

# The Supremacy of European Union Law: An Inevitable Revolution or Federalism in Action?

by  
Redmond Arigho

## Abstract

The European Union is a fully fledged, *sui generis* legal order. The doctrine of supremacy, developed by the European Court of Justice in the seminal case of *Costa v ENEL* established Union laws having primacy over domestic law of the Member-States thereby rendering as non-applicable national law that was deemed to infringe EU Law. Although the ECJ has clarified that this extends to domestic constitutional law, this claim of authority has not been welcomed in its entirety in any of the Member-States. This issue is encapsulated in the so called 'kompetenz-kompetenz' debate, a phrase uttered by the German Constitutional court. According to the Member-States, they retain the ultimate authority to designate which law reigns supreme (regarding it as a fundamental component of national sovereignty) and most importantly, to what extent Union competence extends to. It is clear therefore that there is a fundamental dichotomy over the position claimed by Union law, and that of the Member-States. This has been described as eradicable conflict that must inevitably lead to conflict between the Union legal order and the national ones, with the outcome resulting in a legal revolution which will result in in one of two situations: (i) the acceptance on behalf of the Member-States of the Supremacy doctrine as enunciated by the ECJ or (ii) a clear rejection of the ECJ's claim and the positioning of national constitutional law as the 'grundnorm' of domestic Member-State law. The aim of this paper is, however, to demonstrate that rather than an eradicable conflict, the current dichotomy between the two legal orders is a necessary result of federalism. Under this theory, the 'conflict' between the two systems will not necessarily lead to a legal revolution, and that in fact, such diametrically opposed claims from two *sui generis* legal orders within the one federal system are bound to occur in a federal legal order. Federalism, by its very nature, is the legal fruition of competing legal orders. It is proposed to undertake a comparative analysis of some of the seminal decisions throughout the EU on supremacy, from both the perspective of the Court of Justice and the most relevant emanating from national courts. A teleological analysis of these legal positions will then be undertaken within the competing frameworks of 'conflict' and 'legal pluralism'. Ultimately, the position that legal federalism, by its very nature, engenders such a 'conflict' is proposed and defended.

## Keywords

European Union law, domestic constitutional law, supremacy, conflict of legal orders.

*“The precedence of Community law is confirmed by Article 189, whereby a regulation ‘shall be binding’ and ‘directly applicable in all Member States’. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law. It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”<sup>1</sup>*

This famous acknowledgment by the European Court of Justice in the infancy of the development of the then European Community has acted as the foundation for the development by that court of many unique legal instruments which ensure the implementation of European Union law within the Member States.<sup>2</sup> However, two perspectives on the Supremacy of EU Law have emerged. The European perspective, as held by the Court of Justice of the European Union (CJEU), takes the view that Supremacy of EU law extends to domestic constitutional law and that the Court of Justice will determine when this is the case.<sup>3</sup> On the other hand, the Courts of the Member States have been reluctant to agree with this analysis. Their approach, most strikingly observed in Germany, is that Member States retain the competence to decide whether Union law trumps national constitutional law.<sup>4</sup> This has been described as an eradicable conflict that must inevitably lead to conflict between that Union legal order and the national ones, with the outcome resulting in a legal revolution which will result in in one of two situations: (i) the acceptance on

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1 Case C-6/64 Costa v. ENEL [1964] E.C.R. 585, 593.

2 Direct Effect, Indirect Effect, Horizontal Effect and the effect of EU law doctrine on Judicial Review procedures are just a number of instances where the supremacy of EU law has had a dramatic effect on the legal processes in the Member States.

3 Case C-6/64 Costa v. ENEL [1964] E.C.R. 585; Case 106/77 Amministrazione delle Finanze dello Stato v. Simmenthal SpA [1978] E.C.R. 629.

