THE "HIGHEST COURT" IN FEDERAL SYSTEMS

by

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The courts of last resort within nation-states bear an enormous responsibility for the law, since it is they who ultimately decide what domestic law means and whether it is valid under higher law, be it constitutional or international. It is also they who take responsibility for ensuring whatever degree of legal coherence the polity they serve can claim.

My focus is "highest" courts in federal systems. Of course, even if we arrive at a workable definition of a federal system, we are faced with the definitional question of what constitutes the "highest" court within it. By that notion we may mean, as if by definition, the highest court at the *federal* level. But the notion may also include (within a sphere that has, of course, to be delineated) the highest courts at the level of the constituent *states*? Further, in some nations (such as Germany), there is a multiplicity of nominally supreme courts at either the state or the federal level. The question then arises as to which is the "highest" among them. Finally, where polities offer us both supreme "ordinary" courts and supreme "constitutional" courts, which is the higher as between them? The former may be entitled to give authoritative interpretations of legislation (that is to say, to declare what the law is and means), while the latter may authoritatively determine the constitutionality of legislation in the event it is challenged. (Within the European Union, of course, the European Court of Justice claims to be highest in both of these senses.)

All this is to say that, as in so many other fields of human endeavor, form truly follows function. It is idle to designate a court or courts as "highest" without first identifying the judicial functions to be performed. Thus, in a judicially complex federal system, there can be no fewer than four highest courts: (a) a highest court (and, depending on specialization, possibly several highest courts) for the interpretation and understanding of the law of the constituent states, (b) a highest court for determinations of the constitutionality of constituent state law under the *state* constitution, (c) a highest court (and, again depending on specialization, possibly several highest courts) for the interpretation and understanding of federal law, and (d) a highest court for determinations of the constitutionality of federal law – and possibly also state law – under the *federal* constitution. But even this laborious catalogue of conceivable highest courts may be further complicated by the possibility of having yet a separate court – on the French *Tribunal des Conflits* model – whose function is to decide in which order of courts within a complex judicial system a given case

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belongs, in the event of conflict over even that purely jurisdictional question. (The notion of a "conflicts tribunal" within the EU is one to which I shall return.)

If I am correct that there are numerous logically defensible ways in which to organize "supreme" judicial authority within federal systems, the designers of federal constitutions enjoy considerable architectural license. Whatever the drafters of the U.S. Constitution may have originally and specifically intended, they created – or at least left open the possibility for – a centralization within the U.S. Supreme Court of both final authority to determine both the meaning and the federal constitutionality of federal law (not to mention the federal constitutionality of state law). The further and related, but really not surprising, "move" that the Supreme Court made was to consider that questions of state versus federal legislative competence represent *constitutional* questions and that the resolution of such questions therefore also fell within the Court's own purview. And so, it is today unquestioned – though it is still not expressly inscribed in the U.S. federal constitutional document – that the Supreme Court ultimately determines the outer limits of federal legislative authority and state legislative authority vis-à-vis each other. It has, we might say, *Kompetenz/Kompetenz*. Today, most architects of federal-type systems within nation-states are unlikely to leave any of this to chance. (Admittedly, the architects of looser federal-style systems may well do so, as evidenced by the European Community, whose founding treaty still does not expressly address the question.). In any event, the architects of federal-type systems within nation-states are unlikely (and would certainly be unwise) to make these decisions in isolation from the generally prevailing understandings about the desired degree of political and legal integration within the particular federal system at hand.

And so, when we turn to the European Union, we find – predictably – a rather mixed picture. Certainly, some aspects of the "highest court" problem are quite settled and unlikely to be revisited. For example, the Supreme Courts (and, if they exist, the constitutional courts) of the Member States have ultimate authority to identify and interpret Member State law and to measure the constitutionality of that law under the State's own constitution. Even the most hardened federalist would probably admit that Member State supreme courts have ultimate authority to determine the meaning of Member State law, even when that Member State law has been enacted in implementation of a Community law directive (however strong may be those supreme courts' obligation to give national law an EU-law-friendly interpretation if at all humanly possible).

