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Can Treaty Law Be Supreme, Directly Effective, and Autonomous--All at the Same Time?

Richard Stith

Valparaiso University, richard.stith@valpo.edu

J.H.H. Weiler

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CAN TREATY LAW BE SUPREME, DIRECTLY
EFFECTIVE, AND AUTONOMOUS—ALL AT THE
SAME TIME?

(AN EPISTOLARY EXCHANGE)

RICHARD STITH* & J.H.H. WEILER**

INTRODUCTION TO THE CORRESPONDENCE

The European Court of Justice has long insisted that the law emerging from the European Community treaties is supreme over national law, directly effective as to individuals, and autonomous or independent of national constitutions. One of us asserted in a letter to the other, in early 2000, that such tripartite unity is impossible, that one of the three elements must be absent as a matter of logic, without regard to the actual wording of the European treaties. Our ensuing debate by correspondence ended on normative matters concerning the value of national and supranational constitutions. Having been translated and published in Spain in *Dos visiones norteamericanas de la jurisdicción de la Unión Europea*, we present it here for the interest and, we hope, enjoyment of English-speaking students of European law.

One prefatory clarification: The first issue discussed below concerns substantive treaty law, not the frequently discussed question “Who has the right to interpret treaty law?” (the question of judicial *Kompetenz-Kompetenz*). Treaty law may come before a national court, before an inter- or supranational court, or simply into a university classroom. Wherever it appears, we may ask whether it is and/or can be at once supreme, directly effective, and autonomous.

* Professor of Law, Valparaiso University School of Law; richard.stith@valpo.edu.

** University Professor and Jean Monnet Chair, New York University. Director, Global Law School Program, New York University School of Law; weiler@jeanmonnetprogram.org.

January 17, 2000

Professor Joseph H.H. Weiler
Harvard Law School
Cambridge, MA 02138

Dear Professor Weiler:

YOUR CONSTITUTION OF EUROPE is most enjoyable for me and the students in my "European Federalism" course. Thank you for putting it all together.

Yet something seems to me missing in your response to Theodor Schilling. You write as though it were possible for a treaty (or for its authorized interpretator) to be autonomous and directly effective as well as supreme.

In a nutshell, my thesis to the contrary is that European Community law (or any analogous body of law springing originally from the consent of nations) can have *any two* of the following three characteristics, but *not all three*: supremacy, autonomy (meaning that only the treaty and other international sources of law are decisive), and direct effect.

Supremacy plus autonomy go easily together, imposing duties only on states and leaving direct effect dualistically up to domestic constitutional or statutory rules. (This is the old EC Article 169 etc. approach). Autonomy plus direct effect also make sense together, as long as the question of supremacy is decided domestically. And even supremacy and direct effect are unproblematic, as long as autonomy is surrendered in favor of consideration of international and domestic law as a single system. (For example, the European Court of Justice could have responded to Germany's *Solange I*, as the Advocate General once proposed, by taking into account national constitutional law limits on treaty authority before issuing ECJ opinions—thus surrendering the autonomy of EC law.) But there is no logical way that the ECJ can treat EC law as supreme, autonomous, *and* directly effective.

Let me illustrate with an example I developed last summer while lecturing on these matters in Spain. Let us suppose that don Carlos offers to sell the Eiffel Tower to don José for a million pesetas and the latter agrees to the deal. Here we have a contract (analogy to treaty) involving a surrender by don Carlos of something which he probably did not own under

property law (analogy to domestic constitutional law). Assuming that don Carlos does not deliver, how can a court address the problem?

The court can treat contract law as supreme and autonomous (independent of property law). That is, the court can order don Carlos to pay damages, without even inquiring into questions of property law or related reasons for the non-delivery. Or the court can treat contract law as autonomous and directly effective in property law, by declaring that any interest don Carlos may have in the Eiffel Tower now belongs to don José, still without making any inquiries into actual ownership. The court can even treat contract law as supreme and directly effective, finally settling the whole matter, but only if the court gives up the autonomy of contract law and takes into account the original rights (or lack thereof) of don Carlos under property law.

What the Court cannot do is limit itself to contract law (autonomy), declare that contract law binds regardless of property law (supremacy), and also insist on having a direct effect on property law by declaring that don José is now the legal owner of the Eiffel Tower! Yet this is exactly what the ECJ does again and again (e.g., in *Costa v. E.N.E.L.*), claiming supremacy, autonomy, and direct effect over matters that depend originally on domestic constitutional arguments.

