The Limited Practical Relevance of National Constitutional Rights as a Constraint on the National Application of European Law in the Early Decades of European Integration

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Scholarship on the early development of the supremacy of European law has frequently been dominated by discussion of the possibility that a directly effective European law obligation would not be applied in the national legal order because it violated a national constitutional law fundamental right, as discussed, for example, in the *Frontini* and *Solange* decisions of the Italian and German Constitutional Courts. This paper argues that such a possibility should instead be seen as of limited practical relevance. This claim is supported by early scholarship on the application of European law in the national legal orders and by the practice of constitutional review of laws giving execution to treaty obligations in Denmark, Ireland, Italy and Germany, including the German Constitutional Court’s 1955 decision on the Saar Statute. Two conclusions are drawn from this discussion. First, scholarship examining the development of European law supremacy in relation to national constitutional law fundamental rights in particular should be situated within the context of the flexible and politically sensitive approach to adjudication demonstrated by Europe’s national courts in their decisions on potential conflicts between constitutional rights and international legal obligations. Second, scholarship offering a general explanation of the development of the supremacy of European law should not focus on the national constitutional rights question to the exclusion of a thorough examination of national law solutions to European law’s *lex posterior* problem.

Introduction

In scholarship on the historical development of European legal integration, few topics have been as much discussed as the question whether national constitutional courts would have refused to allow the application of directly effective European law obligations because of a conflict with national constitutional law fundamental rights. In many cases, given that national courts derived the national application of directly effective European obligations from national statutes giving execution of the European treaties, this question can be restated as whether national courts would have refused to allow these national statutes to introduce into the national legal orders European obligations contrary to national constitutional law fundamental rights.¹

This paper will argue that the importance of this question has been exaggerated in two ways – first, because discussions of the development of the supremacy of European law have sometimes come to be overly dominated by the national constitutional rights question, and, second, because this problem in relation to application of European law obligations has often been treated in isolation from the more general way that national courts have addressed potential conflicts between constitutional rights and international legal obligations. As we shall see, national constitutional courts, while insisting on the possibility of national constitutional review of treaty obligations on fundamental rights grounds, particularly in relation to the most fundamental commitments of the national constitutional orders, *

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nevertheless tend to permit the constitutionality of otherwise potentially unconstitutional treaty obligations. Once situated in this wider context, the eventual fundamental rights equilibrium between the European and national courts appears to have many similarities with the methods employed by national constitutional courts to address the challenges of the constitutionality of other important treaty obligations.

This paper proceeds as follows. The second section reminds the reader of the essential obligations involved in recognising the supremacy of European law and the potential conflict with national constitutional rights that may result. The third section demonstrates the emphasis on the question of national constitutional law fundamental rights, and the sometimes neglect of European law’s lex posterior problem, in the scholarship of prominent authors such as Alter, Weiler, and Davies. The fourth section demonstrates that a significant strand of scholarship on the relationship of European law and national law produced in the early years of European integration tended to emphasise European law’s lex posterior problem and, even when recognising the possibility of conflict, did not always see the possibility that Community law might not be applied as a result of national constitutional rights as of strong practical relevance. The fifth section investigates whether national constitutional rights provisions prevented the application of obligations derived from treaties other than the European treaties, using the examples of four member states during the formative decades of European legal integration. The final section concludes with suggestions for future research on the historical development of the supremacy of European law in the national legal orders.

Since the ratification of the Treaty of Lisbon, European Community (EC) law has become ‘European Union (EU) law’. Although the discussion here may be relevant to debates about the contemporary relationship of EU law to national law, the material discussed relates in very large part to the development of the European legal order prior to the entry into force of the Lisbon treaty. This paper will use ‘European Community law’, ‘EC law’ and ‘European law’ interchangeably in discussions of the pre-Treaty of Lisbon European legal order.

**The Supremacy of European law and National Constitutional Law Fundamental Rights**

The European Community, now the European Union (EU), is the treaty regime which organises the single European market and the management of other cross-border externalities for its member states. European law, as developed by the European Court of Justice (ECJ), claims that directly effective European obligations must be applied by national courts, and that, by virtue of the doctrine of the supremacy of European law, the national courts must apply European law even if it conflicts with national legal obligations.

Weiler describes how direct effect and supremacy distinguish EC law obligations from other treaty obligations in these well-known passages:

The judicial doctrine of direct effect ... provides the following presumption: Community legal norms that are clear, precise and self-sufficient ... must be regarded as the law of the land in the sphere of application of Community law ...

The doctrine of direct effect might not strike all observers as that revolutionary, especially those observers coming from a monist constitutional order in which international treaties upon ratification are transposed automatically into the municipal legal order and in which some provisions of international treaties may be recognized as ‘self-executing’ ...

In light of supremacy the full significance of direct effect becomes transparent. Typically, ... although treaty provisions, including self-executing ones, may be received automatically into the municipal legal order, their normative status is equivalent to national legislation. Thus the normal rule of ‘later in time’ (lex posteriori derogat lex anteriori) governs the relationship between the treaty provision and conflicting national legislation. A national legislature unhappy with an internalized
treaty norm simply enacts a conflicting national measure and the transposition will have vanished for all internal practical effects. By contrast, in the Community, because of the doctrine of supremacy, the E.C. norm, which by virtue of the doctrine of direct effect must be regarded as part of the Law of the Land, will prevail even in these circumstances.²

European law's supremacy doctrine therefore protects the status granted to European obligations in the national legal orders by European law's direct effect doctrine.

The obligation on the courts of the member states to apply EC law regardless of contrary national law can lead the national courts to face decisions whether to apply EC law or contrary national law in a variety of scenarios relating to diverse domestic legal obligations. The most obvious and important one is that emphasised by Weiler above: a conflict between a directly effective EC law obligation and a subsequently enacted conflicting national statute, what may be called the lex posterior problem, because – in fundamental principle at least – many national courts, in legal orders where treaty obligations have the rank in national law of the national statute that gives execution to the treaty, when resolving conflicts of between legal obligations of equal rank, apply the obligations of the most recent, or ‘posterior’ legislation. This – the problem of ‘a unilateral and subsequent measure’ – was the conflict addressed in the ECJ's decision in Costa v Enel.³

However, other important scenarios exist, including, prominently, the obligation on national courts to apply directly effective EC law when applying the EC law obligation would conflict with national constitutional law obligations, such as national constitutional law fundamental rights. As the ECJ claimed in Internationale Handelsgesellschaft:⁴

… the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.

