</sup>

From a legal standpoint, the institutional structure of the Community raises the question of whether the treaties should be interpreted narrowly, as classic international law requires, or treated as constitutional documents and given a broader characterization.<sup>36</sup>

Community law is neither international law nor constitutional law, but rather "a new, third 'legal order' not derivable from, but existing *autonomously* beside, or between, the traditional national and international legal orders."<sup>37</sup> This proposition is basic to a clear interpretation and understanding of Community law and its relationship to national law.

The Court of Justice has declared in several cases that national law and Community law are two separate legal systems.<sup>38</sup> This separation prevents the Court from adjudicating national law issues, therefore restricting the Court to adjudication of Community law. In *Nold KG v. Haute Autorite*<sup>39</sup> the Court refused to review the constitutionality of a decision of the ECSC High Authority under the German Basic Law (constitution). In *Costa v. ENEL*, the Court stated that in contrast to other international treaties the Community treaties created their own legal system.<sup>40</sup> In the recent case of *Internationale Handelsgesellschaft mbH v. Einfuhr- & Vorratstelle für Getreide & Futtermittel*, the German Constitutional Court agreed with the Court of Justice "that Community law is neither a component part of the national legal system nor international law,

35. P. HAY, FEDERALISM AND SUPRANATIONAL ORGANIZATIONS 153 (1966).

36. *Id.* at 101.

37. Dagoglou, *supra* note 8, at 257.

38. *E.g.*, *Nold KG v. Haute Autorité*, [1960] C.J. Comm. E. Rec. 857.

39. *Id.*

40. [1964] E. Comm. Ct. J. Rep. 585, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8023.

but forms an independent system of law flowing from an autonomous legal source . . . ."<sup>41</sup>

In *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse*, the Court of Justice ruled that certain articles of the EEC Treaty produce a direct effect on national law and create individual rights which national courts should enforce.<sup>42</sup> Although the EEC Treaty provided that Community regulations would be directly applicable in Member States, it is silent as to whether or not any Treaty articles are directly applicable.<sup>43</sup> Treaty draftsmen probably assumed that implementing regulations would be needed to carry out treaty objectives in most instances. The Court might have reasoned that since the EEC Treaty makes regulations directly applicable, the treaty articles that lay down definitive rules should also apply since the treaty establishes the highest ranking norms in the Community. Instead, the Court adopted a line of reasoning that lays a stronger foundation for strengthening the supranationality of Community law.

The Court's ruling was premised largely upon its conclusion that the Community constitutes a new legal order, for whose benefit the nations had limited their sovereignty, and that both nations and individuals were subjects of the new legal order. The Court reached this conclusion by expressly recognizing that the functioning of the Common Market, which was the main purpose of the EEC Treaty, directly affected citizens of the Community. This direct effect implies that the EEC Treaty is more than an ordinary international treaty creating only mutual obligations between the nations. The conclusion that a new legal order was created was confirmed by the establishment of Community institutions with certain sovereign rights, referral jurisdiction of the Court, and the collaboration required of nationals in the functioning of the European Parliament.

While *van Gend & Loos* clearly demonstrated that the Court had set out to establish the supremacy of Community law, the Court avoided discussing the interrelationship between Community law and national legal systems, especially the impact of national constitutions on Community law. There was no outright suggestion of the primacy of Community law, which would have been a precarious position given the paucity of materials supporting such a position

41. 14 Comm. Mkt. L.R. 540, 549 (Bundesverfassungsgericht, W. Ger., 1974).

42. [1963] E. Comm. Ct. J. Rep. 1, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8008.

43. EEC Treaty, *supra* note 2, art. 189.

at that time. The Court left to future cases the determination of which articles of the EEC Treaty are directly applicable and which require implementation by Member States.

In subsequent cases, the Court of Justice has ruled that certain Community decisions and directives addressed to Member States also create rights for individuals which must be given effect by national courts.<sup>44</sup> The ECSC and EEC Treaties specifically provide that Community decisions are binding upon the designated parties and that directives are binding as to the desired aim upon the designated Member States, leaving the method of implementation to each state.<sup>45</sup> The Court took an important integrative and supranational step in these cases since the Treaties are silent on the direct applicability of decisions and directives to individuals who are not parties. It would not have been illogical to draw a negative inference as to direct applicability from this silence in light of the specific EEC Treaty provision on the direct applicability of regulations, but the Court refused to do so.<sup>46</sup>

Deciding that certain EEC Treaty articles and Community directives and decisions are directly applicable is an important step in ensuring that Community law is applied uniformly throughout the Community. Permitting individuals to assert such Community rights before national tribunals is less threatening to national sovereignty than the cumbersome procedure of the Commission or a Member State instituting proceedings against a Member State for failing to implement a Community rule<sup>47</sup> with its attendant risk of confrontation. Ruling that such provisions could not be directly applicable would effectively deny a remedy to individuals.

### C. Conflict Between Community Law and National Law

The *sine qua non* of the supranationality of the Court of Justice and Community law is the extent of the supremacy of Community law over conflicting national law. Community law may be in conflict

---

44. Franz Grad v. Finanzamt Traunstein, [1970] C.J. Comm. E. Rec. 825, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8107 (a Council decision and implementing directive prohibiting Member States from cumulating turnover taxes with specific taxes was held to create the right for individuals to invoke these provisions in national courts); S.A.C.E. v. Italian Ministry of Finance, [1970] C.J. Comm. E. Rec. 1213, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8117 (Council decisions and directives obligating Member States to abolish certain administrative changes having effect of custom duties held to create individual rights).