What should a Member State, or a high court of a Member State, do when faced with such an order by the ECJ? I think it can do only what don Carlos and don José would have to do if faced with a declaration that don José had become the owner of the Eiffel Tower. Since this result is logically impossible, the court's order can only be interpreted to be the single logically possible directly effective mandate in disguise (i.e., a declaration that all interests formerly held by don Carlos now belong to don José).

In the EC context, domestic constitutional law would trump the ECJ, but not because of some supposed right of "auto-interpretation" of the treaties. Rather, such a response would represent the maximum possible compliance with the ECJ compatible with logic and the rule of law. The national courts can do more than let the ECJ dispose of the limited powers given up in the treaties.

I would be most interested in any thoughts or comments you might have on the above.

Sincerely,

Richard Stith
Professor of Law

February 13, 2000

Professor Richard Stith
School of Law
Valparaiso University
Indiana

Dear Colleague,

Thank you very much for your letter of January 17th. I am on sabbatical this year away from Harvard so that mail sometimes reaches me erratically.

Thank you too for your kind comments. I have thought about them a lot—and inconclusively. The main problem I have is with the notion of autonomy. What exactly does it mean? What are its constitutional implications? In all my work, including my reply to Schilling, I try to avoid using and certainly relying on autonomy as a legal category, though it is used widely, especially in the German literature, simply because I am never sure that I grasp what it means.

If you define autonomy as meaning that only treaty and other international sources are relevant to the resolution of a legal issue, I still do not see why *logically* a system deriving from the consent of States cannot have all three elements. Rather than explain today why I think your hypo is not conclusive (I would be happy to do that in the future) I want to set up my own example for your consideration.

Imagine a Treaty which had the following clauses:

1. The High Contracting Parties agree that all imports into any Treaty member will be classified and valued according to this Treaty and customs duties will be imposed by a schedule annexed to this Treaty. (substantive obligation: common external tariff)
2. Reaffirming the general principles of Public International Law, the High Contracting Parties agree that the provisions of

this Treaty will take precedence over any conflicting norm of a High Contracting Party. (supremacy)

3. So as to ensure the imposition of the same customs in all High Contracting Parties, the provisions of this Treaty, and this Treaty alone, will determine all matters concerning the classification, valuation and imposition of duties of imported goods to the exclusion of any other source of law unless it is recognized in this Treaty as a valid source. (autonomy)

4. The High Contracting Parties also agree that the obligation contained in this Treaty will create rights for individuals which it is the duty of all national courts to apply in accordance with this Treaty (direct effect) including the duty of national courts to abide by the principles of autonomy and supremacy.

5. To remove any doubts the High Contracting Parties declare that it is their express intention that this Treaty create a system that is autonomous, supreme, and produces direct effect. The High Contracting Parties also agree that depositing the act of ratification of this Treaty will constitute certification by a High Contracting Party that all internal obstacles, including constitutional limitations, to the operation of this Treaty have been removed. The Treaty will come into force when all States deposit an act of ratification.

Imagine now that this Treaty has come into force. Why, *logically*, would such a Treaty, based on the consent of States, not be one which is autonomous, supreme, and produces direct effect? Whether the EU treaties are of such a nature is a matter of fact. But you seem to argue that it is not possible *ipso jure* to have such a regime. That I fail to see.

With all good wishes,

Joseph Weiler

p.s. Do you Email?

March 6, 2000

Professor Joseph H.H. Weiler
Harvard Law School
Cambridge MA 02138

Dear Professor Weiler:

Thank you for your fax of February 13, responding at generous length to my letter of January 17 concerning problems related to don Carlos's transfer of the Eiffel Tower.

I'm afraid I'm not convinced. Let me address seriatim the points of view of domestic and of international law (viewpoints that I admittedly mixed together a bit in my earlier letter).

Even a Treaty such as you describe, which is explicitly intended to have supremacy, autonomy, and direct effect, would not have all three of these effects before a domestic tribunal. That tribunal would still depend on domestic law—which means that, whatever the substantive outcome domestically, at least the “autonomy” of the Treaty would drop out in the course of local application.