Internationale Handelsgesellschaft⁵ is only one of many ECJ decisions that have denied that the application of EC law in the national legal orders is dependent on its compatibility with national constitutional law fundamental rights, and asserted that the ECJ itself would review the content of EC law for compatibility with fundamental rights.⁶ As is also well-known, however, despite the ECJ’s statements to the contrary, the courts of many member states have persistently claimed, albeit with varying reasoning, that national constitutional law fundamental rights could indeed prevent the application of EC law obligations.⁷ Prominent examples of such claims by national courts include the 1973 Frontini⁸ decision of the Italian Constitutional Court:

⁵ ibid.
⁷ One should perhaps state that, as is widely acknowledged, the rejection of the ECJ’s claim that European law should be applied regardless of national constitutional law fundamental rights is only one element in national courts’ rejection of the ECJ’s ‘constitutional’ claims. Most crucially, national courts do not accept the ECJ’s claim in Case 26/62 Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1 that European law is applied ‘independently of the legislation of the member states’. See, for example, Gerard Hogan and Anthony Whelan, Ireland and the European Union: Constitutional and Statutory Texts and Commentary (Sweet & Maxwell 1995); Diarmuid Rossa Phelan, Revolt or Revolution: The Constitutional Boundaries of the European Community (Round Hall Sweet & Maxwell 1997); Trevor Hartley, European Union Law in a Global Context: Text, Cases and Materials (CUP 2004) 145-165; Paul Craig and Grainne de Búrca, EU Law: Text, Cases and Materials (OUP 2008) 377.
It is hardly necessary to add that by Article 11 of the Constitution limitations of sovereignty are allowed solely for the purpose of the ends indicated therein, and it should therefore be excluded that such limitations of sovereignty, concretely set out in the Rome Treaty, signed by countries whose systems are based on the principle of the rule of law and guarantee the essential liberties of citizens, can nevertheless give the organs of the EEC an unacceptable power to violate the fundamental principles of our constitutional order or the inalienable rights of man. And it is obvious that if ever Article 189 [of the Treaty of Rome] had to be given such an aberrant interpretation, in such a case the guarantee would always be assured that this Court would control the continuing compatibility of the Treaty with the above-mentioned fundamental principles.  

And the ‘Solange I’ decision of the German Constitutional Court in 1974:

The part of the Constitution dealing with fundamental rights is an inalienable essential feature of the valid Constitution of the Federal Republic of Germany and one which forms part of the constitutional structure of the Constitution. Article 24 of the Constitution does not without reservation allow it to be subjected to qualifications ... Therefore, in the hypothetical case of a conflict between Community law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails ...

Other cases where national supreme or constitutional courts or judges have made similar claims during the formative years of the development of the European legal order include the ‘Solange II’ decision of the German Constitutional Court in 1986, the Maastricht decision of the Danish Supreme Court, and the Grogan case in the Irish Supreme Court.

The early decades of European legal integration were therefore marked by a clear tension between national supreme or constitutional courts and the ECJ on the relationship between national constitutional law and the application of EC law obligations. However, the same high national courts that insisted that circumstances exist where national constitutional law fundamental rights – particularly as they reflect the fundamental principles of the national legal orders – could prevent the application of directly effective EC law obligations refused to find, in any concrete case, that national constitutional law required such a result. These various decisions, European and national, have a central role in our understanding of the development of the supremacy of European law, in accounts that often emphasise the skill and sensitivity of the ECJ to national court concerns, the role of the national constitutional rights question in the ‘completion’ of European law’s supremacy claim, and the significance of the ECJ’s decision to itself take on a role in protecting the fundamental rights of individuals affected by European obligations.

Scholarship on the Supremacy of European law and National Constitutional Law Fundamental Rights

We will not attempt here to summarise the full range of scholarship addressing the role played by national constitutional law fundamental rights in the early years of European legal integration. The essential point to note for the purposes of this paper is that a focus on this particular possibility can

11 Cited in Oppenheimer (n9) 447-448.
13 Hanne Norup CarlSEN and others vs Prime Minister Poul Nyrup Rasmussen [1998] Ugeskrift for Retsvæsen 800.
sometimes dominate all others in analyses on the development of the supremacy of European Community law and on the various possible limits on the application of EC law in the national legal orders. This tendency includes prominent work by scholars, such as Alter, Weiler, and Davies, who have made prominent contributions to our understanding of the development of the European legal order.

We will start by discussing Alter’s well-known monograph, *Establishing the Supremacy of European Law*. Alter states that ‘this study seeks to explain why national judiciaries accepted the supremacy of European law over national law’ and defines the supremacy problem by reference to the problem of conflicts between EC law and subsequent national law – the *lex posterior* problem. The process through which Alter suggests national courts accepted the supremacy doctrine involved a ‘doctrinal negotiation’ between the ECJ and national courts on the basis of their interests.

Now compare that research agenda to the subsequent empirical treatment, in *Establishing the Supremacy of European Law*, of the acceptance of EC law supremacy in Germany. Alter claims that the German case provides a clear example of how judicial rivalries and divergent judicial preferences regarding European legal issues shaped the process of doctrinal change, demonstrated by alternating periods including ‘warming trends’ and reversals. However, in the careful analysis of German court decisions that follows, the ratio of *Internationale Handelsgesellschaft*-issues to *Costa*-topics is very high indeed. The constitutional rights question is considered at much more length and much more directly than the question of European law’s relationship to ordinary, subsequent, German legislation. Thus the German case study starts from the position that treaty law incorporated by national legislation in Germany was subject to the ‘same’ constitutional constraints as national law, and follows the various decisions of the German Constitutional Court – *Solange I*, *Solange II*, the *Maastricht-Urteil* and so on – that indicate the fluctuating criteria by which German courts claimed to review European obligations for fundamental rights violations. These fluctuations are seen as elements in doctrinal negotiations between the ECJ and various German courts, validating Alter’s argument that the German case demonstrates the importance of those interactions in the acceptance of the supremacy of European law in Germany.

As for the supremacy of European law over ordinary, ‘later in time’ German legislation, however, instead of fluctuations, there is constancy. Alter notes briefly, at the end of the chapter, that the German Constitutional Court never questioned this principle. If the discussion on Germany had followed the book’s initial emphasis on the *lex posterior* issue, then, on the basis of the material presented, negotiations between the German Constitutional Court and the ECJ appear to have had little or no impact on the acceptance of European law supremacy. *Establishing the Supremacy of European Law*’s discussion of the German case effectively addresses a narrower research question – the supremacy of European law only in relation to German constitutional law fundamental rights.

Other scholarship, even when not neglecting the *lex posterior* problem, or when explicitly focussing on the fundamental rights question in particular, makes the national constitutional law fundamental rights

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16 ibid 17 and 36-37.
17 The *lex posterior* problem in Germany is mentioned in the introduction to the German chapter, ibid 71-74, and then discussed in one dedicated section, ibid 80-87, while the question of national constitutional law fundamental rights is discussed in two rather longer sections, ibid 87-98 and 104-117. This comparison almost certainly overstates the relative attention given to the *lex posterior* question, because, at 80-87, the author deals with the *lex posterior* question only tangentially and indirectly.
18 BVerfGE 37, 271 (n10).
19 BVerfGE 73, 339 (n12).
21 Alter (n15) 64, 71-74.
22 ibid 118.
question central to the acceptance of the supremacy of EC law in the national legal orders. In this category we can place several of Weiler’s publications on fundamental rights and the constitutional development of the European legal order. Weiler claims, for example, that the status quo position when the European Economic Community (EEC) was founded in 1957 was that Community measures coming into conflict with national guarantees of human rights would be subordinated to them; that it was virtually impossible that national courts would accept EC law supremacy without a guarantee of human rights protection; that national constitutional courts, particularly in Germany and Italy, would find it difficult to accept that European obligations could lead their citizens to lose any of their protections under national constitutions; and that German courts would expect the ECJ’s scrutiny of legislation for violations of human rights to match the ‘German standard’. Among other findings, Davies was able to demonstrate that the German government’s apparent opposition to the ECJ’s decisions in Van Gend en Loos and Costa v ENEL reflected only the influence of middle-level government lawyers, rather than any political decision by Germany’s leading policy-makers, and that the German government’s response to the Solange decision included the Joint Declaration on Human Rights by the European institutions in 1977. Detailed empirical studies, such as Davies’, are remaking our understanding of the history of European law.