45. EEC Treaty, *supra* note 2, art. 189.

46. See note 44 *supra*.

47. EEC Treaty, *supra* note 2, arts. 169-170.

with either a prior or subsequent national law or with a national constitutional provision. The Court of Justice has been fairly consistent in upholding the binding effect of Community law in the face of conflicting national law, but there is no such uniformity among national courts.

A conflict between a Community regulation,<sup>48</sup> or a directly applicable treaty article, and a rule of national law of an earlier date has not caused any supremacy problems because of the general recognition by the courts of Member States of the rule *lex posterior derogat lege priori* (a later statute removes the effect of a prior conflicting one).<sup>49</sup> Thus, in the event of a conflict with a prior ordinary national law, a national court would apply the Community regulation or directly applicable treaty article.<sup>50</sup>

The primary supremacy problem arises when there is a conflict between a Community regulation or directly applicable treaty article and subsequent national legislation. It is not surprising that the Court of Justice has held the Community law to be binding in this situation, since otherwise the Community could not function effectively.<sup>51</sup>

There is no provision in any of the treaties which specifically grants Community law supremacy over conflicting national law, probably because of the political sensitivity implicit in such an overt concession of sovereignty.<sup>52</sup> Hence, the task of solving the problem was left by default to the Court of Justice. Without any ready-made theory of supremacy, the Court of Justice had to develop the theory on a case-by-case basis in a manner similar to the development of new legal concepts in common law jurisdictions. Its solutions to supremacy problems and formulations of supremacy theories have been influenced by events and forces within the Community, the foremost of which has been national court decisions on the same problem.

---

48. EEC Treaty, *supra* note 2, art. 189.

49. R. LAUWAARS, *LAWFULNESS AND LEGAL FORCE OF COMMUNITY DECISIONS* 14-27 (1973).

50. The transformation theory, inspired by the theory of strict separation of international and national law, does not admit of direct applicability, and therefore requires that a treaty provision can become applicable as national law only if "transformed" by legislative action. Under this view, the Treaty, being ratified by an ordinary law, only acquires the force of an ordinary law which being subsequent in time, is now controlling.

51. See generally Bebr, *How Supreme is Community Law in the National Courts?*, 11 *COMM. MKT. L. REV.* 3 (1974).

52. Welsh, *European Economic Community Law versus United Kingdom Law: A Doctrinal Dilemma*, 53 *TEX. L. REV.* 1032, 1040 (1975).

While numerous theories of supremacy have been advanced,<sup>53</sup> the Court has utilized two diverse approaches in upholding supremacy. The simplest and least provocative approach has been to hold a provision of Community law directly applicable without any discussion of supremacy, which is inherent in the decision.<sup>54</sup> The other approach has been to develop a theory of supremacy from the legal nature of the Community and its autonomous powers, which the Member States created by limiting their own sovereign powers.

An early example of holding a Community rule directly applicable without discussion of a rationale for supremacy is *Humblet v. État Belge*.<sup>55</sup> The Protocol on the Privileges and Immunities of the ECSC<sup>56</sup> provided for an exemption from any tax on the salaries paid to Community officials. The Court of Justice ruled that this provision prohibited a Member State from indirectly taxing this income by considering it in determining the tax rate to be applied to the nonexempt earnings of an official's spouse. The Court declared that it did not have the power to annul the Belgium tax assessment because of the separation of powers between institutions of the Community and Member States. However, the Court pointed out that a Member State was required, under article 86 of the ECSC Treaty, to repeal any act of such state which the Court declares violates Community law. The Court reasoned that this obligation follows from the ECSC Treaty and Protocol which have the force of law in the Member States due to their ratification, which gives them precedence over national law. The theory underlying this flat statement is the continental view that ratification itself creates rights. The supremacy of Community law could have been sustained in this case by applying the rule *lex posterior derogat lege priori*, since the Belgian Income Tax Act of 1948 was enacted prior to the ratification of the Treaty, but the Court did not allude to this point. However, relying upon the rule would merely have postponed the development of a theory of supremacy until a case involving subsequent national legislation arose.

---

53. The Court of Justice and leading commentators on the legal structure of the EEC have cited various reasons for the supremacy of EEC law without labeling any particular theory as decisive: (1) new binding legal order; (2) limitation of competence; (3) transfer of power; (4) reciprocity; (5) principle of uniformity, safeguarding Community goals; (6) specific original nature. A. PARRY & S. HARDY, *EEC LAW* 136 (1973).

54. Bebr, *supra* note 51, at 3-4.

55. [1960] C.J. Comm. E. Rec. 1125. Excerpts from the case are translated in 56 *AM. J. INT'L L.* 540 (1962).

56. ECSC Treaty, *supra* note 1, art. 1161.

Three years later in *van Gend & Loos*, the Court of Justice ruled that certain treaty articles produce a direct effect but chose not to rely upon a flat statement of supremacy.<sup>57</sup> Instead, the Court cautiously reasoned that the Community constituted a new legal order, for whose benefit the members had limited their sovereignty.<sup>58</sup> Nevertheless, the Court stopped short of drawing the logical conclusion that Community law was supreme, even though the Commission had argued this position.

In *Costa v. ENEL* the Italian Constitutional Court, in answering a question referred to it by an Italian Justice of Peace, resolved a conflict between certain EEC Treaty articles and a subsequent national law nationalizing the electric distribution industry in accordance with the principle that the subsequent law prevails.<sup>59</sup> The Constitutional Court only accorded the EEC Treaty the status of ordinary law since it was given effect by ordinary law,<sup>60</sup> a result reached by application of the transformation theory.<sup>61</sup> Thus, the Italian Court regarded Community and national law as having equal status.