For example, as you suggest, let us suppose that the Treaty binds all parties to a common external tariff and declares that all internal constitutional obstacles have been overcome. But declaring does not make it so. Perhaps the domestic constitution grants various provinces the right to impose external tariffs. (Perhaps this constitutional provision is even non-amendable.) If so, then no amount of international declaring will make this limit go away, any more than a hundred contractual stipulations can make don Carlos able to sell the Eiffel Tower. *Nemo dat quod non habet*. One can't lift oneself by one's own bootstraps nor jump over one's own shadow, etc.

Perhaps, of course, these limits do not exist, or can be overcome, under domestic law. But my point is that domestic law must at least be consulted. This already makes Treaty law not autonomous, and the conclusion of the consultation may be that the Treaty is not supreme or directly effective either.

As for the international or supranational point of view: Your hypothetical Treaty's certification that “all internal obstacles . . . have been removed” can be read two ways. It can be seen to be an evidentiary declaration concerning domestic law, in which case the autonomy of Treaty law is at least nominally wounded. Moreover, since such a declaration (despite its probative value) has an outside referent, the Treaty is in effect conceding that internal obstacles are possible, which wounds direct effect. (Domestic courts could thus use this very provision to buttress their resistance to the Treaty.)

The second way to understand the no-internal-obstacles provision is merely as a contractual stipulation wholly independent of domestic legal reality, just as don Carlos and don José could stipulate that in all future contractual litigation don Carlos should be irrebuttably presumed to have owned the Eiffel Tower prior to the contract. Autonomy is thus preserved, but direct effect is even more deeply wounded in that, in addition to the Treaty's concession of the possibility of internal obstacles, there is now no evidence at all (not even a certification or declaration) that such obstacles do not exist. A tribunal operating with such blinders must know that it is adjudicating only international rights, not domestic ones, just as a tribunal operating under the above presumption of Eiffel Tower ownership would know that it was not deciding actual ownership.

Permit me to turn from the trees to the forest for a moment. What is at stake here for me is an essential foundation for limited government. Lockean-Jeffersonian political theory ends with limited state sovereignty because it begins with limited individual sovereignty, e.g., the *inalienability* of rights. (Hobbes can end with absolutism because he begins with unlimited liberty.) In the same way, as the *Maastricht* decision makes clear, any hegemonic pretensions of the EU are undercut by the constitutional disabilities of the governments that created it.

Of course, International Law has long irrebuttably presumed sovereignty to be absolute, or at least apparent authority to be actual authority. I have no objection to this presumption as a simplifying prerequisite to a uniform order binding among nations, but only *among* nations. In order to achieve direct domestic effect, the ECJ has treated this possibly counterfactual presumption of absolute domestic sovereignty as a matter of political truth. By a bit of juridical hocus-pocus, it has laid the foundation of a supreme State and jettisoned one of our best hopes for a truly new sort of legal order in the world (motivated, as far as I can tell, largely by an unexamined desire for automatic legal uniformity).

In short, I still contend that when non-absolute, limited governments engage in treaty-making, at least one of the following three characteristics cannot be part of the resulting treaty law: autonomy, supremacy, or direct effect. And it's a good thing, too!

With best regards,

Richard Stith
Professor of Law

P.S. Yes, I do e-mail (Richard.Stith@valpo.edu), but I'm rather slow at typing.

P.P.S. For your convenience, I am also sending you copies of our prior correspondence.

June 11, 2000

Professor Richard Stith
School of Law
Valparaiso University
Indiana

Dear Professor Stith:

Thank you for responding with such clarity and force to my challenge. It may be useful if, following your cue, I first respond to some of the technical issues—the trees so to speak—and then address the forest as a whole.

As regards the technical issues (the fact that they are technical does not make them unimportant. The technical argument is, after all, the poetry of our legal discipline), I think I can now pinpoint where our differences (and perhaps agreements) lie. It is in the passage where you say:

Even a Treaty such as you describe, which is explicitly intended to have supremacy, autonomy, and direct effect, would not have all three of these effects before a domestic tribunal. That tribunal would still depend on domestic law—which means that, whatever the substantive outcome domestically, at least the “autonomy” of the Treaty would drop out in the course of local application.