Equally settled is the fact that, for its part, the European Court of Justice has ultimate authority to interpret all European Union law, treaty and secondary law alike. The Court also has a major role (--it would claim the *exclusive* role--) in determining the validity and enforceability of all secondary EU law, including notably the question whether that law may be *ultra vires* the authority delegated by the Member States to the Union institutions under the basic treaties. It is true that the Court has rarely (--indeed still on only one occasion--) found Community legislation as such to

be *ultra vires*; it certainly has not jumped at the opportunity to give direct judicial effect to the principle of subsidiarity. But "mood swings" within the U.S. Supreme Court suggest that these patterns are not immutable. In short, the Court of Justice's performance of a traditional function of the highest court in federal systems – namely, ensuring the uniform understanding of federal law and enforcing "federal" constitutional limitations on that law – is well within the classical paradigm.

But, to a foreign observer, the role of the European Court of Justice as highest court in a federal system looks in other respects rather unusual. On the one hand, the European Court of Justice is called upon regularly – almost routinely – to sit in judgment of Member State law and policy. It is banal to observe that a Member State measure that has been duly enacted under domestic law, and whose validity may even have been upheld in all other respects by the highest courts of the Member State, risks being condemned by the Court of Justice if, under that Court's own exquisite jurisprudence, the measure offends one of the scores and scores of policy norms (e.g., free movement within the internal market) embedded in the European treaties.

Paradoxically enough, it is rare to find, even among the most tightly integrated federal nation-states, a federal constitution that contains as abundant an array of judicially enforceable policy-based norms against which legislative measures enacted by the constituent states might be legally challenged and judged. The Court's exercise of this power has become so usual that it seems banal to remark upon it. It matters little that the Court of Justice does not itself annul the offending Member State measures or otherwise personally ensure their non-enforcement. Normatively, the situation is clear, and however contentious certain specific exercises of this power by the Court may be, the power itself is largely uncontested.

Viewed in comparative federalism perspective, the federalizing role of the EU's highest court is thus substantively staggering. The underlying explanations are well-known. First, the treaties are far richer in substantive policy norms than any federal constitution in any federal state with which I am familiar. Second, the Court itself has vigorously asserted the authority to enforce these norms in this fashion and has largely succeeded in doing so. Finally, an exceptionally generous preliminary reference procedure has been put in place to facilitate greatly the bringing of such issues from the courts of the Member State directly to the European Court of Justice, even in claims over which the Community courts lack any original jurisdiction whatsoever.

And yet, despite the range and frequency with which judicial policing of this sort goes on within the European Union system, other basic federalism questions remain contested and, to be honest, essentially unresolved. One such question is, of course, the simple *Kompetenz-Kompetenz* question. When it comes to determining the outer limits of the exercise of legislative and policymaking authority by the European institutions, who ultimately decides? If the issue arises and cannot be avoided (which,

experience shows, it usually can be), is it a question for the Court of Justice (the "highest" court at the European level) or for the "highest" courts of the Member States?

If this question is not debated today in the United States (and it is not), that does not mean that it never was. John C. Calhoun is only the most famous spokesperson for the early nineteenth-century view that what distinguishes a federal system from a unitary system is precisely the sharing and allocation of power, and that courts at the federal level cannot be relied upon to ensure that the principles that govern the sharing and allocation of that power will be respected by the federal authorities over time. To this day, the matter is still not addressed explicitly in the American federal constitutional text; but the answer is I think clear. The federal authorities (be they Congress, the President or the federal agencies) enjoy whatever constitutional power they may have asserted on any given occasion as long as the federal courts – and ultimately the U.S. Supreme Court – decide that they do.

The way this "ultimate" question is decided depends on how the very constitution of the federal system is, or comes over time to be, understood. The case for vesting *Kompetenz-Kompetenz* in the highest federal court in a federal system is perhaps at its strongest in a "*we the people*" constitution. After all, if it is the people, taken as a whole, whose decision it was to constitute the federal state, it is quite difficult to see the strength of a claim by state courts that (in the absence of a plain statement to that effect in the constitutional text) they should be the ones principally to police the federalism frontier. The claim is stronger where it is the constituent states themselves ("*we the states*") that have constituted the federal state, though, even then, the claim may be only superficially stronger if the constitution has to be approved (by referendum or otherwise) by a vote of the people as a whole, as opposed to a vote of the people on a state-by-state basis. By this standard, the case for considering *Kompetenz/Kompetenz* as being ultimately lodged in the European Court of Justice, rather than in the Member States' highest courts, is not as strong as some would have it, notwithstanding the *effet utile* arguments that can be brought to bear and despite the desirability of having a uniform understanding of what is and is not valid and enforceable Community law. It is small wonder that Article I-5a of the Draft Constitution provided that "The Constitution, and law adopted by the Union's institutions in exercising competences conferred on it, shall have primacy over the law of the Member States," without, however, indicating who it was to be who would decide whether the Union institutions were, in any given case, acting within the Union's competences.