*Costa* was also referred to the Court of Justice by the Italian Justice of Peace. The Court of Justice ruled that certain EEC Treaty articles create individual rights and that Member States are prohibited from introducing any new measures contrary to these articles.<sup>62</sup> The Court forcefully asserted the supremacy of Community law, reasoning that Member States had transferred certain powers to the Community and had not merely limited the sovereign rights of states as advanced in the *van Gend & Loos* case. The Court drew further support for the supremacy of the EEC Treaty on grounds that a Member State cannot give preference to its own unilateral and subsequent measures over the new legal order which it accepted on the basis of reciprocity.<sup>63</sup> Additional reasons included

---

57. [1963] E. Comm. Ct. J. Rep. 1, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8008.

58. See note 40 *supra* and accompanying text.

59. 3 Comm. Mkt. L.R. 425 (Corte cost., Italy, 1964).

60. *Id.* at 435.

61. See note 50 *supra*.

62. [1964] E. Comm. Ct. J. Rep. 585, 596-98, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8023, at 7392-93.

63. *Id.*, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH), at 7392-93.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. *Id.* at 593-94, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH), at 7391.

the need for uniformity to advance Community aims, and the fact that the direct effect conferred upon regulations by article 189 would become meaningless if a Member State could deprive it of effectiveness by subsequent legislation. Thus, the Court has basically rejected any effort by a Member State to make a subsequent law prevail over the EEC Treaty.

The Court may have asserted supremacy so forcefully because the Italian Constitutional Court had given national law equal status with Community law, which could destroy uniformity of law within the Community. In addition, the Italian government argued that the Court of Justice should not entertain the question referred by the Italian Justice of Peace since no treaty issue was involved in the case.<sup>64</sup>

In *Wilhelm v. Bundeskartellamt*,<sup>65</sup> the Court of Justice recognized the legitimacy of both Community rules and national law on competition in trade. The basis of this recognition was the Court's finding that Community rules only apply to restrictive agreements which may affect trade between Member States, while national law focuses on the internal effect of such agreements.<sup>66</sup> The Court, citing the conventional basis of the Community as constituting a new legal order, concluded that Community rules must prevail in the event of a conflict, thus emphasizing the necessity of uniformity within the Community. In the event a national decision on an agreement between firms is incompatible with a Commission decision on the same situation, the national authorities are required to respect the effect of the Commission decision.<sup>67</sup> Such a conflict could occur because of a difference between the Commission and national authorities on whether the agreement affected trade between the Member States, or on the effect of the agreement upon competition. Thus, the Commission could in effect overturn a national decision rendered on a specific situation, which is an important supranational power. If the Court of Justice should expand the interpretation of "may affect trade between the Member States,"<sup>68</sup> as the

64. *Id.* at 438, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH), at 7387.

65. [1969] E. Comm. Ct. J. Rep. 1, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8056.

66. *Id.* at 13, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH), at 7866.

67. *Id.* at 14, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH), at 7866. "[C]onflicts between the rules of the Community and national rules . . . must be resolved by applying the principle that Community law takes precedence." *Id.*, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH), at 7866.

68. EEC Treaty, *supra* note 2, art. 85.

interpretation of interstate commerce has been expanded in the United States, Community competition rules could pre-empt virtually all national cartel law.<sup>69</sup> It seems likely that any such trend will develop slowly given the precarious status of the Community.

The most serious threat to the supremacy of Community law occurs when it conflicts with a national constitution. In the landmark case of *Societa Acciaierie San Michele v. High Authority*,<sup>70</sup> the Italian Constitutional Court declared that the ECSC Treaty provisions, vesting exclusive jurisdiction over treaty questions in the Court of Justice, operate totally apart from the sphere of national constitutional law and therefore cannot violate the articles of the Italian Constitution prescribing that the judicial function be exercised by regularly appointed ordinary judges and prohibiting the creation of extraordinary or special judges.

In a significant departure from its approach in *Costa*,<sup>71</sup> the Italian Constitutional Court accepted the concept developed by the Court of Justice in its decision in *Costa* that the Community and national legal systems are separate and distinct.<sup>72</sup> Therefore, the ECSC Treaty provisions are not subject to the Italian Constitution, which is designed to protect the rights of each subject derived from his position within the Italian legal system. However, the Italian Constitutional Court was unwilling to accept the logical conclusion of the separate legal order doctrine that no Community rule was subject to constitutional challenge. According to the Italian Court, certain inviolable human rights, such as the right to judicial redress, would be protected from abuse by the Community. These basic rights derive from the Italian Constitution and the European Convention on Human Rights. As long as these basic human rights are not violated, the Community is free to operate in its own sphere of jurisdiction. While this case concedes greater independence to the Community, it indicates that a Community bill of rights is necessary for the Community to secure more complete independence.

---

69. The Court of Justice has interpreted the phrase to include agreements that are capable of "constituting a threat, either direct or indirect, actual or potential, to freedom of trade between Member States in a manner which might harm the attainment of . . . a single market between States." *Establissemments Consten SARL and Grundig-Verkaufs-GmbH. v. E.E.C. Comm'n*, [1966] E. Comm. Ct. J. Rep. 249, 341, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8046, at 7651.

70. 6 Comm. Mkt. L.R. 160 (Corte cost., Italy, 1967).