I agree with you, but I think you prove too much! Yes, internal law would still be depended upon. And from this fact you draw the conclusion that this dependence makes the Treaty law not autonomous. As I indicated in my previous letter, since I am not sure what “autonomy” means in this context, I am willing to agree with this conclusion too. But this is the point where our agreement might end. If the mere fact that

internal law's being consulted eliminates the autonomy of the Treaty, then it would seem to me that no Treaty could ever be autonomous. Because when the internal effects of any Treaty come to be assessed and applied by a domestic tribunal, no matter what the Treaty says (as you cogently argue) a tribunal will always have to depend on domestic law to give effect, even direct effect or supremacy, to an international treaty. But this would be true not only in the case of a Treaty which stipulated, as did the one in my example, supremacy, direct effect, and autonomy, but also in a Treaty which stipulated, let us say, only direct effect and autonomy or only supremacy and autonomy. Also, when deciding on the direct effect of this more restricted treaty, the tribunal will have to depend on domestic law and this, according to your own argument, means that the treaty would no longer be autonomous. Now I understood your original argument to say that a Treaty may have any two of the three attributes (direct effect and autonomy, supremacy and direct effect, supremacy and autonomy) but never all three. But the only reason you offer why "my" hypothetical treaty cannot have all three characteristics is that "[t]hat tribunal would still depend on domestic law—which means that, whatever the substantive outcome domestically, at least the 'autonomy' of the Treaty would drop out in the course of local application." If so then it would seem to me that no treaty can ever be autonomous in the internal legal order of a state, since that dependence on domestic law will always be present by any tribunal applying an international treaty within a domestic legal order.

This conclusion, I want to emphasize, does not strike me as absurd. I can, in fact, see much force in the argument that no treaty is truly autonomous in the internal legal order of a State (though there could be other possible meanings to autonomy, such as when the Treaty exclusively defines the material content of the obligation). What I cannot accept and do not think you have answered is why, if autonomy is possible in a treaty that stipulates only direct effect despite the fact that also in this type of treaty a domestic tribunal will depend on domestic law, it is not possible for such a Treaty to be supreme as well.

In the last paragraphs of your letter you express your broader and normative concerns. I want to address these, too, though I fear I cannot quite do it with the same economy of text which

you have achieved. I apologize for the length of this reflection. I want to say at the outset that I do share your normative concerns. So I am sympathetic to the reasons behind your technical argument, though I still think the argument itself does not hold. I think you would be much more persuasive if you abandoned your current notion which says that any two attributes are possible but never all three, and simply say that autonomy is *never* truly possible so long as law has to be applied by a domestic tribunal which relies for its authority and hermeneutics on a national constitutional order.

As to the normative argument itself, I do not think there has been a more severe critic of the Court of Justice in, for example, its dismal failure to be an effective federal policeman and protect what, in the United States, we would call State Rights. I was not surprised to see Justice Breyer of the US Supreme Court relying on the ECJ in justifying a far reach of federal law in the United States. I have gone so far as suggesting the creation of a new Constitutional Tribunal, composed of sitting judges of the highest Courts in each of the Member States (sitting only ad-hoc so they do not become socialized into a Community ethos) which would decide issues of division of competences between the EU and its Member States and to take that job away from the European Court of Justice!

And yet, I want to explain why, despite our shared concern for limited government, I favor the very special constitutional construct of direct effect and supremacy and why, for the same reason of limited government, I am as suspicious of the totalistic claims of some of the national constitutional courts—such as the German Court in its *Maastricht* decision—as I am of the European Court of Justice.

Modern liberal constitutions are about limitation of power; they do articulate fundamental human rights in the best neo-Kantian tradition; they do reflect a notion of collective identity as a Community of Values which is far less threatening than more organic definitions of collective identity. But, like the moon they, too, have a dark side. Very few constitutionalists, and practically no modern constitutional court, will make an appeal to natural law. Thus their normative authority, from a legal point of view, is mostly positivist and is as deep or shallow as the last constitutional amendment, which in many European countries is much easier than in the USA. The ease with

