Michigan Law Review

Volume 63 | Issue 3

1965

Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Case

Eric Stein
University of Michigan Law School

TOWARD SUPREMACY OF TREATY-CONSTITUTION BY JUDICIAL FIAT: ON THE MARGIN OF THE *COSTA* CASE

*Eric Stein**

INCREASED interdependence of states in modern times has shaken the nineteenth century doctrines of extreme dualism and positivism. These doctrines would build an impenetrable wall between the international and national legal orders; they would elevate the state to the position of exclusive actor and deny the individual any standing in the international legal order; and, in the interpretation of a rule of law, they would exclude any regard for the political, economic, and social context in which the rule is applied.

This change is reflected in international law and in its instrumentalities, including treaties. The number of treaties has multiplied greatly. As the role of government in economic life has broadened, states have tended to include in their treaties clauses designed to impose obligations upon and grant rights to not only themselves but also individuals. Again, certain common purposes could not be achieved without common institutions; thus, states have entered into multilateral treaties establishing such institutions for consultation, coordination, and joint action. Many national constitutions have been modernized to allow delegation or transfer of national power to new international institutions.[1] But, as the need for more integrated action increases, states search for new forms of association which, although going beyond the traditional organizational pattern, stop short of the fully integrated system of a federation. The result is a "chiaroscuro" enveloping the basic legal issues such as the hierarchy of treaty law and national law.

The European Community[2] is such a new association—a "person" in international law, distinct from the member states, with a distinct legal order which, however, interacts directly with the legal order of the member states. The treaty whereby the Community

* Professor of Law, University of Michigan.—Ed.

1. For excerpts from European constitutions and references to literature, see STEIN & HAY, CASES AND MATERIALS OF THE LAW AND INSTITUTIONS OF THE ATLANTIC AREA 14-37 (Prelim. ed. 1963). See also Seidl-Hohenveldern, *Transformation or Adoption of International Law into Municipal Law*, 12 INT'L & COMP. L.Q. 88 (1963).

2. For an introduction to the Treaty Establishing the European Economic Community, see 1 AMERICAN ENTERPRISE IN THE EUROPEAN COMMON MARKET: A LEGAL PROFILE 1-99 (Stein & Nicholson ed. 1960).

was established contains no specific clause decreeing supremacy of the Community legal order over the legal orders of the member states; and the judicial power of the Community Court of Justice is substantially more limited than the power of supreme or constitutional courts in contemporary federations.

As statesmen ponder whether the Community should evolve into a federation or a "confederation" in the nature of "Europe des patries" and as scholars dispute whether the Community is an "international" or "supranational" organization, national courts and the Community Court of Justice are faced with an increasing number of cases that demand immediate and concrete answers to specific questions involving the relationship between Community law and national law.[3] Perhaps the most significant of the recent cases is one instituted by Flaminio Costa, a litigious Milanese attorney who carried his opposition to nationalization of electric power in Italy to court and, while thus far unsuccessful in his objective, provided the impulse for two notable judicial pronouncements: *first*, a judgment of the Italian Constitutional Court[4] that wrought consternation among the jurists of the Community in Brussels,[5] led to a formal parliamentary inquiry in the European Parliament in Strasbourg,[6] and sparked a controversy among scholars in Italy; and *second*, a judgment by the Community Court of Justice of constitutional import.[7]

3. Court of Justice of the European Communities, Affaire 6/64, Costa v. E.N.E.L., Conclusions de M. l'Avocat général Maurice Lagrange, June 25, 1964, at 5 (adv. mimeo. French transl.).

All translations into English in this article are this author's own, except where otherwise indicated and except also the translations of the provisions of the Treaty Establishing the European Economic Community which follow the unofficial English version published by the Publishing Services of the European Communities 8012/5/XII/ 1961/5.

4. Corte costituzionale, March 7, 1964, n.14, Giur. ital. 1964, I, 1 at 516-19, 522-39; and Foro it. 1964, I, at 465-78, with a strongly critical note by Catalano, *ibid.;* Sentenze e ordinanze della Corte costituzionale 1964, at 82; also Giust. civ. 1964, III, 100-07 with notes by F.B.; PIOLA-CASELLI, *Verhältniss des EWG-Vertrages zum nationalen Recht*, AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 219 (1964) (also critical); Migliazza, *La nazionalizzazione dell'energia elettrica e il diritto delle Communità Europee*, Foro pad. 1964, IV, at 18; Foro pad. 1964, IV, at 10. For a comment written from the viewpoint of German law, see Frowein, *Zum Verhältniss zwischen dem EWG-Recht und nationalem Recht aus der Sicht des Gerichtshofes der Europäischen Gemeinschaften*, AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-BERATERS 233 (1964).

5. The executive Commission of the Community informed the court of its "strong apprehension." Avocat gén. Lagrange, *supra* note 3, at 12. M. Lagrange himself speaks of "disastrous consequences." *Id.* at 10.

6. Question écrite no. 27, Journal Officiel des Communautés Européennes 2161/64, Aug. 11, 1964.

7. Affaire 6/64, Costa v. E.N.E.L. (Ente nazionale energia elettrica impresa già della Edison Volta), July 15, 1964 (adv. mimeo. French transl.). For an unofficial English translation, see CCH COMMON MARKET REP. CT. DEC. ¶ 8023 (1964) (with Conclusions

I. Signor Costa Goes to Court

It all started with Mr. Costa's refusal to pay his electricity bill in the amount of 1,925 lire (3.08 dollars) to E.N.E.L.,[8] the newly created governmental body that took over the Milan electric power system from a private concern by virtue of the 1962 nationalization law and implementing regulations.[9] In an action brought before the Justice of the Peace (Giudice Conciliatore) of Milan, Costa, in his capacity as a consumer of electric power and as a shareholder in the nationalized concern, claimed that E.N.E.L. was not entitled to collect the bill because the nationalization law was contrary to the Italian Constitution, enumerating the following provisions: the constitutional prohibition against parliamentarians voting in pursuance of a mandate, the prerequisites for a valid expropriation, and the "equal protection clause." In addition, he invoked article 11 of the Constitution, which provides as follows:

> "Italy renounces war as an instrument of offense to the liberty of other peoples or as a means of settlement of international disputes, and, on conditions of equality with the other states, agrees to the limitations of her sovereignty necessary to an organization which will assure peace and justice among nations, and promotes and encourages international organizations constituted for this purpose."[10]

It was Costa's contention that the nationalization law contravened several specific provisions of the Treaty Establishing the European Economic Community; that the Community was precisely the type of international organization contemplated in article 11; that, by adhering to the Community treaty, Italy had agreed to limit its sovereignty in matters embraced by the treaty; and that, since the nationalization law infringed this limitation, which was sanctioned by the Constitution, the law was unconstitutional and therefore must be held invalid.[11] On the basis of this argument, Costa demanded that the Milan court obtain a ruling on the issue of constitutionality from the Constitutional Court of the Republic, which alone had jurisdiction to determine constitutional issues. Moreover, Costa argued, whether there was a Community treaty violation de-

of Advocate General Maurice Lagrange, of June 25, 1964). For a comment, see Frowein, *supra* note 4; Gori, *La preminenza del diritto della Communità Europea sul diritto degli stati membri*, Giur. ital. 1964, I, at 1073.

8. Ente nazionale energia elettrica impresa già della Edison Volta.

9. Law of Dec. 6, 1962, n.1643, Gaz. uff. n.316, Dec. 12, 1962, Leggi e decreti 1962, n.1643, at 5523, and subsequent decrees of the President of the Republic.

10. Translation in 2 Peaslee, Constitutions of Nations 275, at 280 (2d ed. 1956).

11. Corte costituzionale, March 7, 1964, n.14, *supra* note 4.

pended upon an interpretation of that treaty; and, under article 177 of the same treaty, only the Community Court of Justice may give an authoritative interpretation of its provisions when such a question arises in a proceeding before a national court; in such event, a national court of last resort is obligated to suspend the proceeding and refer the question of interpretation of the treaty provisions for "preliminary decision" to the Community Court.[12]

By an order of September 10, 1963, the Justice of the Peace of Milan obliged Mr. Costa and referred the "preliminary" or "prejudicial" question of constitutionality to the Constitutional Court in Rome.[13] Thus, the stage was set for the first judicial decision in the case.

II. The Holding of the Italian Constitutional Court

The Constitutional Court rendered its judgment on March 7, 1964.[14] It apparently had no difficulty in rejecting the allegations of unconstitutionality, except that it had to deal with article 11 for the

12. Art. 177 provides in full:

"The Court of Justice shall be competent to make a preliminary decision concerning:

"(a) the interpretation of this Treaty;

"(b) the validity and interpretation of acts of the institutions of the Community; and

"(c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

"Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

"Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice."