71. See notes 59-60 *supra* and accompanying text.

72. See notes 63-65 *supra* and accompanying text.

In its 1974 decision of *Frontini v. Ministero delle Finanze*,<sup>73</sup> the Italian Constitutional Court made another significant departure from its rationale in *Costa* by upholding the constitutionality of the Italian law ratifying the EEC Treaty and its article 189 authorizing the promulgation of Community-wide regulations. Under the rationale adopted by the Italian Constitutional Court in *Costa*, a treaty ratified by municipal law would not rise above that status.<sup>74</sup> In *Frontini*, the Italian Court found a basis for the Italian political decision to execute the treaty in article 11 of the Italian Constitution whereby Italy "agrees, on condition of reciprocity with other States, to the limitations of her sovereignty necessary for an order which is to assure peace and justice among the nations."<sup>75</sup> The Italian Court reasoned that article 11 would be deprived of normative content if a constitutional amendment rather than ordinary law were necessary to implement every limitation on sovereignty. Article 11 was intended to permit Italy to join a supranational community. Thus, the Court recognized the legitimacy of placing limitations on Italian sovereignty in order to facilitate integration of the Community. While the Court regarded the Community and Italian legal systems as separate autonomous legal orders, it conceded a greater role for the Community legal order than it had previously.

In also declaring a constitutional challenge to a Community regulation unfounded, the Italian Constitutional Court clearly recognized the direct applicability of Community regulations to Italian citizens. The Italian Court understood that a state cannot insist on implementing Community regulations through state law, which might change the provisions or make them subject to certain repugnant conditions and, thereby, defeat the goals of uniform application of Community regulations. The Italian Constitutional Court found it difficult to hypothesize even abstractly that a Community regulation could violate the Italian Constitution because the EEC Treaty is limited to economic relations and contains precise guarantees. The possibility of a conflict of Community law with fundamental rights guaranteed by the Italian Constitution was regarded as remote because of the judicial protection afforded by the Court of Justice.

It should be emphasized that the Italian Constitutional Court has not surrendered its obligation to protect fundamental constitu-

---

73. 14 Comm. Mkt. L.R. 372 (Corte cost., Italy, 1974).

74. *Costa v. ENEL*, 3 Comm. Mkt. L.R. 425, 435 (Corte cass., Italy, 1964).

75. E. STEIN & P. HAY, *supra* note 24, at 52. See 14 Comm. Mkt. L.R. at 384.

tional rights of Italian citizens from Community encroachment. However, the Italian Court has clearly indicated that it will exercise great judicial restraint in recognition of the damage that judicial interference could cause to Community programs. The net effect of the *Frontini* decision is to concede greater legitimacy to Community law and greatly reduce the likelihood of the Italian Constitutional Court finding Community law unconstitutional. This decision significantly reduces the possibility of the Italian Constitutional Court challenging the supremacy of Community regulations. Such a result is necessary to the establishment of a new supranational legal order. Although the decision does not explicitly recognize the supremacy of the EEC Treaty, it obviously makes this assumption, because the regulations are based upon Treaty article 189.

In 1970, the Court of Justice, in *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*,<sup>76</sup> also faced the ultimate question of supremacy involving a conflict with a national constitution. Pursuant to article 177 of the EEC Treaty, the Frankfurt Administrative Court (Verwaltungsgericht, W. Ger.) submitted to the Court of Justice questions relating to the validity of Community regulations requiring exporters to make a security deposit with national authorities and providing for forfeiture of the deposit if the agricultural commodities were not exported within the period of the license.<sup>77</sup> The Frankfurt Administrative Court thought that the deposit system was contrary to certain structural principles of the German Basic Law which should be safeguarded in the Community law. Thus, the German Court felt that the supranational law should yield to the principles of the Basic Law.<sup>78</sup> The deposit system was thought to intervene excessively in the freedom of disposition in trade, since the purpose of the regulation could be accomplished by other means having less onerous consequences.

The Court of Justice upheld the binding effect of Community law in spite of national constitutions on two grounds. The first

---

76. [1970] C.J. Comm. E. Rec. 1125, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8126.

77. *Id.* at 1134-35, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH), at 7424 (Council Regulation 120/67, 117 J.O. COMM. EUR. 2269 (1967), on the common organization of the markets in the cereals sector and Commission Regulation 473/67, 204 J.O. COMM. EUR. 16 (1967), on import and export certificates, were the regulations in issue).

78. [1970] C.J. Comm. E. Rec. at 1134-35, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8126, at 7424 (German Administrative Court claimed the regulations were contrary to principles of freedom of action and disposition, economic liberty, and proportionality which follows from articles 2(1) and 14 of the German Basic Law).

ground was the necessity of preventing harm to the unity and efficacy of Community law, which was the same ground emphasized in the *Walt Wilhelm* case<sup>79</sup> to sustain supremacy over ordinary law. The second ground expanded the concept of the autonomy of Community law first developed in the *van Gend & Loos*<sup>80</sup> and *Costa*<sup>81</sup> cases. The Court declared that a claim that Community law impairs basic rights laid down in the constitution of a Member State has no bearing on the legality of Community law.<sup>82</sup> Instead, the proper test is whether the challenged Community law violates a similar basic right which the Court of Justice must protect.<sup>83</sup> The primary source of these fundamental rights is the constitutional principles common to all Member States. Previous decisions held that written Community law constituted a legal order autonomous from that of the Member States. The Court of Justice in *Internationale Handelsgesellschaft*, expanded this concept by creating fundamental rights, which are unwritten but implied in Community law, and then holding that these implied rights also function autonomously from constitutional rights guaranteed by Member States. The logical, but unstated, conclusion derived from this line of reasoning is that there is no reason to refuse to uphold the supremacy of Community law over national constitutions, because fundamental rights are an integral part of Community law.