which we will rally to the defense of the national Constitution has a dark side too. Think of the near sacred nature we give to Constitutions adopted by the morally corrupted societies of the World War II generation. In the new constitutional posture of national courts in which they hold themselves out as defending the core constitutional values of their polity, indeed its very identity, there is not only that huge dose of judicial self-empowerment (which has not always been widely noticed, since the national courts cloak themselves as defending against the Barbarians at the Gate—the ECJ) but also no small measure of arrogance. Human rights is what provokes the most strident rhetoric. But constitutional texts in our different polities are remarkably similar. Defending the constitutional identity of the State and its core values turns out in most cases to be defending some hermeneutic foible adopted by five judges voting against four. The Banana saga is the perfect symbol of this farce. There is also an exquisite irony in a constitutional ethos which in part is motivated by a distaste of older notions of organic identity and yet at the very same time celebrates what is an amazing empowerment of the unique moral identity, wisdom, and, yes, superiority, of the authors of the constitution, the people, and the constitutional demos, when it wears the hat of *pouvoir constituant*.

What is unique about the European architecture is the fact that it demands of the Member States a constitutional discipline, in the concepts of supremacy and direct effect, but demands this without a truly European constitutional foundation, i.e., without a European Constitution to legitimate it, or to put it differently, it demands it without *ever* having constitutional autonomy. (If you and I can agree on this reformulation of your original point, our differences will have vanished).

Direct Effect and Supremacy without Autonomy create the conditions to Europe's most original and foundational principle: the principle of Constitutional Tolerance, since they invite constitutional discipline as a matter of a voluntary act of self-negation by the State. They do not "have" to do it. No autonomy. But they should do it!

Let me explain why.

Europe was built on the ashes of World War II, which witnessed the most horrific alienation of those thought of as

aliens, an alienation which became annihilation. In some respects the European construct was about the prevention of another such carnage: But that's the easy part and it is unlikely ever to happen again in Western Europe, though events in the Balkans remind us that those demons are still within the continent.

More difficult is dealing at a deeper level with the source of these attitudes. In the realm of the social, in the public square, the relationship to the alien is at the core of decency. It is difficult to imagine something normatively more important to the human condition and to our multicultural societies.

There are, it seems to me, two basic human strategies of dealing with the alien and these two strategies have played a decisive role in Western civilisation. One strategy is to remove the boundaries. It is the spirit of "come, be one of us." It is noble since it involves, of course, elimination of prejudice, of the notion that there are boundaries that cannot be eradicated. But the "be one of us," however well intentioned, is often an invitation to the alien to be one of us, by being us. *Vis-à-vis* the alien, it risks robbing him of his identity. *Vis-à-vis* one's self, it may be a subtle manifestation of intolerance. If I cannot tolerate the alien, one way of resolving the dilemma is to make him like me, no longer an alien. This is, of course, infinitely better than the physical annihilation. But it is still a form of dangerous internal and external intolerance.

The alternative strategy is to acknowledge the validity of certain forms of bounded identity but simultaneously to reach across boundaries. We acknowledge and respect difference (and what is special and unique about ourselves as individuals and groups) and yet we reach across differences in recognition of our essential humanity. I never tire of referring to Hermann Cohen (1842-1918), the great neo-Kantian philosopher of religion, in an exquisite modern interpretation of the Mosaic law on this subject which captures its deep meaning in a way which retains its vitality even in today's Ever Closer Union. It can be summarised as follows: The law of shielding the alien from all wrong is of vital significance. The alien was to be protected, not because he was a member of one's family, clan, religious community, or people; but because he was a human being. In the alien, therefore, man discovered the idea of "hu-

manity." What is significant in this are the two elements I have mentioned: on the one hand, the identity of the alien, as such, is maintained. One is not invited to go out and, for example, "save him" by inviting him to be one of you. One is not invited to recast the boundary. On the other hand, despite the boundaries which are maintained, and constitute the I and the Alien, one is commanded to reach over the boundary and love him, in his alienship, as oneself. The alien is accorded human dignity. The soul of the I is tended to not by eliminating the temptation to oppress but by maintaining it and overcoming it.

Europe represents this alternative, civilising strategy of dealing with the "other." This is, more than peace and prosperity, Europe's true soul. The constitutional expression of this strategy is the principle of Constitutional Tolerance and it is encapsulated in that most basic articulation of its meta-political objective in the Preamble to the EC Treaty:

Determined to lay the foundations of an ever closer union among the peoples of Europe.