For an analysis of article 177, see Bebr, Judicial Control of the European Communities 179 (1962); Bebr, *The Relationship Between Community Law and the Law of the Member States*, in Restrictive Practices, etc., Supp. to the July 1962 Int'l & Comp. L.Q. at 1. Also Donner, *National Law and the Case Law of the Court of Justice of the European Communities*, 1 Common Market L. Rev. 8, 11 (1963); Lagrange, *Les actions en justice dans le régime des Communautés européennes*, 10 Soc. Ec. Wet. 81, 99 (1962).

13. Giudice conciliatore di Milano, Ordinanza Sept. 10, 1963, Foro it. 1963, I, at 2368. A court is required to transfer the record to the Constitutional Court when two conditions are present: first, that "upon summary examination, the issues prove not to be manifestly unfounded; the second that it be in the nature of a 'prejudicial' question, which in the instant case means that the lawsuit cannot be adjudged without recourse to the challenged law." Cassandro, *The Constitutional Court of Italy*, 8 Am. J. Comp. L. 1, 6 (1959). There is no appeal to a higher court from a judgment of an Italian Justice of the Peace. It has been suggested that in order to be able to decide whether the charge of violation of article 11 (and the Community treaty) was "manifestly unfounded" the Milan judge was required to interpret the treaty and therefore should have first requested such interpretation from the Community Court before he could refer this particular issue to the Constitutional Court. Stendardi, *Discrezionalità ed opportunità del giudice di merito nella remissione di una questione pregiudiziale alla Corte di giustizia delle Communità Europee*, Temi 1181 (1963).

14. Note 4 *supra*.

first time.[15] The court interpreted that article as enabling the Italian Republic, with a view to the purposes specified therein, to adhere to treaties that limit its sovereignty upon approval given in the form of an ordinary (as distinguished from a constitutional) law.[16] But, the court held that this ordinary law (and thus any treaty provision that was thereby incorporated into the Italian legal order) may be modified by any other ordinary law of parliament even though the adoption of the modifying law would make Italy internationally liable for treaty violation. "There is no doubt," the court said, "that the state must honor its obligations or that the treaty possesses the effect given to it by the law which approved it. But since the *imperium* of laws subsequent in time to that law must be maintained any possible conflict between the two cannot raise questions of constitutionality." Because of this conclusion, the court declared it unnecessary to deal with the "nature" of the Community, or with the allegation that the nationalization law violated the Community treaty, or with the suggestion that the Community Court must be asked to interpret the treaty provisions concerned.[17]

In earlier cases the Constitutional Court had similarly refused to interpret article 10 of the Constitution, which provides that "the Italian legal order conforms to the generally recognized principles of international law," as encompassing treaty law and requiring that treaty law be given supremacy over subsequent ordinary law.[18] Com-

15. Catalano, *supra* note 4, at 465.

16. The court did not accept the interpretation that article 11 had no normative content but constituted solely an expression of the direction of foreign policy. For the opposite view, see BALLADORE PALLIERI, DIRITTO COSTITUZIONALE 344-45 (1950) and *id.* at 409-10 (1963).

17. Giur. ital., *supra* note 4, at 538-39. It could perhaps be said that by implication the Court rejected the argument urged upon it by E.N.E.L. and the Avvocatura dello Stato that article 11 applies only to organizations concerned directly with peace and justice such as the United Nations, which the Constitution makers clearly had in mind, and found instead that it extended also to bodies such as the Community. Argument by E.N.E.L. and by Avvocatura dello Stato in Giur. ital., *supra* note 4, at 532-33. The Tribunale di Napoli rejected this argument with respect to the European Coal and Steel Community Treaty. Sent. April 22, 1964, Foro it. 1964, I, at 1253, 1255. See also Pretura di Roma, Ordinanza March 11, 1964, Foro it. I, at 866, 868. The two judgments rejected attacks against the constitutionality of the European Coal and Steel Community Treaty. The legislative history of the Constitution seems to indicate that European organizations such as the Community were intended to be included within art. 11. FALZONE, PALERMO & COSENTINO, LA COSTITUZIONE DELLA REPUBBLICA ITALIANA 43 (1948). The press reports a most recent judgment of the civil court of Milan also dealing with the European Coal and Steel Community Treaty. *Europe*, CECA, No. 3313, item 17748, Oct. 9, 1964.

18. Corte costituzionale, May 18, 1960, n.32, Giur. ital. 1960, I, at 1, 1073; *id.*, March 11, 1961, n.1, Giur. ital. 1961, I, at 861. The court's position is supported by Pizzorusso in Giur. ital. 1961, I, at 866-69, but the general position is opposed by QUADRI, DIRITTO INTERNAZIONALE PUBBLICO 47 (1949) and *id.* at 63 (1960), and Cansacchi in Giur. ital. 1960, I, at 1075. But see Miele, *L'esecuzione nell'ordina-*

ing, as it did, after this interpretation of article 10, the ruling in the *Costa* case seems to have closed another avenue that might lead to recognition in Italian law of the treaty supremacy principle with respect to any treaty, including the Community treaty.

This ruling of the Constitutional Court might have marked the end of the story in the Italian legal order. This would have been the case had the court of Milan obeyed the Constitutional Court and decided the case accordingly without, in the meantime, submitting the matter to the Community Court of Justice. Without such a submission it would have been for the executive Commission of the Community to consider whether Italy, through the failure of its courts to abide by article 177, had violated its Community treaty obligation and should, therefore, be brought before the Community Court.[19] However, the Commission was spared this task since, even before the Constitutional Court had spoken, the same court of Milan in January 1964 issued a further order in which it noted Costa's allegation of the violation of the Community treaty, suspended the proceeding in Milan, and directed transmission of the record to the Community Court of Justice.[20] As a "small claims" court from which there was no appeal, the Milan court apparently felt obligated according to article 177 to request also a preliminary ruling from the Community Court on the treaty issue.

III. The Treaty-Law Conflict Before the Community Court

A. *The Van Gend Case: A New Concept*

The Community Court accepted the reference from Milan despite strenuous opposition to its jurisdiction by the Italian government and rendered its judgment on the preliminary question of

---

mento italiano degli atti internazionali istitutivi della Comunità economica europea e Euratom, in 3 Raccolta di Scritti in Onore di A. C. Jemolo 425, 436 (1963) and Miele, La Costituzione Italiana e il Diritto Internazionale 21 (1951).

19. See arts. 169, 170 of the Community treaty, *infra* notes 26 & 27. The Avvocatura dello Stato argued that the Constitutional Court could not "submit the case to an international court" because the Constitutional Court "cannot be placed within the framework of national judicial organs." Giur. ital., *supra* note 4, at 533. Catalano seems to reach the same conclusion, Foro it. 1963, IV, 67. See also 1 Common Market L. Rev. 318 (1963). On the obligation of other Italian courts to refer questions to the Community Court, see Catalano, in Foro it. 1964, V, at 22-24.

20. Giudice conciliatore di Milano, Ordinanza Jan. 21, 1964, Foro it. 1964, I, at 460. In this ordinanza the court also referred to the Constitutional Court the allegations that the nationalization law violated still other articles of the Constitution that were not mentioned in the ordinanza of Sept. 10, 1963, *supra* note 13.

treaty interpretation on July 15, 1964.[21] This judgment, however, must be read in conjunction with the opinion of the same court in an earlier case that dealt with an essentially identical legal issue. In that case, a Dutch importer of German chemicals sued in a Dutch court to recover from his government customs duties imposed upon him under a Dutch law,[22] adopted *after* the Community treaty went into effect, which he claimed had increased the level of customs duties in contravention of an article in the Community treaty prohibiting any increase. The defendant Dutch Government claimed that this article imposed obligations on member governments only: neither its text nor the intent of the parties to the treaty permitted an interpretation to the effect that an individual could acquire from that article a treaty right that he could press in a national court.[23] The Dutch court referred the "preliminary question" of treaty interpretation to the Community Court, which held—disregarding the views of the Dutch, Belgian, and German governments and of its own Advocate General, and responding instead to the observations submitted by the Community Commission—that the treaty article in question did indeed create an immediate right in any individual in the Community (such as the Dutch importer) to seek relief in national courts in case of the violation of the prohibition.[24]

The Community Court reasoned that, in order to determine "whether a provision of an international treaty" did create such a right, one must consider "its spirit, its structure (*économie*), and its wording." The Community treaty is "more than a treaty imposing mutual obligations upon the contracting governments only"; the objective was to create a Common Market directly concerning the people who as individuals are directly affected by the working of the institutions, are called upon to participate as individuals in the European Parliament and the Economic and Social Committee, and possess the right in national courts to rely directly upon Community

21. Affaire 6/64, Costa v. E.N.E.L. (Ente nazionale energia elettrica impressa già della Edison Volta), July 15, 1964 (adv. mimeo., French transl.).