Nonetheless, Resisting the European Court of Justice maintains the traditional focus on possible clashes between European law and national constitutional fundamental rights. It contains little discussion of the solution to European law’s lex posterior problem in the German legal order. Rather, its discussion of West Germany’s relationship with European law revolves almost exclusively around the basic rights question. For all its novelties, therefore, Davies’ path-breaking monograph demonstrates a very similar set of priorities to those of Alter and Weiler.


24 Bill Davies, Resisting the European Court of Justice: West Germany’s Confrontation with European law, 1949-1979 (CUP 2012).

25 Case 26/62 Van Gend en Loos (n7).

26 Case 6/64 Costa v Enel (n3).

27 BVerfGE 37, 271 (n10).

28 The lex posterior issue is referenced only a few times, eg Davies (n24) 21 (where the ‘primacy’ question is introduced by reference to conflicts between European obligations and ‘preexisting or subsequent national legislation’), 24 (at least by implication), 70 (including footnote 133), and 161. The discussion of fundamental rights topics is, by contrast, the central focus of the book as a whole. Davies does not offer a detailed description of the relationship between treaty obligations (other than those of the European treaties) and the protection of fundamental rights by the German Constitutional Court, but does report the views of German legal scholars that, for example, all foreign treaties were subject to the conditions of the national constitution, and that norms that conflicted with the German Constitution would be unenforceable: Davies (n24) 151. Note, in relation to the argument of this paper, Davies stresses that while Solange’s reasoning was subversive of the claims of European law, the fact that the German Court failed to find that the European legislation in question did indeed infringe a German basic right made a compromise outcome possible: Davies (n24) 188.
To conclude this section, therefore, prominent and influential works of scholarship on the supremacy of EC law in the national legal orders are sometimes dominated by discussions of the possibility that national constitutional law fundamental rights might prevent the application of directly effective EC law obligations. Distinguished accounts identify the importance of EC law supremacy by referring to the problem of subsequent contrary national legislation, but proceed instead by discussing EC law’s supremacy with a particular emphasis on national constitutional law fundamental rights, or, when discussing the fundamental rights question in particular, suggest that national constitutional courts apply the same standards in their adjudication of treaty obligations as of ordinary national legislation, and that they would be opposed to any alteration to the protections offered by national fundamental rights. As we will see, however, these ways of approaching the problems of the application of European law in the national legal order were not always shared by early scholars of the development of European law.

Early Scholarly Discussions of the Relationship between National Constitutional Law Fundamental Rights and the Application of European Law

As has been illustrated above, leading scholarship explaining the development of the supremacy of EC law – its application in the national legal orders regardless of contrary national legal obligations in the early decades of European legal integration – often places considerable emphasis on the issue of whether national constitutional law fundamental rights might prevent the secure application of EC law. An important strand in legal scholarship debating the relationship between EC law and national law in the 1950s and 1960s did not, however, share that emphasis. At that time, scholars regularly considered the problems of supremacy of EC law in a disaggregated manner, methodically addressing lists of possible conflicts between Community and national law – between Community law and national administrative measures, between Community law and national legislation enacted prior to the Community obligation, and so on.29 These scholars often took the view that the *lex posterior* problem, meaning the solution of possible conflicts between EC law and ordinary national legislation enacted subsequently to the conflicting European obligation, posed by far the most important threat to the secure application of EC law in the national legal orders, compared to which possible conflicts between EC law and national constitutional provisions, including those related to fundamental rights, were of little practical importance.

Sasse’s 1966 article on the relationship between Community law and national law can be taken as typical.31 In the middle of an extensive discussion of EC law’s relationship to national law, with a strong focus on the *lex posterior* problem, Sasse devoted no more than a few paragraphs to the issue of the relationship of Community law to the constitutional rights of the member states. Responding to the argument that Community law should not have precedence over national law because it would be undesirable to also provide precedence over national constitutional law, Sasse states that this point tends to channel the solution to the whole problem by concentrating on a single aspect which ‘though very important psychologically, may be relatively insignificant in practical terms’, claiming that the EEC had adopted over six hundred Regulations by that time without producing a case involving a serious conflict with fundamental rights protected by national constitutions.32

Similar conclusions were reached by a fair number of authors. Münch, writing on this question in 1957, noted the example of the German Constitutional Court’s decision on the Franco-German Saar treaty, where the Court allowed its constitutionality despite provisions contrary to the German Constitution, and argued that when considering the constitutionality of treaties, the results derived less from the constitutional doctrines elaborated than from the courts’ adaptation of ‘a rigid legality to

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29 For a good example, see Robert Saint-Esteben, *Droit Communautaire et Droits Nationaux* (Presses Universitaires de France 1967) 9.
32 ibid 732-733, particularly footnote 120.
the exigencies of foreign policy'. Waelbroeck’s 1969 discussion of treaty law and internal law in the countries of the common market noted that even in Community member states whose constitutional courts possessed the power to assess the constitutionality of laws giving execution to treaty obligations, the grave consequences of declaring a law implementing a treaty unconstitutional induced judges to apply different principles of interpretation than those they employ when considering the constitutionality of an ordinary law, thus allowing the constitutionality of laws giving execution to treaties even where their provisions were not entirely compatible with constitutional law. Waelbroeck noted that constitutional complaints against treaties in Italy and Germany had not yet ever been successful, and that the German Constitutional Court allowed the constitutionality of laws approving treaties, as long as they did not violate the Constitution’s fundamental principles. Louis wrote that the Italian and German constitutional courts would not renounce the possibility of exercising control over Community measures for conformity with the fundamental principles of their constitutions, but that claim itself was not a cause for worry, and the possibility itself remained ‘very theoretical’. All of these authors placed much greater emphasis on the lex posterior problem between Community law and national legislation. Some scholarly discussions on the relationship of Community law to national law did not even mention the possibility of conflict between Community law and national constitutional provisions, except as they related to the lex posterior problem.

These scholars appear to have generally expected that national courts would not fail to apply EC law obligations in the national legal order because of a potential violation of national constitutional law fundamental rights. In some cases, this expectation may have resulted from the assumption that the substance of EC law obligations would not seriously conflict with national constitutional law fundamental rights. In other cases, however, scholars accepted the possibility of real conflicts but expected that national constitutional courts would nonetheless find the application of EC law obligations constitutionally permissible. When scholars talk about the limited practical importance of this question, they may draw on either or both of these elements.

The difference in importance that these early scholars of Community law granted to a solution to Community law’s lex posterior problems vis-à-vis ordinary legislation as compared to conflicts between Community law and national constitutional law, is perhaps best exemplified by Ipsen’s paper at the 1964 Bensheim conference. Ipsen first offers a tour de force of the then debate on possible relationships of Community law to German legislation, making only the lightest references to the German Constitution, and stressing that the problem is at its sharpest in conflicts between secondary Community law and ‘a subsequent ordinary Act of Parliament’ (emphasis in the original). Ipsen grouped other scholars’ approaches to this problem into long-lasting categories, offered his critique of each, and then advanced his own, distinct, ‘functional’ proposal, on whose acceptance the future of the Community as an effective organisation is made to appear to depend. At the end of this intellectual whirlwind, Ipsen writes that he will not address the question of conflicts between Community law and German constitutional law, stating curtly in a final paragraph that this issue is not crucial and is of substantially less importance than the material he has already discussed.

An important element in early scholarly discussions on the supremacy of Community law in the national legal order therefore, while fully aware of the theoretical possibility of conflicts between national constitutional law fundamental rights and Community obligations, routinely queried the practical importance of this possibility, certainly in comparison with the lex posterior problem. To be

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35 ibid 287-288, footnote 21 with a list of cases, including the Saar decision of German Constitutional Court.
37 Erik Suy, Les Rapports Entre Le Droit Communautaire et le Droit Interne des Etats Membres (Heule 1964).
39 ibid 394.
40 ibid 402.