No matter how close the Union, it is to remain among distinct peoples. An ever closer union could be achieved by an amalgam of distinct peoples into one nation—which is both the ideal and/or the de facto experience of most federal and non-federal states. The rejection by Europe of that One Nation ideal or destiny is usually understood as intended to preserve the rich diversity—cultural and other—of the distinct European peoples as well as to respect their political self-determination. But the European choice has an even deeper spiritual meaning.

An ever closer union is altogether more easy if differences among the components are eliminated, if they come to resemble each other, if they aspire to become one. The more identical the "other"'s identity is to my own, the easier it is for me to identify with him and accept him. It demands less of me to accept another if he is very much like me. It is altogether more difficult to attain an Ever Closer Union if the components of that Union preserve their distinct identities, if they retain their "otherness" vis-à-vis each other, if they do not become One Flesh, politically speaking.

Herein resides the principle of Constitutional Tolerance. Inevitably I define my distinct identity by a boundary which differentiates me from those who are unlike me. My continued existence as a distinct identity depends, ontologically, on that boundary and, psychologically and sociologically, on preserving that sentiment of otherness. The call to bond with those very others in an ever closer union demands an internalisation (individual and societal) of a very high degree of toleration. The Leviticus imperative to love thy neighbour as oneself is so difficult and hence civilising because that neighbour is not like myself. Living Leviticus 23, or Jesus, or, for the secular, the Kantian Categorical Imperative is most meaningful when it is extended to those who are unlike me.

It is in legal terms that the principle of Constitutional Tolerance finds its deepest and most remarkable expression. The European *Courts of Justice*—in Luxembourg and the various Member States—have enjoined us to accept European law as the supreme law of the land. This, despite the fact that at face value this law defies the normal premise of constitutionality. Normally in our polities, we demand constitutional discipline, i.e., accepting the authority of a higher law, only within a polity which understands itself as being constituted of one people, however defined, bound by its own constitution adopted with due regard to democratic and constitutional processes. Demanding constitutional obedience without such a constitution is usually regarded as subjugation. And yet, in the Community, through the doctrines of direct effect and supremacy we subject the European peoples to the discipline of a constitution even though the European polity is composed of distinct peoples that do not share a constitution in the normal sense. It is a remarkable instance of Constitutional Tolerance to accept to be bound by a decision not by “my people” but by a majority among peoples which are precisely not mine—a people, if you wish, of “others.” I compromise my self-determination in this fashion as an expression of this kind of internal (towards myself) and external (towards others) Constitutional Tolerance.

However—there is a big “however” at this point. This, the Union’s most fundamental principle, that of Constitutional Tolerance, becomes a travesty if the norms I follow, if the democratic discipline I obey is not adopted by others, my fellow

European citizens, with whom I do not share the bonds of peoplehood but instead the bonds of a Community of Values and a new civic and political culture of transnational tolerance, but by a technocratic bureaucracy over which I have little control—presided over in the unreachable supranational Olympus of the European Council (and even European Parliament) and within the infranational netherworld of Comitology. A non-democratic Europe extinguishes the principle of Constitutional Tolerance just as a Statal or a One Nation Europe would. And it is an equal travesty if that principle of Constitutional Tolerance does not itself accept limits—beyond which one must not interfere with Member State autonomy.

And that exactly is the weakness of the European Court and some of its national counterparts: their scant regard for, and weak sensibility to, the democratic processes by which the norms which they demand supreme loyalty are enacted, and their veritable contempt for meaningful material constitutional limits. It was evident in the Court's historic decisions such as *Van Gend & Loos* where the Court said:

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. *Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.* (Recital 10, emphasis added)

There is something deeply unsettling to present the European Parliament and the ECOSOC of 1963 as a chamber that can be said to express a meaningful democratic notion of citizen cooperation in governance and justify rendering laws coming out of the Community process obligatory in nature, binding

upon States and individuals “[i]ndependently of the legislation of Member States” (Recital 12).

This original sin of the Court (and its acceptance by national jurisdictions) may have been justified at the time when the international legal nature of the Community was strong and ratification of the Treaty in national parliaments could have been considered as an effective means for democratic legitimacy. But in today’s incredibly complex and wide ranging Community, when national ratification after each IGC is an impossible Take-it-or-Leave-it pact reminiscent of the worst plebiscites in authoritarian regimes and nothing more than a formal act rather than a civic exercise of democracy, the continued indifference of the Court to the weak democratic basis of many of the norms which it upholds—notably in those coming out of the Comitology process—is more than unsettling: it is an act of constitutional abdication. The late Judge Mancini was right: The court assumes that—respectable democracy—which is not there. The same could be said of competences. Is it not telling that in its entire jurisprudence of thousands of decisions, the European Court has not once struck down a Council measure on the ground that it transgressed the jurisdictional limits of the Community and encroached on State Rights?