22. The new duties were included in the Tarifbesluit (Tariff Ordinance) of March 1, 1960, which repeated the nomenclature of the protocol of July 25, 1958, concluded by Belgium, Luxembourg, and The Netherlands and approved by the law of December 16, 1959. The Community Treaty became effective on Jan. 1, 1958. Recueil, *infra* note 24, at 9-10.

23. The article in question (art. 12) provides: "Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other."

24. Affaire 26/62, la société N.V. Algemene Transporten Expeditie Onderneming van Gend & Loos c. l'administration fiscale néerlandaise, Feb. 5, 1963, II (1) Recueil de la Jurisprudence de la Cour 1 (1963). For an unofficial English translation, see CCH COMMON MARKET REP. CT. DEC. ¶ 8008 (1963).

law as interpreted ultimately by the Community Court. The Court held:

> "The Community constitutes a new legal order of international law for the benefit of which states have restricted their sovereign power in specified limited areas and whose subjects are not only the member states but their nationals as well. Thus Community law which is independent of the legislation of the member states, while imposing obligations upon individuals also creates rights which become part of their legal patrimony (*patrimoine juridique*). Such rights arise not only when they are explicitly stated in the treaty, but also through obligations which the treaty imposes in a definite manner not only upon individuals but also upon member states and Community institutions."[25]

The fact, the Court added, that the member states and the Commission have the authority to institute a proceeding for bringing a treaty violation before the Community Court under articles 169[26] and 170[27] does not mean that individuals whose rights were impaired by the same violation could not pursue national remedies for the violation in national courts. Their right to do so is an added guarantee against treaty violations.

In this broad, novel context the court found that the article in question, having laid down a clear and unconditional prohibition against raising tariffs that "by its very nature lends itself perfectly" to producing a direct effect upon persons without any need for legislation by member states, must be interpreted as *"having direct effect and giving rise to individual rights which the national courts must vindicate," regardless of the fact that it designates the states* as subjects of the obligation.[28]

25. Recueil de la Jurisprudence, *supra* note 24, at 23.

26. "If the Commission considers that a Member State has failed to fulfill any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments.

"If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice."

27. "Any Member State which considers that another Member State has failed to fulfill any of its obligations under this Treaty may refer the matter to the Court of Justice.

"Before a Member State institutes, against another Member State, proceedings relating to an alleged infringement of the obligations under this Treaty, it shall refer the matter to the Commission.

"The Commission shall give a reasoned opinion after the States concerned have been required to submit their comments in written and oral pleadings.

"If the Commission, within a period of three months after the date of reference of the matter to it, has not given an opinion, reference to the Court of Justice shall not thereby be prevented."

28. Recueil de la Jurisprudence, *supra* note 24, at 23-25. This case has received extensive attention in legal periodicals, *e.g.*, Bülow, *Zur unmittelbaren Wirkung von Stillhalteverpflichtungen im EWG-Vertrag*, AUSSENWIRTSCHAFTSDIENST DES BETRIEBS-

However, this is as far as the Court was prepared to go. Although it spoke of Community law "which is independent of the laws of the member states" and of treaty rights of individuals which "national courts must vindicate," the Court failed to specify that these rights must prevail over conflicting national legislation. The Court was not to take this next step until two years later in the Costa affair, and then only after the Italian Constitutional Court had given its opinion in the same matter.

B. *The Next Step: The Costa Judgment*

When the request for a "preliminary decision" in the *Costa* case reached the Community Court in 1964, that court was doubtlessly cognizant of the ruling by the Italian Constitutional Court in the same case. This ruling caused concern in Community circles, not necessarily because of any belief that the nationalization law in fact violated the Community treaty, but rather because of the holding of the Italian Constitutional Court that the Milan court must disregard a treaty right if it conflicts with a subsequent national law.

Faced with this challenge to the supremacy of Community law, the Community Court started from the basic concept formulated in the *Van Gend* case that, "*unlike ordinary international treaties,*" the Community treaty established a distinct legal order. That order, the court said in developing this concept further, "has been integrated with the legal orders of member states" and their courts are bound by it:

> "In effect, by establishing the Community of unlimited duration possessing its own institutions, personality, legal capacity, capacity of international representation and more particularly effective powers derived from *a limitation of the authority of states* members of the Community *or from the transfer of their powers, these states have curtailed their sovereign*

BERATERS 162 (1963); Gori, *Una pietra miliare nell'affermazione del diritto europeo,* Giur. it. 1963, IV, at 49; Hay, *Federal Jurisdiction of the Common Market Court,* 12 AM. J. COMP. L. 21, 36 (1963); Jeantet, *Observations,* JURISCLASS. PER. 1963, II, at 13177; Riesenfeld & Buxbaum, *N.V. Algemene Transport, etc.,* 58 AM. J. INT'L L. 152 (1964); Rigaux, *Observations,* 1963 JOURNAL DES TRIBUNAUX 190; Robert, *Sur une égalité de droits devant la C.e.e. des ressortissants des États membres avec ces États eux-mêmes,* REC. SIREY 1963, Chron. 29; Rodière, *L'art. 177 du Traité de Rome, etc.,* Foro it. 1964, V, at 1, 4; Ronzitti, Foro it. 1964, IV, at 98; Rousseau, Note, 1963 REV. GÉN. DE DROIT INT. PUB. 421; "Sk." [Samkalden], Comment, 11 SOC. EC. WET. 227 (1963).

On the *Van Gend* case and the problem generally, see six separate reports prepared for the *Second International Colloque of European Law* published for the Association of European Jurists, Paris, by N. V. Uitgeversmaatschappij W. E. J. Tjeenk Willink Zwolle under the title *Le problème de l'applicabilité directe et immédiate des normes des traités instituant les Communautés Européennes,* Rapporteurs: Catalano et Monaco (Italy); Jacomet (France); Ter Kuile (The Netherlands); Ophüls (Germany); Rigaux (Belgium); Rapporteur Général Erades.

> *rights,* albeit in limited areas and thus created a body of law which applies to their nationals and to themselves as well.
>
> "The integration of Community law with the law of each member state, and more generally the letter and spirit of the treaty make it impossible, as a corollary effect, for the states to *accord superiority* to a *subsequent unilateral measure over a legal order which was accepted on the basis of reciprocity.*"[29]

Since the Court was unable to point to a specific "supremacy" provision in the treaty it had to rely on general provisions in addition to the basic concept. To tolerate interference with the direct effect of Community law by member states would, the court reasoned, jeopardize compliance with their treaty obligation "to abstain from any measures likely to impair the attainment of the treaty objectives" (Art. 5(2)), bring about discrimination on grounds of nationality which the treaty prohibits (Art. 7), and render treaty obligations contingent rather than unconditional. The treaty expressly specifies the instances, the court proceeded, when a member state may act unilaterally and when it must request authorization. These provisions and the provision that makes regulations issued by Community institutions "directly applicable in all member states"[30] would be meaningless if a member could defeat its obligations simply by enacting a contrary national law.

These factors, taken together, led the court to conclude that the law "born of the treaty" and "issuing from an independent source" cannot, because of its "specific, original character," be defeated in a national court by any "provision of national law without jeopardizing the legal base of the Community itself." The transfer of certain rights and obligations from the legal orders of the member states to the legal order of the Community has brought about a definitive limitation of sovereign rights, and this limitation is immune from a subsequent unilateral act. Thus, if, as in the *Costa* case, a party to a litigation in a national court relies on a treaty right and it is necessary to interpret the treaty to determine whether such right exists, article 177 must be applied and the Community Court must be asked to render the interpretation regardless of any national law that may have been enacted subsequently to the treaty purporting to modify it.

---

29. P. 11 of the mimeographed text. (Emphasis added.)

30. Art. 189 provides: ". . . Regulations shall have a general application. They shall be binding in every respect and directly applicable in each Member State. . . ."

Art. 191 provides: "The regulations shall be published in the Official Gazette of the Community. They shall enter into force on the date fixed in them or, failing this, on the twentieth day following their publication. . . ."

The court nevertheless recognized the limits of its judicial power derived from the allocation of jurisdiction between it and the national courts under article 177: the Community Court, on reference from the Milan court, could only *interpret* the treaty provisions "taking account of the legally relevant data set forth by the [court of Milan]," but it could not declare a specific Italian law void as contrary to treaty law.[31] This function under the treaty was reserved to the Italian court.