4 The Federal Constitutional Court of Germany has been the most vocal in this respect. See Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratstelle fur Gettreide und Futtermittel (Solange I) [1974] 2 C.M.L.R. 540; Wunsche Handelsgesellschaft (Solange II), [1987] 3 C.M.L.R. 225; Brunner v The European Union Treaty [1994] 1 C.M.L.R. 57.

behalf of the Member-States of the Supremacy doctrine as enunciated by the ECJ or (ii) a clear rejection of the ECJ's claim and the positioning of national constitutional law as the *grundnorm* of domestic Member-State law.<sup>5</sup> The aim of this article is, however, to demonstrate that rather than an eradicable conflict, the current dichotomy between the two legal orders is a necessary result of legal federalism. Under this theory, the 'conflict' between the two systems will not necessarily lead to a legal revolution, and that in fact, such diametrically opposed claims from two legal orders within the one federal system are bound to occur in a federal legal order. Federalism, by its very nature, is a political compromise between two legal orders with two competing visions of ultimate sovereign authority.<sup>6</sup> It is proposed to undertake a comparative analysis of the seminal decisions throughout the EU on supremacy, from both the perspective of the Court of Justice and the most relevant emanating from national courts. The two Member States chosen for the present article will be Germany and Ireland.<sup>7</sup> A teleological analysis of these legal positions will then be undertaken within the competing frameworks of 'conflict' and 'legal pluralism'. Ultimately, the position that legal federalism, by its very nature, engenders such a 'conflict' is proposed and defended.

## The Supremacy of EU Law - The Perspective of the Court of Justice of The EU.

Long recognised as perhaps the most prolifically integrationist of the European Institutions, the Court of Justice (CJEU) has been pushing the legal boundaries of Union law since its inception. Rather than merely follow the traditional public international law approach, the Court used the supranational (i.e. federal) aspects of the foundational treaties to establish EU legal order as constituting a new one with direct legal effects within the Member States.

In *Van Gend en Loos*<sup>8</sup>, the Court held that Union law was capable of being directly effective in the Member States. Individuals therefore could rely on Union law to justify their actions as upholding the law, if those actions were

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5 Diarmuid Rossa Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, (Dublin: Round Hall Sweet & Maxwell, 1997).

6 Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, (Oxford: Oxford University Press, 2009).

7 These Member States have been chosen due to the fact that the German position represents the most sceptical of the claims of the CJEU, whilst an analysis of the Irish position will appeal to a domestic Irish audience to which the present article is catered for.

8 Case C-26/62 *Van Gend en Loos* [1963] E.C.R. 1.

contrary to domestic law. This position was built upon by the Court in its seminal decision relating to Supremacy in *Costa v ENEL*.<sup>9</sup> Here the Court handed down a judgment that unequivocally enunciated Union law as enjoying a higher legal status than that of national law. The central rationale of the Court was that in order for EU law to be given the same uniform application across the Member State, it would be incongruous to place the power of interpretation with the Courts of the Member States, which would likely reach different conclusions, thus negating any attempt at one single European law having the same effect in the Member States. If Union law was not superior to national law, then divergent national laws would trump Union law, leaving the State of Union law in a perilous position. This was a clear bold assertion by the Court that placed teleological considerations of the role and purpose of the Treaties at its forefront. In its subsequent *Simmenthal*<sup>10</sup> judgment, the Court reiterated in strong terms that Supremacy was to be guaranteed against national constitutional law.

## An Opposing Vision – The View of the Member States

### Germany

The largest Member State in the Union, as well as one of its founding Members, the legal position adopted by the German Constitutional Court is an interesting one. The Karlsruhe Court has an interesting constitutional tightrope to walk. The German basic law contains famously strong fundamental rights provisions. The *Bundesverfassungsgericht* (the German Federal Constitutional Court) sees itself as the custodian of these human rights protections. Unique to the German Constitution amongst the constitutions of the Member States however, is a provision that obligates the German state to seek European Unity under Article 23.1 of the German basic law. So how has the Federal Constitutional Court reacted to EU Law's claim to ultimate supremacy and how has it balanced this according to its own Constitutional commitments?

Two series of cases reveal two pertinent teleological issues that the Federal Constitutional Court has raised that go to the limits of what it views as the boundaries of EU law. The first round of cases concerned the interaction between Union legal provisions with fundamental rights guaranteed by the German Basic Law. Could it be acceptable that Union law, as required by

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<sup>9</sup> Case C-6/64 *Costa v ENEL* [1964] E.C.R. 585.