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sure, there were, as is well known, other early scholars who did indeed stress the fundamental rights issue above all, with whom the scholarship mentioned here was sometimes in debate.\(^{41}\) The particular strand of early scholarship we have discussed here, however, suggests a little scepticism about the dominant emphasis on the national constitutional law fundamental rights question, and relative neglect of the *lex posterior* problem, by leading later accounts of the historical development of European legal integration.

**National Constitutional Law Fundamental Rights and Treaty Obligations in Four Member States**

Historical research on the development of European law has tended to discuss the problem of potential conflicts between European law and national constitutional law fundamental rights in isolation from wider approaches to addressing potential conflicts between treaty obligations and national constitutional law fundamental rights at that time. In order to put this problem in a wider perspective, this section will discuss the law and politics of national constitutional law fundamental rights and treaty obligations other than obligations of the European treaties in four member states during those formative decades. Of course, on the one hand, the legal order of each member state ideally deserves a comprehensive treatment which would be impossible in an article of this length, and, on the other, a full discussion of this question would address the legal orders of every member state. This paper resolves the trade-off between depth and breadth with a consideration of the law on the relationship between treaty obligations and national constitutional law fundamental rights in four member states: Denmark, Germany, Ireland, and Italy, with a focus on court decisions during the period of the development of the supremacy of European Community law, that is, from the 1950s until the early 1990s. Note that states such as these – each of which adopts the dualist approach to the application of treaty obligations in the national legal order and each of which possesses systems of judicial review to secure national constitutional law fundamental rights – are states where national constitutional law fundamental rights can be expected to produce the most difficulties in practice for treaty obligations. Additionally, this survey includes two member states, Germany and Italy, where the particular sensitivity of the question of national constitutional rights has been emphasised in the scholarship.\(^{42}\)

In each of these states, treaty obligations are given effect by a national implementing statute, according to the dualist approach to the relationship between international law and the national legal order, and it is possible to apply to national courts for the review of the constitutionality of the statute giving effect to treaty obligations. Thus the Danish Supreme Court (*Højesteret*),\(^{43}\) the German Constitutional Court (*Bundesverfassungsgericht*),\(^{44}\) the Italian Constitutional Court (*Corte Costituzionale*),\(^{45}\) and the Supreme Court of Ireland\(^{46}\) all possess the power to review national laws requiring the application of treaty obligations for conformity with the national constitution, including in relation to national constitutional law fundamental rights. It is this possibility in relation to treaties generally that the ECJ has attempted to forestall in relation to the European treaties, in particular through its *Internationale Handelsgesellschaft*\(^{47}\) decision.

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\(^{41}\) Here the best survey may be Davies’ (n24).

\(^{42}\) Weiler, ‘The Transformation of Europe’ (n2) 2417-2418.


\(^{44}\) See Jochen Abraham Frowein and Karin Oellers-Frahm, ‘Allemagne Germany’ in Eisemann (ed) (n43) 86-87.

\(^{45}\) See Tulio Treves and Marco Frigessi di Rattalma, ‘Italie Italy’ in Eisemann (n43) 385.


\(^{47}\) Case 11/70 *Internationale Handelsgesellschaft* (n4).
In Italy, during the period in question, laws implementing treaty obligations (to repeat: other than obligations derived from the European treaties) were found unconstitutional on fundamental rights grounds on four occasions. In the Federal Republic of Germany, provisions of laws implementing treaty obligations have been found to be unconstitutional on fundamental rights grounds by the German Constitutional Court on two occasions. In Denmark and Ireland, there appear to have been no examples of laws implementing treaty obligations being found unconstitutional on fundamental rights grounds by the national courts. The evidence suggests, therefore, that even in relation to states which introduce treaty obligations according to the dualist approach and which possess mechanisms for assessing the constitutionality of national statutes giving effect to treaty obligations against the fundamental rights contained in national constitutions, examples of laws giving execution to treaty obligations being found unconstitutional were relatively infrequent.

Of course, the way that national courts reasoned about the relationship between treaty obligations and fundamental rights may be the more important issue. For two of these states, where there were no court decisions dis-applying treaty obligations on the grounds of national constitutional rights, it may be sufficient to state briefly that in Ireland, the scholarship argues that the courts operate under a strong presumption that treaties are constitutional, and that in Denmark, a scholarly assessment in 1996 noted that in light of the reluctance of the courts to declare Danish legislation unconstitutional, a finding of unconstitutionality in relation to laws giving execution to treaty obligations could ‘hardly ever happen’.

Given the importance of the German and Italian cases to the scholarship on the development of the European legal order, however, a more extensive discussion of constitutional court decisions in these countries is required.

**GERMANY**

The foundational post-war decision by the German Constitutional Court on whether laws implementing treaties must be compatible with German constitutional law fundamental rights is the judgment on the constitutionality of the Saar agreement, already mentioned above. The political background to the Saar agreement between France and Germany was provided by, in long-term perspective, the repeated disputes between these two countries over political control of this important

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48 Treves and Frigessi di Rattalma (n45) 385-386, writing in 1996, state that there are four examples (which they describe as a very limited number): no 54 of 1979 (extradition agreement with France) (listed as 1976 in Treves); no 132 of 1985 (Warsaw Convention); no 210 of 1986 (ILO convention); and no 128 of 1987 (extradition agreement with the United States). The Court also found a constitutional violation by a law implementing the US-Italy extradition treaty in 1996, in a death-penalty related case – see Andrea Bianchi, ‘Venezia v Ministero di Grazia e Giustizia Judgment No 223, 79 Rivista di Diritto Internazionale 815 (1996)’ (1997) 91(4) American Journal of International Law 727.

49 Frowein and Oellers-Frahm (n44) 87, writing in 1996, state that there are only two examples, both relating to double-taxation agreements with Switzerland. The first decision was BVerfGE 30, 272; the second BVerfGE 72, 200. On the first decision, see Hans Georg Rupp, ‘Judicial Review of International Agreements: Federal Republic of Germany’ (1977) 25 (2) American Journal of Comparative Law 286, 295. Note that, as Rupp writes at 295, ‘This decision, the only one which had thus far declared a clause of a ratified international agreement unconstitutional and void, nevertheless did not bring about a conflict between the contracting parties. The clause, which was declared void, concerned only a right and not a duty of the German contracting party ... It had no general effect on Germany’s ability to perform under the agreement as to Switzerland.’ On the second, see Jochen Abraham Frowein and Michael Hahn, ‘The Participation of Parliament in the Treaty Process in the Federal Republic of Germany’ (1991) 67 Chicago-Kent Law Review 361, 384-385.

50 Harhoff, ‘Denmark Danemark’ (n43) 165.

51 In Crotty v An Taoiseach [1987] IR 713, the Irish Supreme Court gave an injunction to restrain the Irish government from completing the ratification process of the Single European Act on the basis that it infringed several articles of the Irish Constitution. However, the Crotty case did not concern the obligations of a treaty already ratified and entered into force. The McGimpsey case was the first occasion when it was sought to use provisions of the Irish Constitution to invalidate provisions of a law giving execution to a treaty in respect of which all the formalities had been completed: see Symmons, ‘International Treaty Obligations and the Irish Constitution’ (n46) 323.