Having reached these general conclusions, the court proceeded to examine the treaty provisions that Costa, in his action in Milan, alleged were violated by the Italian nationalization law. In the pattern set by the *Van Gend* case, the court interpreted these provisions in order to determine whether they created rights upon which individuals like Costa could rely in national courts. Of the four provisions invoked, the court interpreted two (article 53 and a section of article 37) as creating such rights, while the remaining two (articles 102 and 93(1)) the court viewed as imposing obligations on states only and not as benefiting individuals directly.[32] The

31. P. 10. The court noted on the same page that under article 177 it may render an interpretation of a treaty in a "preliminary decision" but "it cannot apply the treaty to a specific case nor pass upon the validity of an internal measure under the treaty as it could do within the framework of art. 169." In the first case under article 177, the court rendered a strictly "abstract" interpretation, that is, one not specifically related to the case before the national court; but the Community Court upheld its right to redefine the questions put to it by the national court in the light of the record of the case and the facts therein. Affaire No. 13/61 Geus c. Bosch et Van Rijn, April 6, 1962, VIII (1) Recueil de la Jurisprudence 89 (1962). The court has followed this pattern in subsequent cases. Bebr believes that the court need not limit itself to an abstract interpretation. Bebr (supp.), *supra* note 12, at 14.

32. More specifically, the court concluded that article 102, prescribing a procedure for the prevention of "distortions" of competition by enactment of new national laws, and article 93(1) and (2), dealing with procedures before the Commission regarding removal of state subsidies, imposed obligations upon the member states only and did not create individual rights. On the other hand, article 53, prohibiting any new restrictions on the right of establishment, being "complete" and capable of direct effect upon individuals, was held to create individual rights. The court pointed out, however, that this article is not infringed by a new law as long as nationals of other member states under the new law are not treated less favorably than local nationals. Costa argued that the nationalization law, by excluding all private persons, Italians as well as nationals of other member states, from access to an important sector of Italian economy, violated article 53. Finally, responding to the charge that the nationalization law violated article 37 which prohibits, *inter alia,* any new state monopolies of a specified nature, the court held that this prohibition is also directly enforceable in national courts. The court defined the prohibited monopoly as one introducing new discrimination among Community nationals in conditions of supply and demand with respect to transactions in a product in the flow of commerce that may be the subject of competition and trade, providing that the monopoly affects such trade. It will be for the national judge, the court concluded, to determine whether any new law (such as the Italian nationalization law) in effect introduces a prohibited monopoly that may affect imports and exports among nationals of member states. Pp. 13-17 of the mimeographed text.

record of the case along with the Community Court's judgment was then duly returned to the Milan court.

IV. The Conflict Between Two Courts

The court of Milan, having pursued the two procedures prescribed by Italian law and the Community treaty, respectively, thus received a ruling from the Community Court that treaty rights must be given precedence over any conflicting national law; on the other hand, it was directed by the Italian Constitutional Court to apply the national law as *lex posterior*, whether or not it impaired a treaty right.

An attempt to pursue the predicament of the Milan court into the complex interstices of Italian law and procedure would exceed the scope of this article and the competence of this writer. As a practical matter, although the issue of constitutionality is presently again before the Italian Constitutional Court with reference to other articles of the Constitution, there is no indication that the court will show more sympathy for the second attack against the nationalization law than it did for the first challenge. Again, although the question of whether the nationalization law conformed to the treaty has been under consideration by the Commission of the Community, there is little evidence, judging from the Commission's views summarized in the Community Court's judgment, that the Commission has reached or is likely to reach a conclusion adverse to the Italian Government. Since public ownership as such is not incompatible with the treaty,[33] the only question that could arise would be whether certain features of the law or its application constituted a concealed subsidy, a prohibited monopoly, or discrimination.

However, these pragmatic considerations do not alleviate in any way the seriousness of the conflict between the two courts on the basic issue of the normative hierarchy in the Community and national legal orders. Three questions arise:

1. Do the Community treaty and regulations give rise to rights that individuals can enforce in national courts?
2. In the Community legal order (and before the Community Court), is a right that is derived from the Community treaty or from a Community regulation (as authoritatively interpreted by the Community Court) superior to national law even if the latter is subsequent in time?

33. Article 222 provides that the treaty "shall in no way prejudice the system existing in Member States in respect of property."

3. If the answers are in the affirmative, must the supremacy be given effect by national courts; and what is the legal situation if the traditional national constitutional practice governing "directly applicable" (or "self-executing") treaties does not ensure such effect?

There is no doubt that the *Van Gend* case answered the first question in the affirmative. One phase of the lively debate surrounding that case centered precisely on whether the judgment provided —or, in fact, *could* provide—a reply also to the second or possibly to the third of these questions. According to the most conservative view, the judgment was nothing more than an elaboration of a rule enunciated by the Permanent Court of International Justice in its advisory opinion on the access of certain individuals to the Danzig courts, in which the Court recognized for the first time—and contrary to the "classic" doctrine—the existence in international law of "self-executing" treaties and provided a rule for their interpretation. Whether a treaty grants given individuals rights that they may press in national courts "depends," the courts concluded, "upon the intention of the contracting parties":

> "[A]ccording to a well established principle of international law, . . . an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules creating individual rights and obligations and enforceable in national courts. That there is such an intention in the present case can be established by reference to the terms of the [agreement]. . . ."[34]

34. Jurisdiction of the Courts of Danzig, P.C.I.J., ser. B, No. 15, at 17-18 (1928) (advisory opinion). "The intention of the parties," the Court continued, "which is to be ascertained from the *contents* of the Agreement, taking into consideration the manner in which the Agreement has been applied, is decisive. This principle of interpretation should be applied by the Court in the present case. *Wording* and *general tenor* . . . show provisions directly applicable. . . ." (Emphasis added.)

Cf. the classic American definition of a "self-executing" treaty by Mr. Chief Justice Marshall:

> "A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is intra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> "In the United States, a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."

Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829).

The holding in the *Van Gend* case, it could be argued (if one wishes to disregard the broad language of the Community Court in the "Reasons" of the judgment), was merely an application of this rule of interpretation to another ordinary international treaty by another international court; at most, the Community Court, in interpreting the Community treaty, could be said to have modified the Danzig rule to the extent that it discarded the rebuttable presumption *against* the "self-executing" effect, which some had read into that rule, or even found a presumption for (instead of against) the direct applicability,[35] or considered a provision "directly applicable" even when the specific language of the provision addressed itself to *states* exclusively.[36] In any event, according to this view, since the court said nothing about the supremacy of Community treaty law, it obviously did not answer the second or third of the questions; and, since in principle the Community treaty must be treated like any other treaty, the effect to be given to a "directly applicable" provision of that treaty—and to a right arising under it—will depend on the national constitutional law and practice concerning treaties. That is clearly the position the Italian Constitutional Court took before the Community Court had rendered its decision in the *Costa* case.

It is beyond dispute that in the *Costa* case the Community Court provided an answer to the second question by declaring the absolute supremacy of Community law over national law. Is it possible, or even necessary, however, to interpret this judgment to the effect that whether such supremacy will prevail in national courts will still depend upon national constitutional law and practice?

V. A Solution in Accordance With Traditional Constitutional Practice

National practice, as Professor Ophüls points out, is based on variations of one of two basic doctrines: One, derived from natural law thinking and reflected in the Permanent Court's opinion, is embodied in the United States Constitution, which requires national courts to apply a "self-executing" provision of a treaty as the "*supreme law* of the land."[37] This effect attaches the moment

35. Jacomet, *supra* note 28, at 7-10, 14.

36. Rigaux, Rapporteur, *supra* note 28, at 26-27; Rousseau, 1963 Rev. Gén. de Droit Int. Pub. 421-22.

37. Article VI of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

the treaty comes into force and no legislative measure is required. Treaty supremacy is absolute with respect to the law of component states of the Union. Theoretically, if the concept of "higher law" were to prevail completely, this treaty supremacy should also be absolute with respect to federal law and should extend not only to preexisting but also to subsequent federal law. Both Jefferson[38] and Jay[39] assumed this to be the case. However, according to a rule evolved by the United States Supreme Court, a treaty modifies a preexisting conflicting federal law but is itself modified by subsequent federal law if the two cannot be reconciled.[40]

The other doctrine, inspired by the theory of strict separation of international and national law, does not admit of "direct applicability" and requires in each case a "*transformation*" of treaty law into the national legal order. Since under this view a treaty provision can become applicable as national law only if "transformed" by legislative action, a subsequent national law will have to be given predominance by the courts if it is contrary to a treaty provision.