<sup>10</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] E.C.R. 629.

the doctrine of Supremacy, could trump a human right guaranteed by the German Constitution? The second round of cases arose directly as a result of the adoption of new EU treaties. The issue these cases revealed has been termed that of *Kompetenz-Kompetenz*.<sup>11</sup> Effectively, this efficient German phrase addresses the question of who determines when Union Law has infringed national constitutional law. Does the CJEU retain this power to determine what fields of law are governed by Union law, or does the competence to decide the remit of Union law rest with national legal systems? The result of these cases would ultimately rest on the issue of the Supremacy of EU Law and whether the view of the ECJ was going to be accepted by the Federal Constitutional Court.

Moving to the first issue, the first case to be considered is the appropriately termed *Solange I*<sup>12</sup> (So long as) decision of the German Federal Constitutional Court in 1974. The factual background of this case concerned two Regulations of the then European Community. These laws placed a time limit on the length of time permitted for a company to export goods within the Community after which the company would not be able to recover its original administrative deposit. The plaintiff company wished to challenge this European rule, arguing that it infringed some of the fundamental rights guarantees in the German Constitution, namely that of freedom of action and of disposition and of economic liberty. It was further argued that these violations were disproportionate, thus infringing the German Constitutional guarantee of proportionality. Whilst ultimately holding that the rules requiring the forfeit of the deposit did not infringe the rights guaranteed by German Constitutional law, the Court nevertheless took the opportunity to outline its dissatisfaction with the ECJ's claim of ultimate legal authority over German constitutional law. According to *Solange I* the German Courts would determine whether Union law infringed German constitutional law and they would reserve the right to apply national constitutional law ahead of Union Law. This legal analysis was therefore in clear contra-distinction to what the CJEU ruled in *Costa v ENEL* and *Simmenthal*. Before moving to considering the next case, it is important at this juncture to highlight the Court's view that human rights protection at a Union law level was not sufficient vis-à-vis the rights protection available under national law. The debate at this point therefore rested on fundamental

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<sup>11</sup> U. Elbers and N. Urban, "The Order of the German Federal Constitutional Court of 7 June 2000 and the Kompetenz-Kompetenz in the European Judicial System" *European Public Law* 7 (2001): 21, 32.

<sup>12</sup> Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratstelle fur Gettreide und Futtermittel (*Solange I*) [1974] 2 C.M.L.R. 540.

rights guarantees and appeared to suggest that if Union law were to protect human rights in an equivalent manner, then the supremacy of EU law could be accepted in national law in a manner advocated by the ECJ. However, despite inclinations to that effect in the *Solange I* judgment, the *Solange II*<sup>13</sup> judgment marked the inception of what has now become the crucial issue which marks the difference in opinion between the constitutional law of the Member States and EU law.

In the *Solange II* case, the German Constitutional Court abandoned its reservations about the standard of European fundamental rights protection. So long as European law guaranteed a similar level of rights protection, the German courts would no longer be obligated to examine the compatibility of Community legislation with domestic human rights protections. Crucially however, it still reserved the right to be the adjudicator of whether fundamental rights were breached. The judgment failed to accept the ECJ's view on supremacy, and strongly indicated that ultimate supremacy rested with German Constitutional Law. This was the very first hint of the *Kompetenz-Kompetenz* debate. Although the court found that there was no breach of fundamental rights in this case and that Union law now guaranteed such rights to the same degree as under national law, *Solange II* suggested that it would be the German courts, and not the CJEU in Luxembourg that would determine whether fundamental rights, guaranteed both at a Union level and at a domestic level, were infringed.

The second issue, and what has become the largest bone of contention between the Courts of the Member States and the CJEU, has become apparent in cases with the backdrop of treaty amendments which further crystallised the federal method of European integration. The first concerned the watershed Treaty of Maastricht which established the European Union, the 1993 decision of *Brunner v Treaty of Maastricht*.<sup>14</sup> Following a trend in the cases that have come before the German Court, the Court held that the Treaty was in compliance with the German Constitution but at the same time outlined a power of ultra-vires review for itself when it arrived, determining whether EU law went beyond the scope envisaged for it under its foundational treaties. This power was inherent in the Federal Constitutional Court's jurisdiction as it was to be the ultimate arbiter of to how far EU law would extend in its scope. It alone

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<sup>13</sup> Wunsche Handelsgesellschaft (Solange II), [1987] 3 C.M.L.R. 225.