Somehow I believe we are not all that far away as regards the normative concerns.

With all good wishes,

Joseph Weiler

June 26, 2000

Professor Joseph H.H. Weiler
Harvard Law School
Cambridge MA 02138

Dear Professor Weiler:

Thank you for your gracious and compelling response of June 11th to my letter of March 6th. There is very little in it with which I would disagree.

You put matters well in this formulation:

What is unique about the European architecture is the fact that it demands of the Member States a constitutional discipline, in the concepts of supremacy and direct effect, but . . . it demands it without ever having constitutional autonomy. (If you and I can agree on this reformulation of your original point, our differences will have vanished).

Direct Effect and Supremacy without Autonomy create the conditions to Europe's most original and foundational principle: the principle of Constitutional Tolerance, since they invite constitutional discipline as a matter of a voluntary act of self-negation by the State. They do not "have" to do it. No autonomy. But they should do it!

Perhaps, given the ambiguous nature of the idea of "autonomy," to which you have drawn attention, I may misunderstand you. But I take it that you are pointing to the necessarily open, pluralistic, or even antinomic nature of European Union law, and to the resultant principle of Constitutional Tolerance (constitutional courts' taking one another into account) as the only alternative to what you elsewhere have called Mutually Assured Destruction (MAD). Professor Antonio Carlos Pereira (University of Santiago de Compostela) makes a similar point when he insists that the true "constitution" of Europe is not just the Treaties, nor just the Treaties and the jurisprudence of the ECJ, but all the formative forces at work—including, in particular, the key decisions of the Constitutional Court of Germany—contrary to any claim of "autonomy" for the law of the Treaties.

If my interpretation of your position is correct, I am in basic agreement, even though I might still prefer a different mix of the three terms. More traditional Treaty autonomy along with correspondingly less direct effect or supremacy would be more coherent and therefore perhaps more stable. This, it seems to me, is the less hegemonic (but still successful) approach taken by the European Court of Human Rights.

I also agree that welcoming the alien, holding both to the One and to the Many, is the core tension to be preserved. In a way, the ideal type of such community is the family, where the greatest love between man and woman, or between parents and children, can coexist with a celebration of deep and un-

bridgeable difference. Contrast this with the bonds of sameness we may feel with friends of the same sex and age. But caution: these intrafamily differences are ineradicable, while cultural pluralism needs political and other support in order to survive.

Yet you and I may still disagree on the means to our shared ends. I think EU hegemony—and, beyond that, WTO or the like global hegemony—to be the most pressing concern. Rule by a deracinated judicial or quasi-judicial elite, cut off both from national traditions and from democratic majorities, is the greatest danger. So I rejoice at every sign of resistance, such as the *Solange I* or *Maastricht* decisions.

I do not quarrel with your point that national constitutional courts may also be “totalistic” and harmful. Indeed, some lectures I gave recently in Spain were entitled “The Problem of the Unreasonable High Court” and criticized constitutional courts in general, not just the ECJ. But my solution to the sometimes too great hubris of national courts is to try to make room in the law for regional and other infranational resistance against them, not to discourage their resistance to supranational tribunals.

Perhaps our differences are simply geographic. My main entry into European legal thought has been through Spain, while yours may have been further north. You take quite seriously the claims of *Maastricht* and like decisions and go on, rightly, to point out their shortcomings. In Spain, by contrast, *Maastricht* is hardly taken seriously at all. Prof. Pereira is among the few who escape from a univocal, Kelsenian vision of Europe.

With every good wish,
Richard Stith

Richard Stith
email: Richard.Stith@valpo.edu
Valparaiso University

BIBLIOGRAPHY

Editor's note: At the authors' request and in order to preserve the nature of their dialogue, we have published the above exchange of letters with only minimal editing. For the benefit and convenience of interested readers, we include below a list

of the primary cases and secondary materials to which Professors Stith and Weiler refer.

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