Cognizant that the treaties lacked a "Bill of Rights," the Court commenced the task of creating one on a case-by-case basis. These rights derive from constitutional principles common to the Member States, just as international tribunals derive general principles of law from rules common to municipal law systems. By elevating basic national constitutional rights to the status of Community law, the Court safeguards these rights at the Community level and reserves for itself the ultimate competence in insuring uniform interpretation and validity.<sup>84</sup> The development of basic individual

79. [1969] E. Comm. Ct. J. Rep. 1, [1967-1970 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8056.

80. [1963] E. Comm. Ct. J. Rep. 1, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8008.

81. [1963] E. Comm. Ct. J. Rep. 31, [1961-1966 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8010.

82. [1970] C.J. Comm. E. Rec. at 1134-35, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8126, at 7424.

83. *Id.*, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH), at 7424. "[T]he recognition of basic rights is one of the general principles of law which the Court of Justice must safeguard." *Id.*, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH), at 7424.

84. Bebr, *supra* note 51, at 6.

rights at the Community level will likely instill greater confidence in the fairness and protection provided by Community law, and thus encourage acquiescence in its supremacy.

The Court of Justice has not yet established an extensive catalog of fundamental rights, but several rights were established even though the Court ruled that they had not been infringed. One of these rights is the principle of proportionality, under which citizens may have an obligation imposed upon them for a public purpose only when it is essential to that purpose.<sup>85</sup> The Court promulgated this right in *Internationale Handelsgesellschaft*, but found that the burden of the deposit and its forfeiture did not violate proportionality because it was not excessive for trade and was a normal consequence of the market system designed to ensure a fair standard of living for farmers and reasonable prices to consumers.<sup>86</sup> In a companion case, the Court of Justice declared that freedom of commerce was a fundamental right, but found that it, too, was not infringed by the deposit system.<sup>87</sup> Clearly the Court has just begun its task of developing fundamental Community rights, but this beginning is critical to sustaining the supranationality of the Community.

The Frankfurt Administrative Court, which had referred the question in the *Internationale Handelsgesellschaft* case to the Court of Justice, refused to accept the idea that the German Basic Law could be overridden by Community law.<sup>88</sup> It concluded that there was no legal foundation for the supremacy of Community law since article 24 of the Basic Law<sup>89</sup> only permitted the Federal legislature,

85. [1970] C.J. Comm. E. Rec. at 1127-28, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8126, at 7419.

86. *Id.* at 1138-40, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH), at 7426.

87. *Einfuhr-und Vorratsselle für Getreide und Futtermittel v. Köster, Berodt & Co.*, [1970] C.J. Comm. E. Rec. 1161, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8127, at 7452.

88. 11 Comm. Mkt. L.R. 177, 181 (Verwaltungsgericht, W. Ger., 1972).

89. Article 24 of the Basic Law of the Federal Republic of Germany is as follows:

(1) The Federation may, by laws, transfer sovereign powers to international institutions.

(2) For the maintenance of peace, the Federation may join a system of mutual collective security; in doing so it will consent to such limitations upon its sovereign powers as will bring about and secure a peaceful and lasting order in Europe and among the nations of the world.

(3) For the settlement of disputes between nations, the Federation will accede to agreements concerning a general, comprehensive and obligatory system of international arbitration.

In pre-war Germany, "state sovereignty" came to be viewed as unitary, indivisible, and inalienable. Therefore, under this prevailing doctrine, it was impossible to transfer any sub-

by ratification of the treaties, to delegate to the Community legislative powers assigned to the legislature by the Basic Law.<sup>90</sup> Thus, the legislature, by ratification of the treaties, could not disclaim basic constitutional rights which were beyond its assigned legislative power.<sup>91</sup>

The Frankfurt Administrative Court also maintained that its position was justified on policy grounds since the supremacy of Community law over any national constitutional provision would leave a constitutional vacuum, due to the absence of a written Community constitution.<sup>92</sup> There would be no legal check on the increasingly expansive Community legislation.<sup>93</sup> A major reason for maintaining the supremacy of national constitutional safeguards is the absence of democratic authorization for the purely executive Community institutions.<sup>94</sup> The German Court quoted a caustic commentator with approval:

Anyone who tears the rigid norm-structure of constitutional law from its hinges with the integration lever of Article 24(1) of the Constitution and sacrifices it on the altar of a Eurocratic economic union will have to bear the responsibility in the end when United Europe has been achieved but the guaranteed form of democratic, constitutional decisionmaking has been gambled away.<sup>95</sup>

However, the Frankfurt Court intimated that it might be willing to concede the supremacy of Community law if there were adequate Community safeguards, including democratic control of the institutions and protection of basic human rights.<sup>96</sup>

Having so expressed its opinion, the Frankfurt Administrative Court submitted the case to the German Constitutional Court (Bundesverfassungsgericht, W. Ger.) for a ruling on whether the Community regulations establishing its security deposit were compatible with the German Basic Law. Rulings of the German Constitutional

---

stantial lawmaking or executive powers inherent in "sovereignty" without impairing this concept of an independent and sovereign state. But, following the war, due to the political and economic needs of Germany for close participation with international organizations, and in view of this doctrine, it was thought necessary to include article 24 as a specific authorization. See E. STEIN & P. HAY, *supra* note 24, at 47-49.

90. 11 Comm. Mkt. L.R. at 184.