52 Symmons ‘Irlande Ireland’ (n46) 341 and 339-340. For a suggestion that the presumption of constitutionality in the area of international relations is ‘even stronger’ than the presumption as it relates to ordinary statutes passed by the Oireachtas (Irish Parliament), see Symmons, ‘International Treaty Obligations and the Irish Constitution’ (n46) 325-326; and Harhoff (n43) 165.

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industrial region, and, more immediately, the attempt of the French government after the Second World War to detach the Saar region, which fell into the French occupation zone, from Germany, and to establish it as an independent entity under French political influence. In 1954, however, France and Germany agreed a ‘Saar Statute’ that envisaged a specific European status for the Saar under the supervision of a European Commissioner responsible to the Western European Union. The agreement was subject to a referendum in the Saar territory and was to last until the conclusion of a peace treaty. 53

Following a complaint by opposition members of the Bundestag that the agreement was contrary to the German Constitution, inter alia because it violated fundamental rights, the German Constitutional Court, insisting on its right to judge the agreement’s constitutionality, found the law implementing the Saar agreement constitutionally acceptable, in a decision which acknowledged the necessity of a different approach when considering laws giving effect to Germany’s treaty commitments. The court found, somewhat euphemistically, that the Saar agreement produced a ‘situation not completely compatible’ with the Constitution. 54 Nevertheless the German Constitutional Court considered that the political environment of treaty-making, particularly in relation to the situation that Germany found itself in after the Second World War, made it unrealistic to assess such laws in a rigorous manner against German constitutional requirements. Instead, when the outcome achieved by the treaty was arguably ‘closer to the constitution’ than the pre-agreement status quo, then these laws should be considered constitutional so long as they did not violate fundamental constitutional guarantees set out in Articles 19 and 79 of the German Constitution. Article 19(2) of the German Constitution reads: ‘In no case may the essence of a basic right be affected’, while Article 79(3) reads: ‘Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.’ Articles 1 and 20 of the German Constitution refer, in turn, to human dignity and human rights, and to the democratic basis of the German constitutional order.

The Court’s approach to the constitutionality of treaty obligations can be illustrated by some passages of the Saar agreement decision:

Above all, the German Constitutional Court, when it evaluates an international treaty, which regulates the political relations of the Federation (Art 59.2 GG [of the German Constitution, ‘Grundgesetz’ or ‘GG’]), against the Constitution, should not leave out of its consideration the political situation from which the treaty has arisen or the political realities which it undertakes to arrange or alter. This is particularly important if, as in the Saar agreement, the political situation has been created in a part of Germany by the other party by virtue of their occupation authority …

The undoubted constitutional principle that any exercise of state power in the Federal Republic of Germany is bound by the Basic Law (Art 20.3 GG) compels the question, in relation to international treaties of this type, whether only such agreements which fully correspond to the Basic Law are to be recognised by the Constitution, or whether we will allow voluntarily undertaken Treaty measures which have a tendency to get closer to the achievement of the fully constitutional state, as far as is politically practicable. The German Constitutional Court finds it necessary to answer this question in the latter sense … In treaty-making, a broad range of political discretion must be preserved because the respective parties limit the treaty solutions that are politically achievable in practice …

These principles, taken together, may have the practical result that political agreements that gradually reduce the occupation regime, without also at the same time setting up a satisfactory new system in its place, retreat into an area of non-justiciability for the constitutional court. The constitutional boundaries drawn in this case, which if the law implementing the treaty transgressed would result in its constitutional invalidity, approximate those designated in Art 79.3 and 19.2 GG. Limitations of other constitutional principles are acceptable for a transitional period when they are directly related to the treaty’s objective which is in its overall tendency directed to becoming closer to the fully constitutional situation. Up to the indicated limits, the contracting authorities of the Federal Republic are only politically responsible for the obligations entered into by them. The legal finding of unconstitutionality is generally excluded by the fact that the contract created by the state is ‘closer to the Basic Law’ than the previously existing ones. If one only wanted to allow the validity of a treaty regulation fully corresponding to the German Constitution, that would mean following a constitutional law rigour ['Rigorismus'], which can be expressed in the sentence: the bad should not yield to the better because the best (or from this point of view: the only good outcome) is not obtainable. That result cannot be the will of the German Constitution … (author’s translation).

The German Constitutional Court’s Saar agreement decision could be understood in various different ways. On the one hand, the decision contained a set of justifications of the constitutionality of laws implementing treaty obligations which were directly tied to the specific situation before the court, such as the goal of dismantling the military occupation regime imposed by the Allied powers at the end of the Second World War, where the logic of moving ‘closer’ to the German Constitution was most relevant, and which involved specific conditions such as the provisional and temporary nature of the deviation from German constitutional requirements.

On the other hand, however, the court’s decision also contained principles – such as the need to respect the discretion of the political authorities in making treaty agreements, the need to take the international political situation into account when deciding on the constitutionality of a law giving execution to treaty obligations, and the finding that international agreements could be constitutional even if they did not correspond ‘fully’ to the German Constitution so long as such treaty obligations did not trespass on the Constitution’s inviolable basic principles – which could potentially be applied to a much wider range of situations. In essence, the German Constitutional Court’s decision could be understood to demonstrate its willingness to allow the constitutionality of otherwise unconstitutional treaty obligations where the international political situation and German national interests so required. This latter, more expansive, view of the Saar agreement decision was not overlooked by scholarly discussion either then or later. Münch, writing in 1957, stated that the Saar agreement decision resulted less from the particular reasons elaborated by the German Constitutional Court – ie moving ‘closer’ to the Constitution – than from the necessities of foreign policy. Kischel, writing in 2002, argued that the Saar decision’s rationale of constitutional approximation was applicable to any situation where constitutionally protected interests could be realised only partially for reasons that are beyond the exclusive control of the German government.

The logic of the Saar agreement decision was developed in subsequent German Constitutional Court decisions. Over time these decisions placed a diminished emphasis on the Saar agreement’s more specific criteria, such as the dismantling of the post-war occupation order and the provisional nature of constitutional infringements. These decisions indicate both the disputes that came before the German Constitutional Court and the approach that Court took to resolving them.

55 Münch (n33) 290-291.
56 Kischel (n53) 12-13.
57 Ibid 10.
In 1963 the German Constitutional Court heard a dispute concerning whether priority granted to males for inheritance purposes granted as a result of occupation law was compatible with the Grundgesetz (GG). The Court allowed the temporary constitutionality of the law until its revision by the Bundestag, noting that a constitutionally more satisfactory arrangement was not attainable and that the essential principles of the German Constitution were not violated. In a dispute as to whether an agreement with the Netherlands violated the constitutional rights (including Art 14 GG, the right to property) of German shareholders in a Dutch company seized by the Dutch authorities in 1944, the German Constitutional Court in 1968 allowed the constitutionality of the agreement while stressing the importance of normalising and bettering the relationship between Germany and the Netherlands.

In a dispute as to whether an international agreement on the regulation of war damages violated Art 14 GG (right to property) and Art 3(1) GG (equality before the law), the German Constitutional Court in 1969 allowed the constitutionality of the agreement, explicitly recognising the overwhelming German interest in accepting the treaties as part of the process of bringing the occupation regime to an end. In a dispute as to whether an agreement with Austria violated the property rights (Art 14 GG) of Germans affected by the development of Salzburg airport near the Austrian-German border, the German Constitutional Court in 1986 allowed the constitutionality of the agreement, noting that Germany needed to balance the constitutional rights of individuals with the state interest in maintaining good relations with Austria.