The other contested, and essentially unresolved, question is of course the one of whether, and if so when, national courts – ultimately the highest national courts – may permit, and possibly even demand, the non-application of European law due to an irresolvable conflict between it (as interpreted by the Court of Justice) and paramount national constitutional values (as understood by the highest national courts themselves). Here, again, the U.S. Constitution is quite clear: all federal law, not

merely the federal constitution, is the supreme law of the land, any state law – even state constitutional law – notwithstanding. But in Europe we know only too well the depth of the reservations – however subtly articulated and however rarely invoked – that various Member State supreme and constitutional courts have interposed against any such categorical assertion of EU law primacy within the European legal arena. It is again small wonder that the Draft Constitution took no sharp position on this basic constitutional law issue either.

And so, we find elements of paradox, not that the paradoxical is anything new in European Union law. On the one hand, the Court of Justice reviews, directly or indirectly, the validity of Member State law on a scale and with a regularity that is unparalleled in any federal system I know. Moreover, the legitimacy of the Court's doing so is hardly contested, however wrongheaded academic and political critics may consider particular exercises of that power to be. And yet, at the same time that this activity, uncontested in principle, goes on, the larger and more delicate relational questions I have identified continue to subsist. One might almost say that the daily conduct of judicial review of Member State law (whether via direct actions or by preliminary rulings) has only been tolerated on condition, effectively, that these theoretically important but practically insignificant tensions be allowed to remain unresolved authoritatively. And, indeed, the European Union has conducted its business for a good long time now without these larger and more delicate relational questions ever having been put to rest.

Should this state of affairs be allowed to endure? A powerful case can be made for creating new institutions for the resolution of precisely these fundamental tensions: a carefully-staffed "competence tribunal" to arbitrate claims that the EU has legally overstepped its bounds (in terms of subsidiarity or otherwise), or an equally carefully staffed "constitutional tribunal" to reconcile national constitutional challenges to the enforcement of EU law within the Member States. That is a good and serious question. But both experience and political reality counsel against any such moves.

First, the legislative procedure at the European level (notwithstanding the rise of qualified majority voting) gives powerful voice to the Member States as such. That procedure has gone, and should continue to go, a long way toward ensuring legislative respect at the European level for the truly fundamental values that infuse the Member State constitutional systems and that may even be inscribed in their constitutions. As for the Court of Justice itself, it has shown a readiness (albeit rarely exercised) to restrict the institutions' use of legislative authority in the name of market integration. It has also shown a remarkable instinct for protecting fundamental national values from the onslaught of the Treaties' various directly effective market integration norms. And it has made plausible and good faith efforts to limit its fundamental rights review of Member State law and policy to circumstances in which Member State officials may be said to be implementing or giving effect to EU law

or policy. In other words, the Fourteenth Amendment has decidedly not come to the European Union.

Can judicial self-restraint of this sort on the part of the EU judiciary continue to be counted on? One is entitled to some doubts on this score. Judicial pendulums do swing. Certainly no one would have predicted fifty years ago the attachment to state prerogatives – vis-à-vis the federal government – that a majority of the current Supreme Court has demonstrated, albeit somewhat inconsistently, over recent years. Still, we have grounds for believing that the sensitivity that has fueled the Court of Justice's recent patterns of self-restraint, when it comes to overriding fundamental national constitutional values, will continue. Third, and finally, it could well happen that the very establishment of a new arbitral institution for these purposes would cause the Member State and EU judiciaries (not to mention Member State and EU politicians) to take harder and more self-serving lines, as regards their powers and prerogatives, than has been and otherwise would continue to be the case.