<sup>14</sup> Brunner v The European Union Treaty 1994] 1 C.M.L.R. 57.

determined the *Kompetenz-Kompetenz* of Union law. The case of *Gauweiler v Treaty of Lisbon*,<sup>15</sup> concerning the constitutionality of the Lisbon Treaty with the German Constitution, the Court (once again upholding the validity of the Lisbon Treaty) reiterated that the power of *Kompetenz-Kompetenz* remains with the German Courts and not with the EU.<sup>16</sup> In the ECJ's view, it has the sole authority to decide whether national constitutional law infringes Union law. The Maastricht judgment clearly posits this power with the German Courts from the perspective of German Constitutional Law. There is therefore a potential challenge to the supremacy of EU as enunciated by the CJEU and the German Federal Constitutional Court.

But what of the practical effect of this discrepancy? Surely the ground is fertile for a direct constitutional conflict between these competing constitutional visions? In Kelsian terms we should be expecting a legal revolution in order to determine the one and only true *grundnorm* that must be placed at the pinnacle of any legal order. To spell this argument out, if a case is to come before the German Federal Constitutional Court and that court exercise its asserted power to judicially review EU legislation, the Court will be acknowledging the locus of German legal sovereignty (i.e. its *grundnorm*) within its traditional confines in the German legal order. If however, the Court accepts the view of the CJEU on the supremacy of EU law, then the locus of German legal sovereignty would be transferred to the EU, with the resulting *grundnorm* of the German legal order resting within the EU legal order.

Alas, a German litigant provided such an opportunity in 2011 in the *Honeywell* case.<sup>17</sup> The initial plaintiff in this case objected to his employment contract on a year only basis, rather than being a fixed-term one, as he had worked for the same company on an ongoing basis for over four years, thus rendering any subsequent employment contract a fixed one in accordance with EU rules to that effect. However, the employer relied on domestic German law that permitted it to grant year-long only contracts in such instances. Although initially unsuccessful, the employee was successful in his claim at the Federal Court in Employment matters. It dis-applied the national provisions, ruling that EU law took precedence and that its rules must be followed above any contrary national ones. Thus far, this result would cohere exactly with

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15 Lisbon Case BVerfG, 2 be 2/08, 30 June 2008 92.

16 D. Halberstam and C. Mollers, "The German Constitutional Court says "Ja Zu Deutschland!" *German Law Journal* 10 (2009): 1241.

17 *Honeywell*, BVerfG, 2661/06, 6 July 2010.



the doctrine of Supremacy handed down by the CJEU. At this stage, the employer took a complaint to the German Constitutional Court, arguing the position outlined by the German Court in its judgments pertaining to the ratification of the Maastricht and Lisbon treaties respectively. In effect, the appellant's argument was that, in line with these judgments, German constitutional law rather than EU law was supreme as the German courts were the arbiters of the exact extent of Union law in German law. Although the German national employment laws were not constitutional ones, in this instance domestic constitutional law was engaged as there had been an infringement of his constitutional right to have his legitimate expectation honoured. The employer's contention was that his legitimate expectation was that the national law was good law and that it was not clear that the competing European Directives were directly effective in this instance. The battle line was thus clearly drawn setting up a conflict between national constitutional law and EU law.

This case therefore concerned the practical effect of Supremacy and tested the Federal Constitutional Court's asserted *ultra vires* competence to review whether a Union Act went beyond the competence conferred upon it in the Treaties. However, even though the Court used its own supremacy analysis to come to its decision, the result that it reached was the same as would have occurred if it used the Supremacy analysis favoured by the CJEU. It held that EU law here trumped national law as the EU had not gone beyond the competences conferred upon it by the Treaties. The important point to stress is that the Court places a significantly high barrier to *ultra vires* review of Union Acts. Even though it accepted that it retained the ultimate *Kompetenz-Kompetenz* to judge the exact ambit of EU law, it nevertheless adopted a highly deferential standard when it came to review the practical implications of that principle.<sup>18</sup>

The result in this case is surely significant. It demonstrates the political appetite that exists to reduce the potential of conflict between domestic constitutional law and that of EU Law. Whilst there are competing claims for the ambit of each legal order's potential legal reach, both are unwilling to crystallise the potential legal conflict that is undoubtedly possible. The existence of two sovereign claims, yet the inexistence of any practical conflict poses a challenge

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<sup>18</sup> M Payandeh, "Constitutional Review of EU law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice" *Common Market Law Review* 48 (2011): 9.



for advocates of indivisible sovereignty.