In the Italian constitutional practice, which is inspired by the transformation doctrine, a law of parliament is required in order to make a treaty provision applicable with the effect of law in national courts.[41] If the Community treaty is an "ordinary" treaty ap-

---

thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

38. Jefferson said in 1790: "A treaty is the law of the land, and a law of superior order, because it not only repeals past law, but cannot itself be repealed by future ones." 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1841 (1891): "Yet Mr. Jefferson afterwards (in Nov. 1793) seems to have fluctuated in opinion, and to have been unsettled as to the nature and extent of the treaty-making power." (Referring to 4 JEFFERSON'S CORRESP. 497, 498.)

39. THE FEDERALIST No. 64, at 394 (Rossiter ed. 1961).

40. Whitney v. Robertson, 124 U.S. 190 (1888); John T. Bill Co. v. United States, 104 F.2d 67 (C.C.P.A. 1939), and other cases listed in HENKIN, ARMS CONTROL AND INSPECTION IN AMERICAN LAW 174 (1958).

41. Generally the parliament adopts a single law containing both an authorization to ratify and an "order of execution." The Italian law on the European Economic Community Treaty of Oct. 14, 1957, No. 1203, 1957 Raccolta ufficiale delle leggi e dei decreti 3973. See also art. 80 of the Italian Constitution; LA PERGOLA, COSTITUZIONE E ADATTAMENTO DELL'ORDINAMENTO INTERNO AL DIRITTO INTERNAZIONALE 318-19 (1961); 2 PERASSI, LEZIONI DI DIRITTO INTERNAZIONALE 33 (1950); Catalano & Monaco, *supra* note 28, at 1-3; Perassi, *L'état dans la communauté internationale*, in LA CONSTITUTION ITALIENNE DE 1948, at 223, 238-39 (Crosa ed. 1950); Udina, *Sull'efficacia delle norme delle Communità europee nell'ordinamento italiano* in 3 RACCOLTA DI SCRITTI IN ONORE DI A. C. JEMOLO 697, 704 (1963). Unlike treaty law, as indicated above, "generally recognized principles of international law" are given constitutional superiority by article 10 of the Italian Constitution.

But see QUADRI, *op. cit. supra* note 18, who claims that article 10 of the Constitution, because it embraces the rule *pacta sunt servanda* brings about an "adattamento automatico" (automatic adaptation) of treaty provisions into Italian law; the "ordine di esecuzione" has merely the function of promulgation or publication. Such treaty

proved by an ordinary (as distinguished from constitutional) law, any subsequent ordinary law must be applied in Italian courts even if it is contrary to the treaty. This is precisely the view taken by the Italian Constitutional Court, which did not even take note of the new concept proclaimed and defined in the *Van Gend* case that the Community treaty was a unique type of treaty.

It could be argued that, had the Community Court in the *Van Gend* case expressly stated the rule of absolute supremacy as it did two years later, the outcome before the Italian Constitutional Court might have been different. There was nothing in the *Van Gend* case—except perhaps the constitutional situation in The Netherlands,[42] judicial restraint, or concern with possible political repercussions—that would have prevented the Community Court from taking this step at that time. However, it is questionable whether even an express statement of supremacy would have swayed the Italian Constitutional Court, considering the general attitude manifested by that court and by the Avvocatura dello Stato. The judgment—summary and brief as it is on this issue—contains not a hint that the court was prepared to accept the new idea of the Community and was willing even to consider anything except the traditional *lex posterior derogat priori* rule that is applicable to treaties generally. One cannot, however, go so far as to assume that the consequences of the application of this rule were not envisaged by the learned constitutional judges. As was shown earlier, the question of Community law supremacy arises not only in connection with directly applicable treaty provisions but particularly, and more importantly, with respect to Community law in the form of regulations by which the Council, and to a limited extent the Commission, are required to evolve the legal framework for the economic union and which, under the treaty, become effective in the national legal orders directly upon adoption by the respective Community organ. What would be the value and logic of this scheme if, for instance, in the antitrust field the Italian Parliament, unwilling to allow the enforcement of Regulation 17 of the Council of Ministers, could adopt a law nullifying the effects of that regulation in Italy? It surely is no answer to say that any other member government or the Commission would be entitled to bring a complaint against Italy before

provisions enjoy constitutional-level supremacy even over subsequent law of parliament.

42. Art. 66 of the Netherlands Constitution—as amended—expressly assures supremacy of treaty provisions "by which everyone is bound" over even subsequent legislation. See note 48 *infra*.

the Community Court.[43] The fact is that for a long time to come, national authorities in antitrust and other fields will play a vital role in the application and enforcement of Community law, and member states have relied on such reciprocal enforcement as an essential component of the treaty scheme which is unique precisely because of its impact upon individuals. If this component of the scheme can be neutralized by a simple law of parliament, the legal security of the system will be reduced even if thus far there is every indication that no parliament will act lightly in violation of Community law.

It is not difficult to understand how a court, concerned exclusively with its own constitutional scene, would reach the conclusion the Italian court reached in the *Costa* case. The astonishing reference in the court's opinion to the executive Commission of the Community as the "advisory" Commission[44] suggests lack of familiarity with Community law. Italy, of all member states, is geographically farthest from the seats of the Community institutions and thus is most remote from their activities. Again, the politically explosive nature of the nationalization issue may have conceivably influenced the Avvocatura dello Stato toward seeking to block any possible avenue through which the nationalization law could be questioned. Finally, one wonders to what extent the judgment reflects the present state of legal thought in Italy, which, to a substantial extent, remains under the influence of the nineteenth century type of positivism.[45]

If the Constitutional Court had been so inclined it surely could have found a way to accept the supremacy of Community law even without impairing traditional Italian constitutional practice. It could have interpreted article 11 of the Constitution to the effect that any national law contrary to a treaty falling within the scope of that article (such as the Community treaty) is unconstitutional. This view, which would have assured the Community treaty (and all treaties included in article 11) the hierarchical position of a constitutional law, was urged upon the court in the *Costa* case and finds support among some writers.[46] Since in principle the Constitutional Court, before passing upon the compatibility of a national

43. See arts. 169 and 170, *supra* notes 26 and 27.

44. Giur. ital., *supra* note 4, at 533.

45. *Cf.* in another context, Gorla, *Lo studio interno e comparativo della giurisprudenza e i suoi presupposti: le raccolte e le tecniche per la interpretazione delle sentenze*, Foro it. 1964, V, 73, especially § 3, § 6 notes 41 and 44 for observations of interest concerning legal education and thought in Italy.

46. Catalano, Foro it. 1964, I, at 466-75 and Foro it. 1964, V, at 24; also "F.B.," in Giust. civ. 1964, III, at 102-03; Gori, *supra* note 28; Piola-Caselli, *supra* note 4.

law with the treaty, would have to have before it an interpretation of the treaty by the Community Court, this view would have also assured compliance with article 177.

It is noteworthy that a similar difficulty in assuring supremacy of Community law over later national law could arise in Germany, which also follows the "transformation" doctrine; the German constitutional provisions governing the treaty-federal law relationship resemble the Italian pattern. In particular, article 24 of the German Basic Law—like article 11 of the Italian Constitution—contemplates transfer of sovereign powers to international organizations and limitation on national sovereignty. However, there has been no final judicial determination as yet of the issue whether subsequent federal legislation modifies an earlier treaty or an act of an international organization. On this question the writers disagree.[47] On the other hand, there should be little difficulty in The Netherlands, where the Constitution was amended in 1953 in order to ensure supremacy in national courts of any "directly applicable" treaty provisions.[48] In France, the Constitution specifically decrees treaty supremacy over national law, whether enacted before or after the date of the treaty, and the trend in the jurisprudence appears to be in the direction of requiring the national judge to enforce the

47. Art. 24 of the Basic Law of 1949:

"(1) The Federation may, by legislation, transfer sovereign powers to international organizations.

"(2) In order to preserve peace, the Federation may join a system of mutual collective security; in doing so it will consent to those limitations of its sovereign powers which will bring about and secure a peaceful and lasting order in Europe and among the nations of the world. . . ."

Art. 25 of the Basic Law:

"The general rules of international law shall form part of federal law. They shall take precedence over domestic law and create rights and duties directly for the inhabitants of the federal territory."

