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A Deeper Look into Dissonance

National Identity

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Solangene repercussions

- Can domestic courts challenge ECJ? On what grounds?

Solangene repercussions

- Can domestic courts challenge ECJ? On what grounds?
  - (constitutional) human rights
  - National identity

- What is national identity?

National Challenges to EU law

- Who should control the scope of EU law?
- GCC Maastricht Decision & Honeywell

- Maastricht (BVerfGe 89,155)
  - Since European Treaties adhere to the principle of conferred powers -> EU is not able to extend its own competences
  - There is a clear dividing line between legal development within the terms of the Treaties and a making of legal rules which breaks through its boundaries and is not covered by valid Treaty Law

- Ultra vires doctrine

National Challenges to EU law

- *Thus, if European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the sphere of German sovereignty. The German state organs would be prevented for constitutional reasons from applying them in Germany…*

- *… in future, it will be noted as regards interpretation of enbaling provisions by [Union] institutions …that the Union Treaty as a matter of principle distinguishes between the exercise of a sovereign power conferred for limited purposes and the amending of the Treaty, so that its interpretation may not have effects that are equivalent to an extension of the Treaty. Such an interpretation of enabling rules would not produce any binding effects in Germany.*

National Challenges

- *i.e. threat to disapply European law that has been adopted ultra vires*

- *Honeywell 2011*
  - Relates to Mangold
  - Claimant argued that ECJ's discovery of a European principle that prohibited discrimination on grounds of age was ultra vires
  - GFCC confirmed the relative supremacy doctrine
  - Option to disapply it when the EU law is not considered to be covered by the principle of conferral
  - BUT: also presumption that Union would generally act within the scope of its competences

National Challenges – types of justifications

- National constitutional courts
  - Constitutional identity
  - Material core
  - Rule of Law

- How CCs react:
  - Where is the European law in the hierarchy
  - What constitutional system there is (diffuse – concentrated)
  - Old v new member states

National Challenges - Italy

- Costa v ENEL 1964
  - Lex posterior derogate legi priori
  - European law = international law
- Frontini 1973
  - Confrontation with direct effect and supremacy principles
  - There can be primacy, but in case of conflict of laws, it is up to Constitutional Court to decide which law has primacy
  - Primacy not from European law, but essence of A11 of the Constitution on conferral of competences
- Simmenthal I.: Italian CC is not right and violates the concept of diffused European judiciary. Against the effectiveness of the European law
  - But: Doesn’t the diffuse system violates legal certainty?
- Granital 1984
  - Dualism, in case of conflict, the EU law prevails, but the domestic law stays intact. Only primacy in application
  - Between Solange I and Solange II

National Challenges - France

- Matter's dotrine: in case of the conflict of domestic and international law, the court should aim for conform interpretation
- If not possible, domestic law is applied
- i.e. no primacy of international law

- Jacques Vebre decision – X Matter doctrine
  - Communitarian law has unconditional primacy (only primary law)

- State Council:
  - 1968 Samoules: international treaty does not have primacy over later domestic law
  - 1986 Smanor: a judge can review the compliance of later law with a treaty but if the law is more detailed, it will prevail
  - 1989 Nicolo – same principle
  - 1990 Boisdet primacy of a regulation
  - 1992 Rothmans International France: vertical direct effect of a directive

- Constitutional Council
  - 70-39 DC: refuses to review the constitutionality of founding Treaties: only a priori control
  - 76-71 Constitutional conformity of direct election to EP
  - Limitation of sovereignty v conferral of sovereignty. Conferral not possible, temporary limitation yes

National Challenges - France

- France
  - Changed in Maastricht I.
    - Transfer of competences is possible, but it cannot be in conflict with specific areas of constitutional law
    - Material core of the Constitution

    - Areas: right to vote in regional election, monetary union, migration and asylum

Slovak Pensions case

- Introductory thoughts:

- Principle of non-discrimination in EU law
  - Driving force of both single market and FR
  - ECJ generally reluctant to make compromises
  - But! Exceptions: *Josemans case*
    - Prohibition of non-Dutch nationals from having access to Dutch coffee shops
    - ECJ: the sale of soft drugs does not fall within the scope of Treaty regulation of services, but, coffee shops also sale other products covered by the Treaty
    - Restricting measures have to be justified on grounds of public order
    - Discriminatory, but justifiable

- Test Achats case (different insurance rates on the grounds of sex)
  - ECJ requires same insurance rates for car insurance or life insurance
    - Women live longer….
    - Different rate of accidents