## Ireland

Ireland joined the then EEC in 1973. In order to ensure that the obligations of membership were fulfilled Ireland inserted Article 29.3 into its Constitution. On the face of it, the doctrine of the Supremacy of EU law as enunciated and developed by the CJEU in *Van Gend en Loos*<sup>19</sup> and *Costa v ENEL*<sup>20</sup>, would appear to have been directly accepted by Ireland in accordance with the doctrine of *acquis communautaire* that must be accepted by new Member-States. If taken to its logical conclusion this would mean that the State had wilfully accepted that the Irish Constitution now accepted EU law as the supreme normative authority in the areas in which it agreed to transfer part of its national sovereign authority to, and thus gave EU law the ability to dis-apply national constitutional provisions in cases of conflict. In reality the position may be far more nuanced than this.

In the Republic of Ireland the Constitution has been conceived as guaranteeing certain unenumerated rights. Its inherent rejection of the positivist conception of law and the acceptance of a type of natural law theory has led to the development within Irish Constitution of a rich jurisprudence of rights guaranteed to citizens that are not outlined in the disposition of the Constitution itself. To use the particular linguistic style adopted by practitioners and judges alike, their existence is 'inferred' because of the nature of the Constitution itself.<sup>21</sup> This created a 'constitutional gap' in the relationship between Irish Constitutional law and the law of the EU. Similar to the German context, it may be contended that Human Rights protection may have, at least in the early years of membership, been superior at a domestic level, rather than at the federal Union level. There is therefore a divergence between those that argue that in accepting the Third Amendment to the Constitution and inserting Article 29 to the Constitution that Ireland had unambiguously accepted the legal obligations of membership up to and including supremacy of EU law<sup>22</sup>, and those who suggest that similar

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19 Case C-26/62 *Van Gend en Loos* [1963] E.C.R. 1.

20 Case C-6/64 *Costa v. ENEL* [1964] E.C.R. 585.

21 *Ryan v. Attorney General* [1965] I.R. 294. For a nice overview of the unenumerated rights doctrine in Irish constitutional law see Ronan Keane, "Judges as Lawmakers: The Irish Experience", *Judicial Studies Institute Journal* 4(2) (2004): 1.

22 B. McMahon, and F. Murphy, *European Community Law in Ireland*, (Butterworths, 1989).

problems such as those suggested by the German *Solange I* decision are capable of surfacing within the Irish jurisdiction.<sup>23</sup>

The question as to whether a potential conflict exists between the Irish Constitution and EU law would therefore appear to rest, at least in part, as to what conception of the Irish Constitution is accepted. The question as to conflict between these two legal norms was alluded to by a former Chief Justice of the Supreme Court, O'Higgins, who has stated: 'it is certain that in relation to developing jurisprudence on human rights fears will be raised as to the possible conflict between a philosophy of legal positivism [an approach that would favour the position of the CJEU] and the concept of natural rights founded on natural law.'<sup>24</sup> Contrary to this view, it is interesting to note the remarks of another former Justice of the Supreme Court, Henchy J, who suggested that 'it is as if the people of Ireland had adopted Community law as a second but transcendent Constitution, with the difference that Community law is not to be found in any single document-it is a growing organism and the right to interpret it and give it conclusive judicial interpretation is reserved to the institutions of the Community and its Court'.<sup>25</sup> Whilst both positions have considerable merit, the jurisprudence of the Irish Courts has not provided us with a clear answer.

Initially, it appeared that Henchy J's position was the one that was to be favoured in Ireland, thus favouring the radical claims by the CJEU. Early judicial comments were supportive of this doctrinally succinct position. Thus in *Pigs and Bacon Commission v McCarron*<sup>26</sup> Costello J held that community law requires 'that it takes effect in the Irish Legal system in the manner in which it itself provides'. This would certainly establish EU law as supreme over constitutional law and it would give the CJEU the authority for deciding when it had the competence to do so.<sup>27</sup> The decision came in the same year as the ECJ's famous *Simmenthal* judgment, which expressly stated that Community law was enjoyed a higher status over national constitutional law.<sup>28</sup> Thus it

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23 Diarmuid Rossa Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, (Dublin: Round Hall Sweet & Maxwell, 1997).