Translation from 2 PEASLEE, CONSTITUTIONS OF NATIONS 34 (2d ed. 1956). See also arts. 59, 79(1). Frowein discusses the conflicting views and includes ample references to literature. He concludes that Ipsen, Maunz, Nicolaysen, and Götz appear to interpret art. 24 as assuring Community law supremacy over later national law, but Jaenicke disagrees. Frowein, *supra* note 4, at 237.

See also Menzel, *Die Geltung internazionaler Verträge im innerstaalichen Recht*, DEUTSCHE LANDESREFERATE ZUM VI. INTERNAZIONALEN KONGRESS FÜR RECHTSVERGLEICHUNG IN HAMBURG 1962, SONDERVERÖFFENTLICHUNG VON RABELS ZEITSCHRIFT 401 (1962); Mosler, *L'application du droit international public par les tribunaux nationaux*, 91 RECUEIL DES COURS 625 (1957); Münch, *Délimitation du domain du droit des Communautés, etc.*, 2 ACTES OFFICIELS DU CONGRÉS INTERNATIONAL D'ÉTUDES SUR LA CECA 271, 289 (Stresa 1957); Preuss, *On Amending the Treaty-Making Power: a Comparative Study of the Problem of Self-Executing Treaties*, 51 MICH. L. REV. 1117, 1132 (1953); Schlochauer, *Das Verhältniss des Rechts der Europäischen Wirtschaftsgemeinschaft zu den nationalen Rechtsordnungen der Mitgliedstaaten*, 11 ARCHIV DES VÖLKERRECHTS 1 (1963).

48. ERADES & GOULD, THE RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW IN THE NETHERLANDS AND IN THE UNITED STATES (1961); Van Panhuys, *The Netherlands Constitution and International Law*, 58 AM. J. INT'L L. 88 (1964).

rule. The application of this rule in France, however, is conditioned upon reciprocal acceptance of the same rule by other parties to the treaty. This opens the possibility for French "retaliation" if Italy follows the rule declared by its Constitutional Court in the *Costa* case.[49] The Supreme Court of Luxembourg has established firmly the rule of absolute treaty supremacy by its own jurisprudence.[50] As for Belgium, where the Constitution is silent on this point, the Procureur Général at the Supreme Court only recently denied that the rule giving preference to subsequent law over treaty law has been accepted by the Supreme Court, and instead he foreshadowed an evolution of the jurisprudence toward treaty supremacy, particularly as concerns the European integration treaties.[51] The trend in the member states thus appears to be distinctly toward the supremacy of all treaties—another fact that one would assume would have provided food for thought for the high Italian court. This brief survey confirms, however, that the problem as it has arisen in Italy of assuring supremacy to Community law might also occur in Germany and possibly in Belgium if the traditional constitutional practice concerning international treaties is followed in national courts.

VI. The Absolute Supremacy Solution

It has been argued with considerable persuasiveness that the Community treaty, as interpreted by the Community Court, calls for a new doctrinal basis upon which "absolute" supremacy of Community law over national law, including constitutional law, must be founded and enforced both in the Community and national legal orders.

49. Art. 55 of the Constitution of 1958. Could it be argued that, since the Community treaty is not an ordinary treaty based upon reciprocal obligations but rather a unique treaty based upon acceptance of common rules, France could not invoke the reciprocity condition in article 55 of its Constitution? On the treaty-law relation, see Chevallier, *Le droit de la Communauté Européenne et les jurisdictions françaises*, 1962 Rev. du Droit Pub. et de la Science Pol. 646; Vignes, *L'autorité des traités internationaux en droit interne*, Études de Droit Contemporain, XXIII Travaux et Recherches de L'Institut de Droit Comparé de L'Université de Paris 475 (1962). For a recent case in which Conseil d'Etat found no conflict between the Community treaty and a Ministerial Decree, see Conseil d'Etat, Assemblée, June 19, 1964, in 1964 Droit Administratif 438, with a note by Laubadère.

50. Chambre des Métiers-Pagani v. Ministère Public, Cour sup. de Justice (Cass Crim.) July 14, 1954, 16 P.L.J. 150; Pescatore, *L'autorité en droit interne des traités internationaux selon la jurisprudence luxembourgeoise*, 18 Pasicrisie Luxembourgeoise 99 (1962).

51. Hayoit de Termicourt, *Le conflit 'Traité-Loi interne'*, 1963 Journal des Tribunaux 431. *Contra*, Rigaux, Rapport *supra* note 28, at 39; Rigaux, *Les problèmes de la validité soulevés devant les tribunaux nationaux, par les rapports juridiques existant entre la constitution de l'état, d'une part, et les traités, etc.*, 1 Problèmes Contemporains de Droit Comparé 181, 209 (Tokyo 1962).

According to one view,[52] the member states, by relinquishing their sovereign rights in specified areas and transferring them to the Community, have removed the obstacles (based upon national sovereignty and reflected in national constitutional practice) that would normally stand in the way of direct effect of the treaty in national law, and thus have created an entirely new and different concept of "immediate applicability." Upon conclusion of the treaty providing for such transfer, the sovereign rights that were thereby transferred to the Community were amalgamated in the hands of a new legal person, thus bringing about a division of jurisdiction with respect to subject matter between the Community on one hand and the member states on the other. While under the American doctrine of "self-executing treaties" a treaty provision becomes effective in national law "with the assistance of the sovereign," and under the transformation doctrine "through the means supplied by the sovereign," under this new doctrine embodied in the Community treaty the effect upon national law occurs as a result of a breach or "break-through" (*Durchgriff*) of sovereignty. Thus, when a state enacts a law that is contrary to an *ordinary* treaty, it violates international law, but the law itself is valid. However, when a member state enacts a law contrary to a directly applicable Community law provision, it attempts to act beyond and outside its sovereignty (not unlike a state seeking to act beyond its territorial sovereignty), and the law is a nullity. When a national court is called upon to apply Community law, it is in the same position as a state court in the United States or a court of a German Land when they are required to apply federal law. In this system there is clearly no place for the *lex posterior* rule. This means that a national court can no longer apply a national law that conflicts with Community law (as interpreted by the Community Court) even though the Community Court did not (and could not) specifically pass upon the validity of that national law in a proceeding under article 177.[53]

52. Ophüls, *supra* note 28, at 25-27; *Quellen und Aufbau des Europäischen Gemeinschaftsrechts*, 1963 N.J.W. 1697, 1698. See also Ipsen, *Europäisches Gemeinschaftsrecht*, 1964 *id.* at 339, 342, listing Bayer, Glaesner, Kraus, Matthies, Much, Schnorr, Wohlfart as supporting Ophüls. Similarly Cahier, *Le droit interne des organisations internationales*, REV. GÉN. DE DROIT INT. PUB. 563, 601-02 (1963). See generally STENDARDI, RAPPORTI FRA ORDINAMENTI GIURIDICI ITALIANO E DELLE COMMUNITÀ EUROPEE 34 (1958); Ipsen, *Rapport du droit des Communautés Européennes avec le droit national*, LE DROIT ET LES AFFAIRES, Doc. LXXXIV, No. 47, Oct. 26, 1964.

53. In a proceeding under articles 169 and 170, the Community Court can declare such a law contrary to the treaty. Ophüls appears to suggest that in such a proceeding the Community Court can declare the law void with direct effect in national law (Bericht, *supra* note 28, at 26-27) while Rigaux holds that a court's decision in that proceeding "has no immediate effect in the internal legal order and binds the state

Another view, purporting to reject the international law concepts of treaty-national law relationship as well as federal-state analogies, is based upon the apparently simple proposition that the Community treaty itself embodies the principle that "Community law supersedes national law." This unwritten rule is necessarily implied by the treaty and by the very nature of the Community because it is functionally indispensable for the very existence of the Community and for the achievement of the objectives laid down by the member states in the treaty.[54] The need for such a rule springs from the necessity to ensure uniform effect and application of Community law and thus to avoid the divergencies and discriminations that might arise from the differing national constitutional practices described in the preceding section. The rule is thus derived from the treaty through a principle of interpretation. It is pointed out that the Community Court itself resorted to the principle of implied power when it sought to determine the limits upon the powers of the institutions of the Community.[55] This principle is reflected in a federal context in United States law,[56] and it was applied in an international organization context when the International Court of Justice concluded

---

only." Rigaux, *Observations*, 1963 JOURNAL DES TRIBUNAUX 190, 191. This was also the position of the Italian Government in the *Costa* case, as quoted by Advocate General Lagrange in his Conclusions, *supra* note 7, at 3-4. Although Rigaux concludes that a Belgian judge is bound by a decision of the Community Court under article 177 and his judgment disregarding such a decision would be annulled by the Cour de Cassation, he seems to make this conditional upon "internal constitutional law." *Id.* at 191-92.

