Primacy of Union Law

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Articles Draco I-10[1]

One of the legal cornerstones of 'formal federalism' is the capacity of any rule of EC Law to override any rule, including those of constitutional rank, of the Member States. The primacy doctrine has been introduced by the Court of Justice in *Costa v. ENEL* (1964). It can be read in two ways. In the first place it may be held to imply the *supremacy* of Community law, i.e., the idea that Community law has a higher rank than even the national constitutions and is hierarchically superior to it, as the Court itself sometimes has expressed it (Simmenthal, 1978).[2] This may be called the existential reading. Alternatively, there is a more modest interpretation implying mere practical priority or *precedence*, as in traffic rules. For this practical interpretation there are equally arguments to be found in the Court's case-law: the aims of the EC-treaty cannot be accomplished if domestic law were to prevail over Community law.

In both readings by the ECJ, primacy of Community law is an expression of the autonomy of the European legal order and is, therefore, unconditional.

Member States' courts (and political institutions) have generally accepted the doctrine but not wholly. Both its ultimate foundation in the autonomy of the legal order and its unconditional character have not gone unchallenged. In different Member States these challenges have, however, taken different forms.

In *Britain,* it is Parliament's continuing general commitment to European integration, as expressed primarily in the European Communities Act, which is foundation and condition of the primacy of Community law. This commitment is valid as long as it is not expressly contradicted by another Act of Parlia-

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

[2] At least in the Dutch version, which speaks of *hogere rang* (point 17). The French and the English version respectively speak of *rang de priorité* and *precedence*.

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ment. In *Denmark and Spain,* it is the Constitution that founds the primacy of Community law, which is, consequently, not unconditional either: there is no primacy over the Constitution itself. In *Germany,* the constitutional court subjects primacy to an evolving variety of conditions. Recently, in its decision of 10 June 2004 (2004-296 DC), the French constitutional court, the Conseil constitutionnel, has aligned itself more or less with the notorious position of the German Bundesverfassungsgericht. Confronted with an Act implementing an EC directive, the court, on the basis of Article 88-1 of the French Constitution,[3] stated that the implementation of a directive is a 'constitutional requirement', which can only be overridden by an 'express contrary disposition of the Constitution' (une exigence constitutionnelle à laquelle il ne pourrait être fait obstacle qu'en raison d'une disposition expresse contraire de la Constitution).

Over the years, in all these Member States not only has the primacy of Community law over Acts of Parliament been firmly established, but also the constitutional conditions attached to it have been wearing thin, due to the increasing practical infeasibility of invoking them. This has been corroborated by accommodation and even acknowledgement of specific national sensitivities by the European Court. In this way the domestic constitutional bases of EC legal supremacy, if formally upheld, are being gently trumped by political reality and judicial pragmatism.

The question concluding this paragraph may be phrased thus: what is the concept of primacy laid down in Article I-10?

Apart from this, there are two further questions involved in the analysis of primacy of EU law. First, there is the difference between codification and modification. Second, there is the question as to the effect of Article I-10 in combination with national ratification.

Constitutional codification and modification through a primacy clause

Article I-10 involves both codification and modification of EU law. Assuming that the Member States' law over which Union law claims primacy includes the national constitutions, from the Union point of view and as concerns (present) EC law, it intends a change in the origin of the primacy clause, codifying it as a statutory norm. What is to be the result of this? As to (present) EC law, with its

[3] 'The French Republic participates in the European Communities and the European Union, which, on the basis of the Treaties which erected them, are made up of states who have deliberately chosen to exercise certain of their competences in common'; translation of the author.

creation taken out of the hands of the judiciaries and their pragmatic interaction, the norm may lose some of its flexibility.

A declaration annexed to the Constitution by the IGC states that 'The Conference notes that the provisions of Article I-10(1) reflect existing Court of Justice case-law.' The existing case-law of the Court only covers Community law, not law emanating under the actual second and third pillar. Does the declaration imply that the precedence of Union law is not extended to actual second and third pillar law, even though the pillar structure has vaporised under the Constitution? Certainly not. Such an interpretation does not hold against the unconditional phrasing of the Article. Therefore, by extending precedence to second and third pillar law, Article I-10 is clearly more than codification and involves modification.

Another question arises. There is actually no agreement on the link between primacy and direct effect of Community law. According to some, only rules that have direct effect, i.e., that are sufficiently clear to be applied by a court, have primacy, while according to others primacy is a quality of all Community law. Does Article I-10 decide the issue by not explicitly linking direct effect and primacy? Again, the declaration annexed to the Constitution gives no clue, because it is not clear where the Court of Justice stands on the issue. The question is far from being of academic interest only. For instance, most decisions taken under the Common Foreign and Security Policy have no direct effect. If they nevertheless enjoy primacy, the national courts are obliged to apply them, even against national law. This might seriously affect the sovereignty of the Member States in the conduct of their foreign policy.[4]

Member State constitutional amendment needed? The paradox

An interesting and paradoxical situation arises when the explicit primacy clause requires prior constitutional amendment. This is not always the case. In the United Kingdom, undoubtedly the view will prevail that whatever the Constitutional Treaty says, its provisions can only have force of law and primacy in the Kingdom if incorporated by an Act of Parliament. That is by far the easiest way around the problem.

Other countries do not seem to have the same facility. It seems that the existence in a State of constitutional review of treaties forces the national constitutional authorities to take a position. France, for instance, cannot ratify a Treaty that gives primacy to Union law without changing its Constitution. This means that such countries have to interpret the primacy clause in one of two ways.

[4] Eileen Denza, House of Lords Report, p. 16.

The most far-reaching possibility is for the national authorities to accept primacy unconditionally as an expression of EU supremacy. This is difficult, if not impossible, for national constitutional authorities, as it seems to imply that the national constitution is not any longer the ultimate national norm. Read in this way, Article I-10 would force the Member States to constitutional self-defiance.

If, on the other hand, primacy is interpreted as just meaning pragmatic precedence, not higher ranking, then the national constitutional acceptance is perhaps not problematic. A provision to that effect can be introduced into the constitution. The national constitutions thus remain supreme and can even specify conditions of acceptance. The Dutch constitution contains an example of such a provision: it accords Treaty provisions and decisions of international organisations precedence over all national law, including the Constitution, on condition that they are 'binding on everyone'.

Ultimately, however, such conditions will probably all align themselves to the British single one: short of a country's express political decision to end membership or create square statutory contradiction, EU primacy is accepted unconditionally. Legal logic cannot settle the paradox except by giving way to the ultimate sovereignty of fact.

This need not, however, be seen as a surrender of EC's proud legal doctrine of autonomy or precedence to crude political reality. It is trading in a successful, but somewhat spent, legal doctrine for the practical and political reality which it has helped to establish.

Questions:

1. Does the primacy clause necessitate constitutional amendment?
2. What express constitutional conditions will be attached to primacy in the different Member States?

Literature

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