24 Preface to M. Reid, *The Impact of European Community Law on Irish Constitutional Law*, (Dublin: Irish Centre for European Law, 1991)

25 Henchy J, "The Irish Constitution and the EEC", *Dublin University Law Journal* (1977): 20.

26 High Court, June 30, 1978 J.I.E.S.E.L. 77.

27 This was a very early indication of the so-called *Kompetenz-Kompetenz* issue which has surfaced in Germany, resolved in this case in favour of EU law.

28 The French judgment and its allusion to EU law enjoying a 'rang de supériorité' (a superior status) is perhaps the most revealing version of the CJEU's view.

may be that Costello J was not fully aware of the implications that this would entail giving EU law supreme effect over Irish Constitutional law. Further authority for this notion can be found in *Campus Oil v Minister for Industry and Energy (No.2)*.<sup>29</sup> This case concerned the preliminary reference procedure under what is now Article 267 TFEU. At the Supreme Court, it was argued that the Court had jurisdiction to overrule the decision of the High Court to submit a preliminary reference to the CJEU. It was argued that this decision fell within the scope of Article 34.4.3 of the Constitution which stipulates that ‘the Supreme Court shall, with exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court.’ However, Walsh J held that the request for a reference was not an appeal, but a consultative request which was based on the interpretation of the EC Treaty. This was an implementation of the position enunciated in the *Pigs and Bacon Commission* case. The consequence of these pronouncements would of course mean that the CJEU’s *Simmenthal*<sup>30</sup> position was accepted by the Irish Courts. The decision was subject to decisive criticism from the renowned Irish Constitutional scholar, Kelly, in which he outlined that this position favoured ‘the radical proposition that Article 29.4.3 has the effect of scheduling every Article of the Treaty of Rome to the text of the Constitution.’<sup>31</sup>

But can it be said that EU law has supremacy over Irish national constitutional law? These early judicial pronouncements have since been radically diminished and it can no longer be conclusively said that Irish constitutional law can always be dis-applied in favour of EU law. Fundamentally this issue is that of *kompetenz-kompetenz*. Whereas EU law trumps constitutional law in most respects, this is done by virtue of article 29 of the constitution. The application can be seen most clearly in *SPUC v Grogan*<sup>32</sup>, where Walsh J (the same judge who gave the decision in *Campus Oil*) held in obiter remarks that: ‘even if the reference to the Court of Justice were a decision within the meaning of Article 34 of the Constitution, I would hold that by virtue of the provisions of Article 29.4.3 of the Constitution, the right of appeal to this court from this decision must yield to the primacy of article 177 of the Treaty’.<sup>33</sup> EU law gets its authority from the fact that the Irish Constitution gives it this

29 [1983] I.R. 88.

30 Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629

31 G.W.Hohan and G.Whyte, Supplement to the second edition of *J.M Kelly: The Irish Constitution* (Dublin: University College Dublin, 1988), p. 40.

32 [1989] I.R. 753.

33 *Ibid.*

authority. It follows that it is then up for the Irish Courts to decide the extent of the parameters that EU governs. According to Walsh J in *SPUC v Grogan* there were certain fundamental rights that are provided for by the Irish Constitution in which it would never be allowed to be dis-applied in favour of an opposing EU law rule: 'it cannot be one of the objectives of the European Communities that a Member State should be obliged to permit activities which are clearly designed to set at nought the constitutional guarantee for the protection within the State of a fundamental right.'<sup>34</sup> In a similar legal analysis taken by the German Federal Constitutional Court, it was clear that Irish courts were sceptical of losing their supreme authority to a jurisdiction that did not guarantee fundamental rights to the same extent.