Catalano and Monaco appear to agree with Ophüls that transfer of jurisdiction to the Community brings about, as a corollary, lack of jurisdiction of member states. Their emphasis is on the difference between the Community and other treaties with reference to "will formation." Acts of the institutions of the Community are not the result of the "fusion" of the will of the states (as are international treaties) but they express a new will of a Community organ. But these two authors, while insisting that the concept of direct applicability under the Community treaty is different from that of a "self-executing" treaty, do not deal expressly with the position of a national judge faced with a conflict between the treaty (or a Community act) and a later national law. Rapport, *supra* note 28, at 8-9, *passim*.

54. Zweigert, *Der Einfluss des Europäischen Gemeinschaftsrechts und die Rechtsordnung der Mitgliedstaaten*, RABELS ZEITSCHRIFT 1964 (in press). See also Gaudet, *Incidences des Communautés européennes sur le droit interne des états membres*, ANNALES DE LA FACULTÉ DE DROIT DE LIÈGE 5, 21 (1963), who suggests that the "priority" of the Community law is necessary for the same reasons that require priority to be given a social group interest over "partial" interest.

55. Zweigert cites as examples Case No. 8/55 in VII Sammlung der Rechtsprechung des Gerichtshofes 296, 312; Case No. 20/59, *id.* VI, at 685, 708; and Case No. 25/59, *id.* VI, at 747, 781. All pertain to the European Coal and Steel Community Treaty.

56. United States v. Oregon, 366 U.S. 643 (1960); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819); Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137 (1919-20).

that the United Nations possessed certain implied powers not specified in its Charter.[57]

Both views appear to lead to the following conclusion in Italian and German law: Since the Community treaty, embodying the supremacy rule, was adhered to by Italy in accordance with article 11 of the Constitution, and by Germany in accordance with article 24 of the Basic Law, and was made part of national law in both states through an act of parliament, national courts are required to apply the supremacy rule irrespective of any subsequent national law. This is a logical result even though the two constitutional articles are not construed as according constitutional status to the Community treaty or any other treaty. In fact, under this theory Community law would have a status superior to that of a constitutional law.

It should be made clear that neither of the two views set forth here has received specific approval in national courts or general acceptance in the literature, even though they are supported by respectable authority. A strong argument can be made, however, that in the *Costa* judgment the Community Court in principle embraced the new approach and held that the rule prescribing supremacy of Community law, although originating in the Community treaty, binds national courts directly and must be applied by them regardless of any contrary national constitutional provisions concerning treaty law in general.[58] If this view is adopted, the court of Milan in the *Costa* case would be free to proceed with an inquiry into whether the nationalization law was consistent with the Community treaty as it was interpreted by the Community Court despite

57. Reparation for Injuries Suffered in the Service of the U.N., [1949] I.C.J. Rep. 174, 180 (advisory opinion), 43 AM. J. INT'L L. 589, 595 (1949).

58. Frowein, *supra* note 4, at 236 suggests that this interpretation is one of the future. See Conclusions of Advocate General Lagrange, *supra* note 7, at 7-8. The Advocate General said:

> "Without wishing to have recourse to doctrinal concepts, which are far too controversial, on the nature of the European Communities, or to take sides between a 'federal Europe' and a 'Europe of fatherlands,' or between the 'supranational' and 'international' concepts, the judge (this is his function) can only consider the treaty as it is. The treaty establishing the EEC—this is simply a statement of fact—like the other two European treaties, creates its own legal order, separate from the legal order of each of the member states, which, however, replaces [the latter orders] in part according to exact rules laid down by the treaty itself, rules that consist in agreed transfers of jurisdiction to common institutions." *Id.* at 5.

The specific argument in Italian law might be that the rule *lex posterior derogat priori* contained in art. 15 of the Preliminary Provisions of the Civil Code was modified by the Law of Oct. 14, 1957, No. 1203, approving the European Economic Community treaty to the extent a modification was necessary to assure the supremacy of the treaty and Community regulations over prior and subsequent Italian law.

the implication in the judgment of the Constitutional Court that such inquiry was irrelevant. Whether an Italian court would choose this course is obviously an open question. However, at least one Italian author has suggested that precisely because of the absolute supremacy of the Community law, the Constitutional Court did not have jurisdiction to deal with the issue of an alleged Community treaty-Italian law conflict and presumably the trial court would be free to proceed with the necessary inquiry.[59]

Conclusions

The judgment in the *Costa* case may be interpreted as holding that Community law (that is, the treaty and the regulations) is superior to national law, including national constitutions, not only in the Community legal order but also in the national legal orders and that the supremacy rule is directly and immediately applicable by national courts, any contrary national provisions regarding ordinary treaties notwithstanding. If this is the correct interpretation, it is perhaps the first time in history that a court established by an international treaty has asserted its power to determine, with effect not only in the "international" (or Community) legal order but also in national law, the hierarchical value of the very norm to which it owes its existence. If one accepts the new doctrinal basis suggested above, the Court could be said to have dealt with the Community treaty as if it were a constitution rather than a treaty and in effect to have rejected the public international law rationale for its power. One is reminded of the recent opinion of the Supreme Court of the United States in the controversial *Sabbatino* case, wherein the Court rejected the international law or "comity" rationale for the "act of state" doctrine and replaced it with a new rationale drawn from the "constitutional underpinnings" of the federation.[60]

Recognition on the part of the Community Court in the *Van Gend* and *Costa* cases that its power to decree the supremacy of

59. Migliazza, *La nazionalizzazione dell'energia elettrica e il diritto delle Comunità Europee*, Foro pad. 1964, IV, at 18. The argument appears to be that, because of the special nature of the Community system, the pattern of adoption of Community law based upon a treaty falling within the scope of article 11 of the Constitution is not subject to the rules that govern ordinary treaties. In fact, a new, different system was created which is superior to any prior Italian constitutional law or any prior or subsequent ordinary law. Because of the supremacy of the Community system over the Italian legal system, no question of constitutionality can arise for the Constitutional Court, and the supremacy must be given effect by ordinary and "special" Italian courts. See also Stendardi, *supra* note 13, at 1181.

60. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

Community law does *not* embrace the power specifically to declare a given national law invalid prevents that court from taking the step taken by the United States Supreme Court when it asserted its power to strike down a state law or prior federal law violating a treaty. In the context of the Community, this gap may not be of decisive importance if it is realized that the decision of the Community Court interpreting the relevant Community law as well as the supremacy rule itself is binding directly upon the national judge.

As a practical proposition, it will be necessary in any case in Italy, and possibly also in Germany and Belgium where the principle of supremacy of treaty law generally (or Community law especially) over subsequent legislation is not part of established constitutional practice as yet, to adjust such practice accordingly, either by a decision of a national tribunal or by a legislative or constitutional act. The competent Italian Court may find it advisable, when the next opportunity arises, to bring about the necessary adjustment in Italy.

It is unlikely, however, that the supremacy issue will arise very often in as sharp and inexorable a context as was presented by the *Costa* case. In the first place, a national court faced with an alleged conflict between Community law and subsequent national law would as a rule be able to go a considerable distance toward removing the conflict by an appropriate construction of the national law; the court might even view the Community law as *lex specialis*, which the national law as *lex generalis* does not purport to affect.[61] Again, even if the doctrine of absolute supremacy is accepted without qualification, it must be kept in mind that the areas over which the Community has sole jurisdiction to the exclusion of the national lawmaker are not many. Even in a field where the Community has exclusive jurisdiction it might be unwise at this juncture to insist that every national measure automatically is void for lack of jurisdiction, regardless of its substantive content, even when the competent Community institution has not acted as yet or where the act of the institution is not necessarily in conflict with the national measure. There is hardly room in the Community context for an analogy with the federal pre-emption doctrine as it evolved in the United States. Moreover, a question may arise, particularly in the earlier stages of the Community when national policies still differ widely and common policy is not firmly set, whether each and every divergence between national and Community law should necessarily be viewed as constituting a conflict to which the Community su-

61. See Frowein, *supra* note 4, at 234; Perassi (Crosa ed.), *supra* note 41, at 242-44.

premacy rule must apply, especially when the national law is clearly in line with an important objective of the Community. If, for instance, the Community Commission in the exercise of its exclusive power under article 85(3) of the treaty grants an exemption to a certain cartel and thus declares it legal, may a national authority nevertheless hold such cartel illegal as contrary to national law? The national action in question aims at increasing competition, which is a basic treaty objective; should it be subordinated to another treaty objective, that is, improved rationalization of production or distribution through certain types of cartels?[62] In areas of concurrent or national jurisdiction, there will be perhaps room for the development of a doctrine of "Community fidelity" analogous to the idea of "federal fidelity" evolved by the German Constitutional Court to "sweeten" the relationship between the federation and the component Länder.[63]

