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# THE RELATIVE ROLE OF THE EUROPEAN UNION (EU) NATION STATES VIS A VIS THE EU COMPARED TO THE ROLES OF STATES/PROVINCES IN THE U.S./CANADA VIS A VIS FEDERAL GOVERNMENTS

*Hans Smit\**

## I. INTRODUCTION

When Professor Henry King invited me to address you on the subject stated in the title, he presented me with a wealth of options. After all, the systems chosen for comparison and instruction show a great many similarities as well as dissimilarities, but, after some reflection, I decided that I would focus upon two elements that are not only of great intellectual and political interests, but that have also evoked significant public reaction. They are the institution of judicial review of the constitutionality of legislation and other public acts and the growing necessity of international co-operation in the regulatory field. I will address these in the order stated.

## II. JUDICIAL REVIEW OF LEGISLATIVE AND ADMINISTRATIVE ACTS

In the United States, the Supreme Court, in *Marbury v. Madison*, established early on the supremacy of the Supreme Court in determining the constitutional propriety of governmental acts.<sup>1</sup> Although the Constitution itself, notwithstanding Marshall's protestations to the contrary, did not address the issue, Justice Marshall had little trouble ruling that the Supreme Court was in fact supreme and that it held the ultimate authority to pass upon the constitutionality of governmental conduct. And, as appeared in later decisions, the due process and equal protection clauses and the commerce clause provided ample bases for the Supreme Court's active assumption of its role as ultimate arbiter.

An interesting development occurred when the Supreme Court's supremacy was challenged in the *Breard* case.<sup>2</sup> In that case, a citizen of

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<sup>1</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>2</sup> *Breard v. Greene*, 523 U.S. 371(1998).

Paraguay had been convicted to die by an American court without having had the opportunity to consult, as required by the Vienna Convention on Consular Relations, to which the U.S. was and is a party,<sup>3</sup> with the Paraguayan counsel. Under a provision in the Convention giving it jurisdiction, Venezuela then brought an action against the United States before the International Court of Justice, seeking an injunction (politely called interim measure) enjoining the U.S. from proceeding with the execution until the Court had had an opportunity to consider the merits of the action. At the time, the interim measure was issued; the U.S. Supreme Court was considering an application for a stay of execution. A number of academicians submitted an amicus brief arguing that the Supreme Court was obligated to heed the interim measure and stay the execution. The Supreme Court refused the stay and its decision provoked considerable critical comment. Clearly, the Supreme Court was not about to acknowledge that there was a tribunal more supreme than it.

The developments in the European Union have been both similar and different. Early on, the Court of Justice of the European Communities ruled that it had the final authority to rule upon the propriety of all governmental conduct that was alleged to violate the EC Treaty. And subsequently, it also ruled that constitutional provisions in the member states and decisions by the highest courts of the member states had to give way to the Court of Justice's rulings under Community law. In the course of time, the member states' courts acquiesced in this assertion of judicial supremacy.

The Canadian Supreme court has also exercised the power of constitutional review of governmental action, but, because of the limited construction it has given to the Canadian constitution's commerce clause, it has exercised this power relatively rarely. I will not dwell upon this any further, readily leaving this to the better-instructed speakers at this Conference.

What are the lessons to be drawn from the European and American experience? The first is no doubt that the creation of a single judicial authority with the power to rule in last resort on the propriety of governmental conduct is indispensable to a proper development and functioning of a federal system. Although neither the U.S. Supreme Court, nor the Court of the European Economic Communities, could point to clear expressions of legislative intent to render them the supreme judges, their arrogation of that power has not only been accepted, but is widely recognized as having had a most beneficial effort on the proper development of the federal systems they supervise. Indeed, the role of the European Court has

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<sup>3</sup> 21 U.S. 1.77, T.I.A.S. No. 6820.

been particularly remarkable for at least two reasons: first, its assertion of supreme power has enabled it to become the most effective of all Community institutions in furthering the cause of European integration; and second, it is now well settled that national courts must give way to its authority even to the extent of having the European court rule incompatible with the Treaty provisions of member states' constitutional law. The U.S. Supreme Court has not been willing to recognize the supreme authority of the International Court of Justice. It would be most interesting to have it face the same problems if NAFTA were to develop an institution similar to the European Court. Once economic integration in the Americas is proceeding apace, it may be more difficult for the Supreme Court to hold on to its unqualified self-proclaimed authority. Recently, in *Bush v. Gore*, the U.S. Supreme Court has demonstrated its unwillingness to accept any challenge of its authority by another court. As a variant on Lord Acton's famous saying has it, power is delicious and absolutely power is absolutely delicious. It is difficult for a court that has supreme power and that has been appointed for life to acknowledge and higher authority. But the European example is most interesting. There, the highest member states' courts with members of lifetime tenure (subject to a retirement age) acquiesced in the assertion of superior power by a court of judges serving for only a limited time.