The overall conclusion that must be reached as a result of these decisions is hard to determine. Fundamentally, it can at least be established that Irish law does not categorically accept supremacy of EU law to the extent to which it has been outlined by the CJEU. It is also clear that EU law certainly has precedence over ordinary law<sup>35</sup> and that in many circumstances the effect of Article 29 of the Constitution will effectively negate a contrary Constitutional provision to an EU law rule<sup>36</sup>. But the exact parameters of the application of the doctrine in Ireland are difficult to quantify. However, unlike Phelan's suggestion that there is an unlitigated conflict between the positions of the two jurisdictions, it would appear that the Irish Courts are not completely averse to adapting a position that is more in congruence with that of the CJEU.<sup>37</sup> The effect of *SPUC v Grogan* may have been that the line for potential EU law supremacy over national constitutional law is established when fundamental rights are at stake.<sup>38</sup> Although there are echoes of the German Court's reservations concerning fundamental rights, it should nonetheless be noted the Irish Supreme Court is yet to assert its *kompetenz-kompetenz* jurisdiction. Unlike the German Federal Constitutional Court, they have not

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<sup>34</sup> Ibid at 769.

<sup>35</sup> *Meagher v. Minister for Agriculture* [1994] 1 I.R. 347, Blaney J : 'It is well established that Community law takes precedence over our domestic law.' The learned judge quoted the ECJ decisions in *Case C-106/89 Marleasing SA v. La Comercial Internacional de Alimentacion SA* [1990] E.C.R. 1-4315 and *Francovich v. Italy* (Case C-6/90) [1991] E.C.R. 1-5357 to that effect.

<sup>36</sup> This is perhaps the most comprehensive statement that can be made based on the decision in *Campus Oil Ltd v. Minister for Industry* [1983] I.R. 83

<sup>37</sup> Diarmuid Rossa Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, (Dublin: Round Hall Sweet & Maxwell, 1997).

<sup>38</sup> For an opposing view on the statue of the supremacy of EU law see W, Phelan, "Can Ireland Legislate Contrary to EC Law?" *European Law Review* 22 (2008): 530. However, it is submitted that Phelan's approach of viewing Irish membership of the EU on a public international law approach, a view that is rejected further in this article.

explicitly reserved an inherent rights of Ultra vires review of Union action where it deems the Union to have acted outside an area which it has been given the competence to so act.

## The Potential for legal Conflict?

As a matter of law therefore, it cannot be categorically said that there is unity of the rule of law between national constitutional law and European law.<sup>39</sup> German law goes so far as to explicitly state that it has the power to judicially review EU legislation if it deems it to go outside its constitutional remit guaranteed by the foundational treaties of the EU. But is it inevitable that there will be an eventual legal revolution or is the existence of a discrepancy in the sovereign claims at different levels proof of the existence of a federal legal order?

## Constitutional Pluralism?

The result of the analysis of the relationship between national constitutional law and European law would appear to leave us in a type of legal limbo. The traditional response is of course to posit that sovereignty is indivisible and that a conflict is inevitable. Phelan suggests that a conflict between the two orders is inevitable and that when this occurs, the adjudicating jurisdiction (namely the national court as any reference to the ECJ will ensure that the European interpretation of the law is put forward) will have to decide whether or not to accept the supremacy of European law and thus adjudicate on whether national constitutional law is superior or inferior in application vis-à-vis EU law. There are two issues with this presumption. Firstly, the Member-States have since constitutionally ratified various treaty amendments and have therefore, as a matter of law, implicitly accepted the *acquis communautaire* of the European Union. There is therefore, at least on some level and in keeping with national courts' views on the position of EU as it pertains to national constitutional law, acceptance of EU law's claim of supremacy over

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39 R. Kwiecien, "The Primacy of European Constitutional Law Over National Law under the Constitutional Treaty", *German Law Journal* 6 (2005): 1480. For a view arguing that the *kompetenz-kompetenz* now rests with the European Council, and thus the EU itself since the introduction of the Lisbon Treaty see G. Barrett, "Creation's Final Laws: The Impact of the Treaty of Lisbon on the "Final Provisions" of the Earlier Treaties", *Yearbook of European Law* 27 (2008): 3 at 15 'From the theoretical standpoint, all of these are of interest in that they confer a form of kompetenz-kompetenz on the European Union in that, for the first time they empower an institution of the Union itself – vis the European Council – to amend the Treaties.'

national constitutional law. Secondly, it fails to explain how some conflicts have been resolved by national courts already. Taking the German example, it is easy to forget that whilst the Federal Constitutional Court reserved the power of Ultra Vires Review of Union Acts, it has yet to exercise this power. It is submitted that this is significant. It hints that the Court is attempting to save constitutional face while at the same time guaranteeing the practical supreme authority of EU law, even over its national constitutional law. There is an important nuance here. The analysis that the Court uses is that of public international law. It is the domestic national constitution provision that gives effect to EU membership that permits the Courts to grant EU law supremacy whilst retaining national sovereignty. We are therefore faced with a glaring discrepancy. The European Court has proffered a more traditional constitutional analysis of its own order to give its law supreme effect. The Member states have rejected a constitutional analysis and have instead applied a public international law one. The end result in practical terms has nevertheless been the same. This suggests that a conflict is in fact unlikely to occur.