Although it occurred slightly past our early-1990s cut off, we may also mention a dispute as to whether a North Atlantic Treaty Organisation (NATO) agreement which restricted the consultation rights of civilian workers on military bases was contrary to Art 3(1) GG (equality before the law), where the German Constitutional Court in 1996 allowed the constitutionality of these restrictions, arguing that, even with the full restoration of German sovereignty, the Western Alliance was a cornerstone of German foreign policy, and that where the German government is subject to negotiations within foreign policy constraints the constitutional assessment of laws implementing treaties was not different from that when considering matters directly related to the post-war occupation regime. For these reasons, as in its decision on the Saar agreement, the German Constitutional Court allowed that a less than full realisation of German constitutional requirements was permissible as long as full compliance was impossible and a better deal could not be reached.

To be sure, there are two occasions where provisions of laws implementing treaty obligations were found to be unconstitutional on fundamental rights grounds by the German Constitutional Court, both of which related to German-Swiss agreements on double taxation that violated the rule of law by allowing the possibility of retroactive taxation by the German authorities. These two cases show that the possibility of the German Constitutional Court finding a law implementing treaty obligations unconstitutional is not wholly hypothetical. These decisions should not, however, be understood to mean that the German Constitutional Court applied the same standards of constitutionality to treaty obligations in general as it does to ordinary domestic legislation.

To the contrary, despite differences in emphasis, scholarly analyses of the German Constitutional Court’s approach to deciding whether laws implementing treaty provisions violate German constitutional rights overwhelmingly acknowledged, and often approved, the consistent tendency of the German Constitutional Court to allow the constitutionality of otherwise unconstitutional treaty obligations, particularly when considering politically important treaties. Zeitler argued that the sharpness of the political problem of practicality in foreign policy led the German Constitutional Court to its Saar decision and the chain of later decisions. Schuppert stressed that the Saar decision’s principles applied to all similar situations where political reality and constitutional provisions seem to

58 BVerfGE 15, 337.
59 BVerfGE 24, 33. Paragraphs 64-65 of this decision argue that, given the foreign policy need for normalising post-war relations with the Netherlands, the German legislature had the legitimate freedom to adopt this scheme.
60 BVerfGE 27, 253.
61 BVerfGE 72, 66.
62 BVerfGE 95, 39. Other decisions by the German Constitutional Court rejecting claims that treaty agreements violated fundamental rights while acknowledging the need for the Federal Republic of Germany to be given freedom to act in foreign policy include BVerfGE 40, 141 and BVerfGE 77, 170.
63 See n49.
64 Zeitler (n54) 262.
collide. Steinberger, a former judge of the German Constitutional Court, described the approach of the court as 'judicial restraint', noting that the international legal process is one of compromise that does not reflect Germany's will alone. Case law and scholarship both suggest, therefore, that the German Constitutional Court tended to allow the constitutionality of laws implementing treaty obligations, even where these might be considered to violate individuals' constitutional rights, so long as the fundamental principles of the German constitutional order were not violated.

ITALY

In Italy, the Constitutional Court's approach to evaluating conflicts between laws implementing treaty obligations and national constitutional law fundamental rights can be illustrated both by the decisions where the Court rejected claims that laws implementing treaty obligations had violated fundamental rights, and by the decisions where the Court found that laws implementing treaty obligations were indeed contrary to the Italian Constitution.

In case no 20 of 1966, the Italian Constitutional Court considered a complaint about the constitutionality of the law executing an agreement between Italy and the United States in 1949. In that agreement, Italy had taken over from the United States the obligation to pay former Italian prisoners of war, who had been held in the United States, the difference between their actual wages paid for work while prisoners of war, and the higher wages due to them under the Geneva Convention. The former prisoners of war claimed that the Italian law implementing this agreement violated the Italian Constitution, in particular Arts 3, 24 and 42 (equality before the law, right to be heard in court, right to property). The Court found the Italian law to be constitutional, noting in its judgment that the other treaty party had not agreed to Italian proposals to meet the former prisoners' claims, and thus suggesting that such international 'facts' were relevant to determining the Italian constitutional question.

In case no 109 of 1971, the Italian Constitutional Court considered a complaint about the constitutionality of the law executing a 1956 agreement between Italy and Libya. In that agreement, Libya had taken over responsibility for paying pension entitlements of Italian citizens of the former Italian colony. A pensioner had claimed that the Italian law implementing this agreement, which had resulted, in practice, in reduced pensions being paid, was contrary to the Italian Constitution, in particular Arts 3 and 38 (equality before the law, right to welfare). Despite these claims, the Court decided that the Italian law was constitutional, finding that the discrimination between these pensioners and others within the Italian pension system was not arbitrary discrimination, but derived from the factual situation derived from Libyan independence.

In case no 446 of 1990, the Italian Constitutional Court considered a complaint about the constitutionality of the law executing the London Convention of 1951 on the Status of NATO forces. That agreement allowed Italy, as the 'country of residence', to waive the exercise of criminal jurisdiction for offences committed by civil or military personnel belonging to another member state of the Atlantic alliance. The claimants argued that this agreement was contrary to the Italian Constitution, in particular Arts 25, 101, 102, 104 and 112 (rights of the defendant, the administration of justice, the ban of special courts, the guarantee of an independent judiciary, the restriction of the right to initiate criminal proceedings to the public prosecutor). The Court found the Italian law to be constitutional, in a decision that drew on various provisions of the Italian Constitution that provided for

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65 Folke Schuppert, Die verfassungsgerichtliche Kontrolle der auswärtigen Gewalt (Nomos 1973) 99.
67 This section is generally indebted to Enzo Cannizzaro, Trattati Internazionali e Guidizio di Costituzionalità (Guiffré 1991).
68 ibid 145-146.
69 Giorgio Gaja, 'Italy' in Francis Jacobs and Shelley Roberts (eds), The Effect of Treaties in Domestic Law (Sweet & Maxwell 1987) 101.
70 An extract from the decision in English can be found in Giuseppe Cataldi, 'Waiver of Criminal Jurisdiction over Members of NATO forces' (1988/1992) 8 Italian Yearbook of International Law 102-104.
a special status for particular international legal obligations to argue for the more general constitutional latitude in the interests of international collaboration between states.71

The Court’s approach to possible conflicts between laws implementing treaty obligations and national constitutional rights is also demonstrated by the cases where the Court did find a constitutional violation. The Court’s decision on the extradition agreement with France (Decision no 54 of 1979) found unconstitutional the Italian law (a royal decree of 1870) which implemented the 1870 extradition treaty between Italy and France, because it allowed extradition for crimes punishable with the death penalty in France.72 The Court stated that Italian laws implementing treaty obligations could not escape ‘the commonly felt need that laws and other acts having the force of law must be reviewed with respect to any constitutional rule or principle’ and found a violation of Art 27(4) of the Italian Constitution, which prohibits the death penalty. However, the Court’s decision does not appear to be a review of constitutionality in relation to every principle or provision of the Italian Constitution. Rather the Court claimed it was inadmissible that ‘as far as the fundamental principles and values of the domestic order are concerned, the Italian authorities may practise discriminations …’ between those subject, or not subject, to extradition in this manner. The court also mentions the ‘fundamental rights of man’, and emphasises the principle of equality as a ‘general principle conditioning the objective structure of whole legal system’.73 As Salerno writes:

In other words, despite the explicit statement according to which the review of constitutionality of ordinary laws implementing treaties which fall within the scope of Art.10 para 2 of the Constitution should be considered the same as that which is carried out for ordinary laws, the Corte Costituzionale arrives at reviewing such laws only in the light of the same fundamental principles that constitute the [‘less rigorous and more nuance’74] test for the evaluation of implementing laws of those treaties, such as the Lateran Pacts and the treaty establishing the European Communities, which fall respectively under Article 7, para 2, and Art. 11 of the Constitution.75

The Court’s Warsaw Convention decision (Decision no 132 of 1985) found the Italian law implementing the Warsaw Convention, regulating liability for losses from air transport, violated Art 2 of the Italian Constitution (inviolable human rights), because of the inadequate compensation provided.