91. *Id.*

92. *Id.* at 185.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* "[T]he national fundamental principles must be observed so long as there is no written constitutional law of the Community." *Id.*

Court have the force of law, but the Frankfurt Administrative Court stated that preliminary rulings of the Court of Justice on the compatibility of Community regulations and national constitutions are not binding on national courts.<sup>97</sup>

The Second Senate of the German Constitutional Court began its analysis in the *Internationale Handelsgesellschaft* case<sup>98</sup> by stating that it only required a clarification of the relationship between secondary Community rules and the fundamental rights of the German Basic Law. The German Court declared that there was nothing to support a conclusion that primary Community rules (i.e., Treaty) could be in conflict with the German Basic Law, thereby diplomatically avoiding this issue. The Court's refusal to express an opinion on the relationship between Community law and constitutional provisions *outside* of the catalog of fundamental rights<sup>99</sup> further limited the sweep of the opinion.

The German Constitutional Court accepted the conclusion of the Court of Justice that the Community constitutes an independent legal system<sup>100</sup> without emphasizing the need for uniformity throughout the Community. The German Court characterized the Community as an "inter-State" institution to which Germany could transfer rights under article 24 of the Basic Law, but interpreted this provision in the overall context of the German Constitution so as not to permit the alteration of the basic structure of the Constitution except by amendment. This basic structure cannot be altered even by amendment of the EEC Treaty, even though, below this level, article 24 permits competent Community institutions to make valid and directly applicable laws which German institutions could not make. Article 24 was interpreted rather narrowly as not granting authority to transfer sovereign rights, but only allowing the German legal system to permit law from another source to have direct effect and applicability there.<sup>101</sup>

Since the fundamental constitutional rights are an inalienable characteristic of the Basic Law, article 24 does not permit these rights to be qualified without reservation. As long as the Community lacks a codified bill of rights and a "democratically legitimated parliament directly elected by general suffrage which pos-

---

97. *Id.* at 186.

98. 14 Comm. Mkt. L.R. 540 (Buundesverfassungsgericht, W. Ger., 1974).

99. *Id.* at 548-49.

100. *Id.*

101. *Id.* at 550.

sesses legislative powers” to which the other Community legislative organs are fully responsible, the reservation to article 24 derived by the German Constitutional Court must apply.<sup>102</sup> The German Court recognized that the Court of Justice’s decisions had been favorable to the protection of fundamental rights but maintained that such protection must be of established validity. The German Court intimated that its reservation would be removed if democratic political control and legal certainty in the protection of fundamental rights were achieved by treaty in the process of further integration of the Community. However, it is likely that only an appropriate constitutional amendment to the EEC Treaty can totally remove these reservations.

Thus, in the case of a conflict between Community law and fundamental rights guaranteed by the German Constitution, the latter must prevail. In such a conflict, the German Constitutional Court can rule on the validity of Community law, but it is limited to ruling that the governmental authorities or courts of Germany cannot apply Community law insofar as it conflicts with fundamental constitutional rights.<sup>103</sup> While the Court of Justice considers that it has jurisdiction to protect fundamental rights, the German Constitutional Court refuses to allow the Court of Justice to oust it from its constitutional mandate to protect the fundamental rights of German citizens.

After asserting its exclusive constitutional jurisdiction to protect fundamental constitutional rights, the German Court ruled that the security deposit did not violate the constitutional proportionality principle or the basic freedom of trade and occupation.

The decision of the German Constitutional Court in the *Internationale Handelsgesellschaft* case actually poses a less serious threat to the implementation of Community law than its constitutional reasoning suggests. In the first place, the German Court can find that no fundamental rights were infringed, as it did in this case, and also that only certain provisions of the Community law in question infringe constitutional rights, which would not always seriously damage the effectiveness of Community law. Secondly, the German Constitutional Court will only rule on Community law that is enforced by “state action” of Germany. It regards as “inadmissible” a constitutional action by a German citizen directly against a Community regulation. Many Community programs are implemented

---

102. *Id.* at 551.

103. *Id.* at 552.

directly by Community institutions without involving any governmental authorities of Member States. Of course, the Community institutions may have to resort to the national courts to enforce their program against a recalcitrant party, which would constitute sufficient state action.

The opinion's careful reasoning keeps the door open for the German Court to expand or contract the position taken. The catalog of fundamental constitutional rights has yet to be determined. The ruling could be expanded to include conflicts between Community treaties and fundamental rights of the German Basic Law, but the Constitutional Court may be reluctant to do so because the treaties were ratified by the German government and the result of such a ruling would have a serious impact upon the Community. Refusing to so expand the ruling would offer the German Court the opportunity to find that a conflict involved a treaty provision rather than merely secondary Community law.

However, at one point, the German Constitutional Court states that "[A]rticle 24 of the Constitution . . . nullifies any amendment of the Treaty which would destroy the identity of the valid constitution of the Federal Republic of Germany by encroaching on the structures which go to make it up."<sup>104</sup> This language indicates that the German Court may not be confining itself to conflicts with secondary Community law. However, it is more likely that the language simply means that the structure of the German government and Basic Law cannot be altered by a treaty amendment, and that such alteration may only be accomplished by a constitutional amendment. The rationale of *Societa Acciaierie San Michele*,<sup>105</sup> that national constitutional requirements are irrelevant to Community laws because both have their "respective spheres of operation,"<sup>106</sup> is an attractive alternative to the approach of the German Constitutional Court in *Internationale Handelsgesellschaft*. However, the *Societa Acciaierie San Michele* approach is limited since no action implementing the Community program by Italy was required in that case.

Although the German Constitutional Court presently wants to retain the ultimate power to rule on conflicts, this does not necessarily mean that it will exercise this power frequently to the detriment of the Community. The civil law tradition of the Community and

---

104. *Id.* at 550 (emphasis added).

105. 6 Comm. Mkt. L.R. 160 (Corte cost., Italy, 1967).