It is further asserted that it is possible to describe this order without the need for there to be a revolution in either the national or EU legal order so as to ensure that there is not a conflict of laws. European Constitutional scholarship has proudly asserted that the European order as a *sui generis* (i.e. unique and lacking in comparable comparisons) one. By applying with rigid loyalty the construct of indivisible sovereignty, European legal scholarship struggled to come to terms with a theory to successfully describe the new legal order which undoubtedly has traditional international elements to it (unanimity requirements on behalf of the Member States) but also supranational ones too, that has pooled the respective states' sovereignty into a new entity. Federalism was deemed an inappropriate conceptualisation for the new legal order as it was too closely associated with the idea of a Nation-State, whose legal notion rests upon the indivisibility of sovereignty and it being placed neatly in one place at the summit of the hierarchy of norms. Thus, it has been proudly asserted that it represented a *sui generis* legal order.

In response to this 'federal dilemma' a new strain of legal thinking based on the work of MacCormick suggested that we conceptualise the legal order as being one that is constitutionally pluralistic (Constitutional pluralism).<sup>40</sup>

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<sup>40</sup> Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 2001); Neil

Under this conception, it is recognised that there are two legal orders at work. They exist side-by-side and are distinct normative legal orders.<sup>41</sup> We can see how this applies to the European scene as the CJEU has confirmed that it administers a new, *sui generis*, legal order.<sup>42</sup> The doctrine of supremacy that it has developed is the clearest vindication of this new *sui generis* normative order.<sup>43</sup> It is also obvious that the member states have their own legal orders. Their existence is not dependent on the existence of other constitutions nor of the EU legal order.

## Conclusion

Although the present author sees the logical merit of the position taken by the pluralists, it must be questioned whether this feat of jurisprudential effort is to be congratulated as a breakthrough that the *sui generis* nature of the Union legal order posed to legal scholars. It is submitted that European scholarship has been too willing to accept this very notion that the EU legal order is a *sui generis* one. Whilst certainly not a federal *State*, it has clearly not been refuted that the Union order is a federal *Union of States*, that have pooled their sovereignty at an international level to be governed at that level in the areas which the States have willingly forsaken their sovereign authority over. The comparative analysis of the three legal systems undertaken with a view to discerning the exact nature of the relationship between the federal EU legal order vis-à-vis that of the domestic legal systems of the Member States highlights a different view on the crucial issue of *kompetenz-kompetenz*. Whether the status quo remains, and an unlitigated conflict between the two approaches continues to exist into the future remains to be seen. But it must be recognised that the current unlitigated conflict is representative of the distinct federal nature of the EU legal order, rendering it unnecessary to conceptualise that order as a ‘*sui generis*’ one. Perhaps the time has truly come to accept the fact that the European Union, at least in a legal sense, is a federal entity.

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MacCormick, “The Maastricht-Urteil: Sovereignty Now” *European Law Journal* 1 (1995): 259; Neil MacCormick, “Beyond the Sovereign State” *Modern Law Review* 56 (1993): 1; Catherine Richmond “Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law”, *Law and Philosophy* 16 (1997): 377.

41 N. Walker, “Late Sovereignty in the European Union” in N Walker (ed), *Sovereignty in Transition* (Hart, 2003) 3; M. Poiars Maduro, “Contrapunctual Law Europe’s Constitutional Pluralism in Action” in N Walker (ed), *Sovereignty in Transition* (Hart, 2003) 501; M. Kumm, “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and After the Constitutional Treaty” *European Law Journal* 11 (2005): 262.

42 Case C-296/83, Parti Écologiste “Les Verts” v. European Parliament [1986] E.C.R. 1339

43 Case C-6/64 Costa v. ENEL [1964] E.C.R. 585.



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