Slovak Pensions case

- Introductory thoughts on discrimination:
- Treaties: elimination of disadvantages of nationalities on EU market
- Amsterdam revision of A8 (3) + legislative competence of EU in new areas
- 2000 Revolution in EU anti-discrimination law
  - Amsterdam treaty
  - Two Equality Directives (2000/43 RED and 2000/78 FED)
  - New grounds for discrimination
    - Race
    - Ethnicity
    - Religion
    - Sexual orientation
    - Age
    - Disability
- Lisbon Treaty and Charter
- Equality vs Equal Treatment

Slovak Pensions case

- 2005 Mangold (discrimination on the ground of age is a general principle of EU law)

- Coleman (discrimination by association)

- Feryn (2008) race equality
- Maruko (2008) sexual orientation as grounds for non-discrimination

- Commission v Hungary (retirement of Hungarian judges and prosecutors)

- Commission v Poland (no sitting judge can be removed on the grounds of age)

Slovak Pensions case

- Constitutional complaint of a Czech claimant (previously working for CS train rails 1969-1993 in Slovakia).
- 1992 Both countries had to establish which state would be responsible for paying the pensions for former CS citizens -> Agreement: the authority with competence to grant pension will be determined by the State of residence of employer

- Core issue: Slovak pensions in 1990s are significantly lower
  - ! What about people who lived in the Czech part but their employer resided in the Slovak part? -> they receive Slovak (lower) pensions while living in CR
  - CCC: this violates the right to adequate material security in old age, the Czech authorities have to pay a **special increment** to Czech citizens to compensate their lower pensions from Slovakia

Slovak Pensions case

- SAC never accepted the CCC reasoning -> Judicial war
- The decision after Landtova is the 17th in line!
- SAC: Such special increment is incompatible with EU law – preliminary question leading to C-399/09 Landtová
  - Is it a discrimination case? The CCC's findings should apply to any EU citizen retiring in CR after its accession to EU, working in CSR before the dissolution

EU Law, FR, and dissolution of the Federation

- CJEU: the CCC's case law is in violation of discrimination on the grounds of nationality, but could be accepted if the same increment would be paid also to other than Czech citizens (within the EU)
- CJEU found "no evidence justifying such discrimination"
- The Czech reaction:
  - Czech legislator amends the law 155/1995 on retirement pensions, prohibiting ANY special increment ☺
  - CCC argues (Holubec case) that it is the domestic constitutional court who is the sovereign authority in protection of constitution, even against the excesses of EU institutions.
  - The coordination of retirement pensions within the EU is a very different question than the one between CR and SR –post federal settlement. There is not cross-border movement or element. The CJEU acted ultra vires (also refused to hear out the CCC)

EU Law, FR, and dissolution of the Federation

- The failure to distinguish legal relationships arising from the dissolution of a state with a uniform social security system from legal relationships arising from the free movement of persons in the European Communities, or the European Union, for social security systems of the Member States, is a failure to respect European history; it is comparing matters that are not comparable. For this reason it is not possible to apply European law, ie. the regulation, to the Czech citizens' claims stemming from social security. Following the principle explicitly stated in its judgment [Lisbon Treaty], it is not possible to do otherwise than to find in relation to the consequences of the [Court of Justice's judgment in Landtová] for similar cases that in its [the Court of Justice's] case the situation where an act of an institution of the EU exceeded the competences transferred to the EU by virtue of Article 10a of the Czech Constitution occurred, that an act ultra vires has occurred.

EU Law, FR, and dissolution of the Federation

- Behind the scenes

  - The CCC refused to ask another preliminary question, instead, it attempted to **invent** its own way of talking to the CJEU – sent in an amicus curiae
  - The Registry refused the letter and sent it back to the CCC: *The members of CJEU do not exchange correspondence with third parties*

  - This angered and insulted the CCC
  - CCC also argued that it ***should have enjoyed a fair trail***

EU Law, FR, and dissolution of the Federation

Komarek: The case is the reflection of continuing undermining of the authority of highest national judicial bodies by incorporating lower levels into the system of EU courts and giving these lower courts **a European mandate**

European mandate = lower courts can choose who their superior is

Instrumental use -> to circumvent the limitations of their own judicial system

In 2012, the Czech case seen as an isolated accident, not a calculated strategy of CCC

Still, a culture of disobedience

Chalmers*: dialogue with constitutional courts is much vaunted in the literature about it, ...* ***in the last two years its central interventions have been to refuse to take submissions from one country's constitutional court*** *and to deny the French Constitutional Council its traditional role of assessing whether French laws violate the French Constitution, if such an assessment in any way touches upon EU law*

EU Law, FR, and dissolution of the Federation

Skouris:

In this case the Supreme Administrative Court received an answer [from the ECJ] and followed it in its own decision. The Constitutional Court reviewed the case and decided differently. So it is primarily a problem on the level of Czech courts. The ECJ did what it was supposed to and answered the questions submitted. If there are some problems in the Czech Republic, it is not our task to solve them. And I would not like to comment on them further. Th e responsibility for the final decision in the case always rests solely with the national court.