106. *Id.* at 170.

the recognized need for further integration makes this unlikely. The strong dissenting opinion in this case may reduce the probability that the majority opinion will be followed in subsequent cases before the Second Senate, or even the First Senate of the German Constitutional Court.<sup>107</sup>

The Court of Justice in the *Internationale Handelsgesellschaft* case adhered to the principle of absolute supremacy of Community law over conflicting national law, including constitutional law.<sup>108</sup> The trend is for the Court to base supremacy upon an "implied power" concept, by which supremacy is implied by the treaty itself and the inherent nature of the Community. The nature of the Community requires uniform application of Community law. Although its procedure of preliminary rulings<sup>109</sup> has given the Court of Justice the opportunity to develop the supremacy rule, the final decision in individual cases is left to the national courts since the Court of Justice has no jurisdiction to decide national cases.

The strongest resistance to the concept of supremacy of Community law over national constitutional law arises in the decisions of the Italian and German Constitutional Courts. This resistance is primarily because the treaties fail to provide expressly for the supremacy of Community law and for a guaranteed bill of rights. The establishment of fundamental rights at the Community level begun by the Court of Justice in *Internationale Handelsgesellschaft* may reduce the incidence of conflict between Community law and the Italian and German Constitutions. However, the German Constitutional Court in *Internationale Handelsgesellschaft* asserted that European Court decisions, "favorable though these have been to fundamental rights," were insufficient to remove the duty of German courts to protect German constitutional rights conflicting with

---

107. See 14 Comm. Mkt. L.R. at 558. The European Commission expressed its great concern with the German Constitutional Court's decision in a letter to the West German Government, alleging that the decision impaired the uniform application of Community law. 8 COMMISSION OF THE EUROPEAN COMMUNITIES, EIGHTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES IN 1974 270 (1975). The Commission could have brought suit against Germany in the Court of Justice for breach of the Community Treaty. EEC Treaty, *supra* note 2, art. 169. It should be noted that if the Court of Justice had sustained the Commission's view, then there would have been an obligation on Germany, as a Member State, to make an internal correction in order to comply with its obligation under the Treaty. EEC Treaty, *supra* note 2, art. 171.

108. [1970] C.J. Comm. E. Rec. 1125, [1971-1973 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 8126.

109. See ECSC Treaty, *supra* note 1, art. 41; EEC Treaty, *supra* note 2, art. 177; EURATOM Treaty, *supra* note 12, art. 150.

Community law.<sup>110</sup> Complete supremacy of Community law requires a written bill of rights affording Member States the opportunity to compare it with their own national guarantees and to know with certainty that application of Community law will not sacrifice any fundamental rights.<sup>111</sup> Without any such major changes, the Italian and German Constitutional Courts will retain ultimate control for some time.<sup>112</sup> Belgium,<sup>113</sup> Luxembourg,<sup>114</sup> and the Netherlands<sup>115</sup> appear to be willing to accept the supremacy of Community law over constitutional law. Most of the national courts have upheld the supremacy of Community law over both prior and subsequent national legislation.<sup>116</sup>

#### IV. CONCLUSION

In the brief span of a quarter of a century, the decisions of the Court of Justice have advanced the supranationality of Community law to a surprising degree. The Court has successfully tread the narrow path between boldness and caution in order to facilitate the acquiescence of national courts. This progress was not accomplished by a single sweeping decision but by a variety of Community-building decisions in different areas. The Court of Justice devised and adhered to the doctrine that the treaties created a new legal order. Adoption of this doctrine helped to make the Court's rulings

110. 14 Comm. Mkt. L.R. at 551.

111. *Id.* at 554.

112. The German Constitutional Court in *Internationale Handelsgesellschaft* intimated that at some future time Community fundamental rights would be codified and Community law supreme. "What is involved is . . . a legal difficulty arising exclusively from the Community's continuing integration process, which is still in flux and which will end with the present transitional phase." *Id.* at 551.

113. The Belgian Constitution makes no provision as to the supremacy of international treaties. However, despite the lack of constitutional provisions, Belgian courts have not hesitated to take a rather favorable stand towards Community law. See *Bebr, supra* note 51, at 9.

114. For a discussion of *Chambre de Metiers v. Pagain*, PAS. LUX XVI 150 (1954), see A. PARRY & S. HARDY, *supra* note 53, at 155 (international treaties take precedence over national legislation).

115. The Netherlands Constitution was revised in 1956 in anticipation of the development of Community law. It provides that the constitutionality of a treaty may not be challenged and that a treaty may pre-empt certain constitutional provisions as well as prior or subsequent national laws. STATUUT NEDS., arts. 60(3), 63, 66 (Neth., 1953, amended 1956).

116. The Court of Appeals of Paris explicitly "recognized that, pursuant to Article 55 of the constitution, international treaties, duly ratified, have a force superior to that of laws and that, therefore, the EEC Treaty prevails even over subsequent national law." *Bebr, supra* note 51, at 16; the Italian Court in an unpublished judgment of December 18, 1973, No. 183, recognized the absolute supremacy of Community regulations. See *Bebr, supra* note 51, at 36.

that Community law is binding on Member States and their citizens palatable to national courts, thus avoiding the necessity for ruling on the primacy of Community law.

Deciding that certain articles of the EEC Treaty are directly applicable was a critical step in ensuring that Community law is applied uniformly throughout the Community. Uniformity is essential to the survival of the Community since the courts of Member States would not be inclined to acquiesce in the binding effect of Community law if it were not applied uniformly. Permitting individuals to assert Community law before national courts greatly enhances the importance of Community law.