71 ibid 103. As the Court stated, ‘Nor can it be hypothesized that the right to waive jurisdiction, or to establish that determinate conditions are necessary for the criminal action to be promoted or pursued, is prohibited by any constitutional principle or denied by the ordinary legislator. On the contrary, the Constitution provides, in articles 10, 11 and 26 … significant examples of the willingness of the legal order to contemplate cooperation between States both in criminal matters and in any other field …’ (translation from Cataldi (n70)). Other cases where the Constitutional Court considered, and rejected, claims that laws implementing treaty obligations were unconstitutional are set out in Cannizzaro (n67).

72 English translation from Francesco Salerno, ‘Implementation of the Convention on Extradition of 12 May 1870 between Italy and France’ (1978-79) IV Italian Yearbook of International Law 189, 195-200. The 1996 decision of the Italian Constitutional Court relating to an extradition treaty with the United States also concerned the death penalty, see Bianchi (n48).

73 Salerno (n72) 194.

74 ibid.

75 ibid 195. Salerno refers to Italian Constitutional Court decision no 30 of 1971, a dispute about the constitutionality of the treaty agreement – the Lateran Pacts – between Italy and the Vatican. In that decision, the Court stated: ‘all the same, although a reciprocal position of independence and sovereignty is recognised to the Italian State and the Catholic Church, it cannot have the effect of negating the supreme principles (i principi supremi) of the constitutional order of the Italian State’ (author’s translation). See Vincenzo Starace and Carmela Decaro, La Giurisprudenza Costituzionale in Materia Internazionale (Editoriale Scientifica 1977) 247-249, 248. A further finding of a violation of constitutional rights by a law implementing treaty obligations during this period has a similar logic. In Decision no 128 of 1987, the Court found unconstitutional an extradition agreement between the United States and Italy which could lead to the extradition of a minor when, under the law of the requesting state, they would no longer be treated as a minor: Luigi Sbolci, ‘Implementation of the Treaty on Extradition of 18 January 1973 Between Italy and the United States’ (1986-1987) 7 Italian Yearbook of International Law 313, including English translation. The Court stated that ‘the juvenile delinquent’s treatment in the State of New York is incompatible with the fundamental principles on criminal responsibility and the function of punishment which are provided in our Constitution’, ibid 315.
Despite this finding, the Court’s judgment demonstrates considerable respect for the objectives of international law, noting that uniform limits on liability may be part of an appropriate international regulatory agreement. It appears to have been the very inadequate level of compensation on offer, in this case relating to a fatality, and not mere differences between the Italian and international rules on compensation, which resulted in the declaration of a constitutional violation.

Scholars tend to note that the cases where the Court found that laws implementing international agreements violated the Italian Constitution were characterised by political conditions that enabled the finding of a constitutional violation. In the 1979 death penalty extradition case, a new extradition agreement between Italy and France had been agreed, but not yet ratified. In the Warsaw Convention case, the Court noted claims that the limits on compensation were widely considered inadequate and not applied in practice. In a case where the Court found that a law implementing an International Labour Organisation (ILO) convention that banned women from working at night violated the Italian Constitution, it was unlikely that this decision would cause an international controversy.

Scholarly assessments, despite differences in emphasis, tend to agree that the Court’s approach allowed the application of treaty obligations even where these potentially conflicted with fundamental rights. Barile, conceding that in theory treaty norms cannot be applied if they come in to conflict with any norm of the Italian Constitution (con nessuna nostra norma costituzionale), argued that international reality (realtà internazionale) prevented individual constitutional norms from being applicable. Rather only the Constitution’s ‘hard core’ (nucleo forte) should have an effect, when the issue truly impacts on the fundamental principles of the constitutional order. Cannizzaro described the Court’s approach as favor conventionis – ‘privileged handling for treaties’ – and writes, ‘On the basis of the behaviour put into effect in the [Constitutional Court’s] judgments, there is no doubt that the norms which relate to the observance of international obligations enjoy a different and more favourable treatment than that reserved to internal norms having the same formal value’. Cannizzaro disagreed with Barile’s assessment to the extent that it implied that all treaties would benefit from favourable treatment by the Court regardless of the reasonableness of their content, and because such an approach would give the same treatment to treaties of real political significance as to those of much less importance. Instead, Cannizzaro argued that the Court should, and did, adopt a more case-by-case approach.

In short, therefore, subject always to a continuing insistence on the necessity of respect for the fundamental principles of the Italian Constitution, the Court was widely agreed to apply a less rigorous standard of constitutional review to laws executing treaty obligations, particularly the obligations of politically important treaties, than it applied to internal legal norms. As Barile wrote, ‘our Constitutional Court, while always formally maintaining faith with the theory that treaty norms not of constitutional rank should confirm to all Italian constitutional rules, has attempted to assume substantially, in the most broad measure possible, a coordination between the needs of the international community and those of the Italian community’.

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76 Treves and Frigessi di Rattalma (n45) 387.
77 Gaja (n69) 102: ‘The change in the Court’s attitude may be partly explained by the fact that the treaty with France was over 100 years old and a new bilateral treaty on the same subject had already been drafted’. See also Treves and Frigessi di Rattalma (n45) 386-387.
78 Gaja (n69) 102: ‘Similarly, a statute authorizing ratification of the 1971 Guatemala Protocol on air carriage had been enacted before Decision no 132 of 1985 was given. The Court may have failed to realize that the Guatemala Protocol was not likely to enter into force for some time and thereby underestimated the impact of its decision on the application of two treaties in force’.
79 Case no 210 of 1986. See Cannizzaro (n67) 171, footnote 107, and 180.
80 Gaja (n69) 101.
81 Giuseppe Barile, Costituzione e Rinvio Mobile a Diritto Straniero, Diritto Canonico, Diritto Comunitario, Diritto Internazionale (CEDAM 1987) 84, 85-86, 91.
82 Cannizzaro (n67) 185 (author’s translation).
83 ibid 186-187, including footnotes 128 and 129.
84 Barile (n81) 87 (author’s translation).
This discussion of the relationship between treaty obligations and national constitutional law fundamental rights in four member states suggests that in some member states (even those with dualist approaches to international law and courts which protect national constitutional rights) the problem scarcely existed in a practical sense, while in other member states, such as Germany and Italy, where the national constitutional court has, on occasion, found that national laws giving execution to treaty obligations are unconstitutional on fundamental rights grounds, the theoretical problem was reduced in practice by judicial approaches which, while undertaking a careful assessment of national laws implementing treaty obligations, and pressing national executives to take fundamental rights concerns seriously, tested their constitutionality, not rigidly against every provision of national constitutions, but more flexibly, in a politically sensitive manner, and by reference to a more limited set of fundamental constitutional principles. Placed in this context, the eventual equilibrium of the early decades of European legal integration – where national constitutional courts insisted that circumstances exist where national constitutional law fundamental rights – particularly as they reflect the fundamental principles of the national legal orders – could have prevented the application of directly effective EC law obligations but refused to find, in any concrete case, that national constitutional law requires such a result – may appear less of a surprise. One might perhaps even add that similarities in the manner that national courts approached the constitutionality of obligations derived from the European treaties and obligations derived from public international law treaties demonstrate one way in which European law, despite its ‘constitutional’ claims, continued to be regarded as a form of international law by national constitutional courts.