Article 4

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

Ultra vires 2

Germany after Lisbon

FCC ruling of 5 May 2020 on the partial unconstitutionality of the ECB's PSPP program (Public Sector Asset Purchase Programme)

Accepts the primacy of Treaties over Constitution, but classifies an individual secondary act of EU institution as ultra vires

Follow-up: Commission filed infringement proceedings against Germany: Germany has not only violated fundamental principles of EU law (autonomy, primacy of application, effectiveness, uniform applicability of EU law). It has also interfered with the judicial mandate of the ECJ)

FCC should not have declared Weiss decision to be ultra vires act without referring the matter back to ECJ – violated primacy of EU law.

Interference in the independence of a MS's court

ECJ will be a judge in its own case

Ultra vires 2

The Court of Justice of the European Union exceeds its judicial mandate, as determined by the functions conferred upon it in Article 19(1) second sentence of the Treaty on European Union, where an interpretation of the Treaties is not comprehensible and must thus be considered arbitrary from an objective perspective. If the Court of Justice of the European Union crosses that limit, its decisions are no longer covered by Article 19(1) second sentence of the Treaty on European Union in conjunction with the domestic Act of Approval; … these decisions lack the minimum of democratic legitimation necessary under Article 23(1) second sentence in conjunction with Article 20(1) and (2) and Article 79(3) of the Basic Law.

Ultra vires 2

Where fundamental interests of the Member States are affected, as is generally the case when interpreting the competences conferred upon the European Union as such and its democratically legitimated European integration agenda (*Integrationsprogramm*), judicial review may not simply accept positions asserted by the European Central Bank without closer scrutiny.

The combination of the broad discretion afforded the institution in question together with the limited standard of review applied by the Court of Justice of the European Union clearly fails to give sufficient effect to the principle of conferral and paves the way for a continual erosion of Member State competences.

German constitutional organs, administrative bodies and courts may participate neither in the development nor in the implementation, execution or operationalisation of *ultra vires* acts. This generally also applies to the *Bundesbank*.

Ultra vires 2

ECJ Press release

In general, it is recalled that the Court of Justice has consistently held that a judgment in which the Court gives a preliminary ruling is binding on the national court for the purposes of the decision to be given in the main proceedings. 1 In order to ensure that EU law is applied uniformly, the Court of Justice alone – which was created for that purpose by the Member States – has jurisdiction to rule that an act of an EU institution is contrary to EU law. Divergences between courts of the Member States as to the validity of such acts would indeed be liable to place in jeopardy the unity of the EU legal order and to detract from legal certainty. 2 Like other authorities of the Member States, national courts are required to ensure that EU law takes full effect. 3 That is the only way of ensuring the equality of Member States in the Union they created

PolExit?

- Poland: Constitutional Tribunal decision of 7 October 2021

  - Primacy of EU law
  - Application of PM for a judicial review of EU Founding Treaties with Polish Constitution
  - Retaliation for CJEU Grand Chamber ruling from March 2021 in C-824/18 on appointment of judges to the Supreme Court of Poland

  - Targets mostly compatibility of A19.1 and 19.2 TEU with the Constitution (remedies sufficient to effective legal protection in fields covered by EU law)
  - Activist decision (review beyond the scope of the PM application)
  - Tribunal interprets the EU law – exclusive competence of the CJEU

PolExit?

- Poland: Constitutional Tribunal decision of 7 October 2021

- Unlike the German ruling, it calls into question the cornerstone of European integration
  - Sweeping rejection of the primacy of European law
  - Establishes the unconstitutionality of central primary law norms: A1 and 19 TEU
  - Poor reasoning, does not address harmonization or reconciliation of EU law and national constitution
  - **Blanket primacy of Polish constitution**
  - Effectively denies any competence of the EU
  - Denies national judges power to review the conformity

PolExit?