In any event, if the economic integration of the North American Free Trade Agreement (NAFTA) is to proceed apace, it is indispensable that its dispute resolution mechanisms (ad hoc tribunals with varying memberships and varying national majorities) are relinquished and a central judicial authority with supreme power over the compatibility of all governmental conduct with the provisions of the relevant treaty provisions be established. Because of the U.S. Supreme Court's demonstrated reluctance to accepting judicial authority superior to its own, it will undoubtedly be necessary that the relevant treaty text be unambiguous in its bestowal of this power on the American Community's Court. It would then be most interesting to see how the U.S. Supreme court would address the confrontation. No doubt the politicians, the scholars, and the media would have a hey day. But, ultimately, I believe, the Supreme Court would have to give way.

Regardless of the outcome of this peaceful institutional confrontation, there can be no doubt that a single supreme court as the ultimate judicial authority over all questions of American community law would have a most beneficial effect on the effective integration of the economies of the participating American states. The developments in the European Union provide a most striking demonstration of what the effect will be.

### III. CO-ORDINATION OF REGULATORY POLICIES

The drafters of the EU Treaty realized that true economic integration could not be achieved without substantial co-ordination of economic and social policies. They therefore granted the institutions power they deemed adequate for the purpose. In some cases the power granted was legislative power. Thus, in the area of competition law, the EU Council was given the power to implement the Treaty's provisions by legislative measures, which are called regulations. But in most instances, the power granted to the Council is more limited. It has been given the authority to issue directives to the member states specifying the objective to be achieved by appropriate member state measures, but leaving the member states the freedom to chose what measures were most suitable for the purpose. In the course of time, the Council, less than satisfied with the adequacy of the implementing measures devised by the member states, has become more and more specific in specifying how the stated objectives are to be achieved and in many cases incorporated in the directive the precise measures the member states had to take. The European Court added the final step to this development by ruling that sufficiently specific directives could become law directly applicable in the member states and to be applied by member state courts at the instance of those to whom the law purported to grant benefits.

In NAFTA, a similar approach should certainly be welcomed. However, it may not, in the near future, become a reality. This means that the NAFTA member states will continue to pursue their own policies, which will stand in the way of progressive integration. The best next step would therefore appear to be an ever-closer co-ordination of economic and social policies by the regulators in the respective states charged with the implementation of those policies.

The recent failed acquisition of Honeywell by G.E. provides an excellent example of the problems created by insufficient co-ordination. The United States authorities, which could well be regarded as most immediately concerned because the enterprises involved were U.S. enterprises, which conducted their principal businesses in the United States, ruled the proposed acquisition permissible, but the EU authority, concerned about the effects of the proposed merger in the European Union, ruled it forbidden by EU law.

In view of the ever-increasing integration of world trade, ways must be found to reconcile the interests of the states concerned. The appropriate national authorities working together in administering the policies concerned can achieve this. In many cases, a reasonable compromise may be found. But when the policies are divergent, proper co-ordination may take the form of assigning primary jurisdiction to the state with the more direct interest.

This will be particularly appropriate when, as in the Honeywell-G.E. case, the fundamental policies to promote competition are the same, but may differ somewhat in their more particular implementation. In that case, the relative little that the state of subordinate interest must sacrifice to enable a compatible regime of regulation of competition in both states appears worth the price to be paid.

In the absence of legislative directions, it will be up to the regulatory authority of the states involved to establish regimes of proper co-ordination. Regulatory authorities are not known for their energetic pursuant of this goal. But the realities of world trade render it imperative that immediate steps to that be taken. The Honeywell-G.E. case is not an isolated instance. The fact is that anti-competitive conduct, or polluting conduct, or securities fraud may be engaged in my enterprises operating on a bias that transcends national borders and thereby become subject to numerous regulatory schemes for the same conduct. This may be welcome news for the lawyers, but become a nightmare for those operating on an international scale. The international community must seek to produce workable solutions for these kinds of situations. Reasonable regulators, once they make a genuine effort, are quite capable of solving approaches that make sense. It must not be forgotten in this context that regulatory measures may also produce significant private law consequences. An enterprise found to have violated American anti-trust laws can readily count on being faced with a civil class action in the United States. But class actions are generally not known in non-common law countries. It will therefore be of immense importance to determine which authority will be accorded the leading role. If it is the non-common law authority, its decision will have only most limited private law consequences because class actions are not known in such countries and a determination by a foreign regulatory authority is unlikely to be recognized by common law courts are a proper legal basis for a class action brought before them.

The lawyers facing these types of problems must also be aggressive in pursuing reasonable solutions by encouraging national regulations to work together and not to go on their own ways.

In the world of today, regulatory policies must necessarily be given sufficiently expensive effect to cover conduct transgressing national borders. This is increasingly recognized. Truly national regulation and administration will not work. The task must be addressed on the international level. Instituting an international tribunal and a transnational regulatory scheme are indispensable to the proper functioning of the forces controlling world trade. The European Union requires this and so has the United States as far as its own federal system is involved. The next step is for NAFTA to move in this direction. The Institution of an international court and the proper co-

ordination of regulatory policies would prove that the participating states are waking up to the realities of the situation. This may appear to be rather bold steps, but they were equally bold when the European Union came into existence. And making them has helped the European Union to develop as well as it did. The Americas should follow suit.