With respect to Germany particularly, another factor should be considered. In that country, largely as a result of the post-Weimar experience, the conviction is strong that the system of checks and balances of public power in general, and the federal system assuring a decentralization of public power in particular, must be preserved and must not be impaired by the Community. It is generally recognized that a major aspect of the Community scheme is the transfer of substantial law-making powers previously held by national parliaments to the Community institutions, particularly the Council of Ministers, which is composed of and dominated by national executives and is not answerable to any Community organ except, of course, in a limited way to the Community Court. If the Ministers are allowed to make law without an effective Community-level parliamentary control as is the case today, there may be some merit in the argument that as an ultimate safeguard national parliaments must retain the power to compel their courts to enforce national law even where it conflicts with Community law. The problem is more general and exceeds the confines of the supremacy issue. As long as the preponderance of power remains with member states the present pattern of Community institutions may be considered adequate. But if, as is contemplated, Community law-making should substantially replace national law-making in the economic field, this pattern will require adjustment lest the basic concept of

62. Steindorf, *Das Wettbewerbsrecht der Europäischen Gemeinschaften und das nationale Recht*, in 1 KARTELLE UND MONOPOLE IM MODERNEN RECHT 157, 178 (1961).

63. Judgment No. 22, March 26, 1957, ("Reichskonkordat") 6 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 309 (1957). McWhinney, *Federal Constitutional Law and the Treaty-Making Power*, 35 CAN. B. REV. 842 (1957).

democratic government embodied in national constitutions of the member states be impaired. It has been suggested that despite a rather widely held feeling of a "crisis of parliamentarism" in Europe the remedy would be to increase the powers of the European Parliament, whose functions in the law-making process are in effect purely advisory under the present treaty.[64] Such a step may prove advisable, if not indispensable, in the long run—even though it is not politically feasible today—not only to ensure political acceptance of Community law as an expression of the expectations of the people but also to protect the Community against the charge that it is incompatible with national constitutions. In fact, the German Federal Constitutional Court currently has before it the question of compatibility of the Community treaty with the German Basic Law;[65] the Italian courts have thus far rejected the claims of unconstitutionality as "manifestly unfounded,"[66] and the issue is not likely to arise in this context in other member states of the Community since national courts do not have the authority to review laws and treaties for constitutionality. But, in most countries of the Community, the political issue of parliamentary control is likely to prove more important than the legal issue.

The Community Court must, of course, keep in mind at all times that it is not a federal court backed up by an integrated federal power, and it must be aware of the dangers inherent in pressing "legal integration" too far ahead of integration in the economic and political fields. There is, however, evidence that the court calculated the risk correctly when it declared the supremacy rule in the *Costa* case and that the ruling will receive the necessary political backing. When the judgment of the Italian Constitutional Court was drawn to the attention of the Councils of Ministers by a member of the European Parliament, the Councils referred the questioner to the Community Court's judgment in the *Costa* case. Although the

64. See, *e.g.*, European Parliament, Working Documents 1963-1964, Report prepared on behalf of the Political Committee on the powers and competence of the European Parliament, Rap. Herr Hans Furler, Doc. 31, June 14, 1963, at 70.

65. The Fiscal Court of the Land Rheinland Pfalz was the first court to question the constitutionality of the Community treaty in Germany. Judgment Nov. 14, 1963, Case No. RML, III 77/63. The case is now pending before the Federal Constitutional Court. For a partial text of the lower court holding, see Aussenwirtschaftsdienst des Betriebs-Beraters 1964, 26, and for comment, see Ophüls, *Deutsches Zustimmungsgesetz zum EWG-Vertrag teilweise verfassungswidrig?*, in *id.* at 65. For an opposite view rejecting the claim of unconstitutionality, see judgment of the Administrative Court of Frankfurt/Main, of Dec. 17, 1963, Case No. II/1, 636/63, *id.* 1964, at 60. See CCH COMMON MARKET REP. ¶ 9133 (1964). See also Conclusions of the Advocate General, *supra* note 7, at 8-10.

66. See note 17 *supra* for the judgments of the courts of Naples and Rome. The cases dealt with the European Coal and Steel Community.

Councils understandably made it clear that they did not wish to take a position on the legal issues, they nevertheless expressed their awareness of the "*political importance* of a faithful application of Community law in the member states for the establishment of the Common Market and more generally for the realization of the objectives of the European treaties. Consequently, [the Councils] pursue with the greatest attention the problems which arise in this respect."[67] It is difficult to conceive that the "political" branch of the Community could have gone much farther in expressing its support for the Community judiciary than it did in this official reply.

In the legal-constitutional sense, the *Costa* judgment is a milestone. In the social context, a rule has been proclaimed that is designed to strengthen the symbol of the Community and thus to contribute, along with the economic, political, and social factors, toward the partial transfer of the loyalties of the people to the Community. Such a change in the fundamental attitudes of individuals

67. Journal Officiel, *supra* note 6. The question was directed to the Council of Ministers of the European Economic Community and to the Council of Ministers of the European Atomic Energy Community. See also statement of Prof. Hallstein, President of the European Economic Community Commission, European Parliament, Débats parlementaries, Doc. No. 13A, June 18, 1964, at 535. President Hallstein said:

"I would like to sum up the Commission's opinion on this point as follows:

"First: the legal acts of the Community organs can be defined, examined as to their validity and interpreted only in terms of Community law. Assimilating them to categories of State legal systems involves the danger of misunderstandings and erroneous conclusions. Thus we are obviously led astray if regulations of the Community organs are designated as derived rules of law applied by delegation from the real lawmaker.

"Secondly, the Community's legal order is, on the other hand, dovetailed into the law of the Member States in a great variety of ways. Official bodies, administrative authorities and courts in the Member States are increasingly applying rules of Community law. This interplay of two legal systems is not without precedent. Federal associations of various types and degrees offer examples of it. Here the rule that each part can only lay down valid law in the sphere of competence allotted to it, or which it has retained—a rule which, as we know, also applies to our Community—avoids constant conflict between different legal systems. If, however, an overlap of competence should exceptionally exist and there should be a clash of valid rules apparently requiring equal respect, it necessarily follows from the character of the merger into a wider order that the law of the superior association takes precedence—but I repeat, only in its sphere of competence.

"Thirdly, this precedence above all means two things: the rules of Community law come first irrespective of the level of the two orders at which the conflict occurs. And further, Community law not only invalidates previous national law but also debars subsequent national law. Both rules of conflict are part of that solidly entrenched body of law applied in comparable cases. Without them to acknowledge the supremacy of Community law would be no more than a courteous gesture, carrying no obligations. In reality the Member States could do with it what they liked.

"Fourthly, and in support of the above, a unified solution valid for the whole Community must be provided for the order of precedence here mentioned. Any attempt to solve the order of precedence differently to accord with the idiosyncrasies of the Member States, their constitution and political structure, runs counter to the unifying character of European integration, and thus to the fundamental principles of our Community. The Commission thinks it particularly important to note this fact." English translation from 7 Bulletin of the EEC 10-11 (Aug. 1964).

will be necessary if the Community is to become in reality something more than an instrumentality of national governments.

In the literature, the problem of Community law supremacy has evoked significant methodological controversy. The question is, as demonstrated above, to what extent solutions of Community problems will be derived from concepts of international law, federal-state law, or public law generally and, above all, to what extent these solutions will be hampered by unreasoned dogmatic positivism.

The significance of the legal and political issues discussed in this article extends beyond the arena of the European Community. Central American integration, for instance, has now reached a stage of development—at least on the legal-institutional level—where the problem of the relationship between Central American integration law and national law of the member states is coming under scrutiny. A seminar group assembled by the Inter-American Institute of International Legal Studies has recommended that this problem be included in a systematic examination of legal issues posed by Central American integration.[68]

As current intergovernmental institutions prove inadequate to achieve the common interests of member states on regional or functional levels, the interaction of treaty law with national law will demand increasing attention.

68. Report of the General Secretariat, Inter-American Institute of International Legal Studies, Seminar on Legal and Institutional Aspects of Central American Integration at 8 (Engl. text) (Washington, D.C. 1964). For the texts of the Central American integration treaties, see INSTRUMENTOS RELATIVOS A LA INTEGRACIÓN ECONÓMICA EN AMERICA LATINA, INSTITUTO INTERAMERICANO DE ESTUDIOS JURÍDICOS INTERNACIONALES (Washington, D.C. 1964).