- Argues that questioning of EU institutions of the breach of Polish statutes goes beyond competences conferred to EU (organisation of the judiciary)
  - BUT: the scope of competences transferred to EU includes the obligation of MS to establish remedies sufficient to ensure effective legal protection of the EU law application (a.19.1)
  - Also, everyone, whose R&F guaranteed by EU law are violated has the right to effective remedy before a tribunal (meaning domestic one, not CJEU)

  - Independence of judges is prerequisite of this

The Polish case

- The supremacy of Polish Constitution was already established (K 18/04, K 32/09, SK 45/09)
  - two autonomous legal orders exist side by side, they interact and potential conflict is not excluded
  - In case of a collision, authorities should respect the autonomy of both legal orders, but they CANNOT recognize the supremacy of EU norm over the Polish constitutional norm
  - Nor can they replace the constitutional norm with a Union norm
  - Friendly interpretation of EU law cannot go contrary to express wording of constitutional norms

- This all does NOT mean that Poland cannot function in EU as a sovereign and democratic state, or the Constitution ceased to be the supreme law of Poland (as argued in K 3/21)

Dissonance in Romania

- Even more extreme
- AFJR case
- Romanian Constitutional Court 8 June 2021
  - Pitești Court of Appeal – one of the national courts that addressed the preliminary requests to the ECJ – decided that, in accordance with the ECJ ruling, the Special Section for investigating criminal offences within the judiciary (SIIJ) is no longer competent to investigate a case brought before it.

- Retaliation of RCC: decision on a referral of unconstitutionality of several articles from the Law on the judicial organization that pertain to the SIIJ. The Decision 390/2021 is a hallucinating succession of legal nonsense, in which the Constitutional Court literally renders the ECJ judgment devoid of any effect in respect of national courts and practically forbids the latter to apply EU law and disregard contrary provisions of the national legislation
- HOW?

Dissonance in Romania

- 1. RCC comes to an opposite finding on the compatibility of SIIJ with rule of law as the CJEU

- 2. national judge is competent to disregard conflicting domestic provision that is contrary to EU law

- 3. BUT: EU law has no primacy over Romanian constitution

- 4. If ConCourt reviews domestic provision (constitutional review) – it triggers the Constitution, which is hierarchically above the EU law. Hence, any law assessed as constitutional receives constitutional quality and is above the EU law

- ….

Dissonance in Romania and the end of CVM

- 22 November 2022 – early Christmas present for Romania, ECom terminates the CVM
- (Bulgaria fulfilled all benchmarks by 2019)
- Last reporting period: 12 recommendations in 2017
  - Same year, new period of RoL backsliding under Social Democrats
  - EC adds more recommendations
  - In 2019, Dragnea, leader of Social Democrats, loses power and is sentenced to prison for the abuse of power
  - National Liberal Party comes to power and reforms the judiciary – EC seems happy (2021)
    - Romanian judges (and Venice Commission) argues that corruption was not solved
    - DNA powers transferred to new Section which soon collapsed under the backlog
    - Overuse of emergency procedures since 2020
    - Judicial independence: problematic with prosecutors, and GP (concentration of powers against subordinated prosecutors)
    - Primacy of EU law: CCR consistently upholds controversial justice reforms, preventing national courts from enforcing EU law where it requires the disapplication of a national norm that is declared in accordance with the constitution.

Questions

- Elisa
  - what can be the specific mechanisms that the Court can use in order to counter discrimination?
  - What are the key differences in the judicialization of different grounds of discrimination?

- Claire
  - What mechanisms or frameworks could be envisioned to foster a dynamic and inclusive dialogue between EU institutions, member states, and their citizens to collectively shape the future trajectory of fundamental rights legislation within the EU?

- Kim
  - - How can the EU create more support from member states to take up the role of legislator when it comes to the protection of fundamental rights?
  - - How can the subsidiarity principle be reconciled with a more supranational approach regarding the protection of fundamental rights?

- Thomas
  - How does the European Union's commitment to fundamental rights protection contributes to the development of a common European identity?

Questions

- Jelle
  - In what ways can EU anti-discrimination law become more effective?
  - • How should this law receive updates to change with the evolving norms in society?
- Martha
  - Is a hierarchical structure suitable for anti-discrimination law?
  - How effective is this system? To have equal judgments do we need to rely on the passing of time and tables turning to change the hierarchy?
  - Or should we advocate for a more just and impartial approach to handling these matters?
- Simo
  - How could the open wording of Art. 21 CFR in connection with the RED and FED directives be used for an intersectional approach by the Court without violating Art. 6(1) TEU?
  - Do you think that this structure “imports a descriptive and normative view of society that reinforces the status quo”

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