Conclusion

In his inaugural address as Chair of European Constitutional Law at the University of Utrecht in January 2007, Professor Leonard Besselink gave a stimulating account of the differences between understanding Europe as possessing a ‘multi-levelled’ as opposed to a ‘composite’ constitution. Besselink argued elegantly in favour of the latter, as better reflecting the non-hierarchical nature of the relationship between European and national law. In his discussion of the question of ‘primacy’, however, Besselink criticises the hierarchical approach in the following terms:

The hierarchical view is not an adequate description or explanation of constitutional reality ... In most Member States, the precedence of EU acts over national constitutions is not (or at least not unconditionally) recognised. The precedence of European acts above ordinary legal rules of a lower rank than the national constitution is usually recognised, but precedence is not recognised if application of the EC or EU act (or norm) would lead to conflict with a national constitutional norm. Some national constitutional courts seem by now prepared to make a distinction within the totality of national constitutional norms between certain less essential norms of constitutional law, and constitutional norms which are of fundamental importance: the fundamental national constitutional rules and principles form an obstacle to European acts and norms which do not respect them; less fundamental rules apparently do not. This type of distinction is made, for instance, in Germany and Italy ...

We hope that at this stage the reader will understand our disagreement with this – in fairness, we must say conventional – approach to understanding how the relationship between European law and national law has developed. Note particularly the expression ‘by now’, with its implication that it is the development of the European legal order, and perhaps the dialogues between the ECJ and the national courts, that have led to this distinction. As we have seen, however, a more compelling description might be as follows:

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86 Ibid 9-10 (emphasis in the original).
87 Such dialogues are mentioned by Besselink ibid 11.

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Some national constitutional courts have long been prepared to make a distinction within the totality of national constitutional norms between certain less essential norms of constitutional law, and constitutional norms which are of fundamental importance: the *fundamental* national constitutional rules and principles form an obstacle to treaty obligations, including European treaty obligations, which do not respect them; *less fundamental rules* apparently do not. This type of distinction has often been made in post-war constitutional adjudication, for instance, in Germany and Italy …

Nothing in the argument advanced here, we hope, suggests to the reader that there was no variation in the ways that national courts approached the relationship between EC law and national constitutional rights in the early decades of European legal integration, that national courts’ decisions on the constitutionality of public international law obligations were exactly the same as those relating to the constitutionality of EC law obligations, that there were no meaningful interactions or tensions between the national courts and ECJ on fundamental rights questions, that the national constitutional law fundamental rights question was unimportant for ‘completing’ the supremacy of European law, or, finally, that it was of no practical importance whether the ECJ itself came to take on a role in the protection of individuals from violations of fundamental rights. Rather, the argument here is that leading descriptions of the particular problem facing the development of European law – that treaty law incorporated by German legislation was subject to the same constitutional constraints as national law, for example, or that national courts would be motivated to ensure that individuals would not lose any of the protections afforded under national constitutions – are perhaps not the most helpful starting points. *Decisions such as that on the Saar Statute demonstrate that national constitutional courts would not adopt such pristine positions. Thus the underlying incentives and approaches that produced the German Constitutional Court’s Saar Statute decision are highly relevant to understanding the same court’s solution to European law’s national constitutional rights problem. Indeed, in the case of the European treaties, the pressure on national courts to interpret their constitutions in a treaty-accommodating manner must always have been intense. After all, the European treaties, no less than the Saar treaty, are part of the peace settlement of the Second World War.*

A better approach to studying this question may be to note that, as regards the relationship of EC law to national constitutional law fundamental rights, in member states such as Italy and Germany where individual rights enjoy constitutional protection, the problem was less severe than it might first appear because their national constitutional courts, while insisting on the national justiciability of treaty obligations on national constitutional rights grounds and claiming the inviolability of a limited set of fundamental constitutional principles, demonstrated a willingness to limit the application of national constitutional rights in practice where national foreign policy so required. The challenge for these courts in the early decades of European legal integration was to take the principles underlying this general orientation and adapt them to the particular circumstances of the stream of obligations derived from the European treaties.  

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88 See n21 and n23.
89 The Italian Constitutional Court, in its *Frontini* decision (n8), referred to Italy’s decision to sign the Treaty of Rome as a ‘political choice of historical importance’, see Oppenheimer (n9) 636.
90 After (n15) 116 concludes a discussion of the German Constitutional Court’s *Maastricht-Urteil* and other decisions on European law in the 1990s by asking why the German Constitutional Court avoids invalidating the application of European law in Germany: ‘Perhaps it is motivated by respect for the ECJ, but then one might wonder why it is so willing to reject ECJ jurisprudence in its obiter dictum. Perhaps it is being deferential to the executive’s foreign policy prerogatives, and Germany’s commitment to the European Union’. As we have seen, however, the practice of the German Constitutional Court in considering whether treaty obligations violate German constitutional law fundamental rights is both to insist on the possibility of national constitutional review and then to accommodate German foreign policy commitments by carrying out that constitutional review in a politically sensitive manner. German Constitutional Court decisions on European law that combine a rejection of ECJ jurisprudence with outcomes that nonetheless respect Germany’s European treaty commitments therefore have much in common with German Constitutional Court decisions on the compatibility of other treaties with German constitutional rights.
Seen in this way, the distinctiveness of the European legal order is at least somewhat reduced. The eventual fundamental rights equilibrium is not the result only of the much discussed interactions between the national courts and the ECJ. It is also derived from, and therefore should be better integrated with, wider developments in national constitutional adjudication that defer to the necessities of national political commitments in an interdependent world. One might go further: the European legal order can be seen as the beneficiary of broad trends towards flexible forms of constitutional adjudication in post-war Europe, of which the accommodation of the politics of treaty obligations in fundamental rights jurisprudence is only one example.

We may finish with a final word about research on the historical development of the supremacy of European law: where discussions of EC law supremacy are introduced (as they so often are) with an emphasis on the *lex posterior* problem, then the appropriate follow-through must involve a thorough examination of how the *lex posterior* problem has been addressed. Important topics to address include the degree to which national courts applied subsequent national law in place of contrary prior treaty obligations before the member state joined the EEC or EU (the pre-1957 or pre-accession status quo), how national doctrine changed (if at all) over time, whether the prevailing solution in national law is robust to a variety of possible scenarios (such as the national legislature expressly amending the national statutes giving execution to the European treaties or enacting an expressly contrary national constitutional amendment), the degree to which these legal arrangements rely on ‘self-control’ by national political authorities, and an assessment of the uncertainty involved in any such scenarios. In other words, the question of how national legal orders have addressed European law’s *lex posterior* problem should be systematically pursued, and not be silently ‘swallowed up’ by discussion of the national constitutional law rights question. For in the construction of the European legal order, and its remarkable break with the use of inter-state retaliation mechanisms to enforce treaty obligations, the national constitutional rights question must be seen as only one strand of a rich and varied story.

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91 Scholarship on national constitutional review on fundamental rights grounds of obligations derived from public international law treaties does at times integrate discussion of the similar problem in relation to the European treaties (for just two examples, see Kischel (n53) and Salerno (n72)); however, scholarship on national constitutional review on fundamental rights grounds of obligations derived from the European treaties rarely discusses how national courts address the similar problem in relation to public international law treaties.

92 On this general theme, see Peter Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (OUP 2010).

93 Phelan (n1).


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