The Court of Justice has consistently upheld the binding effect of Community law in the face of both prior and subsequent conflicting national law. These decisions have primarily relied upon a theory of supremacy based upon the legal nature of the Community and its autonomous powers developed by the Court. In *Costa*, the Court of Justice built upon its supremacy theory by reasoning that Member States had transferred certain powers to the Community, thus rejecting the conclusion of the Italian Constitutional Court that Community law and national law were of equal status. The Italian Constitutional Court later retreated and accorded a higher status to Community law in *Frontini*.

The Court of Justice has not had any difficulty in upholding the binding effect of Community law, even in the face of a conflicting national constitutional provision, but the national courts have been more jealous of their prerogative as guardians of their own constitutions. In reversing its earlier approach in *Costa*, the Italian Constitutional Court, in *Societa Acciaierie San Michele*, finally recognized the theory developed by the Court of Justice that the Community and national legal orders were separate and distinct. While the Italian Constitutional Court concluded that the treaty provisions were not subject to the Italian Constitution, it indicated that Community law was not immune from challenge for violation of certain basic constitutional rights. Similarly, the German Constitutional Court, in *Internationale Handelsgesellschaft*, ruled that secondary Community rules must not violate the fundamental rights of German Basic Law. Although the German Court found that the Community regulations in question did not violate the Basic Law, it reserved the right to rule on the validity of Community law. The German Court was concerned about the absence of a Community bill of rights and a democratically elected parliament.

It is quite clear that the national courts are now very reluctant

to declare Community law unconstitutional. However, they may be willing to surrender their remaining jurisdiction only when a Community bill of rights is codified and the European Parliament is democratically elected.<sup>117</sup> Although the latter change is presently being pursued,<sup>118</sup> it seems unlikely that this will satisfy the German Constitutional Court unless the European Parliament is granted greater political power.<sup>119</sup> The Court of Justice in *Internationale Handelsgesellschaft* commenced its task of writing a catalog of pro-

---

117. Members of the European Parliament are presently nominated from national parliaments by their own memberships and according to their own procedures. EEC Treaty, *supra* note 2, art. 138. For a discussion of the selection of members, see Kyle, *The European Parliament*, 28 *WORLD TODAY* 530, 533 (1972).

118. The procedure of appointing members of the European Parliament from the respective national parliaments is only temporary, since the EEC Treaty directed Parliament to draft a proposal for direct universal suffrage in all Member States. EEC Treaty, *supra* note 2, art. 138. At the Community Summit Conference in December, 1975, the heads of government agreed that elections should take place in May or June of 1978, with Britain and Denmark deciding their own dates. 9 COMMISSION OF THE EUROPEAN COMMUNITIES, NINTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES IN 1975 14-15 (1976). See *European Communities*, [1975] *EUR. Y.B.* 555 (Council of Europe).

The Council, under strong threat from Parliament to take the matter to the Court of Justice, met in Brussels on July 12, 1976, to discuss allocation of seats in the directly elected Parliament. The Council decided upon a total of 410 seats, to be allocated as follows: Italy, the United Kingdom, France, and the Federal Republic of Germany, 81 each; the Netherlands, 25; Belgium, 24; Denmark, 16; Ireland, 15; and Luxembourg, 6. Stewart, *Direct Elections to the European Parliament*, 13 *COMM. MKT. L. REV.* 283, 299 (1976). Many members of the European Parliament strongly favor direct elections in the hope that they will reduce the dual mandate problem and ease the administrative inconvenience of varying election dates.

119. The European Parliament possesses such limited powers that its main function is deliberation. See EEC Treaty, *supra* note 2, art. 137. The European Parliament is not a full-fledged parliament, since the European Commission proposes and the EEC Council enacts all significant Community law. Kyle, *supra* note 117, at 533. Rather, European Parliament's main functions are limited to advisory and supervisory powers, which in operation are even less potent than those delineated in the Treaties. This power is sharply limited as the European Parliament has no power of decision and the EEC Council is free to disregard the European Parliament's advice.

The first success in increasing the power of the European Parliament was a Council resolution, *J.O. COMM. EUR.* (No. L 94) 23 (1970), annexed to the Budgetary Treaty of Luxembourg, done April 22, 1970, *J.O. COMM. EUR.* (No. L 94) 19 (1970), granting Parliament limited control of the Community budget. See Kapteyn, *The European Parliament, the Budget and Legislation in the Community*, 9 *COMM. MKT. L. REV.* 386 (1972). The Council additionally adopted joint guidelines in which it recognized the right of Parliament to reject the budget, 18 *O.J. EUR. COMM.* (No. C 89) 1 (1975), and in 1975, Member States signed the Treaty of July 22, 1975, which is subject to ratification, implementing this provision.

However, any major increase in the European Parliament's powers must be by amendment to the treaties. In 1972, the European Council received the Vedel Report detailing a plan for expansion of the European Parliament by elevating the European Parliament to a status equal to that of the Council. See Shlaim, *The Vedel Report and the Reform of the European Parliament*, 27 *PARLIAMENTARY AFF.* 159 (1974).

tected human rights. It remains to be seen whether the German Constitutional Court will be satisfied with anything short of a bill of rights treaty.

The success of the Court of Justice in establishing the supranationality of Community law justifies its labeling as at least an emerging supranational institution, thus giving Community law a constitutional flavor. The important steps of satisfying the bill of rights and European Parliament objections may have to be taken by treaty, steps clearly beyond the control of the Court of Justice. These steps are more of theoretical than of practical concern from the standpoint of the supremacy of Community law, since conflict with a national constitution is rare and can usually be avoided by the courts.